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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,
Respondent.

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff can establish "actual damages" under the Privacy Act's civil liability provisions, 5 U.S.C. §§ 552a(g)(1)(C)-(D) and (g)(4), by relying on evidence that a federal agency's intentional or willful violation of the Act caused severe mental and emotional distress.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT	1
A. The Privacy Act Authorizes Civil Suits Against Federal Agencies For "Actual Damages" Caused By Intentional Or Willful Disclosures Of Confidential Information	1
B. Petitioners Intentionally And Willfully Disclose Confidential Information About Thousands Of Pilots, Including Mr. Cooper	3
C. Mr. Cooper Suffers Severe Mental And Emotional Distress As A Result Of Petitioners' Unlawful Disclosures	4
D. The District Court Finds Privacy Act Violations And Evidence Of Intentionality And Willfulness, But Rules That "Actual Damages" Does Not Encompass Compensation For Proven Mental Or Emotional Distress	5
E. The Court Of Appeals Holds That "Actual Damages" Encompasses Proven Mental Or Emotional Distress Caused By An Intentional Or Willful Privacy Act Violation	6

SUMMARY OF ARGUMENT 7

ARGUMENT.. 11

The Privacy Act's "Actual Damages" Provision Authorizes Compensation For Proven Mental Or Emotional Distress 11

A. When Congress Enacted The Privacy Act, The Plain Meaning Of "Actual Damages" Encompassed Compensation For Proven Mental Or Emotional Distress 12

B. Recognized Principles Of Construction Reinforce That The Privacy Act's "Actual Damages" Provision Authorizes Compensation For Proven Mental Or Emotional Distress 17

1. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With Common Law Tradition 18

2. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With The Contemporaneous Construction Of Other Federal Statutes 25

3. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With The Privacy Act's Express Sovereign Immunity Waiver 32

4. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Avoids Arbitrary, Capricious, And Absurd Results 33

5. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With The Privacy Act's Legislative History 35

C. Petitioners' Arguments Contravene Established Principles Of Construction And Fail To Account For The Privacy Act's Text, Structure, And Purpose 41

1. Petitioners' Reliance On The Sovereign Immunity Canon Is Misdirected 41

2. Petitioners' Attempt To Limit "Actual Damages" To Pecuniary Losses Violates Settled Principles Of Statutory Construction 45

3. Petitioners' Assertion That The Privacy Act's "Actual Damages" Provision Was Modeled On Defamation "Per Quod" Is Erroneous 51

4. Petitioners' Limiting Construction Of "Actual Damages" Is Not Supported By Public Policy 56

CONCLUSION 59

TABLE OF AUTHORITIES

Page

Cases:

Am. Stevedores v. Porello,
330 U.S. 446 (1947) 43, 44, 50
Am. Tobacco Co. v. Patterson,
456 U.S. 63 (1982) 34
Ardestani v. INS,
502 U.S. 129 (1991) 44
Birdsall v. Coolidge,
93 U.S. 64 (1876) 8, 19, 49
Bowen v. City of New York,
476 U.S. 467 (1986) 33
Calva-Cerqueira v. United States,
281 F. Supp. 2d 279 (D.D.C. 2003) 27
Canadian Aviator, Ltd. v. United States,
324 U.S. 215 (1945) 42, 43, 44, 50
Cannon v. Univ. of Chicago,
441 U.S. 677 (1979) 25
Cantrell v. Forest City Publ'g Co.,
419 U.S. 245 (1974) 23, 24, 25
Casella v. Equifax Credit Info. Servs.,
56 F.3d 469 (2d Cir. 1995) 31
Childers v. San Jose Mercury Printing & Publ'g Co.,
38 P. 903 (Cal. 1894) 23
Carey v. Piphus,
435 U.S. 247 (1978) 50
Conn. Ry. & Lighting Co. v. Palmer,
305 U.S. 493 (1939) 49
Davis v. Mich. Dep't of Treasury,
489 U.S. 803 (1989) 12
De May v. Roberts,
9 N.W. 146 (Mich. 1881) 22

Dep't of Energy v. Ohio,
503 U.S. 607 (1992) 44
Doe v. Chao,
540 U.S. 614 (2004) .... passim
Estate of Cowart v. Nicklos Drilling Co.,
505 U.S. 469 (1992) 12
FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 12
Fitzpatrick v. IRS,
665 F.2d 327 (11th Cir. 1982) 51
Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 23, 24
Guimond v. Trans Union Credit Info. Co.,
45 F.3d 1329 (9th Cir. 1995) 31
Hitt v. Connell,
301 F.3d 240 (5th Cir. 2002) 58
Hrubec v. Nat'l R.R. Passenger Corp.,
829 F. Supp. 1502 (N.D. Ill. 1993) 48
Hudson v. Reno,
130 F.3d 1193 (6th Cir. 1997) 51
Indian Towing Co. v. United States,
350 U.S. 61 (1955) 33
Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) 33, 42
Jeanty v. McKey & Poague, Inc.,
496 F.2d 1119 (7th Cir. 1994) 30
Johnson v. Dep't of Treasury, IRS,
700 F.2d 971 (5th Cir. 1983) 50, 51
Jones v. United States,
9 F. Supp. 2d 1119 (D. Neb. 1988) 48
Kapuschinsky v. United States,
259 F. Supp. 1 (D.S.C. 1966) 27
K Mart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988) 57

Kosak v. United States,
465 U.S. 848 (1984) 12
Lane v. Pena,
518 U.S. 187 (1996) 41
Library of Congress v. Shaw,
478 U.S. 310 (1986) 42
McMillian v. FDIC,
81 F.3d 1041 (11th Cir. 1996) 21
Millstone v. O'Hanlon Reports, Inc.,
383 F. Supp. 269 (E.D. Mo. 1974),
aff'd, 528 F.2d 829 (8th Cir. 1976) 31
Molzof v. United States,
502 U.S. 301 (1992) .... passim
Morehead v. Lewis,
432 F. Supp. 674 (N.D. Ill. 1977),
aff'd, 594 F.2d 867 (7th Cir. 1979) 21
Morissette v. United States,
342 U.S. 246 (1952) 8, 18
Osborn v. Leach,
47 S.E. 811 (N.C. 1904) 23
Phila. Newspapers, Inc. v. Hepps,
475 U.S. 767 (1986) 24
Rayonier Inc. v. United States,
352 U.S. 315 (1957) 33
Richards v. United States,
369 U.S. 1 (1962) 12
Richlin Sec. Serv. Co. v. Chertoff,
553 U.S. 571 (2008) 26, 44, 45, 50
Ruckelshaus v. Sierra Club,
463 U.S. 680 (1983) 44
Seaton v. Sky Realty Co., Inc.,
491 F.2d 634 (7th Cir. 1974) 30
Sloane v. Equifax Info. Servs., LLC,
510 F.3d 495 (4th Cir. 2007) 31

Smith v. United States,
507 U.S. 197 (1993) 33, 45
Smith v. City of Jackson,
544 U.S. 228 (2005) 25
Smith v. Sol D. Adler Realty Co.,
436 F.2d 344 (7th Cir. 1970) 30
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478 F.2d 380 (10th Cir. 1973) 30
Stevens v. Dobs, Inc.,
373 F. Supp. 618 (E.D.N.C. 1974) 31
Thompson v. San Antonio Retail Merchs. Ass'n,
682 F.2d 509 (5th Cir. 1982) 31
Time Inc. v. Hill,
385 U.S. 374 (1967) 23
United States v. Aetna Cas. & Sur. Co.,
338 U.S. 366 (1949) 42
United States v. Kubrick,
444 U.S. 111 (1979) 32
United States v. Nordic Village, Inc.,
503 U.S. 30 (1992) 41
United States v. Rice,
327 U.S. 742 (1946) 42
United States v. Sherwood,
312 U.S. 584 (1941) 41
United States v. Williams,
514 U.S. 527 (1995) 42
Van Norman v. Peoria Journal-Star, Inc.,
175 N.E.2d 805 (Ill. App. Ct. 1961) 23
Ward v. United States,
973 F. Supp. 996 (D. Colo. 1997) 48
Weider v. Hoffman,
238 F. Supp. 437 (M.D. Pa. 1965) 21
Williams v. Matthews Co.,
499 F.2d 819 (8th Cir. 1974) 31

Zicherman v. Korean Air Lines Co., Ltd.,
516 U.S. 217 (1996) 50

Statutes:

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§ 2, 88 Stat. 1896 .... 15, 17
§ 2(a), 88 Stat. 1896 .... 13, 14, 15
§ 2(b), 88 Stat. 1896 .... 1, 14, 15, 16
§ 2(b)(6), 88 Stat. 1896 .... 8, 16
§ 3, 88 Stat. 1897-1905 .... 10, 16, 17
5 U.S.C. §§ 552a(b)(1)-(12) 1, 57
5 U.S.C. § 552a(b)(7) 3
5 U.S.C. § 552a(e)(5) 16, 17
5 U.S.C. § 552a(e)(10) 8, 17
5 U.S.C. § 552a(g) 2
5 U.S.C. § 552a(g)(1)-(5) 1
5 U.S.C. §§ 552a(g)(1)(A)-(D) 1
5 U.S.C. § 552a(g)(1)(C)-(D) .... passim
5 U.S.C. § 552a(g)(1)(C) .... passim
5 U.S.C. § 552a(g)(1)(D) .... passim
5 U.S.C. § 552a(g)(4) .... passim
5 U.S.C. §§ 552a(g)(4)(A)-(B) 34
12 U.S.C. §§ 1821(e)(3)(A)-(B) 47
17 U.S.C. § 1009(d)(l)(ii) 49
18 U.S.C. § 2318(e)(3)(B) 49
26 U.S.C. §§ 7431(a) & (c) 47, 49
26 U.S.C. §§ 7432-33 .... 47, 49

28 U.S.C. § 2674 .... passim
42 U.S.C. § 1982 30

Legislative History:

Legislative History of the Privacy Act of 1974 -- S. 3418 (Pub. L. No. 93-579) (1976):
S. 2810, 93d Cong. (1973) 38
S. 2963, 93d Cong. (1974) 38
S. 3418, 93d Cong. (1974) 38, 39, 54
S. 3418, 93d Cong. (as passed by the Senate on Nov. 21, 1974 and corrected on Nov. 22, 1974) 39, 55
S. 3633, 93d Cong. (1974) 38
H.R. 13,872, 93d Cong. (1974) 38
H.R. 16,373, 93d Cong. (1974) 38, 54
H.R. 16,373, 93d Cong. (as passed by the Senate on Nov. 21, 1974 and corrected on Nov. 22, 1974) 39, 55
H.R. Rep. No. 93-1416 (1974) 38, 39
120 Cong. Rec. (1974)
9,382 37
12,646-47 37
32,849 37
36,645 37
36,658 40
36,659 40
36,890-92 41
36,893 .... 39, 55
36,897 38
36,900 37
36,955 36
36,955-56 40
37,805 54
40,880 39

Other Authorities:

Black's Law Dictionary (1951) 12, 13, 20
Brief for the Respondent, *Doe v. Chao*, No. 02-1377 (2003) 43, 55
Brief for the United States, *Molzof v. United States*, No. 90-838 (1991) 27, 43
Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission (1977) 50, 51
Restatement (First) of Torts (1938) 21, 53
Restatement (Second) of Torts (1977)................. 21, 53
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25 C.J.S. Damages § 2 (1966).................................... 21

STATEMENT

A. The Privacy Act Authorizes Civil Suits Against Federal Agencies For "Actual Damages" Caused By Intentional Or Willful Disclosures Of Confidential Information

As stated by Congress, the purpose of the Privacy Act of 1974 is to "provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies . . . to" comply with specified record-keeping duties and to "be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896, *reprinted in* Pet. App. 65a-109a.

