No. 02-1377

IN THE

Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an individual to whom the United States "shall be liable" for an "adverse effect" suffered as a result of a federal agency's "intentional or willful" violation of the Privacy Act, 5 U.S.C. § 552a *et seq.*, must prove that he suffered "actual damages" to be entitled to the statutory damages award of $1,000 available under Section 552a(g)(4) of the Act.

PARTIES TO THE PROCEEDINGS

The Petitioner is Buck Doe. The Respondent is the United States Department of Labor. Robert Doe, Tays Doe, Otis Doe, Thomas Doe, Joe Doe, Dick Doe, and Charles Doe were parties to the proceedings below.

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

JURISDICTION

The court of appeals entered its judgment on September 20, 2002, and denied petitioner's motion for rehearing and suggestion of rehearing *en banc* on November 15, 2002. Pet. App. 1a-2a. On January 23, 2003, Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, granted Petitioner's motion for extension of time in which to file a petition for a writ of certiorari up to and including March 15, 2003. The petition for a writ of certiorari was filed on March 14, 2003, and granted on June 27, 2003. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Privacy Act, 5 U.S.C. § 552a *et seq.*, are reprinted at Pet. App. 105a-106a.

STATEMENT

The Privacy Act of 1974 protects individuals' "personal and fundamental right" of privacy by "regulat[ing] the collection, maintenance, use, and dissemination of information by [federal] agencies." Pub. L. No. 93-579 §§ 2(a)(4), 2(a)(5), 88 Stat. 1896.[1] The Act stemmed from Congress's prescient concern that federal agencies' "increasing use of computers and sophisticated information technology . . . has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use or dissemination of personal

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[1] Several enacted provisions of the Privacy Act (§§ 2, 5, 6, and 7) were not separately codified in the United States Code.

information." *Id.* § 2(a)(2). Congress was especially troubled by federal agencies' routine use and disclosure of social security numbers (*id.* § 7), which it described as "one of the most serious manifestations of privacy concerns in the Nation." S. Rep. No. 93-1183, at 28 (1974), *reprinted in* Comm. on Gov't Operations U.S. Senate and Comm. on Gov't Operations House of Representatives, *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579) Source Book on Privacy* at 181 (1976) [hereinafter "*Source Book*"].

Petitioner, a black-lung benefit claimant, brought suit under the Privacy Act after the Department of Labor ("Department") – pursuant to long-standing Department policy – used his social security number as a claim identifier and widely disseminated the number in hearing notices. Petitioner's harm was the one most typically suffered as a result of a privacy invasion – emotional distress, here compounded by a well-founded fear that the disclosure could lead to someone assuming Petitioner's identity. The issue in this case is whether proof of such harm, which unquestionably constitutes an "adverse effect" under Section 552a(g)(1)(D) of the Act, along with the other required elements of a cause of action, allows recovery of the $1,000 statutory damages provided for under Section 552a(g)(4)(A), or whether additional proof of some measure of "actual damages" conditions such an award.

1. Statutory And Regulatory Background

The Privacy Act prohibits federal agencies from "disclos[ing] any record which is contained in a system of records by any means of communications to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b). The Act also affords individuals a right to review and, where appropriate, demand amendment of, agency records that are inaccurate or incomplete. *Id.* § 552a(d)(1)-(3). The Act further regulates

the manner by which an agency may collect and maintain information about individuals. *Id.* § 552a(e).

The Act "safeguards . . . an individual against an invasion of personal privacy" by, among other things, making federal agencies "subject to suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under th[e] Act." *Id.* § 2(b)(6). Congress intended this private right of action to "encourage the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236; *see also* H.R. Rep. No. 93-1416, at 15 (1974), *reprinted in Source Book* at 308 ("best means" to enforce the Act is "constant vigilance of individual citizens backed by legal redress").

Section 552a(g) sets forth the Act's civil remedies. Section 552a(g)(1)(D) – the provision under which Petitioner brought suit – provides a cause of action for, among other things, wrongful disclosures of information:

> Whenever 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, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Section 552a(g)(4) further provides:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a

person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorneys fees as determined by the court.

5 U.S.C. § 552a(g)(4).[2]

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

The Privacy Act tasked the Office of Management and Budget ("OMB") to "develop guidelines and regulations for the use of agencies in implementing the provisions of [the Act]." Pub. L. No. 93-579 § 6 (current version codified at 5 U.S.C. § 552a(v)). Pursuant to that authority, OMB promulgated the Privacy Act Guidelines in July 1975, only seven months after the Act's effective date. The Guidelines construe Section 552a(g)(4) to mean:

[2] Sections 552a(g)(1)(A) and (g)(1)(B) allow suits for injunctive relief, but not damages, where an agency fails to amend an inaccurate record or fails to provide access to records, respectively. *See* 5 U.S.C. §§ 552a(g)(1)(A), (g)(1)(B), (g)(2), and (g)(3). Section 552a(g)(1)(C) allows suits for damages where an agency maintains an inaccurate record that forms the basis of an "adverse" determination "relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record." *See id.* § 552a(g)(1)(C). The United States' liability in Section 552a(g)(1)(C) "adverse determination" actions is, as in Section 552a(g)(1)(D) actions, measured by Section 552a(g)(4). Injunctive relief is not available in actions brought under Sections 552a(g)(1)(C) and (D).

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

– actual damages or $1,000, whichever is greater

– court costs and attorney fees.

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

2. Factual Background And Proceedings Below

The Department of Labor administers claims brought pursuant to the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*. Pet. App. 5a. For years, the Department's application form asked claimants to provide their social security numbers, which the Department used as claim identifiers. *Id.* Administrative law judges ("ALJs") routinely distributed hearing notices identifying multiple black-lung claims by name and social security number. *Id.* ALJs also routinely captioned benefits decisions with claimants' names and social security numbers and released them for publication. As a result, claimants' social security numbers were widely disclosed. Pet. App. 5a-6a. The existence and operation of the Department's policies and practices are undisputed. Pet. App. 63a, 70a-71a, 82a.

In February 1997, Petitioner and several other black-lung benefit claimants brought Section 552a(g)(1)(D) Privacy Act suits against the Department in the United States District Court for the Western District of Virginia. They alleged that the Department had failed to comply with the Act by routinely disclosing social security numbers. Each claimant sought $1,000 statutory damages under Section 552a(g)(4)(A). Pet. App. 5a-6a, 82a-83a. Petitioner attested (by affidavit and by sworn testimony) that the disclosure caused him significant emotional distress, specifically fear that someone would

fraudulently use his name and social security number. Pet. App. 75a-76a; JA 14-15, 20-21, 24, 28-29.

