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No. 10-1024

In the Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, ET AL.,
PETITIONERS

v.

STANMORE CAWTHON COOPER

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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioners are the Federal Aviation Administration, the Social Security Administration, and the United States Department of Transportation. Respondent is Stanmore Cawthon Cooper.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 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 (Pet. App. 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 (Pet. App. 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 Janu-

ary 14, 2011. On January 12, 2011, Justice Kennedy further extended the time to and including February 13, 2011, which is a Sunday, and the petition was filed on February 14, 2011 (Monday). The jurisdiction of this Court rests on 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:

> (1) CIVIL REMEDIES. Whenever any agency
>
> * * * * *
>
> (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,
>
> the individual may bring a civil action against the agency * * *.
>
> * * * * *
>
> (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 petition appendix. Pet. App. 65a-109a.

STATEMENT

1. The Privacy Act of 1974, portions of which are codified at 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); see generally Pub. L. No. 93-579, 88 Stat. 1896. The Act requires, for example, an agency to maintain records that are used to make "determination[s]" about "individual[s]" with "such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. 552a(e)(5). The Act also requires 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 Act authorizes private civil actions, as well as criminal prosecutions, to enforce its terms. 5 U.S.C. 552a(g) (civil remedies); 5 U.S.C. 552a(i) (criminal enforcement). A violation of some provisions entitles a civil plaintiff only to declaratory or injunctive relief. 5 U.S.C. 552a(g)(2)-(3) (authorizing only injunctive relief, plus fees and costs, for failure to correct a record or to provide an individual with access to his records). Viola-

tions of other provisions, including the disclosure-related provision at issue in this case, may also entitle a plaintiff to an award of money damages against the government. 5 U.S.C. 552a(g)(4).

The subsection that allows civil actions for disclosure-related and certain other violations requires a plaintiff to show, as a prerequisite to suit, that the violation occurred "in such a way as to have an adverse effect on" him. 5 U.S.C. 552a(g)(1)(D). Plaintiffs seeking damages must satisfy additional prerequisites. The plaintiff must demonstrate both that the violation was "intentional or willful" 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. Pet. App. 15a. In order to operate an aircraft, a pilot must have, under FAA regulations, not only a pilot's certificate, but also a valid medical certificate. *Ibid.*; 14 C.F.R. 61.3(a) and (c). Those regulations further 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. Pet. App. 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. Pet. App. 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. Pet. App. 16a. In 1995, he applied for long-term disability benefits from the Social Security Administration (SSA). *Ibid.*; see generally 42 U.S.C. 401 *et seq.* (providing, in Title II of the Social Security Act, for disability benefits for wage earners who satisfy specified qualifications). He disclosed his HIV-positive status on his application. Pet. App. 16a. The SSA granted respondent's application and paid him disability benefits until his health improved and he discontinued the benefits. *Ibid.*; *id.* at 39a.

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. Pet. App. 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 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). Pet. App. 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; 5 U.S.C. App. §§ 4, 6 (2006 & Supp. III 2009); 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. Pet. App. 16a-17a. Concerned that such fraud might be more widespread, the inspectors 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 but had received disability benefits. Pet. App. 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. Pet.

App. 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. *Ibid.* 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 FAA, SSA, and DOT, claiming that the agencies willfully or intentionally violated the Privacy Act by sharing records as part of Operation Safe Pilot. Pet. App. 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. Pet. App. 19a. Respondent did not, however, allege any direct or indirect pecuniary loss. *Id.* at 15a.

The district court granted summary judgment for the government. Pet. App. 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 only nonpecuniary harm, such as mental distress, is alleged. Pet. App. 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. Pet. App. 14a-37a (amended panel opinion).

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." Pet. App. 32a (citing *Lane* v. *Peña*, 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 *id.* at 33a (discussing *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30 (1992)).

The court of appeals departed from the district court, however, in its application of the sovereign-immunity canon. The court of appeals acknowledged that the term "actual damages" has no "ordinary or plain" meaning because it is a "legal term of art"; expressed the view that the definition in *Black's Law Dictionary* "sheds little light" on the term's meaning in the Privacy Act; and stated 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." Pet. App. 22a-24a (citation omitted). The court additionally recognized that its sister circuits were in conflict over whether "actual damages" under the Privacy Act includes nonpecuniary harms, with courts on

both sides of the divide agreeing that the term is "ambiguous." *Id.* at 21a-23a. But the court nevertheless concluded, based on what it described as "[i]ntrinsic" and "[e]xtrinsic" sources, that the term "actual damages" in the Privacy Act was "unambiguous" and that "a construction that limits recovery to pecuniary loss" was not "plausible." *Id.* at 22a, 28a, 34a (boldface omitted).

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). Pet. App. 1a-37a.

Judge O'Scannlain, joined by seven other judges, dissented from the order denying rehearing en banc. Pet. App. 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 Pet. App. 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.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in concluding that the Privacy Act permits damages actions against the United States based purely on claims of mental or emotional distress. Because the Act's "actual damages" provision constitutes a limited waiver of the United States' sovereign immunity, the question is not whether the statutory text could be read to authorize such claims, but instead whether the statutory text clearly and unequivocally compels that conclusion. It does not. Interpreting "actual damages" to include only pecuniary harm is not only a possible construction of the Act, it is the best construction of the Act.

A. This Court has repeatedly held that the scope of a sovereign-immunity waiver must be narrowly construed in favor of the sovereign. That rule applies with special force when the extent of the United States' damages liability is at issue, in light of a court's obligation to assure itself that Congress has made a considered decision to expend Treasury funds for the purpose of paying the claims of particular plaintiffs. The use of the term "actual damages" in the Privacy Act provides no assurance that Congress made a considered decision to allow for an award of damages for claims of mental or emotional distress. Every court of appeals to have addressed the question has agreed that the term "actual damages" itself has no fixed meaning and could refer exclusively to damages other than damages for mental or emotional distress. Because a narrow construction of the Privacy Act's sovereign-immunity waiver—as including only pecuniary harm and excluding mental or emotional distress—is accordingly reasonable, a court is required to respect Congress's exclusive authority over the public fisc by adopting that construction.

B. Indeed, even setting sovereign-immunity principles to one side, that construction would be the most reasonable one. First, as this Court explained in *Doe* v. *Chao*, 540 U.S. 614, 624-625 (2004), the Privacy Act's damages remedy is likely modeled on certain common-law defamation torts that required proof of pecuniary harm as a precondition for recovery. As the Privacy Protection Study Commission—which was charged by the Act (among other things) with studying the Act's damages provision and which included two of the Act's original congressional sponsors—concluded, Congress incorporated that pecuniary-harm limitation in the Act. Second, Congress expressly tasked the Privacy Protection Study Commission with making a recommendation about whether to expand the Act to permit "general damages"—a term that Congress would have understood, and the Commission expressly did understand, as referring to awards for nonpecuniary harms such as mental and emotional distress. The only reasonable inference to draw, and the inference that the Commission itself drew, is that the existing provision for "actual damages" (which has never been amended to include "general damages") does not allow awards for mental or emotional distress.