To safeguard against invasion of individuals' privacy, the Act provides that an agency generally may not disclose information gathered about an individual to another agency or a third-party, "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains" or pursuant to certain narrowly defined exceptions. 5 U.S.C. §§ 552a(b)(1)-(12).

To give these privacy safeguards added force, the Act authorizes a private right of action to redress four separate categories of agency misconduct. 5 U.S.C. §§ 552a(g)(1)(A)-(D). Section 552a(g)(1) then expressly waives the government's sovereign immunity from suit in such actions, and the Act makes separate provisions for the redress of each of those four enumerated categories of misconduct. *Id.* §§ 552a(g)(1)-(5).

Specifically, the Act authorizes a private right of action and waives the government's immunity from suit "[w]henever any 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 . . . ." *Id.* § 552a(g)(1)(D). This catch-all provision includes private civil actions for unlawful disclosures of information from one agency to another.

The Act further provides that "[i]n any suit" brought under subsections (g)(1)(C) or (g)(1)(D) "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.

5 U.S.C. § 552a(g)(4).

In *Doe v. Chao*, 540 U.S. 614, 618 (2004), this Court considered §§ 552a(g)(1)(C)-(D) and (g)(4). The Court held that a complainant must demonstrate that he or she has sustained some "actual damages" in order to be entitled to the minimum statutory award of $1,000. *Id.* The Court did not address, however, "the precise definition of actual damages" under subsection (g)(4) and cautioned that its decision should not be read to "suggest that out-of-

pocket expenses are necessary for recovery of the $1,000 minimum." *Id.* at 627 n.12.

B. Petitioners Intentionally And Willfully Disclose Confidential Information About Thousands Of Pilots, Including Mr. Cooper

In 2003, 2004, and 2005, agents of the Department of Transportation (DOT) and the Social Security Administration (SSA) disclosed and exchanged massive amounts of confidential information in Federal Aviation Administration (FAA) and SSA records pertaining to thousands of pilots (including Mr. Cooper). These disclosures were part of an investigation known as "Operation Safe Pilot" (OSP), and they were made with intentional and willful disregard of the Act's safeguards. For example, the agencies did not provide required notice to, or obtain written consent from, any pilot. The investigators also disclosed agency records without written requests from, or approval by, their respective agency heads—in contravention of the Act's carefully drawn exception for exchanges pursuant to legitimate "civil or criminal law enforcement activity," 5 U.S.C. § 552a(b)(7). Pet. App. 16a-17a, 40a-41a.

When OSP was proposed, certain SSA agents and counsel raised concerns that such wide-ranging, cross-agency exchanges would violate the Privacy Act. But, rather than complying with the law, the SSA drafted internal procedures intended to circumvent the Act's requirements. These proposed procedures did not comply with the Act and, in any event, were disregarded immediately by federal agents implementing OSP. Pet. App. 41a. Because of

these failings, extensive confidential information was unlawfully disclosed by each agency. Pet. App. 17a-18a, 42a-44a (noting the disclosure of FAA records of approximately 45,000 pilots and SSA records of a subset of that group).

These illegal disclosures included confidential information pertaining to Mr. Cooper. He was targeted because he properly claimed Social Security disability benefits at one time, but failed to disclose that he was HIV-positive on FAA medical certification forms. Pet. App. 15a, 17a-18a, 43a-44a. Without regard for the Privacy Act, these agency-to-agency disclosures included: (1) Mr. Cooper's Social Security number and other identifying information; (2) the Social Security diagnosis code that indicated that he was HIV positive; and (3) his complete Social Security disability file, including more than 230 pages of medical records provided in confidence to the SSA. Pet. App. 16a-18a, 42a-45a.

C. Mr. Cooper Suffers Severe Mental And Emotional Distress As A Result Of Petitioners' Unlawful Disclosures

In March 2005, DOT agents confronted Mr. Cooper in a coffee shop with a complete copy of his Social Security disability file, including his medical records. Pet. App. 18a, 44a-45a.

When Mr. Cooper learned that information contained in his file had been disclosed to DOT agents, he was devastated. His declaration, as well as those from four friends who personally observed him, and an expert psychiatrist, substantiated his claim of real and appreciable mental and emotional injury. Pet. App. 59a-61a.

In fact, his distress was so severe that it had consequences for his mental health, physical condition, relationships, and ability to function, including sleeplessness, loss of appetite, physical tension, agitation, isolation from friends, and anxiety. Mr. Cooper's anxiety also prevented him from utilizing his natural sources of psychological support and seeking professional care (and thus incurring the type of pecuniary injury that Petitioners contend would be sufficient to support a suit). Ultimately, he was diagnosed as suffering from an anxiety disorder with many of the debilitating symptoms of acute distress disorder. *Id.*

D. The District Court Finds Privacy Act Violations And Evidence Of Intentionality And Willfulness, But Rules That "Actual Damages" Does Not Encompass Compensation For Proven Mental Or Emotional Distress

Mr. Cooper accepted responsibility for his failure to disclose his HIV status, pleading guilty to a single misdemeanor for making a false official writing.[1] He firmly believed, however, that Petitioners *also* should be held accountable because the Act expressly prohibited *their* cross-agency disclosures of his confidential records. Mr. Cooper thus brought a suit under 5 U.S.C. § 552a(g)(1)(D), seeking damages for

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

his severe mental and emotional injuries. Pet. App. 18a-19a.

On cross-motions for summary judgment, the district court held: (1) Petitioners violated the Act by illegally exchanging information from FAA and SSA disability files; (2) there was a triable issue of fact on whether Petitioners' violations were intentional or willful; and (3) Mr. Cooper had shown that he sustained real and appreciable mental and emotional injury from the violation. Pet. App. 18a-19a, 46a-61a. The court nevertheless entered summary judgment against Mr. Cooper on the ground that evidence establishing his various mental and emotional injuries could not, as a matter of law, establish "actual damages" under § 552a(g)(4). Pet. App. 19a, 61a-64a.

E. The Court Of Appeals Holds That "Actual Damages" Encompasses Proven Mental Or Emotional Distress Caused By An Intentional Or Willful Privacy Act Violation

The court of appeals reversed and remanded for further proceedings. It found that the district court failed to consider the "full panoply of sources available to it" for evaluating the meaning of the term "actual damages" in context. Pet. App. 34a. Applying established principles of statutory construction, the court considered: the plain meaning of the term "actual damages" in isolation; the term as it appears in the context of the entire Act; relevant precedents from this Court concerning invasions of privacy and defamation, as well as common law authorities; the construction of other federal statutes that provide monetary awards for "actual damages"

caused by violations of statutory privacy rights; and other traditional canons of construction, including the canon of sovereign immunity. Pet. App. 22a-36a.

Against that backdrop, the panel unanimously held that Petitioners' narrow construction of "actual damages" was not plausible; "actual damages" was unambiguous when read in the context of the Privacy Act; and Congress clearly intended to provide a monetary award for both pecuniary and nonpecuniary damages that are proven to have been caused by an agency's intentional or willful violation. Pet. App. 36a-37a.

Petitioners sought rehearing and rehearing en banc. The court issued an amended opinion (deleting a footnote not relevant here) and two separate opinions respecting the denial of rehearing en banc. Pet. App. 1a-14a. Judge Diarmuid F. O'Scannlain, joined by seven other judges, dissented from the denial of rehearing en banc. Pet. App. 8a-14a. Judge Milan D. Smith, Jr., the author of the panel decision, responded in a concurrence in the order denying rehearing en banc. There, he specifically noted why the panel's decision was consistent with controlling precedents, supported by multiple parts of the express statutory text, and in harmony with this Court's reasoning in *Doe*. Pet. App. 3a-8a.

SUMMARY OF ARGUMENT

The single question for this Court's resolution is whether a plaintiff can establish "actual damages" under the Privacy Act through competent evidence of real and appreciable mental or emotional distress caused by an intentional or willful violation of the

statute. Under settled principles of statutory construction, the answer to that question is yes.

To begin with, the plain meaning of "actual damages," as evidenced by non-legal and legal dictionaries in use in 1974, is a reparation in money for an actual injury to a legally protected right, as distinct from "nominal," "presumed," "liquidated," or "exemplary" damages. This plain meaning clearly encompasses compensation for proven mental or emotional distress.

That plain meaning is confirmed by the Act's statement of purpose and its substantive requirements which show that: (1) Congress intended to subject agencies "to civil suit for any damages which occur as a result of willful or intentional action . . . ;" (2) the Act aims to prevent "embarrassment;" and (3) "[w]henever any agency" violates subdivision (g)(1)(D) "in such a way as to have an adverse effect on an individual, the individual may bring a civil action . . . ." Privacy Act, § 2(b)(6); 5 U.S.C. §§ 552a(e)(10), (g)(1)(D).

A similar meaning and conclusion follow from the "cardinal rule" of construction that holds that when Congress borrows legal terms of art from common law tradition, it presumably adopts the meaning attached to each borrowed word and the body of learning from which it was taken. *Morisette v. United States*, 342 U.S. 246, 263 (1952). The term "actual damages" entered the American legal lexicon long ago, and it was defined succinctly by this Court in *Birdsall v. Coolidge*, 93 U.S. 64 (1876), as meaning "the same thing" as "[c]ompensatory damages"—*i.e.*, "compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from

the defendant." In 1974, the common law regularly awarded actual damages, including compensation for proven mental or emotional distress, in cases of invasion of privacy and defamation by libel and slander per se. Thus, giving "actual damages" the meaning those words would have in the body of learning from which they were taken, the term authorizes compensation for any real or substantial mental or emotional distress sustained by an individual as a result of an intentional or willful violation of the Act's privacy requirements.