Immediately after Petitioner filed his suit, the Department consented to an order barring further disclosures of black-lung claimants' social security numbers on hearing notices or other documents. Pet. App. 5a-6a, 82a-83a; JA 12-13.

On the parties' cross-motions for summary judgment, the magistrate judge concluded: (i) social security numbers are "records" held by the Department in a "system of records" under the Privacy Act, Pet. App. 86a; (ii) Doe did not consent to the Department's disclosure of his social security number, Pet. App. 87a-88a; (iii) no exception to the Privacy Act's restrictions excused the Department's disclosure, Pet. App. 88a-92a; (iv) as a result of the disclosure, Doe suffered the "adverse effect" of emotional distress, Pet. App. 93a-94a; (v) "undisputed evidence" proved the Department's violation of the Act was "intentional and willful," Pet. App. 96a-97a; and (vi) Doe's evidence of emotional harm could trigger at least "the statutory damages provided for in the Act" and, thus, the Department was not entitled to summary judgment. Pet. App. 99a-100a.[3]

The district court accepted the magistrate's report in part and rejected it in part. Pet. App. 61a-62a. It held that Doe had proven the "elements essential to prevail on a claim for damages under the Privacy Act." Pet. App. 66a. It further held that Doe's "incontrovertible evidence" of "emotional distress as a result of the Department disclosing his social

[3] The magistrate judge recommended summary judgment for the Department on the other plaintiffs' claims because none had produced any evidence of adverse effect. Pet. App. 100a. The magistrate judge also recommended denial of a motion to certify a class of black-lung claimants. Pet. App. 79a-81a. The district court accepted these recommendations, Pet. App. 61a-62a, and the Fourth Circuit affirmed. Pet. App. 21a-23a. These issues are not before this Court.

security number to parties not specifically involved in his black lung claim" was sufficient to "allow[] granting summary judgment in his favor" for the "statutory minimum amount of $1,000 . . . provided by 5 U.S.C. § 552a(g)(4)(A) . . . ." Pet. App. 66a-67a.

A split panel of the Fourth Circuit reversed, framing the issue as "whether a person must suffer 'actual damages' in order to be considered 'a person entitled to recovery' within the meaning of section 552a(g)(4)(A), and therefore entitled to the statutory minimum of $1,000 under that section." Pet. App. 9a. The court of appeals held that "a person must sustain actual damages to be entitled to the statutory minimum damages award." *Id.*

The court of appeals' decision rested on rationales it deemed convincing in the "aggregate." Pet. App. 9a. The court opined that Section 552a(g)(4)(A)'s juxtaposition of the phrases "person entitled to recovery" and "actual damages" suggested that the provision "indirectly" defines "'recovery' . . . by its express limitation of the Government's liability to actual damages sustained." Pet. 9a-10a. It also believed that Congress "could have phrased the liability provision to provide unequivocally for a statutory minimum recovery, even for those who are unable to prove actual damages." Pet. App. 11a. The court of appeals conceded that its interpretation was "not strictly compelled by the statute's language." Pet. App. 13a. It reasoned, however, that because the Privacy Act is a "limited waiver of sovereign immunity," Section 552a(g)(4)(A) must be "strictly construed." Pet. App. 13a-14a.

The court of appeals then held that Doe's emotional harm, though an "adverse effect," was not quantifiable as "actual damages." It therefore reversed the district court and remanded with instructions to enter summary judgment for the Department. Pet. App. 14a-18a.

Judge Michael dissented. He would have held that an individual like Petitioner who proves an "adverse effect" caused by an agency's "willful or intentional" disclosure of private information can recover $1,000 statutory damages under Section 552a(g)(4)(A) without proving some measure of "actual damages." Pet. App. 25a. He noted that the Act expressly states, in language preceding Section 552a(g)(4)(A), that the United States "shall be liable" to an individual who demonstrates an "adverse effect" caused by an "intentional or willful" violation of the Act. Pet. App. 31a-32a & n.4. Thus, "the phrase 'person entitled to recovery' is more naturally read to mean anyone to whom 'the United States shall be liable . . . .'" Pet. App. 30a. Moreover, "[a]s a matter of ordinary language usage, an entitlement to 'recovery' is surely broader than an entitlement to actual damages." Pet. App. 31a.

Judge Michael buttressed his interpretation with four additional arguments. *First*, "most circuit courts have read the Privacy Act to allow recovery of statutory damages without proof of actual damages." Pet. App. 33a. *Second*, the interpretation is "consistent with" OMB's Privacy Act Guidelines, which are "due the deference accorded to the interpretation of an agency charged with oversight of implementation." Pet. App. 35a (internal quotation marks omitted). *Third*, the interpretation conforms with that given other statutory damages provisions similar in language, structure, and purpose to Section 552a(g)(4). Pet. App. 35a-39a. *Fourth*, the interpretation fulfills the Privacy Act's remedial and deterrent purposes. Without a statutory damages remedy available in the absence of "actual damages," few individuals would have incentive to sue given that damages arising from a privacy invasion "can be hard to quantify . . . because the typical injury caused . . . is mental distress." Pet. App. 50a, 52a, 59a.

Finally, Judge Michael "doubt[ed]" the majority's application of a sovereign-immunity-based narrowing

construction where the question is "what a plaintiff must prove to obtain relief that has been unequivocally authorized" and not "whether a lawsuit may be brought at all or about the availability of certain forms of relief." Pet. App. 46a & n.10. In any event, Judge Michael reasoned, the scales "decisively tip" in favor of his interpretation. Pet. App. 46a-47a.

SUMMARY OF ARGUMENT

Section 552a(g)(4) of the Privacy Act awards $1,000 statutory damages to any individual who has proven an "adverse effect" caused by a federal agency's "intentional or willful" failure to comply with the Act. The Act does not deny a remedy to those individuals whose rights under the Act have been violated, and who have suffered real harm in the form of an "adverse effect," but who cannot quantify, or choose not to seek, "actual damages." The Act's plain text, structure, context, purpose, and relevant administrative guidance compel this interpretation.