The conclusion that the term "actual damages" is limited to pecuniary harm is reinforced by the unrebutted characterization of "actual damages" as "out-of-pocket expenses" on the floor of the House of Representatives, and by Congress's evident concern, during extensive legislative revision and debate, with limiting the government's liability under the Act. There is no suggestion that Congress intended to, or would have wanted to, expose the United States Treasury to significant new

liability based on subjective and uncapped claims of mental or emotional distress.

C. The Ninth Circuit offered no persuasive basis for subjecting the United States to such liability. Rather than focusing on the "actual damages" provision itself, the court of appeals looked elsewhere—including to its case law interpreting a different statute altogether—and erroneously attributed to Congress a single-minded purpose to provide plaintiffs with expansive damages remedies. Its analysis gives short shrift to the established rule that conditions on a waiver of the United States' sovereign immunity to suit for money damages must be strictly construed; overlooks key aspects of the "actual damages" provision; disregards this Court's decision in *Doe*; and conflicts with the conclusions of the Privacy Protection Study Commission. The Ninth Circuit's judgment should be reversed.

ARGUMENT

THE PRIVACY ACT DOES NOT SUBJECT THE UNITED STATES TO DAMAGES LIABILITY BASED ON CLAIMS OF MENTAL OR EMOTIONAL DISTRESS

The Privacy Act provides that in suits for certain types of "intentional or willful" violations of the Act, "the United States shall be liable" to the plaintiff for "actual damages sustained by the individual as a result of the [violation], but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. 552a(g)(4). This Court held in *Doe* v. *Chao*, *supra*, that the term "actual damages" in that provision serves two functions. First, it is a prerequisite for receiving any recovery at all: the provision "guarantees $1,000 only to plaintiffs who have suffered some actual damages." *Doe*, 540 U.S. at 627. Second, it is a measure for the amount

of recovery: a plaintiff will receive either "actual damages" or $1000, whichever is greater. 5 U.S.C. 552a(g)(4).

Congress's limited waiver of the United States' sovereign immunity for claims of "actual damages" does not encompass a damages action by a plaintiff who alleges only mental or emotional distress. As the court of appeals correctly 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. Pet. App. 32a (quoting *Lane* v. *Peña*, 518 U.S. 187, 192 (1996)). Had the court of appeals adhered to that principle in this case, it would have concluded that sovereign immunity bars respondent's complaint, which contains no allegations of pecuniary loss. The term "actual damages," which is often understood not to encompass mental or emotional distress, cannot supply a clear and unequivocal waiver of the United States' sovereign immunity against claims seeking damages for such distress. Indeed, the text, structure, and legislative history of the Privacy Act, as well as the report of the Privacy Protection Study Commission established by the Privacy Act, demonstrate that the term "actual damages" is best read as authorizing only claims for pecuniary harm.

A. Congress Did Not Clearly And Unequivocally Waive The United States' Sovereign Immunity For Claims Of Mental Or Emotional Distress

The civil-remedies provision of the Privacy Act waives the United States' sovereign immunity from suit and from some form of damages remedy in certain cases. This Court has "frequently held" that such "a waiver of

sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). In order for the United States to be liable for money damages, or a particular type of money damages, Congress's intent must be "unequivocally expressed in statutory text." *Lane*, 518 U.S. at 192.

That well-established rule of sovereign immunity precludes an interpretation of the term "actual damages" that would expose the United States to uncapped damages liability under the Privacy Act based on a plaintiff's claims of mental or emotional distress. The term "actual damages" is often used to refer solely to pecuniary harm and not to mental and emotional distress. Since a court must "construe[] ambiguities in favor of immunity," *United States* v. *Williams*, 514 U.S. 527, 531 (1995), it is required to adopt that narrower definition.

1. The sovereign immunity of the United States encompasses not only immunity from suit altogether, but also strict observance of the conditions upon which a suit may proceed. See, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981); *United States* v. *Testan*, 424 U.S. 392, 399 (1976) ("It long has been established, of course, that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). Accordingly, even when Congress has waived the sovereign immunity of the United States from suit, the availability of monetary relief, interest, and a jury trial depend upon an additional express and particularized waiver by Congress. See, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34-37 (1992) (monetary claims unavailable); *Library of*

Congress v. *Shaw*, 478 U.S. 310, 318-319 (1986) (Title VII's general waiver of immunity does not authorize prejudgment interest); *Lehman*, 453 U.S. at 160 (jury trial unavailable); see also *United States* v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 308 (1960) (despite the general waiver of immunity from suit in 28 U.S.C. 2410, "the United States is not subject to local statutes of limitations"). Any "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman*, 453 U.S. at 161 (citation omitted).

This Court has been "particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable" for "monetary exactions," *United States* v. *Idaho*, 508 U.S. 1, 8-9 (1993), because monetary claims against the United States present heightened separation-of-powers concerns. The power to waive sovereign immunity rests exclusively in Congress's hands. Neither the Executive Branch nor the Judicial Branch can effect a waiver through the exercise of its respective powers. See *OPM* v. *Richmond*, 496 U.S. 414, 424-434 (1990); *United States* v. *Shaw*, 309 U.S. 495, 501-502 (1940). Rather, the Executive Branch's Article II powers and the Judicial Branch's Article III powers are "limited by a valid reservation of congressional control over funds in the Treasury." *OPM*, 496 U.S. at 425; see U.S. Const. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). Strict construction of statutory waivers of immunity thus ensures that courts do not mistakenly impose burdens on the public fisc that Congress did not authorize and that "public funds will be spent [only] according to the letter of the difficult judgments reached by Congress as to the

common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM*, 496 U.S. at 428, 432; see also *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001) ("In traditionally sensitive areas, . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (citations omitted). Scrupulous adherence to the statutory text is especially important in cases, like this one, in which the statutory language at issue is the product of hard-fought legislative compromise. See pp. 29-32, *infra*; cf. 120 Cong. Rec. 36,910 (1974) (Sen. Bayh) ("I understand there are restrictions between what we might like to accomplish and what we feel we have 51 votes for.").

2. In accordance with these principles, the requirement of narrow construction has long been applied to statutory terms, like "actual damages," that circumscribe the remedies available against the United States pursuant to a waiver of sovereign immunity enacted by Congress. "[W]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,'" or those that a court can plausibly infer from the statutory text, "but only those for which sovereign immunity has been expressly waived" by Congress itself. *Lane*, 518 U.S. at 197 (citation omitted).