The same interpretation follows under all other relevant principles of construction. At the Privacy Act's inception, courts had construed recently enacted statutes authorizing "actual damages" for violations of federal civil rights and record-keeping requirements to include compensation for real or substantial mental or emotional distress. These contemporaneous statutes and judicial precedents further substantiate that when Congress authorized recovery of "actual damages" under the Act, it plainly intended to authorize compensation for real or appreciable emotional distress.

In fact, because mental or emotional distress is the frequent, natural, and primary consequence of an invasion of privacy, it is more notable that Congress did not use any language limiting "actual damages" to proven pecuniary damages. In statutes before and after the Privacy Act, Congress has subjected the government to liability for actual or compensatory damages for proven mental or emotional distress. In contrast, when Congress has intended to limit federal liability for actual damages to pecuniary injuries, it typically has directed that result expressly in the

statutory text. Yet, even though Congress knew that emotional distress was a well-recognized form of "actual damages" for invasions of privacy, Congress included no such language restricting "actual damages" to pecuniary injuries.

Finally, because the Act includes an express waiver of sovereign immunity authorizing civil suits against federal agencies for monetary relief, a court should be reluctant to narrow the scope of the express waiver that Congress provided. And that step certainly should not be taken without a firm grounding in the text of the statute and a clear directive from Congress to do so. Both are absent here. Accordingly, if the Privacy Act's "actual damages" provision is to be limited, it is Congress, not the judiciary, that should direct that result.

Petitioners disagree and urge the Court to limit "actual damages" to proven pecuniary loss. But their arguments do not account for the full text of the statute, the common meaning of the term as evidenced in legal or non-legal dictionaries, treatises, or the many precedents in existence in 1974. Nor do they account for the established construction of contemporaneous statutes with similar purposes or subsequently enacted statutes that reinforce a broader construction.

Instead, Petitioners simply *declare* that "actual damages" is an ambiguous term, *assume* that its meaning cannot be grasped using traditional tools of statutory construction, and *argue* that, because of the sovereign immunity canon, the term must be limited to out-of-pocket loss. Simply put, this litany does not align with settled principles of construction.

Indeed, Petitioners have advanced this argument before, and this Court has refused to accept it. To begin with, the sovereign immunity canon does not displace the other tools of statutory construction. Furthermore, because established principles of construction reveal here that Congress intended to provide compensation for proven mental and emotional distress, the sovereign immunity canon cannot be invoked to sanction Petitioners' statutory rewrite. Petitioners' remaining arguments based on legislative history and the post-enactment opinions of a federal commission also cannot override the result that recognized principles of statutory construction compel.

ARGUMENT

The Privacy Act's "Actual Damages" Provision Authorizes Compensation For Proven Mental Or Emotional Distress

Subsection 552a(g)(4) of the Privacy Act subjects the United States to civil liability for "actual damages" sustained by an individual as the result of an intentional or willful violation. Established principles of statutory construction—beginning with the plain meaning of the term, common law tradition, and the construction of contemporaneous statutes with similar purposes—all compel that the term "actual damages" be construed to authorize compensation for proven mental or emotional distress. Efforts to rewrite the term to mean "pecuniary loss" contravene these principles and should be rejected.

A. When Congress Enacted The Privacy Act, The Plain Meaning Of "Actual Damages" Encompassed Compensation For Proven Mental Or Emotional Distress

1. The starting point for the analysis of "actual damages" in § 552a(g)(4) is the plain, ordinary, and contemporary meaning of the words used by Congress, read "in context" and with a view to the "place" of the words "in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)) (FDA regulatory authority); *Kosak v. United States*, 465 U.S. 848, 853 (1984) (Federal Tort Claims Act's construction); *Richards v. United States*, 369 U.S. 1, 9 (1962) (same). If the words are unambiguous when given their plain, ordinary, and contemporary, meaning the Court's task is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

2. When Congress drafted and enacted the Privacy Act, *Webster's Third New International Dictionary* defined the term "actual" as describing something that "exist[s] in fact or reality." *Webster's Third New International Dictionary* 22 (1971). *Black's Law Dictionary* similarly defined "actual" as "[r]eal" and "substantial" and "having a valid objective existence" as opposed to something "nominal," "constructive," or "theoretical." *Black's Law Dictionary* 53 (1951).

"Damages," in turn, was defined as an "estimated reparation in money for detriment or injury . . . caused by a violation of a legal right." *Webster's Third New International Dictionary* 571; *see also*

Black's Law Dictionary 466 (defining "damages" in similar terms); Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.1 at 135 (1st ed. 1973) (defining "damages" as a money award provided by a court to one who suffers an injury as a result of an invasion of a legally protected right or interest).

3. Thus, when Congress drafted and enacted the Privacy Act, the phrase "actual damages" simply meant an estimated reparation in money for a real and substantial detriment or injury caused by the intentional or willful violation of a protected legal right or interest. This plain meaning stood in contrast to measures of damages that are not based on real and substantial injuries—*i.e.*, damages that are "nominal," "constructive," or "theoretical." Congress therefore plainly embraced and authorized compensation for *any* real and substantial detriment or injury, including proven mental or emotional distress.

4. This plain, ordinary, and contemporary meaning of "actual damages" is further confirmed by reading the Act's civil liabilities provision in context with the Act's statement of purpose and its substantive requirements.

a. Section 2(a) begins with a statement concerning the circumstances that made it "necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by [federal] agencies." § 2(a), 88 Stat. 1896, *reprinted in* Pet. App. 65a-66a. Congress found that:

- "the right to privacy is a *personal* and *fundamental* right protected by the Constitution of the United States;"
- "the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;"
- "the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has *greatly magnified the harm to individual privacy* that can occur from any collection, maintenance, use, or dissemination of personal information;" and
- "the opportunities for an individual to secure employment, insurance, and credit, and *his right to due process, and other legal protections* are endangered by the misuse of certain information systems[.]"

Id. (emphasis added).

In section 2(b), Congress was equally definitive in stating that "[t]he 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—"

- "permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;"
- "prevent records . . . obtained by such agencies for a particular purpose from being used or made available for another purpose without

[the] consent [of the individual to whom the record pertains];"

- "permit an individual to gain access to information pertaining to him in the Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;"
- "collect, maintain, use, and disseminate any record of identifiable personal information in a manner" that "prevent[s] misuses of such information;" and
- "be subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under this Act."

Id. (emphasis added).

Although Petitioners contend that section 2 is "generally worded," "generic," "ambiguous," not "controlling," and "no[t] even accurate" in its description of the statute's substantive and remedial provisions (Pet. Br. 37-38), this Court cannot so summarily dismiss or marginalize this duly enacted statutory language. On the contrary, "[i]t is a cardinal principle of statutory construction that 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." *Doe*, 540 U.S. at 630-31 (internal quotations omitted).

Moreover, section 2(a) confirms that, when it passed the Act, Congress was concerned with "harm" to dignitary interests in privacy—interests that it understood to be "personal," "fundamental," and "protected" by the Constitution. Section 2(a) also

shows that Congress believed the Act was "necessary and proper" to protect and redress not only pecuniary injuries to "opportunities" for "employment, insurance, and credit[,]" but also intangible, nonpecuniary injuries including violations of the "right to due process," and "other legal protections" flowing from "the misuse of government information systems."

Finally, each of the "safeguards" described in section 2(b) corresponds *directly* not only to particular substantive requirements in the Act, but also to the four categories of agency misconduct addressed by its remedial provision. The last of these "safeguards" (described in section 2(b)(6)) is the requirement that federal agencies "be subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." This is an unmistakable reference to civil suits for monetary awards brought under *either* subsection (g)(1)(C) *or* subsection (g)(1)(D). It also is a clear statement of Congress's intent to provide compensation for the natural or primary injuries that are proven to result from those types of agency misconduct.

b. Section 3 also demonstrates Congress's intent to both protect and redress nonpecuniary interests and harm. For example, one part of section 3 requires that an agency maintain "all records" used by the agency "in making *any* determination" about an individual in a manner that reasonably "assure[s] *fairness* to the individual in the determination." *See* 5 U.S.C. § 552(a)(e)(5) (emphasis added). Another part likewise instructs agencies to "establish appropriate administrative, technical, and physical safeguards"

to "protect" against "threats" that could result in both pecuniary and nonpecuniary "harm," including "*embarrassment*, *inconvenience*, or *unfairness* to any individual on whom information is maintained." *Id.* § 552a(e)(10) (emphasis added). An intentional or willful violation of either duty by an agency is sufficient to trigger civil liability for "actual damages" under the Act. 5 U.S.C. § 552a(g)(1)(C)-(D) and (g)(4).

In short, the plain, ordinary, and contemporary meaning of the words "actual damages" expresses Congress's approval of monetary compensation for *any* real and substantial injury caused by the intentional or willful violation of the protected privacy rights and interests. Sections 2 and 3 of the Act, in turn, underscore that Congress sought to protect *both* pecuniary interests *and* nonpecuniary interests through the statute, expressly *including* the Act's civil liability provision. Nothing more is needed to hold that the "actual damages" provision authorizes compensation for proven mental or emotional distress caused by the Act's intentional or willful violation.

B. Recognized Principles Of Construction Reinforce That The Privacy Act's "Actual Damages" Provision Authorizes Compensation For Proven Mental Or Emotional Distress

If the Court elects to go beyond the plain meaning of the words "actual damages," recognized principles of statutory construction reinforce and confirm that "actual damages" authorizes compensation for proven mental or emotional distress.

1. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With Common Law Tradition

a. A "cardinal rule" of statutory construction, both now and in 1974, holds that:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952), *quoted in Molzof v. United States*, 502 U.S. 301, 307 (1992).

As this Court has noted, this rule carries "particular force" in cases where Congress has waived the United States' sovereign immunity from suit and subjected the United States to liability for monetary exactions using common legal terms. *Molzof*, 502 U.S. at 307 (construing the FTCA and the liability of the government for damages other than "punitive damages").

b. Here, the construction of the Act's "actual damages" provision as authorizing compensation for proven mental or emotional distress is consistent

with these rules of construction and a reading of "actual damages" as a legal term borrowed from the common law torts of defamation and invasion of privacy.

The term "actual damages" itself entered the American legal lexicon long before Congress used the term in subsection (g)(4) of the Privacy Act. In 1876, in *Birdsall*, 93 U.S. at 64, this Court was asked to construe the term "actual damages" appearing in two statutes that were applicable to claims for patent infringement, and the Court defined the term "actual damages" succinctly and unequivocally as "mean[ing] the same thing" as "[c]ompensatory damages"—*i.e.*, "compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant." *Id.* (construing 5 Stat. 123 and 16 Stat. 207).