1. The Privacy Act's language, structure, and context make plain that the phrase "person entitled to recovery" in Section 552a(g)(4)(A) describes those individuals to whom "the United States shall be liable" – *i.e.*, those who have proven an "adverse effect" caused by an "intentional or willful" violation of the Act. In "no case" are these individuals entitled to receive "less than the sum of $1,000," even if they have not quantified "actual damages."

a. The Privacy Act mandates that "the United States shall be liable" to an individual who establishes: (i) an "adverse effect"; (ii) an agency's failure to comply with the Act caused the "adverse effect"; and (iii) the failure to comply was "intentional and willful." These elements are thus necessary and sufficient to establish the United States' liability. Sections 552a(g)(4)(A) and (B) provide the measure of that mandatory liability – at a minimum "an amount equal to the sum of" $1,000 statutory damages, costs, and attorneys' fees. They do

not set forth additional elements required to establish the United States' liability *vel non*. If, as the court below held, proof of "actual damages" is to be read as a claim element, and not simply one measure of established liability, the result would (i) subvert the Act's plain meaning by rendering its mandatory liability language merely permissive, and (ii) render the Act's "adverse effect" requirement superfluous.

b. Section 552a(g)(4)(A)'s text and structure confirm that a $1,000 damages award does not require proof of "actual damages." The independent statutory damages clause uses the phrase "person entitled to recovery" to describe those individuals who are entitled to $1,000 statutory damages. An entitlement to "recovery" has a different, and far broader, meaning than an entitlement to "actual damages." It specifically encompasses damages awards that do not require a claimant to quantify "actual damages." Thus, "person entitled to recovery" must describe the broader class of individuals to whom the United States "shall be liable"– *i.e.*, those whose "adverse effect" is to be remedied by $1,000 statutory damages. It cannot be limited to the narrow class of individuals who suffer harm quantifiable as "actual damages." Section 552a(g)(4)(A)'s grammatical structure points to the same result. The two damages clauses are joined by the adversative conjunction "but," thereby identifying the second, statutory damages clause as independent of, and in contrast to, the first, actual damages clause.

c. Petitioner's interpretation of the Act avoids absurd, and potentially unconstitutional, results. It satisfies the usual rule that attorneys' fees extend only to a prevailing party. Proof of an "adverse effect" caused by an agency's "intentional or willful" violation merits at least a $1,000 statutory damages, a success that triggers a concomitant attorneys' fees award. The court below's interpretation, however, suggests that an individual who cannot quantify "actual damages" may nonetheless recover attorneys' fees. An attorneys' fees award

unaccompanied by any remedial award would be anomalous and would raise a constitutional problem. If an individual may plead a Privacy Act cause of action in which the only possible relief is attorneys' fees, then the Act would allow a suit even where there is no Article III case or controversy.

d. Three times since Congress enacted the Privacy Act, it has employed language identical in all material respects to Section 552a(g)(4) in privacy-protection statutes. Each time, Congress intended to create a statutory damages remedy that does not depend on proof of actual damages. This repetition confirms that Congress understood and intended Section 552a(g)(4) to do so as well.

e. Any sovereign immunity based departure from the interpretation compelled by the Privacy Act's plain language, structure, and context would be improper. The sovereign immunity canon of construction does not mean that an explicit waiver, like that in the Act, should be given an implausible reading. Moreover, this canon applies only to the questions of (i) whether the government has waived its right to be sued, and (ii) whether the government has waived its right to be subject to a given remedy. Subsidiary questions concerning a statute's operation and administration – in this case, the type of proof necessary to recover monetary relief under the Act – are not ones to which the sovereign immunity canon applies.

2. The Privacy Act's serves two goals: (1) to remedy harm typically suffered as a result of a violation, not just that quantifiable as "actual damages"; and (2) to deter federal agencies from violating the Act's privacy protections. The Act's civil remedies provision serves these goals when it awards $1,000 statutory damages to an individual who proves an "adverse effect" caused by an "intentional or willful" violation.

a. The emotional distress "adverse effect" that results from a privacy invasion is real and, as in all types of privacy invasion claims, often the only harm suffered. Such harm is inherently difficult to quantify for purposes of establishing "actual damages." Therefore, a statutory damages remedy that stands independent of any provable "actual damages" extends the Act's reach to all those Congress intended to protect. This in turn ensures that robust civil enforcement will deter future agency violations of the Act.

b. The Act's legislative history describes Congress' careful crafting of a provision that serves the Act's remedial and deterrent goals, yet mitigates the risk of excessive liability. The Senate's desire for a "liquidated damages" provision to remedy difficult-to-quantify harms and encourage widespread citizen enforcement (a desire shared by a number of House members as well) was addressed by the $1,000 statutory damages provision. The House's countervailing desire to limit the United States' liability was addressed by the strict "intentional and willful" culpability standard and by capping statutory damages at $1,000.

c. The Privacy Act's civil remedies provision also parallels common-law remedies for intentional torts generally, and privacy torts specifically. In such actions, some damages (even if nominal) are awarded to vindicate the legally protected interest itself, to remedy difficult-to-quantify harms, and to encourage suits to vindicate the protected interest. Properly interpreted, the Privacy Act conforms with these analogous tort remedies, which serve the same purposes Congress intended the Act to serve.

d. Congress tasked OMB to develop guidelines and regulations that would direct agencies' implementation of the Privacy Act. OMB's comprehensive Privacy Act Guidelines interpret Section 552a(g)(4) to create $1,000 statutory damages award that does not require proof of "actual damages." OMB's contemporaneous, longstanding interpretation is

entitled to great respect, and confirms the result compelled by the Act's text, structure, context, and purpose.

ARGUMENT

I. THE PRIVACY ACT AWARDS $1,000 STATUTORY DAMAGES TO ANY INDIVIDUAL WHO HAS PROVEN AN "ADVERSE EFFECT" CAUSED BY AN "INTENTIONAL OR WILLFUL" VIOLATION OF THE ACT

Every touchstone of textual interpretation – "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" (*Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) – leads to the same result in this case. The Privacy Act awards $1,000 statutory damages to any individual who proves an "adverse effect" caused by a federal agency's "intentional or willful" failure to comply with the Act. In "no case" does the Act deny a remedy to those individuals whose rights under the Act have been violated and who have suffered real harm in the form of an "adverse effect," but who cannot quantify, or choose not to seek, "actual damages." This interpretation flows from the Act's plain text and structure, gives meaning and consistency to each aspect of the Act's civil remedies provision, and avoids absurd and potentially unconstitutional results.