In *Price* v. *United States*, 174 U.S. 373 (1899), for example, the question before the Court was whether a particular waiver of the government's immunity from suit for damages for property taken by Indians also encompassed a waiver of immunity for consequential damages—that is, "damages to other property which resulted as a consequence of the taking." *Id.* at 375.

The Court held that it did not. *Id.* at 377. The Court concluded that the determination of what type of damages Congress had authorized directly implicated the United States' sovereign immunity and, as such, "its liability in suit cannot be extended beyond the plain language of the statute authorizing it." *Id.* at 376. The Court stressed that the "contingencies in which the liability of the government is submitted to the courts," *ibid.*, are "a matter resting in [Congress's] discretion," *id.* at 377, and "cannot be enlarged by implication," regardless of what "may seem to this court equitable, or what obligation we may deem ought to be assumed by the government," *id.* at 375.

The Court took a similar approach in *United States Department of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992). There, Congress, in the Clean Water Act, had waived the federal government's immunity from suit and authorized monetary "sanction[s]" against the government as "civil penalties" for certain violations. *Id.* at 615, 620-627 (citations omitted). The question presented was whether the United States' liability extended only to coercive fines (*i.e.*, fines to incentivize future compliance with the statute) or instead encompassed punitive fines (*i.e.*, fines to punish past violations) as well. *Id.* at 611. The Court held that the explicit waiver of sovereign immunity from monetary "sanction[s]," and Congress's use of "a seemingly expansive phrase like 'civil penalties arising under federal law,'" were not enough to overcome application of the "rule of narrow construction." *Id.* at 626-627. To the contrary, application of that traditional rule led the Court to "take[] the waiver no further than" authorizing coercive fines. *Id.* at 627. The Court acknowledged "unresolved tension" in the statutory scheme, which suggested that punitive sanctions might

indeed have been intended by Congress. *Id.* at 626. But the Court held that "under our rules that tension is resolved by the requirement that any statement of waiver be unequivocal" and narrowly construed to favor the sovereign. *Id.* at 627; see *id.* at 615; see also *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554, 563-564 (1921) (applying sovereign-immunity principles in interpreting waiver as limited to compensatory damages, and not to include additional "double damages" for delayed payment).

Likewise, in *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983), the Court strictly construed Congress's express waiver of sovereign immunity from an award of attorney's fees, "whenever [a court] determines that such an award is appropriate," in suits brought under the Clean Air Act. *Id.* at 681-682 (citation omitted). The Court held that, notwithstanding Congress's waiver of immunity from suit and its clear authorization of some monetary relief, the term "appropriate" should be narrowly construed to prevent judicial enlargement of the available relief beyond what Congress had clearly authorized. *Id.* at 685-686.

3. The same principle applies to the meaning of "actual damages" in the Privacy Act. The proper starting point for analyzing the scope of a waiver of sovereign immunity is the "common rule," with which the Court "presume[s] congressional familiarity, that any waiver of the National Government's sovereign immunity must be unequivocal." *United States Dep't of Energy*, 503 U.S. at 615. That is an especially important foundational principle here, because Congress was well aware, when it drafted the Privacy Act's civil-remedies provision, that it was defining the contours of a sovereign-immunity waiver. As one Member of Congress reminded his colleagues: "As I believe most of the lawyers in the

House know, it is a general principle of law that the Government, in exercising its governmental functions, is not liable." 120 Cong. Rec. at 36,660 (Rep. Erlenborn); see also, *e.g.*, *id.* at 35,659 (Rep. Butler) (questioning whether particular damages would be proper against the United States); *ibid.* (Rep. McCloskey) (similar).

A similar point was emphasized by the Privacy Protection Study Commission, an expert body established by Congress in the Privacy Act to study, *inter alia*, the Act's damages provision. § 5(a)(1), 88 Stat. 1905 (requiring that Commission members be "well qualified" based on "their knowledge and expertise" in one or more relevant areas, including "civil rights and liberties" and "law"); § 5(c)(2)(B)(iii), 88 Stat. 1907 (requiring Commission to consider and report on issues of damages liability under the Act). The members of the Commission included two of the Representatives who had been sponsors of the original legislation in the House of Representatives, along with other appointed experts. *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* ix (1977) (*Privacy Commission Report*) (listing Commission members, including Representatives Koch and Goldwater); see H.R. 16373, 93d Cong. (1974) (listing Representatives Koch and Goldwater as sponsors of the House Privacy Act bill). The Commission's 1977 report to the President and Congress observed, among other things, that "[t]he restriction on recovery articulated in the 'actual damage' standard of the Privacy Act reflects the ancient limitation on governmental liability embodied in the principle of sovereign immunity." *Privacy Commission Report* 531.

Both before and after the enactment of the Privacy Act, Congress has employed the term "actual damages"

(or the equivalent term "actual damage") to refer exclusively to economic harm. See 17 U.S.C. 1009(d)(1)(ii) (defining "actual damages" in copyright-related suit as "the royalty payments that should have been paid"); 18 U.S.C. 2318(e)(3)(B) (defining "actual damages" for counterfeit labeling by reference to the value of the goods); *Connecticut Ry. & Lighting Co.* v. *Palmer*, 305 U.S. 493, 494, 504 (1939) (interpreting "actual damage" in bankruptcy statute to mean economic damages normally permitted for breach of a lease); *Birdsall* v. *Coolidge*, 93 U.S. 64, 64-71 (1876) (discussing "actual damages" for patent infringement in economic terms). Accordingly, had Congress intended for the Privacy Act to contain a waiver of the United States' sovereign immunity to claims of mental and emotional distress, it would have, and was required to, use a term other than "actual damages." The appearance of the term "actual damages" in a civil-remedies statute is not necessarily a signal, and certainly is not a clear and unequivocal statement, of congressional intent to permit recovery for mental or emotional distress.

The Privacy Protection Study Commission reported, a mere three years after the Act's passage, that "there is no generally accepted definition of 'actual damages' in American law" and that the term can be used to refer exclusively to economic injuries. *Privacy Commission Report* 530. All four courts of appeals to consider the question presented—including the Ninth Circuit in this case—have similarly observed that the term "actual damages" has no fixed legal (or non-legal) meaning that would necessarily encompass mental or emotional distress. Pet. App. 24a; *Hudson* v. *Reno*, 130 F.3d 1193, 1207 n.11 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998), 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, 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.

That observation should have ended this case. This Court has instructed that so long as there is a "plausible" narrower construction of ambiguous text in a waiver of sovereign immunity, that is "enough to establish that a reading imposing monetary liability"—here, the additional monetary liability of damages for mental and emotional distress—"is not 'unambiguous' and therefore should not be adopted." *Nordic Vill., Inc.*, 503 U.S. at 37; see *Sossamon* v. *Texas*, 131 S. Ct. 1651, 1658-1660 & n.4 (2011) (citing *Nordic Village* and applying similar principle in case concerning state sovereign immunity). The universal acknowledgment that "actual damages" *can* exclude mental and emotional distress thus by itself compels the conclusion that, in the context of the Privacy Act's waiver of sovereign immunity, the term *does* exclude mental and emotional distress.