Although the term "actual damages" sometimes has been used by courts in passing to describe particular damages awards in various cases of pecuniary and nonpecuniary injury, the basic "concept" of "actual damages" has a "long pedigree in the law" as being synonymous with the concept of "compensatory damages." *Molzof*, 502 U.S. at 306. Thus, as the plain meaning of "actual damages" would suggest, the term describes an amount awarded to a plaintiff in *compensation* for a proven injury proximately caused by a violation of a legally protected interest or right. *Id.*

Legal dictionaries in use at the time of the Privacy Act defined "actual damages" in much the same way as this Court did in 1876 in *Birdsall*. For example, the leading legal dictionary at the time gave the following definition:

> Real, substantial and just damages, or the amount awarded to a complainant in *compensation* for his *actual* and *real* loss or injury, as opposed, on the one hand to "nominal" damages, and on the other to "exemplary" "or "punitive" damages.

Black's Law Dictionary 467 (1951) ("Actual Damages" as defined under "DAMAGES") (noting that "actual damages" is "synonymous with 'compensatory damages'") (emphasis added); *id.* (defining "compensatory damages as an amount awarded to compensate the injured party for the injury sustained and nothing more").[2]

Other contemporaneous treatises also defined "actual damages" as being synonymous with "compensatory damages" and distinguished the term from other types of "damages" that do not aim to *compensate* a plaintiff for proven injury or loss to a legally protected right or interest (including "nominal damages," "liquidated damages," and "punitive

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[2] *Black's* states that "actual damages" also could be read synonymously with "general damages." *Id.* More precisely, actual or compensatory damages could be subdivided into "general" or "special" damages. *See* Dobbs, *Handbook on the Law of Remedies* §§ 3.1, 3.2 (describing general and special damages as forms of compensatory damages). *Black's* does not state, however, that "actual damages" can be read synonymously with "special damages," as Petitioners' would have it here. "Special damages" were discreet, routinely defined separately in non-legal and legal dictionaries, and subject to heightened standards of pleading and proof. *See, e.g.*, *Webster's Third New International Dictionary* 2186 (1971) (defining "special damages"); *Black's Law Dictionary* 469 ("Special Damages" as defined under "DAMAGES"); Dobbs, *Handbook on the Law of Remedies* §§ 3.1, 3.2 (same).

damages”). *See, e.g.*, *Weider v. Hoffman*, 238 F. Supp. 437, 445 (M.D. Pa. 1965) (analyzing “actual damages” in a state-law libel action and quoting from 25 C.J.S. Damages § 2); *Morehead v. Lewis*, 432 F. Supp. 674, 678 (N.D. Ill. 1977) (construing “actual damages” as used in the Civil Rights Act of 1968, section 812(c)) (citing 22 Am. Jur. 2d Damages § 11 (1965) and 25 C.J.S. Damages § 2 (1966) and noting that actual damages “[g]enerally . . . is understood in the law [as] synonymous with compensatory damages and as meaning substantial as distinguished from nominal”), *aff’d*, 594 F.2d 867 (7th Cir. 1979); *McMillian v. FDIC*, 81 F.3d 1041, 1055 n.15 (11th Cir. 1996) (quoting 25 C.J.S. Damages § 2 (1966)) (“According to Corpus Juris Secundum, ‘“Compensatory damages” and “actual damages” are synonymous terms . . . and include[ ] all damages other than punitive or exemplary damages.’”).

c. In addition, at the time of the Privacy Act’s enactment, the common law: (1) recognized mental suffering and emotional distress to be the natural and primary injuries that result from acts of defamation by libel and invasions of privacy; and (2) regularly issued awards for actual or compensatory damages to redress proven mental or emotional distress. *See* Restatement (First) of Torts §§ 867 (interference with privacy), 903 (compensatory damages), 905 (compensatory damages for nonpecuniary harm); Restatement (Second) of Torts § 652H(b) and cmt. b (compensatory damages for “proved” mental distress “of a kind that normally results from such invasion”); Dobbs, *Handbook on the Law of Remedies* §§ 7.1-7.4 at 509-39 (1973).

For example, in one of the earliest cases of tort for an invasion of "a legal right to . . . privacy," *De May v. Roberts*, 9 N.W. 146, 149 (Mich. 1881), the Michigan Supreme Court held that an intrusion into the privacy of a medical patient giving birth at home entitled "the injured party to recover the damages afterwards sustained, from shame and mortification upon discovering the true [nonprofessional and unmarried] character of the defendants." *See also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890) (arguing that the remedies for an invasion of privacy should be modeled after the common law of defamation, including "substantial compensation . . . for injury to feelings as in the action of slander and libel" "[e]ven in the absence of special [*i.e.*, pecuniary] damages.")

Other cases from the same era involving acts of defamation by libel describe the meaning of "actual damages" as a synonym for "compensatory damages" in greater detail:

> Two classes of damages may be recovered in actions of libel, to wit, [1] actual or compensatory damages and [2] exemplary damages. Special damages, as a branch of actual damages, may be recovered when actual pecuniary loss has been sustained, and is specially pleaded. The remaining branch of actual damages embraces recovery for loss of reputation, shame, mortification, injury to feelings, etc.; and, while special damages must be alleged and proven, general damages for outrage to feelings and loss of reputation need not be alleged in detail, and may be recovered in the absence

> of actual proof, and to the amount that the jury estimates will fairly compensate plaintiff for the injury done.

Childers v. San Jose Mercury Printing & Publ'g Co., 38 P. 903, 904 (Cal. 1894); *see also Osborn v. Leach*, 47 S.E. 811 (N.C. 1904) (same); *Van Norman v. Peoria Journal-Star, Inc.*, 175 N.E.2d 805, 811 (Ill. App. Ct. 1961) (although common law presumes damages to reputation from libel, the fact-finder's duty in a given case is to determine "actual damages sustained by the plaintiff, if any, by consideration of all of the evidence with respect thereto").

The extant common law tradition of protecting privacy and other dignitary interests through compensatory awards for proven mental or emotional distress also is reflected in this Court's own decisions in *Time, Inc. v. Hill*, 385 U.S. 374, 385 n.9 (1967), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

Thus, in *Time, Inc.*, 385 U.S. at 387-88 (decided seven years before the passage of Privacy Act), analyzing a First Amendment challenge to an action under a New York privacy statute, the Court noted the close relationship between the dignitary interests protected in defamation and privacy cases and observed that, in "right of privacy cases, the *primary* damage is the mental distress from having been exposed" to others involuntarily. *Id.* at 385 n.9 (emphasis added).

Similarly, in *Gertz*, 418 U.S. at 349 (decided six months before the passage of the Privacy Act), the Court held that, in a private individual's action

against a publisher for a libel that involved a matter of public concern, the First Amendment prohibited awards for presumed and punitive damages for false and defamatory statements unless the plaintiff showed "actual malice"—*i.e.*, knowledge of falsity or reckless disregard for the truth. However, *Gertz* recognized that substantial money damages could be awarded for libel, without proof of actual malice, to compensate a plaintiff for an "*actual injury*" "supported by competent evidence." *Id.* at 349-50 (emphasis added). And *Gertz* made clear that compensatory awards for "actual injury" need not be "limited to out-of-pocket loss." *Id.* "Indeed," the Court stated that compensatory damages could be awarded for "the more *customary* types of *actual harm* inflicted by defamatory falsehood" including "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350 (emphasis added). In other words, "*Gertz* expressly held that . . . a showing of simple fault sufficed to allow recovery of *actual damages*" including proven mental or emotional distress. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986) (emphasis added).

Cantrell, 419 U.S. at 248, 252, decided a few days before the passage of the Act, also reflects the common meaning of "actual damages" as including compensation for proven mental or emotional distress. There, the Court upheld an award of "actual" or "compensatory" damages, including "outrage, mental distress, shame, and humiliation" issued under Ohio's "false light" theory of invasion of privacy and used the terms "actual damages" and "compensatory damages" interchangeably when

describing the plaintiff's request for relief and the ensuing award. *Id.*

In sum, in using the term "actual damages" in the Privacy Act, Congress borrowed a legal term of art whose common meaning had been defined and widely understood for at least ninety-eight years as being synonymous with compensatory damages and as authorizing recovery for real and substantial injuries, including proven mental or emotional distress, sustained as a result of an invasion of privacy or defamation by libel or slander per se. Accordingly, to the extent that this Court goes beyond the plain meaning of the words "actual damages," it should read "actual damages" in light of the extant common law tradition when Congress enacted the Act. Indeed, "there is no warrant for assuming that Congress was unaware of established tort definitions" when it enacted the Privacy Act. *Molzof*, 502 U.S. at 305-07 (citing cases).

2. *Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With The Contemporaneous Construction Of Other Federal Statutes*

a. Another cardinal principle of construction provides that when Congress "uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) (Congress

legislates with full recognition of existing jurisprudence). This principle also carries particular force in the construction of statutes that waive sovereign immunity from suit and subject the United States to monetary exactions. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589-90 (2008) (federal liability for "fees" and "other expenses" under the Equal Access to Justice Act).

b. Once again, construction of the Act's "actual damages" provision as authorizing compensation for proven mental or emotional distress is consistent with this rule of construction as well. The Privacy Act was not the first statute to subject the United States to liability for proven mental or emotional distress. In 1946, Congress enacted the Federal Tort Claims Act (FTCA) which provides in relevant part that:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674 (first paragraph). This paragraph has been construed to (1) subject the United States to liability for actual or compensatory damages or any other form of legal damages other than "punitive damages" and (2) borrow terms and concepts from the common law tradition in existence in 1946. *See, e.g.*, *Molzof*, 502 U.S. at 305-08 (construing "punitive damages" for purposes of the FTCA as a legal term borrowed by Congress from common law tradition and defining the term based on the conduct and culpability of the defendant, as opposed to "actual or

compensatory damages" based on "actual loss" sustained by the plaintiff).

Although § 2674's first paragraph does not expressly subject the United States to liability for actual or compensatory damages for nonpecuniary injuries, it has been understood by the government and this Court to provide for precisely that result. Thus, at the time of the Privacy Act, under the first paragraph of § 2674, the United States already had been held liable in tort for "actual damages," including proven mental or emotional distress. *E.g., Kapuschinsky v. United States*, 259 F. Supp. 1, 6-8 (D.S.C. 1966) (after previously finding the government liable, holding, with respect to damages, that "[p]laintiff shall have judgment for *actual (compensatory) damages*," including "pain and suffering [and] psychological damage" proven by the evidence) (emphasis added). *See also Calva-Cerqueira v. United States*, 281 F. Supp. 2d 279, 282 (D.D.C. 2003) (using "actual damages" and "compensatory damages" interchangeably; holding the government liable; and awarding damages to compensate for, *inter alia*, proven pain, suffering, mental anguish, and emotional distress).

Indeed, the government itself noted in *Molzof* that, under this first paragraph, "the government *regularly* pays awards for *non-pecuniary* but nevertheless *compensatory* damages (such as damages for *pain and suffering*, *loss of consortium*, or infliction of *emotional distress*)." Brief for the United States 19 n.13, *Molzof v. United States*, No. 90-838 (1991) (emphasis added); *see also Molzof*, 502 U.S. at 309 (noting this concession).