A. The Privacy Act's Plain Language, Structure, And Context Establish That $1,000 Statutory Damages Are Not Contingent Upon Proof Of Actual Damages

The Privacy Act's civil remedies provision, properly read as a whole, does not condition an award of $1,000 statutory damages on an individual's quantifying "actual damages." The provision first defines who may bring a Privacy Act claim – an "individual." 5 U.S.C. § 552a(g)(1). It then defines the circumstances under which "the United States shall be liable" to that individual: (i) the individual suffered an "adverse effect"; (ii) an agency's "fail[ure] to comply with any other

provision of this section, or any rule promulgated thereunder" caused the adverse effect; and (iii) the agency's failure to comply was "intentional or willful." 5 U.S.C. §§ 552a(g)(1)(D), (g)(4). Hence, the Act unambiguously designates these elements as necessary and sufficient to establish the United States' liability. *Black's Law Dictionary* 915 (6th ed. 1990) ("liable" means "[b]ound or obliged in law or equity; responsible, answerable, compellable to make satisfaction, compensation, or restitution"); *The Oxford English Dictionary* 878 (2d ed. 1989) ("liable" means "[b]ound or obliged by law or equity, or in accordance with a rule or convention; answerable . . . ; legally subject or amenable to").

Section 552a(g)(4)'s use of the mandatory "shall" leaves no room for courts to require an individual to prove any additional element as a prerequisite to establishing the United States' liability. *See, e.g., National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) ("shall" is "mandatory"); *Miller v. French*, 530 U.S. 327, 337 (2000) ("shall" is a "mandatory term"); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen [a] stronger word[]" than "shall" "to express its intent that [an action] be mandatory"). Nor can there be any argument that Section 552a(g)(4) uses "shall" as a synonym for "may." Where the Privacy Act makes the United States' liability permissive, and not mandatory, it uses the word "may." *See* 5 U.S.C. § 552a(g)(2)(A) (court "may order the agency to amend the individual's record"); *id.* §§ 552a(g)(2)(B), g(3)(B) (court "may assess against the United States reasonable attorney fees"); *id.* § 552a(g)(3)(A) (court "may enjoin the agency from withholding . . . records"). When a statute "uses both 'may' and 'shall', the normal inference is that each is used in its usual sense – the one . . . being permissive, the other mandatory." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947).

Once an individual establishes the United States' mandatory liability, Sections 552a(g)(4)(A) and (B) on their face provide the *measure* of that liability – at a minimum "an amount equal to the sum of" $1,000 statutory damages (5 U.S.C. § 552a(g)(4)(A)), costs, and attorneys' fees (*id.* § 552a(g)(4)(B)). These provisions do not set forth additional elements required to establish liability *vel non*. Certainly, an individual who can quantify "actual damages" over and above the demonstrated "adverse effect" may recover them. But Section 552a(g)(4)(A) does not condition the United States' liability on such proof. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

Section 552a(g)(4)(A)'s text and structure likewise make clear that the Act's $1,000 statutory damages remedy stands independent of proof of "actual damages." Section 552a(g)(4)(A) contains two independent clauses. The second, statutory damages clause uses the phrase "person entitled to recovery" to describe those individuals who "in no case shall . . . receive less than the sum of $1,000." It does not limit the entitlement in terms of "actual damages," as does the preceding clause of Section 552a(g)(4)(A). Where Congress "uses certain language in one part of the statute and different language in another, the [C]ourt assumes different meanings were intended." 2A N. Singer, *Sutherland on Statutory Construction* § 46.06 (6th ed. 2000); *see Russello v. United States*, 464 U.S. 16, 23 (1983).

An entitlement to "recovery" has a different, and far broader, meaning than an entitlement to quantifiable "actual damages." This Court has held that questions concerning the proper measure of damages are "no longer confused with a right of recovery" where "a wrong has been done." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S.

555, 565-66 (1931). The Court also has described an individual as "entitled" to "recover" or to "recovery" when discussing nominal damages awards, which are not contingent upon proof of any actual damages, and attorneys' fees awards. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 267 (1978) (nominal damages); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 283 (1975) (Marshall, J., dissenting) (attorneys' fees); *Keystone Mfg. Co. v. Adams*, 151 U.S. 139, 147 (1894) (nominal damages).[4] Thus, the term "person entitled to recovery" in Section 552a(g)(4)(A)'s second clause must describe the broader class of individuals to whom the United States "shall be liable" – *i.e.*, those whose "adverse effect" is to be remedied by $1,000 statutory damages and concomitant attorneys' fees. It cannot be limited to the more narrow class of individuals who suffer harm quantifiable as "actual damages."

Section 552a(g)(4)(A)'s structure confirms this interpretation. When two independent clauses are joined by the adversative conjunction "but," as they are here, the second clause "[i]ntroduc[es] a statement of the nature of an exception, objection, limitation, or contrast to what has gone before." *Oxford English Dictionary* at 704; *accord Fowler's Modern English Usage* 120-21 (3d ed. 1996); *cf. Webster's Third New Int'l Dictionary* 303 (unabridged ed. 1976) ("adversative" terms are "expressive or indicative of antithesis, opposition, adverse circumstance, reservation, or contrary

[4] Common legal definitions of "recovery" are similarly broad. *See, e.g., Black's Law Dictionary* at 1276 ("[t]he obtaining of a thing by the judgment of a court, as the result of an action brought for that purpose"); W. Anderson, *A Dictionary of Law* 865 (1889) ("[t]he actual possession of anything, or its value, by judgment of a legal tribunal"); S. Gifis, *Dictionary of Legal Terms* 369 (2d ed. 1993) ("the establishment of a right by the judgment of a court"); *Oxford English Dictionary* at 1367 (in law, "[t]o get back or gain by judgement in a court of law; to obtain possession of, or a right to, by legal process").

suggestion"). Thus, the Act expressly designates the second, statutory damages clause of Section 552a(g)(4)(A) as independent of, and in contrast to, the first, actual damages clause.

If Section 552a(g)(4)(A) is instead read, as it was by the court below, to make an actual damages showing a necessary claim element – and not simply one measure of the United States' liability – the result would "subvert the plain meaning of the statute" by "making its mandatory language merely permissive." *Miller*, 530 U.S. at 337. Proof of an "adverse effect" caused by an "intentional or willful" violation of the Act would not mean that "the United States shall be liable." Rather, proof of these elements would mean only that the United States "may" be liable, and then only if the individual further proves that he suffered some "actual damages."

Furthermore, in that event, Section 552a(g)(1)(D)'s "adverse effect" requirement would become superfluous, since it would be insufficient to support a conclusion of liability and an individual's claim necessarily would depend upon the further showing of "actual damages." Of course, 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," and the Court therefore has "the duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted).

It is inconceivable that Congress would permit an individual who has suffered an "adverse effect" to bring a claim under the Privacy Act, yet deny any remedy for that harm unless the individual further proved a more narrow type of injury quantifiable in "actual damages." This is particularly so given that inherently difficult-to-quantify emotional harms are the predominant ones that result from privacy invasions. *See infra* pp. 27-28, 31. The Act's language, structure, and context make plain that Congress does provide a remedy for

individuals who suffer an "adverse effect" caused by an agency's "intentional or willful" violation – $1,000 statutory damages that do not depend on proof of "actual damages."