B. In The Context Of The Privacy Act, The Term "Actual Damages" Refers Exclusively To Pecuniary Harm

Interpreting the term "actual damages" to exclude mental and emotional distress is, in any event, the far better interpretation of the Privacy Act even separate and apart from principles of sovereign immunity. First, as this Court has noted, Congress likely modeled the "actual damages" provision on a common-law remedy that required proof of pecuniary harm, rather than merely proof of mental or emotional distress, as a prerequisite to a damages award. Second, the Privacy Act expressly excluded a certain type of damages that Con-

gress would have understood as including recovery for mental and emotional distress—"general damages"—from the scope of the "actual damages" provision and instead assigned the Privacy Protection Study Commission to study whether the Act should later be expanded to include such damages. The Commission accordingly recognized that the Act, as enacted, allowed recovery only for pecuniary harm.

An interpretation of the term "actual damages" as including only pecuniary harm is, moreover, reinforced by the legislative history, which demonstrates Congress's acute concern with restricting the United States' financial exposure under the Act. The only statement in the legislative history that directly addresses the issue supports the limitation of "actual damages" to "out-of-pocket" expenses. Congress's decision to adopt such a limitation represents a sound policy choice to reduce the government's exposure and litigation costs by making money damages available only to plaintiffs who could demonstrate a concrete and easily monetizable injury.

1. As previously noted (see pp. 12-13, *supra*), this Court held in *Doe* v. *Chao* that proof of "actual damages" is a prerequisite to *any* monetary recovery under the Privacy Act. 540 U.S. at 627. A plaintiff who can show "actual damages" is entitled to either those damages or $1000, but a plaintiff who cannot show any "actual damages" has no entitlement to recovery at all. *Ibid.*

Doe did not expressly decide whether the term "actual damages" is limited to out-of-pocket expenses. 540 U.S. at 627 n.12. Its reasoning, however, strongly supports that conclusion. In particular, the Court recognized in *Doe* that the Privacy Act's "actual damages" provision was likely modeled on a particular common-

law doctrine in which a plaintiff would have to prove pecuniary harm, and not simply mental or emotional distress, to recover damages. 540 U.S. at 625.

The petitioner in *Doe* had argued that it would be "peculiar" to interpret the Privacy Act's civil-remedies provision to provide $1000, "as a form of presumed damages not requiring proof of amount, only to those plaintiffs who can demonstrate actual damages." 540 U.S. at 625. The Court rejected that argument, observing that "this approach parallels another remedial scheme that the drafters of the Privacy Act would probably have known about." *Ibid.* "At common law," the Court explained, "certain defamation torts" permitted plaintiffs to "recover presumed damages only if they could demonstrate some actual, quantifiable pecuniary loss." *Ibid.*

The defamation torts referred to by the Court in *Doe* are sometimes called defamation "per quod" (to distinguish them from defamation "per se," in which damages are automatically presumed). See, *e.g.*, Dan B. Dobbs, *Handbook on the Law of Remedies* § 7.2, at 512-513 (1st ed. 1973) (Dobbs). Those torts required a plaintiff to prove "special harm" (sometimes called "special damages") as a prerequisite to *any* monetary award. *Doe*, 540 U.S. at 625 (citing Restatement of Torts § 575 cmts. a and b (1938) (First Restatement); Restatement (Second) of Torts § 575 cmts. a and b (1977) (Second Restatement)); see Dobbs § 7.2, at 520. "Special harm" was defined as "harm of a material and generally of a *pecuniary* nature." *Doe*, 540 U.S. at 625 (emphasis added) (quoting First Restatement § 575 cmt. b); see Second Restatement § 575 cmt. b ("Special harm, as the words are used in this Chapter, is the loss of something having economic or pecuniary value."); Dobbs § 7.2, at 520

("Special damages in defamation cases mean pecuniary damages, or at least 'material loss.'") (footnote omitted).

Emotional or mental distress was not considered to be "special harm" or "special damages" that would trigger damages liability for defamation per quod. As the First Restatement of Torts explained, "[t]he emotional distress caused to the person slandered by his knowledge that he has been defamed is not special harm and this is so although the distress results in a serious illness." First Restatement § 575 cmt. c; see Second Restatement § 575 cmt. c ("Under the traditional rule, the emotional distress caused to the plaintiff by his knowledge that he has been defamed is not special harm; and this is true although the distress results in a serious illness."); Dobbs § 7.2, at 520 ("Even under the more modern approach, special damages in defamation cases must be economic in nature, and it is not enough that the plaintiff has suffered harm to reputation, mental anguish, or other dignitary harm, unless he has also suffered the loss of something having economic value."). Accordingly, "neither emotional distress nor bodily harm resulting from it is special harm sufficient to support an action for a slander which is not actionable per se." First Restatement § 623 cmt. a; see Second Restatement § 623 cmt. a (same); see also Dobbs § 7.2, at 520.

If, as this Court posited in *Doe*, defamation per quod was the model for the Privacy Act's "actual damages" provision, the natural conclusion is that Congress incorporated that tort's threshold limitations into the Privacy Act. Accordingly, the "actual damages" that a plaintiff must show to obtain any recovery under the Privacy Act is best interpreted to include only pecuniary harm, and to exclude emotional or mental distress.

That interpretation is reinforced by the contemporary understanding of the Act. The only statement in the legislative history that directly addresses the issue supports the view that "actual damages" is limited to economic harm. Representative Eckhardt, commenting on a version of the bill that provided for "actual damages," stated that "[t]here is nothing in this that would provide for any damages beyond [a plaintiff's] actual *out-of-pocket* expenses." 120 Cong. Rec. at 36,956 (emphasis added). No Member of Congress disputed Representative Eckhardt's understanding.

The Court's analysis in *Doe*—and the conclusion that "actual damages" includes only pecuniary harm—finds additional support in the report of the Privacy Protection Study Commission. As part of its discussion of the Act's damages provision, the Commission's 1977 report stated 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. The Commission went on to explain that "special damages in defamation cases are more limited than in other situations; the injuries clearly covered by them are loss of specific business, employment, or promotion opportunities, or other tangible *pecuniary* benefits." *Ibid.* (emphasis altered). "Injuries *not* provided for," the Commission continued, "are those which may be labeled intangible: namely, loss of reputation, chilling of constitutional rights, or *mental suffering* (where unaccompanied by other secondary consequences)." *Ibid.* (emphasis added).