Three years after the FTCA's enactment, Congress added a second paragraph to § 2674 addressing the government's liability in actions for wrongful death occurring in places where state law had been construed to provide only for punitive damages. This amendment subjected the United States to liability for "actual or compensatory damages" in such actions. 28 U.S.C. § 2674 (second paragraph). In this amendment, Congress did not define the phrase "actual or compensatory damages." Congress recognized, however, that "actual or compensatory damages" were synonyms whose common meaning included compensation for real and substantial mental or emotional distress in cases of wrongful death. Yet, Congress did not elect to extend federal liability that far and thus it directed a special "pecuniary" measure for "actual or compensatory damages" in those particular cases—*e.g.*, "actual or compensatory damages, measured by the pecuniary injuries resulting from such death." *Id.*; *Molzof*, 502 U.S. at 309 (noting that this particular "pecuniary injuries" measure does not apply in any other FTCA action for actual or compensatory damages).

A review of § 2674 thus confirms that, prior to the Privacy Act: (1) the terms "actual damages" and "compensatory damages" had been used by Congress as synonymous legal terms providing compensation for any real or substantial injury caused by a violation of a right or legally protected interest; and (2) in those instances when Congress thought it appropriate to limit federal liability for "actual damages" to cases of proven pecuniary loss, it directed that result expressly and unequivocally in statutory text.

c. Nineteen years after the amendment to § 2674, Congress used the term "actual damages" again in the remedial provision of Title VIII of the Civil Rights Act of 1968. *See* Civil Rights Act of 1968, Pub. L. 90-284, Title VIII, § 812(c), 82 Stat. 81, 88 (Apr. 11, 1968) (enacting what is now known as the Fair Housing Act (FHA)) (originally codified at 42 U.S.C. § 3612(c); presently codified as amended at 42 U.S.C. § 3613(c)). This Civil Rights Act's purpose was to recognize and protect individual rights to housing and to prohibit discrimination in housing on the basis of race, color, religion, or national origin. *Id.* §§ 803-06. To this end, the Civil Rights Act's remedial provision authorized a cause of action for "actual damages" sustained as a result of unlawful housing discrimination. *Id.* § 812(c).

Two years later, in 1970, Congress again used the term "actual damages" in a remedial provision of the Fair Credit Reporting Act (FCRA). Fair Credit Reporting Act, Pub. L. 90-321, Title VI, § 617, *as added by* Pub. L. 91-508, Title VI, § 601, 84 Stat. 1134 (Oct. 26, 1970) (codified as amended at 15 U.S.C. § 1681o). The FCRA's purpose was "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.* § 602. Thus, the FCRA regulated the maintenance and use of consumer credit reports and authorized a cause of action for "actual damages" for FCRA violations. *Id.* § 617.

Both the 1968 Civil Rights Act and the FCRA: (1) were enacted in close proximity to the Privacy Act; (2) sought to recognize and protect individual civil rights, including individual privacy interests, that

Congress understood to be personal, fundamental, and rooted in the Constitution; and (3) authorized compensation for "actual damages" in the ordinary legal sense of that term without providing any special definition or qualification. And, prior to the Privacy Act, the "actual damages" provisions in each statute had been construed to be synonymous with "compensatory damages" to authorize compensation for real and substantial injuries caused by violations of the rights protected in that statute, including proven mental or emotional distress.

For example, in *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 350-51 (7th Cir. 1970), the Seventh Circuit directed entry of a monetary award for "actual damages" under section 812(c) of the Civil Rights Act of 1968 in an amount that would "fairly and properly compensate" the plaintiff for proven mental anguish sustained as a result of unlawful housing discrimination. *See also Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636-37 (7th Cir. 1974) (confirming that an award for "compensatory damages" under 42 U.S.C. § 1982 and "actual damages" under section 812(c) of the FHA could include an amount that would compensate the plaintiff for proven mental anguish sustained as a result of unlawful housing discrimination); *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1121 (7th Cir. 1974) (same).

Likewise, in *Steele v. Title Realty Co.*, 478 F.2d 380, 384 (10th Cir. 1973), another case arising under section 812(c) of the Civil Rights Act of 1968, the Tenth Circuit held that "actual damages" includes compensation for proven nonpecuniary injuries,

including mental or emotional distress sustained as a result of unlawful housing discrimination.

In *Williams v. Matthews Co.*, 499 F.2d 819, 829 (8th Cir. 1974), the Eighth Circuit similarly directed the entry of a monetary award for "actual damages" under section 812(c) of the FHA in an amount that would "properly compensate" the plaintiff for proven "humiliation" suffered due to housing discrimination.

Finally, prior to the Privacy Act's enactment, federal district courts also had construed the term "actual damages" as it appeared in section 812(c) of the 1968 Civil Rights Act and as it appears in section 617 of the FCRA, as authorizing an award for proven mental or emotional distress. *See, e.g.*, *Stevens v. Dobs, Inc.*, 373 F. Supp. 618, 622 (E.D.N.C. 1974) ("actual damages" section 812(c) of the Civil Rights Act of 1968); *Millstone v. O'Hanlon Reports, Inc.*, 383 F. Supp. 269 (E.D. Mo. 1974) ("actual damages" under the FCRA is compensatory and includes compensation for nonpecuniary injuries), *aff'd*, 528 F.2d 829 (8th Cir. 1976).[3]

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[3] Petitioners note that this Court has never interpreted the FCRA's "actual damages" provision, and they contend that its meaning was unsettled when the Privacy Act was enacted. Pet. Br. 42. But they cite no decision contrary to *Millstone*. Indeed, *Millstone*'s construction of the FCRA's "actual damages" provision is not an aberration. *E.g.*, *Sloane v. Equifax Info. Servs., LLC*, 510 F.3d 495, 500 (4th Cir. 2007); *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 473 (2d Cir. 1995); *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995); *Thompson v. San Antonio Retail Merchs. Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982). In any event, the settled presumption is that when Congress borrows a term that it recently has used in similar statutes and that term has been

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In sum, at the time of the Privacy Act, courts uniformly had construed the "actual damages" provisions of the 1968 Civil Rights Act and the FCRA to encompass compensation for proven mental or emotional distress. Congress manifested no intent to give the term a different meaning in the Privacy Act. Accordingly, under settled principles of construction, Congress should be presumed to have intended that the Privacy Act's "actual damages" provision be given the same construction encompassing compensation for proven mental or emotional distress.

3. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With The Privacy Act's Express Sovereign Immunity Waiver

a. Because the Privacy Act provides an express waiver of sovereign immunity authorizing civil suits against Petitioners for monetary relief using a term—"actual damages"—borrowed from common law tradition and other statutes with similar purposes, the Act also is subject to the canon of construction that directs courts not "to assume the authority to narrow" the scope of the express waiver that Congress has provided. *United States v. Kubrick*, 444 U.S. 111, 118 (1979).

b. In particular, the text of §§ 552a(g)(1)(C)-(D) and (g)(4) expressly waives the government's

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judicially construed, Congress is presumed to have intended the construction given in the judicial precedents absent a contrary indication. That presumption applies here.

sovereign immunity and authorizes an award "in the amount of" the "actual damages" sustained. Given the express waiver and authorization for a monetary award, if the government's liability for "actual damages" is to be limited or curtailed, it is the function of Congress, not this Court, to direct that result. *Rayonier Inc. v. United States*, 352 U.S. 315 320 (1957); *see also Smith v. United States*, 507 U.S. 197, 203 (1993) (describing this principle of construction as a "canon;" reading the foreign-country exception to the FTCA to exclude torts committed in Antarctica; and rejecting the alternate construction advanced by the government); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (applying the canon; holding that the time for filing an employment discrimination action against the federal government can be subject to equitable tolling; and rejecting the government's narrower interpretation of the statutory right of action); *Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (same in action to challenge eligibility determinations of the Social Security Administration); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) (applying the canon in an action for negligence in the maintenance of a lighthouse and rejecting "finespun" and "capricious" statutory distinctions advanced by the government).

4. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Avoids Arbitrary, Capricious, And Absurd Results

a. "[S]tatutes should be interpreted to avoid untenable distinctions and unreasonable results

whenever possible." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). Here, a construction of the Act's "actual damages" provision as authorizing compensation for proven mental or emotional distress would be reasonable and would avoid a construction that would result in arbitrary and capricious distinctions.

b. Here again, construing the Act's "actual damages" provision to authorize compensation for proven mental or emotional distress would provide plaintiffs with a remedy for the intangible harms that have long been understood by courts to be the natural and primary consequences of a violation of legally protected privacy interests. A more limiting construction of "actual damages," on the other hand, would deprive *all* individuals of *any* compensation for those types of injuries that are the primary, most natural, and most likely consequences of an intentional or willful violation of privacy rights—*i.e.*, real and substantial mental or emotional distress. Given the statute's express purpose to protect and vindicate individuals' privacy interests in personal information collected by federal agencies, that result would be absurd and implausible standing on its own.

c. There is more to consider. The Act *guarantees* any "person who is entitled to recovery" an award of no less than $1,000 *as well as* "the costs of the action together with attorney fees as determined by the court." 5 U.S.C. §§ 552a(g)(4)(A)-(B). In *Doe*, the Court indicated that *any* form of out-of-pocket or pecuniary loss could support a claim for "actual damages" under the Act and thus result in a recovery of no less than $1,000 plus costs and attorney fees as

provided by the statute. *See Doe*, 540 U.S. at 626 n.10 (noting that out-of-pocket losses for "running a credit report" or "a Valium prescription" could easily support a claim for "actual damages" under the Act).

Thus, a narrowing construction of "actual damages" would *deprive* claimants of any monetary compensation for mental or emotional distress, even when that injury is shown to be severe and debilitating, while *allowing* claims for at least $1,000 plus costs and attorneys' fees based on the miniscule pecuniary losses associated with a credit report or prescription drug co-pay.

d. Even if one assumes that, in 1974, Congress was concerned with limiting claims on the federal fisc and further assumes that this concern influenced the decision to make the United States liable for "actual damages" and not liquidated or punitive damages, a narrowing construction of the Act's "actual damages" provision would not be likely to have any meaningful effect on claims upon the federal fisc. It would simply create incentives for aggrieved individuals to incur small pecuniary losses as a basis for suit. *Doe*, 540 U.S. at 635-40 (Ginsburg, J., dissenting) (noting that out-of-pocket expenses are "easily arranged").

5. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With The Privacy Act's Legislative History

To the extent that this Court wishes to consult the Act's legislative history, it also confirms that "actual damages" encompasses the proven mental or emotional injuries that naturally result from privacy

invasions. *See generally* House Comm. on Gov't Operations and Senate Comm. on Gov't Operations, 94th Cong., 2d Sess., *Legislative History of the Privacy Act of 1974 -- S. 3418 (Pub. L. No. 93-579)* (1976) (*Legislative History*).[4]

a. In 1973 and 1974, members of Congress were concerned with the extent to which federal agencies were misusing records pertaining to individuals and invading individuals' privacy, and they concluded that legislation was required to protect personal privacy rights in such records. *See* 120 Cong. Rec. 36,900 (1974) (remarks of Sen. Nelson) ("[I]individual liberty has been eroded by an expanding web of snooping conducted at all levels of government . . . which make a mockery of the individual freedoms guaranteed by our Constitution.").

The legislative history shows that the members of Congress who drafted and enacted the Act (1) deliberately drew from the common law of torts generally and from the law of defamation and invasion of privacy more specifically; (2) intended the Act to prevent and redress harm to dignitary interests and rights to privacy protected by the Constitution; (3) were influenced particularly by contemporaneous decisions of this Court concerning privacy and civil rights; and (4) understood that the natural and primary consequences of invasions of privacy were intangible and nonpecuniary.

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[4] This report contains much of the Act's legislative history in one volume and is available on-line at http://www.loc.gov/rr/frd/Military_Law/pdf/LH_privacy_act-1974.pdf (visited Sept. 27, 2011).

As Senator Muskie remarked, the legislation considered by the House and Senate

> draws upon the constitutional and judicial recognition accorded to the right of privacy and translates it into a system of procedural and substantive safeguards against obtrusive Government information-gathering practices . . . .

120 Cong. Rec. 36,897. Senator Muskie then described provisions in the House and Senate legislation providing a private right of action for statutory violations, including compensation for "actual damages" as follows:

> [E]ach citizen would be entitled to enforce this right of access and challenge in a Federal district court and seek an award of damages for *injuries* resulting from the misuse of personal information.
>
> These are fundamental rights to be included in any privacy legislation and they should help begin to restore public faith in our Government's information practices."

Id. (emphasis added); *see also* 120 Cong. Rec. 9,382 (Rep. Burgener) (discussing an early bill as drawing from the "great common law tradition" and this Court's jurisprudence); *id.* at 12,646-47 (Sen. Ervin) (introducing the bill later enacted as the Privacy Act, referencing multiple constitutional precedents, and stating that the legislation advanced a right of privacy whose "significance" is to safeguard human "feelings" and "intellect" in addition to "material things"); *id.* at 32,849 (Sen. Nelson) (describing the legislation as protecting privacy rights that are

"essential to "[personal] peace and happiness"); *id.* at 36,893 (Sen. Percy) (referencing Warren & Brandeis's seminal 1890 law review article on the right to privacy).

b. During this period, each chamber of Congress considered and rejected several bills. Proposals that would have provided for liquidated damages of varying amounts were considered but rejected. *See* S. 2,810, 93d Cong., § 7(c)(1) (1973); S. 2,963, 93d Cong., § 308(e) (1974); S. 3,633, 93d Cong., § 11(b)(1) (1974); H.R. 13,872, 93d Cong., § 552a(g)(1) (1974); *Legislative History* 612, 647, 674, 733-34.

The Senate and House of Representatives moved forward in parallel on S. 3,418, 93d Cong. (1974) and H.R. 16,373, 93 Cong. (1974); *Legislative History*, 9-28, 239-257. As introduced, each bill would have allowed an individual to bring a civil action against certain defendants for "actual damages" and "punitive damages" for certain violations.

As introduced, H.R. 16,373 would have subjected agencies to civil liability for "actual damages" sustained by an individual as the result of a "negligent" violation of the Act and both "actual damages" and "punitive damages" in cases of a "willful" violation. H.R. 16,373, 93d Cong. § 3(f)(A)-(B) (1974); *Legislative History* 250-51.

However, the House Committee on Government Operations subsequently amended the bill to make liability for "actual damages" dependent on proof of "willful, arbitrary, or capricious conduct" and to eliminate the bill's "punitive damages" provision. *See* H.R. Rep. No. 93-1416, at 17-18, 31-32; *Legislative History* 310-11, 324-25. At least ten Congress

members objected to these amendments and called for the inclusion of a "liquidated damages" provision as well as the restoration of "punitive damages." H.R. Rep. No. 93-1416 at 37-38; *Legislative History* 329-30. Notwithstanding these objections, the Committee's mark-up of the bill subsequently was adopted by the full House. H.R. 16,373, 93d Cong. (as passed on Nov. 22, 1974); *Legislative History* 388.

As introduced, S. 3418 would have made any person who violated the Act subject to civil liability for "actual damages" sustained by an individual as a result of the violation and "punitive damages" where appropriate. S. 3418, 93d Cong., § 304(b) (1974); *Legislative History* 27. Prior to passage on November 21, 1974, S. 3418 was amended to make the United States liable for "actual damages" caused by a violation. 120 Cong. Rec. 36,890-92 (describing amendments). The day after the Senate passed S. 3418, it authorized a "correction[]" to the engrossed S. 3418 to allow plaintiffs to recover "actual and general" damages, but in no event less than $1,000, for "any" violation of the Act by any government officer or employee. 120 Cong. Rec. 37,085 (Sen. Byrd) (authorizing the correction); S. 3418, 93d Cong., § 303(c) (as passed on Nov. 21, 1974 and corrected on Nov. 22, 1974); *Legislative History* 371.

c. In the wake of this divergence, members of the House and Senate proceeded to negotiate an informal compromise that "retain[ed] the basic thrust of the House version but which also include[d] important segments of the Senate measure." 120 Cong. Rec. 40,880 (Rep. Moorhead). The compromise, in relevant part, subjected the United States to civil liability for

"actual damages" sustained as a result of an "intentional or willful" violation of the rights and protections duties described in § 552a(g)(1)(C)-(D), but provided those persons entitled to recovery a guaranteed minimum award, as well as costs and attorney fees as determined by the court.

While the remedial provisions of the Act were subject to revision and debate in the House and Senate, that debate concerned (1) the standard of culpability ("intentional or willful") and (2) whether to provide liability for types of damages that do not depend on proof of injury (including liquidated and punitive damages). No one remarked on the definition of the term "actual damages" or proposed an amendment that would have directed a specific "pecuniary" measure for that term akin to the measure for actual damages that had been enacted as part of the 1949 FTCA amendment.

d. Accordingly, the Act's drafting history further shows that Congress intended "actual damages" to be synonymous with "compensatory damages" and distinguished from types of damages that do not depend on proof of actual injury. The Congressional debates all assumed that the Act would authorize the compensatory damages ordinarily available at common law for proven injuries caused by invasions of privacy and centered on whether to provide for other damages measures untethered to proof of actual injury. *E.g.*, 120 Cong. Rec. 36,645 (Rep. Abzug) (discussing assessments of "actual damages" in contrast to "punitive damages"); *id.* at 36,955 (Rep. Moorhead) (noting that a citizen must prove a violation, then an "adverse determination," and then "damages caused by the violation"); *id.* at 36,658

(Rep. Fascell) (discussing an amendment to restore "punitive damages" and distinguishing "punitive damages" from "actual damages"); *id.* at 36,659 (Rep. McCloskey) (describing actual damages as "ordinary damages" and in contrast to "punitive damages").

C. Petitioners' Arguments Contravene Established Principles Of Construction And Fail To Account For The Privacy Act's Text, Structure, And Purpose

1. Petitioners' Reliance On The Sovereign Immunity Canon Is Misdirected

Petitioners begin with a seven-page recitation of the canon of statutory construction that states that a waiver of sovereign immunity must be unequivocally expressed in statutory text and construed strictly. Pet. Br. 12-19. The belaboring of this proposition is perplexing. There is no debate that the Act contains an express waiver of immunity from suit subjecting the United States to liability for "actual damages." To the extent that Petitioners appear to go further and urge that the sovereign immunity canon displace other tools of construction, their argument is a misdirection.

a. It is true that this Court typically requires a clear statement of a waiver of sovereign immunity and likewise requires a clear statement subjecting the United States to liability for monetary exactions. *See, e.g.*, *United States v. Sherwood,* 312 U.S. 584, 587-88 (1941) (waiver of immunity from suit); *Lane v. Pena*, 518 U.S. 187, 191 (1996) (monetary remedies); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34-

35 (1992) (same); *Library of Congress v. Shaw*, 478 U.S. 310, 314-15 (1986) (interest). Neither proposition is implicated here, however, given the express terms of §§ 552a(g)(1)(C)-(D) and (g)(4).

b. By comparison, where, as here, Congress *has* made an express waiver of immunity authorizing a monetary exaction, a court must construe that waiver in a way that makes a "realistic assessment of legislative intent" in light of the full text. *Irwin*, 498 U.S. at 95. Thus, the Court does not use the canon as "a mechanical rule of construction . . . to create doubts" about the meaning of statutory terms or to add to the "rigor" of the doctrine of sovereign immunity where an express waiver has been provided. *United States v. Rice*, 327 U.S. 742, 752-53 (1946); *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383 (1949); *accord United States v. Williams*, 514 U.S. 527, 540 (1995) (Scalia, J., concurring).

c. For these reasons, this Court frequently has found the sovereign immunity canon to be unhelpful and inapplicable to the construction of statutes, like the Privacy Act, that (1) contain broad language authorizing suit against the United States and its agencies and (2) expressly subject the United States to liability for money damages using "customary" legal terms whose meaning is borrowed from common law tradition and statutes and precedents in existence at the time of enactment. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222 (1945).

For example, in *Canadian Aviator*, 324 U.S. at 222, the Court declined to restrict an express waiver in the Public Vessels Act for "damages caused by a

public vessel" to those damages that were caused by a collision involving a public vessel, holding that "Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation."

Similarly, in *American Stevedores v. Porello*, 330 U.S. 446, 450 (1947), the Court construed the same unqualified waiver of immunity for tort "damages" to reach *both* injury to property and individuals. *Id.* (noting that the "historical[]" meaning of "damages" was "a fact too well-known to have been overlooked by Congress").

And, in *Molzof*, the government argued that "the starting point for any discussion of the scope of federal liability under the FTCA must be a recognition that the statute is a limited waiver of the government's sovereign immunity" and that the waiver should be construed "strictly" and not "extended by implication." Brief for the United States 8 & n.3, *Molzof*, No. 90-838. However, the sovereign immunity canon played no role in the Court's construction of "punitive damages," and the Court rejected the government's position based on common law principles, judicial precedents, and legal dictionaries in existence when the FTCA was enacted. *Molzof*, 502 U.S. at 307.