B. A Proper Interpretation Of The Privacy Act's Civil Remedies Provision Avoids Absurd Results And Potential Unconstitutionality

A proper interpretation of the Privacy Act's civil remedies provision must not lead to absurd results, which "are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982); *accord, e.g, Clinton v. City of New York*, 524 U.S. 417, 429 (1998). It is likewise "'a cardinal principle' of statutory interpretation" that when a particular construction "raises 'a serious doubt' as to [a statute's] constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Petitioner's interpretation of the Act avoids the pitfalls of absurd results and constitutional defect; the court below's does not.

The United States' liability to individuals who successfully establish claims under Section 552a(g)(1)(D) is "an amount equal to the sum of" damages under Section 552a(g)(4)(A) "*and*" costs and attorney fees under Section 552a(g)(4)(B). (emphasis added). The usual rule is that a statutory attorneys' fees award only extends to a prevailing party. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603-04 (2001). Petitioner's interpretation of the Act comports with this usual rule. An individual who has proven an adverse effect caused by an agency's intentional or willful violation of the Act is entitled to at least $1,000 statutory damages, a success that triggers a concomitant award of attorneys' fees.

The court below's interpretation, however, suggests that an individual who cannot plead or prove "actual damages," but who can prove an "adverse effect" caused by an "intentional or willful" violation of the Act, would receive an award of attorneys' fees despite no entitlement to any other form of relief. This is because the damages and attorneys' fees subsections of Section 552a(g)(4) are conjunctive ("the sum of" damages "and" attorneys' fees), with no language conditioning attorneys' fees on a damages award. An attorneys' fees award unaccompanied by any remedial award would be, to say the least, odd.

Indeed, such a result would suggest a constitutional defect in the Act. If it is possible – as the decision below suggests (Pet. App. 31a-32a & n.3), and as the government suggested in its opposition to certiorari (Opp. 9; Pet. Rep. 5) – to plead a Privacy Act cause of action in which the only possible relief is attorneys' fees, then the Act would allow a suit even when there is no Article III case or controversy. This Court repeatedly has held that

> a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself. An "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990)); *accord, e.g, Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000); *Diamond v. Charles*, 476 U.S. 54, 70 (1986). The Privacy Act should not be read to raise this constitutional defect; indeed, it cannot be read to do so.

C. Congress Has Repeatedly Used Language Identical To That In Section 552a(g)(4)(A) To Create Privacy-Protection Statutory Damages Remedies That Do Not Require Proof Of Actual Damages

In the years since Congress enacted the Privacy Act, it has thrice employed language identical in all material respects to that in Section 552a(g)(4) in other privacy-protection statutes. Each time Congress created a statutory damages remedy that does not require proof of actual damages. *See* Tax Reform Act of 1976, Pub. L. No. 94-455 §§ 1201(i)(2)(A), 1202(e)(1), 90 Stat. 1520, 1665-66, 1687 (codified at 26 U.S.C. § 6110(j)(2)(A) and 26 U.S.C. § 7217(c) (Supp. 1981) (repealed 1982)); Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508 § 201, 100 Stat. 1848, 1866 (codified at 18 U.S.C. § 2707(c)). When statutes share "similarity of language," and especially when they "share a common *raison d'etre*," they "should be interpreted *pari passu*." *Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973) (*per curiam*); *accord, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). Congress' repeated use of language identical to that in Section 552a(g)(4) to create statutory damages remedies that do not depend on proof of actual damages confirms that Congress clearly understood and intended Section 552a(g)(4) to do so in the first place.

Two years after the Privacy Act's enactment, in the Tax Reform Act of 1976, Congress authorized lawsuits against federal officials for improper disclosure of tax return information. With inconsequential variations, the statute employed the same structure and language as Section 552a(g)(4):

> [T]he defendant shall be liable to the plaintiff in an amount equal to the sum of—
>
> (1) actual damages sustained by the plaintiff as a result of the unauthorized disclosure of the return or return information and, in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, but in no case shall a plaintiff entitled to recovery receive less than the sum of $1,000 with respect to each instance of such unauthorized disclosure . . . .

26 U.S.C. § 7217(c) (Supp. 1981) (repealed 1982).

Congress intended this provision to permit statutory damages even in the absence of actual damages: "[B]ecause of the difficulty in establishing in monetary terms the damages sustained by a taxpayer as the result of the invasion of his privacy caused by an unlawful disclosure of his returns or return information, the amendment provides that these damages would, in no event, be less than liquidated damages of $1,000 for each disclosure." S. Rep. No. 94-938, at 348 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2897, 3778. The federal courts have confirmed this reading of the statute. *See Johnson v. Sawyer*, 120 F.3d 1307, 1313 (5th Cir. 1997) ("[A] plaintiff is entitled to his actual damages sustained as a result of an unauthorized disclosure . . . or to liquidated damages of $1,000 per such disclosure[.]"); *Rorex v. Traynor*, 771 F.2d 383, 387-88 (8th Cir. 1985) (same); *cf. Scrimgeour v. Internal Revenue*, 149 F.3d 318, 327 n.11 (4th Cir. 1998) (interpreting Section 7217(c)'s successor statute identically).

In a separate provision of the same act, Congress employed nearly identical language to describe the United States' liability where an Internal Revenue Service employee "intentionally or willfully" fails to delete personal information from tax documents requested by third parties:

> [T]he United States shall be liable to the person in an amount equal to the sum of—
>
> (A) actual damages sustained by the person but in no case shall a person be entitled to receive less than the sum of $1,000 . . . .

26 U.S.C. § 6110(j)(2)(A).

As with Section 7217(c), Congress stated that this provision, which also tracks Section 552a(g)(4) of the Privacy Act, "includ[es] minimum damages of $1,000 plus costs." H.R. Conf. Rep. No. 94-1515, at 475 (1975). No court has interpreted this provision, but given that the relevant language is virtually identical to Section 7217(c), there is no reason to believe that a judicial interpretation would differ in any respect. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (the "normal rule of statutory construction [is] that identical words used in different parts of the same Act are intended to have the same meaning").