2. Indeed, the Act's text and drafting history expressly demonstrate that Congress considered the possibility of awarding damages for mental or emotional distress, but "left the question * * * for another day."

Doe, 540 U.S. at 622. The Privacy Act required the Privacy Protection Study Commission, "among its other jobs, to consider 'whether the Federal Government should be liable for general damages'" under the Act. *Doe*, 540 U.S. at 622 (quoting § 5(c)(2)(B)(iii), 88 Stat. 1907). The Senate had originally passed a bill that would have allowed for recovery of both "actual damages" and "general damages." *Id.* at 622-623; see also *id.* at 637-638 (Ginsburg, J., dissenting). But the "general damages" language "was trimmed from the final statute, subject to any later revision that might be recommended by the Commission," *id.* at 623, and was never added back in.

By declining to enact a "general damages" remedy, Congress rejected a damages award for either assumed or proven mental or emotional harm. As the Court observed in *Doe*, the term "general damages" included "presumed damages," *i.e.*, "a monetary award calculated without reference to specific harm." 540 U.S. at 621; see *id.* at 621 n.3 (citing First Restatement § 621 cmt. a and § 867 cmt. d; Second Restatement § 621 cmt. a); see also *id.* at 623 (noting that a "provision for general damages would have covered presumed damages"). At common law, such presumed damages were essentially an automatic monetary recovery based on the harm that the defamation was "assumed to have caused to the [plaintiff's] reputation," even if the plaintiff could not concretely prove such harm in monetary terms. First Restatement § 621 cmt. a; see Second Restatement § 621 cmt. a; Dobbs § 7.2, at 514-515. In particular, they would have included damages "for such emotional distress" that the factfinder believed would "normally result[] from" the defamation. First Restatement § 623;

see Dobbs § 7.2, at 514; see also Second Restatement § 623 cmt. b.

Congress would likely also have understood the term "general damages" in this context to encompass proven, as well as presumed, emotional-distress damages. Although, as just discussed, a plaintiff was entitled simply to have the trier of fact presume the sorts of harm compensated by "general damages," a plaintiff would often try to prove them, presumably in the hope of increasing his award by convincing the factfinder that his injury was unusually serious. First Restatement § 621 cmt. a (general damages "compensat[e] the plaintiff for * * * harm * * * *which is proved*, or, *in the absence of proof*, assumed") (emphasis added); Second Restatement § 621 cmt. a (similar); see also First Restatement § 904 cmt. a (discussing proof of general damages); Second Restatement § 904 cmt. a (similar). The term "general damages" was thus used to broadly describe *all* damages, presumed or proven, for certain types of harm. See First Restatement § 904; Second Restatement § 904; Dobbs § 3.2, at 139. Specifically, for the sort of dignitary torts that Congress had in mind when it drafted the Privacy Act, "the term 'general damages' * * * refer[red] to damages awarded for the affront to the plaintiff's dignity and *the emotional harm done*." Dobbs § 3.2, at 139 (emphasis added). "These [were] called 'general damages,' to distinguish them from proof of actual economic harm and from punitive damages." *Ibid.*

Accordingly, when Congress elected to submit the issue of "general damages" to the Commission for further study (88 Stat. 1907), and to include only "actual damages" in the operative text of the Act (5 U.S.C. 552a(g)(4)), it was excluding claims of mental and emo-

tional distress from the scope of the Act's civil-remedies provision. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted). As the Court recognized in *Doe*, Congress substituted a $1000 statutory-minimum award in place of "general damages." 540 U.S. at 622-623, 625-626. In a common-law suit for defamation per quod, a plaintiff who cleared the threshold hurdle of proving pecuniary harm could then have recovered both his pecuniary damages and also "general damages," including damages for mental and emotional distress. *Id.* at 625; see First Restatement § 575 cmt. a; *id.* § 623 cmt. a; Second Restatement § 575 cmts. a, c; *id.* § 621 cmt. a; *id.* § 623 cmt. a; Dobbs § 7.2, at 520-521. The Privacy Act, however, does not open up a new category of "general damages" to plaintiffs who meet the threshold requirement of proving "actual damages." 5 U.S.C. 552a(g)(4)(D); see *Doe*, 540 U.S. at 620. Instead, a plaintiff who can prove "actual damages" simply recovers those "actual damages," or, if those damages are below $1000, receives a statutory-minimum award "as a form of presumed damages." *Id.* at 625.

The Commission itself recognized that the Privacy Act, as adopted by Congress in 1974, did not provide damages for mental or emotional distress and that it was required to make a recommendation as to whether the Act should be expanded to include such an award through an allowance of "general damages." The Commission's report explained that "[c]ompensation for *any* injury done to an individual is available under a claim of general damages." *Privacy Commission Report* 530;

see *ibid.* ("An individual can make claims for losses due to pain and suffering, for example, even though it is impossible to fix a precise dollar value to such an injury."). The Commission contrasted that broad category of "general damages" with the damages available under the Act. "The legislative history and language of the Act," the Commission explained, "suggest that Congress meant to restrict recovery to specific pecuniary losses until the Commission could weigh the propriety of extending the standard of recovery." *Ibid.*

The Commission did ultimately recommend, in its 1977 report, that the Privacy Act be amended to permit recovery of "general damages," albeit subject to a $10,000 cap. *Privacy Commission Report* 531. Specifically, the Commission recommended that the Act should be expanded to provide "recovery for intangible injuries such as pain and suffering, loss of reputation, or the chilling effect on constitutional rights" that might, in theory, be caused by certain Privacy Act violations. *Id.* at 531. Congress did not, however, adopt that recommendation. Congress thus has provided no basis for a court to read into the Act a right to money damages based on a claim of mental or emotional distress.

3. Judicial recognition of a right to recover damages for mental or emotional distress would be particularly inappropriate in light of Congress's concern, in enacting the Privacy Act, with limiting the Act's impact on the public fisc. "Throughout the Privacy Act debate, a central concern was the scope of potential government liability for damages." *Fitzpatrick*, 665 F.2d at 330; see, *e.g.*, 120 Cong. Rec. at 36,644 (Rep. Moorhead) ("We have tried to tailor this bill so that it will protect individual rights and at the same time permit the Government to operate responsibly and perform its functions without

unjustifiable impediments."); *id.* at 36,659 (Rep. McCloskey) ("[W]e are trying to balance two great interests here. We are trying to balance the necessity of balancing the budget, and we are trying to protect the government from undue liability.").

There were proposals, for example, to allow recovery of actual damages even when the violation was neither intentional nor willful, and to allow recovery of punitive damages in certain cases. See, *e.g.*, S. 3418, 93d Cong. § 304(b)(1) and (2) (1974); H.R. 16373, 93d Cong. § 3(f)(3)(A) and (B) (1974). Those proposals were defeated, and the statutory text as enacted conditions damages liability on an "intentional or willful" government act and limits such liability to "actual damages." 5 U.S.C. 552a(g)(4).