Finally, in *Doe*, the government made the *exact same* argument that Petitioners are making here about the sovereign immunity canon and the Privacy Act. *Compare* Brief for the Respondent 17-25, *Doe v. Chao*, No. 02-1377 (2003), *with* Pet. Br. 13-19 (following the *Doe* brief almost verbatim). This Court ultimately agreed with the government that a claimant must submit evidence proving some "actual

damages" in order to obtain a monetary award. However, the Court did *not* embrace the sovereign immunity argument in any respect. To the contrary, the Court reviewed the Privacy Act in much the same way as it reviewed the FTCA in *Molzof* and the Public Vessels Act in *Porello* and *Canadian Aviator*—it engaged in a straightforward analysis of the statutory text, its apparent purpose, context, and relevant principles of tort law without reference to the canon. The same method should be followed in this case.

d. Even when the sovereign immunity canon is considered here, it is settled that the canon does not displace other principles and tools of statutory interpretation. As this Court explained in *Richlin*, 553 U.S. at 589-90, a case Petitioners ignore entirely, the sovereign immunity canon "is just that—a canon of construction. It is a tool for interpreting the law [that does not] displace[] the other traditional tools of statutory construction." Indeed, *Richlin* indicates the sovereign immunity canon should be invoked only as a last resort—after the Court has engaged in a close reading of the whole statute and employed other tools of construction to resolve any arguable ambiguities. *Id.*; *see also Ardestani v. INS*, 502 U.S. 129, 137 (1991) (relying on the canon as "reinforce[ment]" for the independent "conclusion that any ambiguities in the legislative history are insufficient to undercut the ordinary understanding of the statutory language"); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682, 685-86, (1983) (relying on the canon in tandem with "historic principles of fee-shifting in this and other countries" to define the scope of a fee-shifting statute); *Dep't of Energy v. Ohio*, 503 U.S. 607, 626-627 (1992) (resorting to the canon only after a close

reading of the statutory provision had left the Court "with an unanswered question and an unresolved tension between closely related statutory provisions"); *Smith*, 507 U.S. at 201-03 (invoking the canon only after observing that the claimant's argument was "undermine[d]" by the "commonsense meaning" of the statutory language).

Here, similar to *Richlin* and many other cases, "traditional tools of statutory construction . . . compel the conclusion" that "actual damages" is a synonym for "compensatory damages" that, in the context of a statute redressing statutory rights to privacy, includes compensation for proven mental or emotional distress. "There is no need for [this Court] to resort to the sovereign immunity canon [after a comprehensive analysis of the Act] because there is no ambiguity left [in the Act] to construe." *Richlin*, 553 U.S. at 590.

2. *Petitioners' Attempt To Limit "Actual Damages" To Pecuniary Losses Violates Settled Principles Of Statutory Construction*

Petitioners also declare that "actual damages" is an ambiguous term and further assume that the term's meaning in the Privacy Act cannot be grasped using traditional tools of statutory construction. Pet. Br. 19-22. In arriving at these summary determinations, they do not provide a meaningful analysis of legal dictionaries, treatises, statutes, or federal or common law precedents to support their position. Yet, a comprehensive construction of statutory text is precisely what this Court's decisions require. *E.g.*, *Richlin*, 553 U.S. at 590; *Molzof*, 502 U.S. at 307.

a. For example, Petitioners pass over the plain meaning of "actual damages" as evidenced by non-legal dictionaries and the legal meaning of "actual damages" as defined by legal dictionaries and treatises, precedents of this Court, and common law tradition. They also pass over the FTCA and the 1949 amendment to the FTCA, as well as the uniform construction of "actual damages" under section 812(c) of the 1968 Civil Rights Act and section 617 of the FCRA.

Petitioners assert that, at the time of the Privacy Act, it would have been (1) "'unprecedented' [for Congress to enact a statute that made] the United States liable for damages for mental or emotional distress" and (2) "highly unusual for Congress to subject the United States to liability for mental or emotional distress for the first time without expressly so providing . . . ." Pet. Br. 31. These contentions lack merit.

As previously noted, prior to the Privacy Act, Congress had made the government liable for damages for mental or emotional distress through § 2674's first paragraph and, pursuant to that paragraph, courts had held the government liable in tort for "actual damages" including proven mental or emotional distress. Furthermore, when Congress added § 2674's second paragraph and sought to limit government liability for "actual or compensatory damages" to pecuniary injuries in certain cases, it recognized a need to direct that result expressly in statutory text. And, in section 812(c) of the 1968 Civil Rights Act and section 617 of the FCRA, Congress proceeded to use the term "actual damages" without special qualifications or limitations and with a

judicially recognized intent to provide full compensation for *all* proven injuries caused by violations of statutory civil rights and privacy interests, including proven mental and emotional distress. *See* pp. 25-32 *supra*.

As a result, at the time of the Privacy Act, it manifestly was not "'unprecedented'" for Congress to enact a statute that made the government liable for damages for mental or emotional distress; nor was it "highly unusual" to provide compensation for proven mental or emotional distress through an award of "actual damages" plain and simple.

Indeed, since the Privacy Act, Congress has continued to enact statutes that subject the United States to liability for "actual damages" for certain derelictions of government duties. In those instances where Congress has sought to limit government liability for actual damages to pecuniary injuries, it has continued to recognize a need to direct that result expressly in statutory text. Conversely, in cases where Congress has legislated to protect the confidentiality and privacy of information in federal records, it has continued to provide for compensation for proven mental or emotional distress through an award of "actual damages" plain and simple.

For example, in the Internal Revenue Code, 26 U.S.C. §§ 7432-33, Congress has subjected the United States to liability for "actual damages" sustained by a taxpayer as a result of (1) a federal agent's failure to release a tax lien and (2) certain unauthorized tax collection actions. But, in each instance, Congress has specified that such damages must be "actual, direct economic damages" sustained by the taxpayer on account of the defendant's actions. *See also* 12

U.S.C. § 1821(e)(3)(A)-(B) (subjecting the FDIC in its capacity as a conservator or receiver of a depository institution to liability for actual damages caused by the disaffirmance or repudiation of certain contracts, but specifying that such damages must be "actual direct compensatory damages" and do not include "punitive or exemplary damages," "damages for lost profits or opportunity," or "damages for pain and suffering").

In contrast, since the Privacy Act, Congress has enacted at least one other privacy-protecting statute that is similar to the Privacy Act and subjects the United States to civil liability for "actual damages" without qualification for the unauthorized inspection or disclosure of federal tax returns or tax return information. *See* 26 U.S.C. § 7431(a) & (c). The federal district courts have held that this statute provides for federal liability for real and appreciable mental or emotional distress proven to have been caused by a violation of the statute's privacy requirements. *See Ward v. United States*, 973 F. Supp. 996, 1001-02 (D. Colo. 1997) (awarding "actual damages" for proven mental and emotional distress); *Hrubec v. Nat'l R.R. Passenger Corp.*, 829 F. Supp. 1502, 1504-06 (N.D. Ill. 1993) (finding the statute "includes damages for emotional distress" and denying motion to strike or dismiss emotional distress claims); *see also Jones v. United States*, 9 F. Supp. 2d 1119, 1148-51 (D. Neb. 1988) (following the reasoning of *Ward* and *Hrubec* and entering awards for "actual damages" reflecting both pecuniary and nonpecuniary injuries proven at trial).

These later-enacted statutes reinforce and confirm that there is nothing unprecedented or

unusual about the Privacy Act's "actual damages" provision. The Privacy Act does not contain any express provision akin to the 1949 amendment to the FTCA or 26 U.S.C §§ 7432-33 directing that "actual damages" be measured in terms of economic or pecuniary injuries. To the contrary, the Act is like the 1968 Civil Rights Act, the FCRA, and 26 U.S.C § 7431(a) & (c): it authorizes compensation for "actual damages" plain and simple and without any other qualification.

b. Petitioners cite only two statutes as being relevant to the construction of "actual damages." Neither involves the liability of the government for monetary exactions or redress for violations of privacy or other statutory civil rights, and both include statute-specific definitions or provisions directing that compensation be measured in strictly economic terms. 17 U.S.C. § 1009(d)(l)(ii) and 18 U.S.C. § 2318(e)(3)(B). Far from supporting Petitioners, these statutes reinforce the point that Congress historically has used the term "actual damages" without qualification as a synonym for "compensatory damages" and has supplied an express limitation when it intends to limit liability for "actual damages" to economic injuries.

c. Petitioners also miss the mark when they cite *Birdsall*, 93 U.S. at 64-71, and *Connecticut Railway & Lighting Co. v. Palmer*, 305 U.S. 493, 494, 504 (1939), as being supportive of their position. As previously noted, *Birdsall* defines "actual damages" as a synonym for "compensatory damages," and *Palmer* is not to the contrary. In each case, the Court naturally discussed "actual damages" in terms of economic injury because economic injuries were the

only types of injury at issue. Neither casts doubt on the common meaning of "actual damages" as a synonym for "compensatory damages" authorizing compensation for real and substantial mental or emotional distress sustained by an individual as a result of a federal agency's intentional or willful violation of a privacy statute.[5]

d. Petitioners note that the Privacy Protection Study Commission (PPSC) and courts of appeals on both sides of this "actual damages" question have considered the term to be ambiguous at least to some degree when viewed in isolation and without the aid of traditional tools of construction. Pet. Br. 20-22. But the Fifth and Ninth Circuits had no difficulty grasping the meaning of "actual damages" when read in context and with the aid of traditional tools of construction. Pet. App. 22a-36a; *Johnson v. IRS*, 700 F.2d 971, 974-86 (5th Cir. 1983). And their decisions align well with the method of analysis employed by this Court in *Richlin*, *Molzof*, *Porello*, and *Canadian Aviator*.

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[5] This is not to say every federal statute that provides for "actual damages" must be construed to provide for compensation for mental and emotional distress. As a synonym for compensatory damages, "actual damages" provides compensation for proven injuries that are legally cognizable—*i.e.*, those types of injuries that are the natural and primary consequence of a violation of a particular legal right or interest. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 223-24 (1996); *Carey v. Piphus*, 435 U.S. 247, 254-59 (1978). In some instances, that might be a purely economic interest. But, in 1974, it was clear that compensation for the natural, primary, and legally cognizable consequences of an invasion of privacy and a violation of federal civil rights included proven mental or emotional distress.

In contrast, the views expressed by the Sixth and Eleventh Circuits and the PPSC suffer from the same flaws as the Petitioners' brief—*i.e.*, they do not account for the term's plain meaning, its definitions in legal dictionaries, common law tradition, or other tools of statutory construction.

The Eleventh Circuit's decision on this question consists of a single paragraph asserting that "actual damages" has no plain meaning, followed by a two-page analysis of legislative history that has been described as patently flawed by multiple courts. *Fitzpatrick v. IRS*, 665 F.2d 327, 329-31 (11th Cir. 1982); *e.g.*, *Johnson*, 700 F.2d at 981 nn. 25, 27. The Sixth Circuit's decision is no broader: it consists of eight sentences—five following *Fitzpatrick* and three noting disapproval of the Fifth Circuit's decision in *Johnson* based upon the sovereign immunity canon. *Hudson v. Reno*, 130 F.3d 1193, 1207 & n.11 (6th Cir. 1997). The PPSC's post-enactment statement of its views on this issue also was cursory—consisting of only one page of commentary in a 620-page report with no citation to *any* legal authority or legislative history. *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 529-31 (1977).