In 1986, Congress once again used language virtually identical to Section 552a(g)(4), this time in the Electronic Communications Privacy Act, which prohibits unauthorized access to electronic communications:

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

18 U.S.C. § 2707(c).

Again, Congress understood, and intended, this language to create a statutory minimum damages award that does not depend on proof of actual damages. *See* H.R. Rep. No. 99-647, at 74 (1986) ("Damages include actual damages, any lost profits but in no case less than $1,000."); S. Rep. No. 99-541, at 43 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597 ("[D]amages under the section includ[e] the sum of actual damages suffered by the plaintiff and any profits made by the violator as the result of the violation . . . with minimum statutory damages of $1,000."); *United Labs., Inc. v. Rukin*, No. 98 C 602, 1999 WL 608712, at *5 (N.D. Ill. Aug. 4, 1999) (same). Furthermore, Congress enacted Section 2707(c)

against the backdrop of an unbroken line of federal court decisions interpreting identical language in Section 552a(g)(4)(A) of the Privacy Act and Section 7217(c) of the Tax Reform Act of 1976 to allow statutory damages without proof of actual damages. *See Rorex*, 771 F.2d at 387-88 (Tax Reform Act); *Johnson v. Department of Treasury*, 700 F.2d 971, 977 & n.12 (5th Cir. 1983) (Privacy Act); *Fitzpatrick v. IRS*, 665 F.2d 327, 331 (11th Cir. 1982) (same); *Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980) (same).

These subsequent statutes confirm that, in privacy-protection statutes, Congress has frequently used language identical in all material respects to that found in Section 552a(g)(4). Each time, Congress understood that these words created, and intended them to create, a statutory damages remedy that does not depend upon proof of actual damages. There is no reason to ascribe the language in Section 552a(g)(4) a different meaning.

D. The Sovereign Immunity Canon Of Construction Provides No Reason To Depart From The Interpretation Compelled By The Act's Language, Structure, And Context

The fact that the Privacy Act waives the United States' sovereign immunity does not provide a reason to depart from the interpretation compelled by the Act's plain language, structure, and context. To the contrary, reaching a different interpretation in service to a sovereign immunity canon of construction would be improper for two reasons.

First, the rule that statutes waiving sovereign immunity are to be strictly construed "does not . . . require explicit waivers to be given a meaning that is implausible." *United States v. Williams*, 514 U.S. 527, 540 (1995) (Scalia, J., concurring); *see also United States v. Rice*, 327 U.S. 742, 752-53 (1946) ("Statutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a

mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue of statutory purpose is otherwise obscure."). As this Court has held, the "exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383 (1949) (internal quotation marks and citation omitted); *accord*, *e.g.*, *Williams*, 514 U.S. at 541 (Scalia, J., concurring).

Acceptance of a "strained reading" or "technical argument[s]" to deny a remedy to an individual who has suffered an "adverse effect" caused by an "intentional or willful" violation of the Privacy Act – despite clear language providing one in the form of statutory damages – would flout this Court's "preference for commonsense inquiries over formalism," even where a statute waives sovereign immunity. *Williams*, 514 U.S. at 536. Moreover, doing so would set a "clear language" bar so high as to make it difficult for Congress ever to surmount. At worst, this would threaten Congress' supremacy in legislative matters; at best, it would force Congress back to the drawing board repeatedly to achieve a clearly-intended waiver, wasting valuable time and legislative resources. *See* J. Nagle, *Waiving Sovereign Immunity In an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 819-20, 826.

Second, the sovereign immunity canon of construction applies only to the questions of (i) whether the government has waived its right to be sued by the plaintiff (*see, e.g., United States v. Sherwood*, 312 U.S. 584, 587-88 (1941)); and (ii) whether the government has waived its right to be subject to a given remedy (*see*, *e.g.*, *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)). There is no

dispute that in Section 552a(g) of the Privacy Act, the United States waived its immunity from suit and from monetary remedies.

When these waivers are clear, as they are in the Privacy Act, the sovereign-immunity canon of construction does not reach more deeply into a statute to govern every subsidiary question of its operation and administration. *See West v. Gibson*, 527 U.S. 212, 222 (1999) (questions concerning "how the waived damages remedy is to be administered" are "distinct," their relationship "to the goals and purposes of the doctrine of sovereign immunity may be unclear," and "ordinary sovereign immunity presumptions may not apply"). This is well demonstrated by this Court's decisions in *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215 (1945), and *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947). Each involved interpretation of the Public Vessels Act, ch. 428, 43 Stat. 1112 (1925), which clearly waived the United States' immunity from suit "for damages caused by a public vessel of the United States." *Id.* § 1.

In *Canadian Aviator*, the government argued that the words "caused by" in the Public Vessels Act meant that suits could be brought only when a "collision" with a public vessel led to damages. 324 U.S. at 222. The Court acknowledged that "the general history of the Act . . . does not establish that the statute necessarily extends to the noncollision cases in view of the rule of strict construction of statutory waiver of sovereign immunity." *Id.* But the Court held the sovereign immunity canon of construction inapplicable to this causation question; the "broad statutory language authorizing suit . . . is not to be thwarted by an unduly restrictive interpretation." *Id.*

The government contended in *American Stevedores* that the word "damages" in the Public Vessels Act effected a waiver to liability for "damage to property," but not "injury to the person." 330 U.S. at 450. The Court refused to parse the word "damages" this way pursuant to a sovereign immunity

canon. The United States had plainly consented to monetary damages remedies, and the Court could not "believe that the Public Vessels Act, read in the light of its legislative history, evinces a Congressional intent only to provide a remedy to the owners of damaged property." *Id.* at 454.

The same analysis applies in this case. The Privacy Act clearly waives the United States' immunity to suit and to monetary remedies. The question at issue is the type of proof that an individual must produce to recover monetary relief. This is a subsidiary question of the Privacy Act's operation to which the sovereign immunity canon does not apply.

II. THE AVAILABILITY OF STATUTORY DAMAGES THAT DO NOT REQUIRE PROOF OF ACTUAL DAMAGES FULFILLS THE PRIVACY ACT'S PURPOSES AND IS CONSISTENT WITH OMB'S PRIVACY ACT GUIDELINES

The object and policy of the Privacy Act, as expressed in both its text and legislative history, confirm that the civil remedies provision was intended to remedy the harms that typically result from a privacy invasion and to encourage robust enforcement of the Act's privacy protections. These purposes are fulfilled only if the civil remedies provision is interpreted in accordance with its plain text – to award $1,000 in statutory damages to an individual who proves an "adverse effect" caused by an agency's "intentional or willful" violation of the Act. Furthermore, OMB's longstanding Privacy Act Guidelines, promulgated within months of the Act's effective date, confirm that a $1,000 statutory damages award under the Act is not conditioned on proof of "actual damages."