The rejection of proposals for broader and more open-ended liability rested largely on concerns about the damages exposure of the United States. For example, one Member of Congress stated in respect to one of the proposals that "I think it is wrong to make the Government of the United States and this congressional budget subject to an absolutely incalculable amount of liquidated damages." 120 Cong. Rec. at 36,659 (Rep. McCloskey). Responding to that same proposal, another Member pointed out that it would be "unprecedented to make [the] Government liable for punitive damages." *Id.* at 36,660 (Rep. Erlenborn). His colleagues had similar concerns. *Id.* at 36,659 (Rep. Butler) ("May I fairly observe there is no sovereignty in the world that exposes itself to punitive damages by a statute of this nature?"); *ibid.* (Rep. McCloskey) (noting that this "would be the first time in history that the United States has made itself subject to punitive damages in any cause or in any case"); see also *id.* at 36,956 (statements of Rep.

Butler) (questioning the precedent for awarding "actual damages" in cases of government negligence).

It would have been similarly "unprecedented" to make the United States liable for damages for mental or emotional distress. We are unaware of any pre-1974 decision imposing liability on the United States for mental or emotional harm pursuant to a statute that limits recovery to "actual damages." It would be highly unusual for Congress to subject the United States to liability for mental or emotional distress for the first time without expressly so providing, and, indeed, without any debate. Yet the one (unchallenged) statement in the legislative history on the subject characterized a provision allowing for "actual damages" as limited to a plaintiff's "out-of-pocket expenses." 120 Cong. Rec. at 36,956 (Rep. Eckhardt).

Had Congress actually intended open-ended liability for a plaintiff's asserted mental or emotional distress, there might, at the very least, have been some discussion of a cap on the amount of such damages. Out of concern for open-ended liability, for example, the Privacy Protection Study Commission recommended a cap when it suggested that the Act be amended to allow an award of "general damages." *Privacy Commission Report* 531 (unenacted recommendation to allow recovery of "general damages" only up to $10,000, with goal of "ensuring that recovery does not become too burdensome"). But there is in fact no express suggestion in the legislative history of the Privacy Act that Congress intended to allow an award of damages for mental or emotional distress. That absence of any expression of such an intent contrasts tellingly with Congress's close attention to fiscal concerns in other aspects of the legislation. See, *e.g.*, 120 Cong. Rec. at 36,956 (Rep. Erlenborn)

(stating that if the House of Representatives adopted an amendment permitting actual damages without proof of intention or willfulness, "I, for one, would recommend to the President—as important as this bill might be—that he veto it. We just cannot afford to have that kind of liability, leaving the Government so exposed.").

4. The legislative history thus points in the same direction as the text and structure of the Act and the Privacy Protection Study Commission's report: namely, that the Act limits the damages available solely to pecuniary harm. Any Members of Congress who might have believed that more was warranted could look forward to the prospect of revisiting the issue when the Commission completed its study. Privacy Act § 5(c)(2)(B)(iii), 88 Stat. 1907 (requiring the Commission to make a recommendation about whether "general damages" should be allowed under the Act). But even after the Commission recommended that the Act be extended to permit additional damages, including damages for mental and emotional distress, up to a $10,000 cap, Congress declined to enact such an expansion. There are significant reasons why Congress would decline to expose the United States to such liability.

First, permitting emotional-distress damages would have greatly expanded the United States' liability. The Privacy Act covers an enormous range of government conduct. It applies broadly 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. And it broadly covers those entities' handling of any "record"—defined

expressly to include "any item, collection, or grouping of information about an individual that is maintained by an agency * * * that contains his name, or the identifying number, symbol or other identifying particular assigned to the individual"—maintained in a "system of records." 5 U.S.C. 552a(a)(4)-(5). Such governmental record-keeping activity is pervasive, and plaintiffs frequently allege that government agencies have violated the Privacy Act: case-tracking data collected by the Department of Justice reveal more than 400 separate Privacy Act suits (seeking either damages or other relief) since the start of 2005.

That number of course would be higher, and the lawsuits themselves far more costly, if the Act were construed to permit an award of damages based solely on claims of mental or emotional distress. Allowing emotional-distress damages would open the door to damages actions by plaintiffs, like respondent here, who otherwise would not have any damages claim at all under the Act. And even as to plaintiffs who might be able to show some pecuniary harm, permitting emotional-distress damages would greatly increase the size of judgments and strengthen plaintiffs' settlement leverage. Congress cannot lightly be taken to have invited that result. It is "undisputed" that Congress, in enacting Section 552a(g)(4), not only sought to "deter[] violations and provid[e] remedies when violations occur," but also "did not want to saddle the Government with disproportionate liability." *Doe*, 540 U.S. at 637 (Ginsburg, J., dissenting).

Second, emotional-distress damages are inherently problematic because they are to a large extent subjective and not easily quantifiable. Cf. *Consolidated Rail Corp.* v. *Gottschall*, 512 U.S. 532, 552 (1994) (rejecting

proposed test under Federal Employers' Liability Act pursuant to which "[j]udges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts"). Congress, however, is very likely to have placed a premium on the predictability of government liability. For plaintiffs able to show at least some actual pecuniary loss connected to a Privacy Act violation, Congress could have some confidence that there would be an objective basis for awarding reimbursement (or the statutory minimum of $1000). Congress could have no similar degree of confidence for claims of mental or emotional distress. Such claims are, in addition, complicated and expensive to litigate. Whereas pecuniary damages can generally be proven through receipts, pay records, and the like, litigation over asserted mental or emotional distress could be much more extensive and typically would require expert discovery of opposing psychologists and cause the government to seek independent medical examinations of plaintiffs.

Third, Congress reasonably could conclude that, on balance, the Privacy Act already provides sufficient protection for individuals who suffer no pecuniary harm. The Act includes criminal penalties for certain violations, including knowing and willful violations of the disclosure-related provision at issue here. See 5 U.S.C. 552a(i). And damages actions are not the only potential civil remedy available for violations of the Act's disclosure-related or other provisions. A plaintiff will be able seek injunctive relief under the Administrative Procedure Act to halt any ongoing agency violation of the Privacy Act, so long as he can demonstrate that he is

adversely affected by the agency's practice. 5 U.S.C. 702, 706; *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983).[*]

The Privacy Act is in fact unusual in permitting monetary relief against the federal government at all. The Administrative Procedure Act, which provides the typical basis for challenging federal agency action, specifically excludes "money damages" from the available forms of relief. 5 U.S.C. 702. In suits against the United States, the availability of retrospective money damages is therefore the exception rather than the rule. There is, accordingly, no reason to presume that Congress meant for "actual damages" in the Privacy Act to include the even more exceptional relief of damages for mental and emotional distress, especially when fundamental principles of sovereign immunity and all of the traditional tools of statutory interpretation point in the opposite direction.