3. Petitioners' Assertion That The Privacy Act's "Actual Damages" Provision Was Modeled On Defamation "Per Quod" Is Erroneous

All parties agree that Congress drew upon the common law torts of defamation and invasion of privacy when drafting and enacting the Privacy Act's civil liability provision. Petitioners, however, go a

step farther and assert that the Act's "actual damages" provision was modeled *specifically* on the torts of libel and slander "per quod"—two common law defamation torts that required a claimant to plead and prove "special damages" consisting of pecuniary losses as a prerequisite to any monetary award. And from this premise, Petitioners leap to the conclusion that it is only "natural" to construe "actual damages" to include only pecuniary loss. Pet. Br. 22-24. There is, however, no factual or legal support for the premise that the Act's "actual damages" provision was modeled on the requirements of libel or slander per quod.

a. To begin with, Petitioners overreach by relying on *dicta* from *Doe*. Pet. Br. 22-24. *Doe* turned on "a straightforward textual analysis" of §§ 552a(g)(1) and (4) and the "traditional understanding that tort recovery" requires "proof of some harm for which damages can reasonably be assessed." 540 U.S. at 620-21, 628 n.12. This Court did *not* state, as matter of fact, that the Privacy Act's "actual damages" provision was modeled on libel or slander per quod or hold, as a matter of law, that the term should be construed as such. To the contrary, the Court reserved judgment on whether "adequately demonstrated mental anxiety" would constitute proof of "actual damages" for purposes of civil liability under the Act. *Id. Doe* accordingly does not support Petitioners.

b. The text of the Act itself likewise does not support Petitioners' contentions concerning libel or slander per quod. The Act does not refer to either "special harm" or "special damages" (the specific terms of art used in actions in libel and slander per

se and per quod to denote pecuniary loss and compensation for pecuniary loss). *See, e.g.*, *Webster's Third New International Dictionary* 2186 (defining "special damages"); Dobbs, *Handbook on the Law of Remedies*, § 7.2 at 512-13, 520-22 (discussing "special damages" in libel and slander per se and per quod); Restatement (First) of Torts § 575 cmt. b ("*Special harm* as the words are used in this Chapter, is the loss of something having economic or pecuniary value."); Restatement (Second) of Torts § 575 cmt. c (same).

To the contrary, the Act employs a *different* term that had a *different* legal definition at the time of the Act's enactment—a term, moreover, that recently had been (1) used in other legislation providing redress for violations of federal civil rights and statutes regulating the maintenance and use of personal records and (2) construed to encompass proven mental or emotional distress. And the Act contains a broadly phrased statutory statement of purpose that is inconsistent with a reading of "actual damages" as a synonym for special damages under libel or slander per quod.

c. The Act's legislative history also belies Petitioners' argument concerning libel and slander per quod. Petitioners claim that a single remark by Representative Eckhardt directly addressed the meaning of "actual damages." Pet. Br. 25. They are mistaken. During a debate on a proposed amendment to the House bill that would have made the government liable for "innocent" violations of the Act, Representative Eckhardt provided a hypothetical example of an innocent violation of the Act involving only economic injury (lost wages following the loss of

employment). *See* 120 Cong. Rec. 36,955-56 (1974). In the context of that hypothetical, Representative Eckhardt stated that there is nothing in this [*i.e.*, the proposed amendment] that would provide for any damages beyond the [the plaintiff's] actual out-of-pocket expenses." *Id.* In short, the remark is not a comment on the meaning of "actual damages" but a simple conclusion to a hypothetical about a pecuniary injury.

In reality, no member of Congress made any remark indicating that the Act's "actual damages" provision was limited to pecuniary losses or modeled on the torts of libel or slander per quod. Nor did any member indicate that he understood "actual damages" to be synonymous with the concept of "special damages" under the law of defamation. To the contrary, as introduced, H.R. 16,373 and S. 3418 used the term "actual damages" in its ordinary sense as a synonym for "compensatory damages" and as distinguished from "punitive" and "liquidated" damages. *See* pp. 35-41 *supra*.

d. Petitioners note that, in the final version of the Act, Congress did not include language appearing in a late amendment to S. 3418 that would have authorized both "actual" and "general" damages for "any" violation of the Act by a government officer or employee. From this observation, Petitioners contend that (1) "general damages" is a term that Congress would have understood to include monetary awards for "proven, as well as presumed," mental or emotional distress and (2) Congress's election not to enact a "general damages" remedy is a signal that it intended to exclude claims not only for presumed mental or emotional distress but also proven mental

or emotional distress. Pet. Br. 25-28. There are several problems with Petitioners' position.

To start, that was *not* the government's position in *Doe*. *See* Brief for the Respondent 42-43, *Doe*, No. 02-1377. In *Doe*, the government maintained that (1) "[t]he 'general damages' provision likely derived from the common law tort of invasion of privacy, where 'general damages' may be awarded as 'presumed damages' without proof of harm" and (2) the final version of the Act "eliminated the authorization for general or 'presumed' damages." *Id.* The government was on the mark in *Doe*: the omission of general damages from the final legislation was intended to preclude an award of presumed damages without proof of injury. It reveals nothing about compensation for proven mental or emotional distress.

In any event, the circumstances surrounding the amendment to S. 3418 do not support Petitioners' position. The legislative history shows that on the day that the Senate passed its version of the Privacy Act, Senator Ervin placed a memorandum in the legislative record calling for "a provision for liquidated damages of say $1,000." 120 Cong. Rec. at 36,891 (Sen. Ervin). The next day, the Senate authorized a "correction[]" to both the House and Senate bills adding a provision for "actual and general damages sustained by any person but in no case shall a person entitled to recovery receive less than the sum of $1,000." *See* H.R. 16,373, § 303(c)(1) (Nov. 22, 1974) (as passed by the Senate); *see also* 120 Cong. Rec. at 37,085 (Sen. Byrd) (proposing the correction to engrossed Senate bill, S. 3418). No one addressed the meaning of the "general damages"

amendment or how general damages might be distinguished from actual damages, liquidated damages, or punitive damages—the only other damages measures considered in connection with the Act.

In the Act's final version, Congress did direct the PPSC to study whether the United States should be made liable for "general damages," but this reference to the PPSC also was not defined or explained. *Doe*, 540 U.S. at 639 n.6 (Ginsburg, J., dissenting) (describing the reference as "less than crystalline").

All of this drafting history was carefully presented to the Court in *Doe*, and the Court concluded that "[t]he deletion of general damages from the bill is fairly seen, then, as a deliberate elimination of any possibility of imputing harm and awarding presumed damages." *Id.* at 623. There is no reason to draw a different conclusion now.

4. Petitioners' Limiting Construction Of "Actual Damages" Is Not Supported By Public Policy

Petitioners lastly offer three policy-based arguments in pursuit of their effort to redraft the statute and alter its intended meaning. Pet. Br. 32-35. But these arguments cannot, in keeping with sound principles of statutory construction, be used to narrow the meaning of the words chosen by Congress. Moreover, they are unpersuasive even if considered.

a. As noted above, the principles of statutory construction are applied to the language of a statute, read in context, to properly determine the intent of Congress. Abstract policy arguments untethered

from that language cannot be invoked to alter a statute's meaning as enacted. "The principle of our democratic system is not that each legislature enacts a purpose, *independent of the language in a statute*, which the courts must then perpetuate . . . ." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part) (emphasis added) (adhering to the text of § 526(a) of the Tariff Act of 1930, read in context and with the aid of traditional tools of interpretation; disagreeing with a narrower construction of the statute based on policy arguments untethered from the text).

b. In the first of their policy diversions, Petitioners express a generalized fear for depletion of the federal fisc if individuals are allowed to assert claims based on proven mental or emotional distress. Pet. Br. 32-33. This argument was succinctly answered in the dissents of Justices Ginsburg and Breyer in *Doe,* which note how settled judicial constructions of other provisions of the Act make the risk of frequent or "massive recoveries" from the fisc highly unlikely. 540 U.S. at 636 (Ginsburg, J. dissenting); *id.*, at 641-42 (Breyer, J. dissenting). There is much force to this observation in view of the Act's requirements that an "intentional" or "willful" violation be proven as a prerequisite to any compensation for injuries.[6]

[6] Apart from the elevated standard of culpability, the Act contains numerous exceptions providing for the disclosure of otherwise confidential information (*e.g.*, 5 U.S.C. §§ 552a(b)(1)-(12)) as well as other substantive provisions that effectively limit the possibility of claims under §§ 552a(g)(1)(C)-(D). As a practical matter, claims for compensation for proven injuries ultimately can be brought under §§ 552a(g)(1)(C)-(D) only in a

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Indeed, in *Doe*, the government was forced to concede at oral argument that there has not been "'a problem with enormous recoveries against the government up to this point.'" *Id.* at 636 (Ginsburg, J. dissenting) (quoting the oral argument transcript). Experience with the Privacy Act in the Fifth Circuit over the last twenty-eight years does not suggest that there will be a drain on the fisc if individuals are allowed to assert claims based on proven mental or emotional distress.

c. Next, Petitioners contend that claims for emotional distress should be excluded from the Act's scope because they are inherently subjective and thus "problematic" for the government even when decided (as they are in Privacy Act cases) by a federal judge. Pet. Br. 33-34. This argument lacks merit as well. More than three decades of experience under the Privacy Act has shown that federal judges understand that the Act does not "endorse massive recoveries" against the government. *Doe*, 540 U.S. at 636 (Ginsburg, J. dissenting). Again, experience shows that federal courts require competent proof of real and substantial injury and do not award substantial (or even nominal) amounts for mere hurt feelings. *See Hitt v. Connell*, 301 F.3d 240, 250-51 (5th Cir. 2002) (reviewing the sufficiency of evidence of mental and emotional distress in a § 1983 action).

d. Petitioners finally contend that claims for emotional distress should be excluded from the Act's scope because the Act contemplates proceedings for

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narrow range of situations created by egregious agency misconduct, and, even then, recovery is far from certain.

injunctive relief and criminal penalties for certain violations. This is more misdirection. Neither involves individual compensation for injuries resulting from an intentional or willful violation of the Act. Congress enacted the Act's civil liability provision to provide compensatory relief. The Act's language and structure provide no indication, moreover, that the injunctive or criminal penalty provisions serve to narrow the compensatory relief authorized by Congress in any respect.

CONCLUSION

Congress plainly provided Mr. Cooper with a civil remedy against Petitioners for his injuries. He should be allowed to proceed to trial where his claim may be developed and adjudicated. The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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