A. Awarding $1,000 Statutory Damages To Any Individual Who Proves An "Adverse Effect" Caused By An "Intentional Or Willful" Violation Of The Privacy Act Fulfills The Act's Purposes As Expressed In Its Text And Legislative History

The object and policy of the Privacy Act are plain. Congress found that a "right to privacy is a personal and fundamental right protected by the Constitution of the United States." Pub. L. No. 93-579 § 2(a)(4). The Act "provide[s] certain safeguards for an individual against an invasion of personal privacy," chief among them making federal agencies "subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under th[e] Act." *Id.* §§ 2(b), 2(b)(6) (emphasis added). Congress intended the civil remedies provision to "encourage the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236; *accord* H.R. Rep. No. 93-1416 at 15, *reprinted in Source Book* at 308 ("best means" to enforce the Act is "constant vigilance of individual citizens backed by legal redress"). Thus, the Act posits civil suits as serving two goals: (1) to remedy the harm typically caused by a privacy violation, not just that quantifiable as "actual damages"; and (2) to deter federal agencies from violating the Act's privacy protections.

"In determining the meaning of [a] statute," this Court "look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). The Act's civil remedies provision serves its remedial and deterrent functions when it awards $1,000 statutory damages to an individual who proves an "adverse effect" caused by an "intentional or willful" violation. Privacy is a dignitary interest, and "in a great many of the cases" in which this interest is invaded "the only harm is affront to the plaintiff's dignity as a human being, the damage to his self-image, and

the resulting mental distress." 2 D. Dobbs, *Law of Remedies* § 7.1.1 (2d ed. 1993); *accord, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967). These are real harms or, in the parlance of the Privacy Act, "adverse effects." Indeed, when, as in this case, a federal agency discloses a social security number, the emotional distress is compounded by the well-founded fear of consequences like identity theft, a crime rapidly growing in frequency and severity. *See* General Accounting Office Report 02-352, *Social Security Numbers: Government Benefits From SSN Use But Could Provide Better Safeguards* 13-14 (2002).

When a worst-case scenario like identity theft materializes, the individual will likely be able to quantify some "actual damages." But for those individuals who are fortunate enough to avoid the worst case, the "adverse effect" of emotional distress that results from the privacy invasion is nonetheless real, albeit difficult to quantify for purposes of establishing actual damages – as is true in all types of privacy invasion claims. *See* 2 Dobbs, *supra*, § 7.2; *Restatement (Second) of Torts* § 652H cmt. b (1977).[6] Providing a statutory damages remedy in these situations ensures that the Act reaches all those Congress intended to protect by providing an incentive to bring suit even when actual damages cannot be proven. This in turn ensures that robust civil enforcement of the Act will deter agency violations. *See Story Parchment*, 282 U.S. at 563 (where the wrong is "of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to

[6] *See also, e.g, Scrimgeour*, 149 F.3d at 327 n.11 ("Actual damages for the invasion of privacy . . . can be hard to quantify."); *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 842 (C.D. Cal. 1998) ("Although monetary damages are available for [privacy] injuries, they are difficult to quantify . . . ."); *Williams v. Poulos*, 801 F. Supp. 867, 874 (D. Me. 1992) ("Invasion of privacy . . . inflicts damage which is both difficult to quantify and impossible to compensate fully with money damages."), *aff'd*, 11 F.3d 271 (1st Cir. 1993).

deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts").

If the Act does not provide a remedy in these circumstances, then few Privacy Act suits can be brought successfully, if they can be brought at all. This would markedly reduce – if not eliminate outright – the Act's capacity to remedy existing privacy violations and deter future privacy violations. This weakening effect would be amplified by the Act's already significant barriers to recovery. The Privacy Protection Study Commission's review of the Act noted that "[t]he vast number of systems involved, the need to establish willful or intentional behavior on the part of the agency, and the cost and time involved in bringing a law suit, often make enforcement by the individual impractical." Privacy Protection Study Comm'n, *Personal Privacy in an Information Society* 529 (1977); *see* Pub. L. No. 93-579 §§ 5(b)-(d) (creating the Commission and authorizing the study). Congress and commentators agree that the "intentional and willful" level of culpability a Privacy Act plaintiff must demonstrate is a formidable barrier. *See Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*, 120 Cong. Rec. 12,243 (daily ed. Dec. 18, 1974), *reprinted in Source Book* at 858, 861-62 [hereinafter *Analysis of House and Senate Compromise*]; 2 B. Braverman & F. Chetwynd, *Information Law* § 21-3.3.3 (1985); 2 J. O'Reilly, *Federal Information Disclosure* §§ 22.30, 22.57 (3d ed. 2000).

The legislative history leading to the final version of Section 552a(g)(4) confirms that Congress carefully crafted a means of ensuring that harms suffered as a result of a violation of the Act would be remedied, that adversely affected individuals would have adequate incentive to enforce the Act, and that the Act would deter future agency violations. It also installed checks – an "intentional and willful" culpability standard and a $1,000 cap on statutory damages – to ensure

that the Act would not expose the United States to excessive liability.

Section 552a(g)(4) emerged as a compromise between Senate and House bills. The Senate bill would have made the United States liable for negligent privacy violations, with liability measured as "any 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." S. 3418 § 303(c)(1), *reprinted in Source Book* at 371. The Senate Committee on Government Operations specifically recommended the addition of a $1,000 statutory damages provision as "liquidated damages . . . [to be] assessed against the agency for a violation of the Act." *Source Book* at 768. In common-law and statutory contexts, recovery of "liquidated damages" does not require any proof of "actual damages." C. McCormick, *Damages* 622 (1935); 3 Dobbs, *supra,* § 12.9(2); *Rex Trailer Co. v. United States*, 350 U.S. 148, 153-54 (1956) ("liquidated damages" under the Surplus Property Act "serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable"); *Scofield v. Telecable of Overland Park, Inc.*, 751 F. Supp. 1499, 1521 (D. Kan. 1990) ('liquidated damages" under the Cable Communications Policy Act "are properly awardable even without a showing of actual damages"), *rev'd on other grounds*, 973 F.2d 874 (10th Cir. 1992).