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[*] Such a suit is permissible, notwithstanding the Privacy Act's independent remedial scheme, because the Privacy Act itself is part of the Administrative Procedure Act. The Privacy Act's provisions principally derive from the House bill (H.R. 16373). Compare H.R. 16373 and 120 Cong. Rec. at 40,398-40,400, with *id.* at 40,400-40,405 (compromise text). The House Bill was designed to protect personal privacy "within the framework of the Freedom of Information Act (5 U.S.C. 552)," H.R. Rep. No. 1416, 93d Cong., 2d Sess. 2 (1974), which itself was enacted as an amendment to Section 3 of the Administrative Procedure Act (Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238). See *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989). To do so, H.R. 16373 proposed amending Title 5 of the United States Code by inserting a Section 552a within the codified provisions of the Administrative Procedure Act immediately following the Freedom of Information Act. See H.R. Rep. No. 1416, *supra*, at 1, 27; Privacy Act §§ 3-4, 88 Stat. 1897-1905.

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

The court of appeals correctly 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." Pet. App. 34a. The court nevertheless proceeded to conclude 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. *Ibid.* That conclusion is untenable. None of the sources relied upon by the court of appeals supports the view that the broad reading is the better one, let alone the only one.

1. To begin with, the court of appeals focused on 5 U.S.C. 552a(g)(1)(D), which provides that an individual "may bring a civil action" whenever an agency "fails to comply with" certain Privacy Act provisions or rules, including the disclosure-related provision at issue here, "in such a way as to have an adverse effect on an individual." Pet. App. 27a. The court observed that it and other courts "have recognized that a nonpecuniary harm, such as emotional distress, may constitute an adverse effect" under that provision. *Ibid.* The court believed that interpreting "actual damages" not to include such distress would be "an unreasonable construction of the Act," because it would suggest that an individual who has experienced an "adverse effect" might nevertheless not be eligible to recover damages. *Ibid.*

As Judge O'Scannlain and the other seven judges who dissented from the denial of en banc rehearing observed, the court of appeals' reasoning "quite clearly"

conflicts with this Court's decision in *Doe*. Pet. App. 12a-13a. *Doe* made clear 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 prerequisite to a *monetary* recovery. *Ibid.* An "adverse effect" is insufficient by itself to establish "a complete cause of action" for money damages under Section 552a(g)(1)(D); the Act 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, as Congress expressly provided that only a subset of plaintiffs with standing to sue could recover money damages. See Pet. App. 12a (O'Scannlain, J., dissenting from denial of rehearing en banc) ("[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.").

2. The Ninth Circuit also erred in relying on the Privacy Act's generally worded preamble. The preamble states, in relevant part, that the "purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies, except as otherwise provided by law, to," *inter alia*, "be subject to civil suit for any damages which occur as a result of willful or intentional action which vio-

lates any individual's rights under this Act." § 2(b)(6), 88 Stat. 1896; see Pet. App. 24a-25a. According to the court of appeals, the Act's "actual damages" provision should be interpreted to include mental and emotional distress so as to "fully realize[]" the preamble's use of the phrase "any damages." *Id.* at 26a.

But that generic language (which is itself ambiguous) neither supersedes nor even accurately describes the operative text of the remedial provisions of the Act. The preambular statement of purpose is expressly qualified by the phrase "except as otherwise provided by law," making clear that the Act's operative provisions, rather than its preamble, are controlling. § 2(b)(6), 88 Stat. 1896. Under those operative provisions, many violations of the Act, even if willful or intentional, do not give rise to a cause of action for damages under any circumstances. See 5 U.S.C. 552a(g)(2)-(3) (providing only injunctive relief, not money damages, for failure to correct a record or to provide an individual with access to his records). When damages are available, the damages provided are neither "any damages," nor even "general damages," but instead only "actual damages." See *Russello*, 464 U.S. at 23 (different terms in the same act are presumed to have different meanings).

The court of appeals thus erred in permitting general notions of congressional purpose to trump specific legislative consideration of the precise matter at hand and the specific statutory provisions addressing that matter. "No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary ob-

jective must be the law." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam)). As previously discussed, Congress was concerned about the potential financial impact of the Act and limited the civil-remedies provisions accordingly. See *Doe*, 540 U.S. at 637 (Ginsburg, J., dissenting) (acknowledging that although Congress wanted to "deter[] violations and provid[e] remedies when violations occur," it "did not want to saddle the Government with disproportionate liability"). Courts should respect the product of that legislative compromise and not enlarge the Privacy Act's waiver of sovereign immunity beyond its express terms.

3. The court of appeals similarly sought to find support for its interpretation of "actual damages" in other provisions that discuss the Act's purposes. See Pet. App. 26a. The court observed that the Act "obligates agencies to maintain a records system that 'shall . . . establish appropriate administrative, technical and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, *embarrassment*, inconvenience, or unfairness to any individual on whom information is maintained.'" *Ibid.* (quoting 5 U.S.C. 552a(e)(10)) (emphasis supplied by court). The court further observed that the Act "provides a civil remedy for an agency's failure 'to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the . . . *character* . . . of . . . the individual that may be made on the basis of such record.'" *Ibid.* (quoting 5 U.S.C.

552a(g)(1)(C)) (emphasis supplied by court). The court believed that "Congress's use of language to ensure that a federal agency's record-keeping practices do not result in embarrassment or harm to one's character bolsters a construction of actual damages that reaches nonpecuniary damages." *Ibid.*

The two words ("embarrassment" and "character") highlighted by the court of appeals do not illuminate the meaning of "actual damages." Neither of the subsections in which those words appear 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 intended to award damages every time a plaintiff has been embarrassed. 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); it would have used a different term in place of "actual damages," 5 U.S.C. 552a(g)(4)(A); and it would have permitted a monetary award to anyone who had suffered an "adverse effect," as opposed to only plaintiffs who have sustained "actual damages," see *Doe*, 540 U.S. at 624-625.

A plaintiff who is "embarrass[ed]" due to a failure of agency safeguards, 5 U.S.C. 552a(e)(10), or whose records are maintained in such a way that an unfair determination of "character" is threatened, 5 U.S.C. 552a(g)(1)(C), may have an action for injunctive relief. See pp. 34-35 & n.*, *supra*. But without any proof of "actual damages"—*i.e.*, pecuniary harm—he does not

have a claim for monetary recovery. *Doe*, 540 U.S. at 620.

4. The court of appeals additionally tried to buttress its interpretation of the Privacy Act by reference to circuit precedent interpreting a different statute altogether, the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* FCRA, originally enacted in 1970, is a consumer-protection statute that regulates the collection, dissemination, and use of information related to a consumer's finances and creditworthiness. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001). It contains civil-remedies provisions that allow a consumer to recover "actual damages" for willful or negligent violations of its substantive requirements. 15 U.S.C. 1681n (2006 & Supp. III 2009); 15 U.S.C.1681*o*. The court of appeals perceived similarities "in purpose and time" between FCRA and the Privacy Act that, in its view, made FCRA "a reliable extrinsic source" for interpreting the meaning of "actual damages" in the Privacy Act. Pet. App. 31a. The court accordingly believed that circuit precedent interpreting "actual damages" recoverable under FCRA to include emotional-distress damages "buttresse[d]" a similar construction of the term "actual damages" in the Privacy Act. *Id.* at 30a-31a.

The court of appeals' resort to FCRA to interpret the Privacy Act is mistaken in several respects. As a threshold matter, any attempt to directly equate the meaning of "actual damages" in two different statutes presents inherent difficulties. As the court of appeals itself recognized in another portion of its opinion, the term "actual damages" is a "chameleon," the meaning of which "changes with the specific statute in which it is found." Pet. App. 23a-24a (citation omitted). Even if comparisons of this sort had force in some circum-

stances, the particular comparison between the Privacy Act and FCRA is inapt, because it overlooks material differences in the statutes' language and structure. Cf. *Doe*, 540 U.S. at 626-627 (rejecting asserted comparisons between Privacy Act's civil-remedies provision and remedial provisions in other statutes). FCRA does not condition "entitle[ment] to recovery" on proof of "actual damages," as the Privacy Act does, and FCRA's interpretation would therefore not be informed by the common-law remedies available for defamation per quod, as the Privacy Act's interpretation is. Compare 5 U.S.C. 552a(g)(4)(A), with 15 U.S.C. 1681n and 15 U.S.C. 1681*o*; see pp. 22-25, *supra*. Nor does FCRA's text provide a clear contrast between "general damages" and "actual damages," as the Privacy Act's text does. Compare Privacy Act § 5(c)(2)(B)(iii), 88 Stat. 1907, with 5 U.S.C. 552a(g)(4)(A); see *Russello*, 464 U.S. at 23.

Furthermore, it is not definitively settled today, and certainly was not settled when the Privacy Act was enacted, that "actual damages" under FCRA includes recovery for mental or emotional distress. This Court has never itself interpreted FCRA to permit damages for mental or emotional distress. Only one judicial decision to do so—from the District Court for the Eastern District of Missouri—predated the Privacy Act's enactment. See *Millstone* v. *O'Hanlon Reports, Inc.*, 383 F. Supp. 269 (1974) (decided on October 12, 1974), aff'd, 528 F.2d 811 (8th Cir. 1976). Even that decision came well after the original Privacy Act bills, containing the term "actual damages," were introduced into Congress. See S. 3418, 93d Cong. (1974) (introduced May 1, 1974); H.R. 16373 (introduced August 12, 1974). Finally, we are aware of no court that has ever held that emotional-distress damages are available against the *United States*

under FCRA. FCRA is a statute of general applicability, and it is the government's position that the United States is immune from suit under its general civil-remedies provisions. See *United States* v. *Bormes*, petition for cert. pending, No. 11-192 (filed Aug. 12, 2011) (presenting question whether the Little Tucker Act, 28 U.S.C. 1346(a)(2), waives the United States' sovereign immunity to suit under FCRA's general civil-remedies provisions). Cases construing FCRA in the context of private civil actions have had no occasion to address whether FCRA's reference to "actual damages" clearly and unambiguously waives United States' sovereign immunity to damages for mental or emotional distress.

5. Finally, the court of appeals sought support for its holding in two decisions of this Court: *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Pet. App. 25a. Those decisions, which impose First Amendment limitations on state-law damages actions for the publication of falsehoods, have no bearing on the issue of how far the statutory damages remedy in the Privacy Act extends.

In *Time, Inc.*, the Court addressed a suit under New York law against the publisher of an allegedly inaccurate magazine article. 385 U.S. at 376-377. The Court held, "upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals," that the plaintiff had to prove "knowing or reckless falsehood" in order to recover. *Id.* at 390.

In *Gertz*, the Court held (among other things) that plaintiffs in state-law defamation suits could not recover presumed damages, but were instead limited only to "compensation for actual injury," unless they could prove that the defendant knowingly lied or recklessly

disregarded the truth. 418 U.S. at 349. The Court declined to define the term "'actual injury,'" but explained that it "is not limited to out-of-pocket loss," observing that "the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350.

The court of appeals found *Time, Inc.* and *Gertz* instructive on the issue of "what types of injuries typically result from the violation of" a right to privacy. Pet. App. 25a. "Given the nature of the injuries that most frequently flow from privacy violations," the court reasoned, "it is difficult to see how Congress's stated goal of subjecting federal agencies to civil suit for *any damages* resulting from a willful or intentional violation of the Act could be fully realized unless the Act encompasses both pecuniary and nonpecuniary injuries." *Id.* at 26a.

As already discussed, however, the operative language of the Act does not entitle plaintiffs to "any damages," but only to "actual damages." Respondent has suggested (Br. in Opp. 20-21) that *Time, Inc.* and *Gertz* would nevertheless have informed Congress's view of what the term "actual damages" meant in the context of the Privacy Act. But those decisions arose in a different context, and neither decision employed the term "actual damages." Use of the term "actual injury" in the context of a judicial opinion addressing a private state-law suit for the publication of an inaccurate article provides no meaningful insight into Congress's use of the term "actual damages" in a statutory waiver of federal sovereign immunity for claims arising out of federal record-keeping.

At most, *Time, Inc.* and *Gertz* support the unexceptional proposition that, as a matter of state law, emotional-distress damages were often available to plaintiffs alleging certain types of privacy and defamation torts. Congress was well aware of that, but it rejected a similar scheme for the Privacy Act when it opted not to permit the recovery of "general damages." See pp. 25-29, *supra*.

If *Time, Inc.* or *Gertz* (or, for that matter, any other source) in fact provided a controlling definition of the term "actual damages" in the Privacy Act that would include nonpecuniary harm, such a definition was unlikely to have escaped the notice of the Privacy Protection Study Commission. The Commission instead concluded that "actual damages," as used in the Privacy Act, "was intended as a synonym for special damages as that term is used in defamation cases," which are limited to "injury that has caused clear economic loss to the individual." *Privacy Commission Report* 530. That interpretation is supported by principles of sovereign immunity, the text and structure of the Act, this Court's decision in *Doe*, the legislative history, and sound policy considerations. The Ninth Circuit therefore fundamentally erred by nevertheless exposing the United States to additional damages liability for mental or emotional distress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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