The House bill would have made the United States liable for "willful, arbitrary, or capricious" violations, reflecting a concern that the government's liability be constrained by a strict culpability requirement. H.R. 16373 § 552a(g)(3)(A), *reprinted in Source Book* at 288; *see also Source Book* at 926-28 (House debate on culpability requirement). The House bill measured liability as "actual damages sustained by the individual as a result of the refusal or failure" to comply with privacy protections. H.R. 16373 § 552a(g)(3)(A), *reprinted in*

Source Book at 288 Several House members, however, specifically noted their concern that

> Actual damages resulting from an agency's misconduct will, in most cases, be difficult to prove and this will often effectively preclude an adequate remedy at law. Moreover, if we are concerned with effectively deterring the willful, arbitrary, or capricious disclosure or transfer of protected records, a provision permitting a court to assess punitive damages or, at the very least, liquidated damages is essential.

H.R. Rep. No. 93-1416, at 38, *reprinted in Source Book* at 330.

The final version of the Act "represent[ed] a compromise between the two positions." *Analysis of House and Senate Compromise, reprinted in Source Book* at 862. The House bill's culpability standard was retained in slightly softened form – an "intentional or willful" standard that is "somewhat greater than gross negligence." *Id.* The Senate's $1,000 liquidated damages provision was added to the "actual damages" provision in the House bill. *Id.* at 851.

The final Act thus allows individuals to recover some damages for the dignitary harm, and associated emotional distress, of a privacy invasion – more often than not the only harm associated with such a claim. 2 Dobbs, *supra*, § 7.3(4). This ensures that the civil remedies provision serves the Act's goals to remedy the harms typically caused by a privacy violation and to deter future agency violations. The availability of liquidated damages also provides an incentive to "the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236. At the same time, the $1,000 cap on liquidated damages, particularly when combined with the strict culpability element, mitigates the risk of excessive government liability. 2 Dobbs, *supra*, § 7.3(4).

Finally, it is noteworthy that, as enacted, the Privacy Act's civil remedies provision parallels common-law remedies in intentional torts generally, and privacy torts specifically. Congress "legislate[s] against a background of common-law adjudicatory principles" (*Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)), and this Court often looks to this background to "defin[e] the elements of damages and the prerequisites for their recovery" in federal statutes. *Carey*, 435 U.S. at 257-58. The Act defines liability for "intentional or willful" actions. At common law, intentional torts (such as battery and false imprisonment) do not require proof of actual damages as a prerequisite to recovery. *See, e.g.*, McCormick, *supra*, § 107. Rather, some amount of damages (even if nominal) is awarded to vindicate the legally protected interest itself, to remedy harms presumed to result even if not quantifiable, and to encourage suits to vindicate the protected interest. 2 Dobbs, *supra*, §§ 7.1(1), 7.1(2); *see also Restatement (Second) of Torts* § 902 cmt. a. The same is true in common-law privacy torts, in which a plaintiff may "recover damages for emotional distress or personal humiliation that he proves to have been actually suffered by him, if it is of a kind that normally results from such an invasion." *Restatement (Second) of Torts* § 652H cmt. b. If quantifiable, actual damages are recoverable as well, but their absence does not preclude any recovery at all. *Id.* cmt. d; *see* D. Elder, *Privacy Torts* § 2:10 (2002). Thus, an interpretation of the Privacy Act that allows statutory damages for "intentional or willful" violations, even absent provable actual damages, conforms with analogous common-law tort remedies that serve the same purposes Congress intended the Act to serve.

B. OMB's Privacy Act Guidelines Interpret The Privacy Act To Allow A $1,000 Statutory Damages Award Without Proof Of Actual Damages

Congress tasked the OMB to "develop guidelines and regulations for the use of agencies in implementing the provisions of" the Privacy Act and to "provide continuing assistance to and oversight of the implementation of the provisions [of the Act] by agencies." Pub. L. No. 93-579 § 6 (current version codified at 5 U.S.C. § 552a(v)). Seven months after the Act's effective date, OMB promulgated the Privacy Act Guidelines. 40 Fed. Reg. 28,948 (1975). The Guidelines speak directly to the issue presented in this case, interpreting Sections 552a(g)(1)(D) and (g)(4)(A) to mean that "[w]hen the court finds that an agency has acted willfully or intentionally in violation of the Act in such a manner as to have an adverse effect upon the individual, the United States will be required to pay . . . actual damages or $1,000, whichever is greater . . . ." *Id.* at 28,970. OMB's "interpretation of the statute, like its legislative history, confirms what is clear from the statute's plain language." *Wimberly v. Labor and Indus. Relations Comm'n of Mo.*, 479 U.S. 511, 522 (1987). Statutory damages are not contingent upon proof of actual damages. Rather, they are an alternative available to individuals who cannot quantify actual damages.

OMB's interpretation is entitled to great respect for three reasons.[7] *First*, OMB's interpretation is consistent with the

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[7] *See generally United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("'The weight [accorded to an administrative] judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . .'" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Lower federal courts have afforded the Guidelines "the deference usually accorded interpretation of a statute by the agency charged with its administration[.]" *Albright v. United States*, 631 F.2d 915, 919 n.5 (D.C. Cir. 1980); *accord, e.g.*,

Privacy Act's language, structure, context, and purpose. *See Wimberly*, 479 U.S. at 522. *Second*, OMB's Guidelines "'involve[] a contemporaneous construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Dev. Co. v. International Union of Elec. Radio & Mach. Workers*, 367 U.S. 396, 408 (1961) (quoting *Norwegian Nitrogen Prods. v. United States*, 288 U.S. 294, 315 (1933)); *accord, e.g., Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389 (1984). *Third*, OMB's interpretation is "longstanding" and unchanged in the 28 years since its promulgation, despite numerous intervening amendments to the Guidelines. *See NLRB v. Bell Aerospace Co. Div.*, 416 U.S. 267, 274-75 (1974).[8]

Respect for OMB's interpretation, although not necessary to ground a holding that the Privacy Act awards $1,000 statutory damages without proof of actual damages, nonetheless confirms the soundness of such an interpretation.

Bechhoefer v. U.S. Dep't of Justice Drug Enforcement Admin., 209 F.3d 57, 61-62 (2d Cir. 2000); *Quinn v. Stone*, 978 F.2d 126, 133 (3d Cir. 1992); *Perry v. FBI*, 759 F.2d 1271, 1275-76 & n.7 (7th Cir. 1985); *Baker v. Department of Navy*, 814 F.2d 1381, 1383 (9th Cir. 1987); *Clarkson v. IRS*, 678 F.2d 1368, 1374 (11th Cir. 1982).

[8] *See* 40 Fed. Reg. 56,741 (1975); 48 Fed. Reg. 15,556 (1983); 52 Fed. Reg. 12,990 (1987); 54 Fed. Reg. 25,818 (1989); 56 Fed. Reg. 18,599 (1991); 61 Fed. Reg. 6,428 (1996).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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