Supreme Court, U.S.
FILED

08-467 OCT 8 - 2008

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No. 08-

IN THE

Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS
OF THE UNITED STATES OF AMERICA AND
THE HONORABLE JAMES B. PEAKE,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Privacy Act prohibits any agency official from disclosing, to "any person," by "any means of communication," any "item . . . of information" that "is contained in a system of records," unless the disclosure is made pursuant to "the prior written consent of[] the individual to whom the record pertains." 5 U.S.C. § 552a(a)(4), (b).

The question presented is whether, as the court of appeals held below, in conflict with the Ninth Circuit and the D.C. Circuit, the Privacy Act permits an agency official to disclose personal information about an individual that the official acquired in the process of creating a record in a system of records as long as the official does not physically retrieve the record before disclosure.

PARTIES TO THE PROCEEDING

Petitioner is John Doe, plaintiff-appellant below.*

Respondents are the Department of Veterans Affairs of the United States of America and the Honorable James B. Peake, Secretary of the Department of Veterans Affairs, in his official capacity, defendants-appellees below.†

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* The district court permitted petitioner to bring this action under the pseudonym "John Doe" given the sensitive nature of his allegations. *See* App. 21a.

† Pursuant to Supreme Court Rule 35.3, the Honorable James B. Peake, Secretary of the Department of Veterans Affairs, has been substituted as respondent for the Honorable R. James Nicholson, defendant-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 519 F.3d 456 and is reprinted in the Appendix to the Petition ("App.") at 1a-19a. The district court's opinion is reported at 474 F. Supp. 2d 1100 and is reprinted at App. 20a-32a (Schiltz, J.).

JURISDICTION

The court of appeals issued its decision on March 7, 2008, and denied a petition for rehearing and rehearing *en banc* on July 10, 2008. App. 33a-34a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix. App. 35a-39a.

STATEMENT OF THE CASE

The decision of the court of appeals permits a physician working for the federal government to disclose with impunity a patient's highly confidential medical information, even though the Privacy Act, 5 U.S.C. § 552a(b), expressly prohibits the unauthorized disclosure of personal information contained in federal records as defined by the Act ("government records" or "federal records"), including "medical histor[ies]," 5 U.S.C. § 552a(a)(4). This result stems from the court's interpretation of the "retrieval rule,"

a judicially-created rule that precludes liability under the Act if an official's unauthorized disclosure is based on information retrieved from memory rather than directly from a record. Here, petitioner's doctor personally created many of the notations in petitioner's federal medical file and disclosed that information without petitioner's permission. Nevertheless, because the disclosure was made from the doctor's memory of petitioner's medical history rather than from the medical file itself, the court of appeals held that the agency and official were not liable under the Act.

That decision conflicts with decisions of the Ninth and D.C. Circuits. Those courts have recognized a "scrivener's exception" to the retrieval rule, under which an official who improperly discloses private information from memory is liable if the official also helped create the record containing that private information. The contrary ruling of the court of appeals below *"turns the Privacy Act on its head."* App. 18a (Hansen, J., concurring) (emphasis added). The district court, the Honorable Patrick J. Schiltz, likewise expressed the view that *"any law worthy of the name 'privacy act'"* should permit petitioner's claim to proceed. *Id.* at 25a (emphasis added). This Court should grant the petition to resolve the conflict among the circuits and restore the protection of privacy required by the text, purpose, and history of the Act.

1. In the summer of 2000, petitioner John Doe, a veteran, sought employment as a housekeeping aide at the Veterans Administration Medical Center ("VAMC" or "Center") in Minneapolis, Minnesota. App. 22a; C.A. App. 78. In order to obtain employ-

ment, Doe was required to undergo a pre-employment physical at the Center's Employee Health Service ("EHS"), which was run by Dr. Samuel Hall. App. 3a. As part of that physical, Doe filled out a "Report of Medical History," a form that guaranteed confidentiality and required Doe to provide truthful information about his medical history or be subject to criminal sanctions. C.A. App. 398, 401-02. Doe revealed on the form that he was HIV-positive. During his physical, Doe also told the physician, Dr. Barbara Gibson, that he took several medications to treat his HIV infection. C.A. App. 136-41, 231-50. Dr. Gibson recorded all of this information in Doe's medical file, which was maintained at the EHS. *Id.*; App. 3a.

In September 2002, approximately two years after Doe began working at the VAMC, he experienced chills and nausea while at work, and consulted Dr. Hall in the EHS. App. 22a. Dr. Hall took an extended medical history, and Doe informed the doctor that he was HIV positive and was taking multiple drugs for his condition. *Id.* Dr. Hall personally recorded that information in Doe's EHS medical file. *Id.* at 3a.

In January 2003, Doe injured himself at work while lifting a barrel. App. 22a; C.A. App. 87-88, 251-52. Doe reported to Dr. Gibson, as required by VAMC policy, and he was diagnosed with a groin strain. C.A. App. 146-47, 251-59, 411-12. The EHS directed Doe to rest for the remainder of the week and to follow up with Dr. Hall before returning to active duty. *Id.*; App. 22a. During that follow-up visit, Dr. Hall again asked Doe for his medical history. Doe again stated that he was HIV-positive.

App. 22a. Doe also revealed to Dr. Hall that he occasionally used marijuana for the medical purpose of enhancing his appetite. *Id.* Dr. Hall recorded Doe's HIV-positive status and his medical marijuana use in the EHS file. *Id.* at 25a-26a. Doe felt that Dr. Hall became disrespectful and condescending from the moment Doe revealed he occasionally used medical marijuana. *Id.* at 23a.

On February 24, 2003, unknown to Doe, Dr. Hall called Doe's supervisor at the VAMC, John Kangas, volunteering to "help" the supervisor address what Dr. Hall perceived to be Doe's absenteeism problem. App. 23a; C.A. App. 150-51, 320. Kangas had never had such a call from an EHS doctor before. C.A. App. 321-22.

Two days later, on February 26, 2003, Doe came to work and was told to report to Dr. Hall immediately. App. 23a. Doe had no idea why he was being sent to the EHS. Because of his prior unpleasant experience with Dr. Hall, however, Doe asked his union steward, George Rankin, to join him. *Id.* Kangas, who had arranged the meeting with Doe and Dr. Hall, was out sick the day it was scheduled to take place. *Id.* Dr. Hall was unaware of the purpose for which Kangas had called the meeting but decided that he would proceed with it anyway, assuming that the meeting related to his earlier call about Doe's absences. *Id.* at 24a.

Before Rankin arrived at the meeting, Doe explicitly instructed Dr. Hall not to reveal any of his medical information to his union representative. App. 24a. After Rankin joined them, however, Dr. Hall almost immediately, and without warning, "told

Rankin that Doe was HIV-positive and suspected of using drugs." *Id.* "Doe immediately and angrily protested that he had told Dr. Hall not to disclose this information." *Id.* Rankin was "absolutely flabbergasted" that Dr. Hall would disclose such sensitive information. C.A. App. 442. Doe became so distraught that Dr. Hall terminated the meeting and typed up a summary of his recollections of the encounter, which he placed into Doe's EHS medical file. *Id.* at 148-58, 413-16. Doe "later complained to a patient representative about Dr. Hall's conduct and sought counseling to deal with his feelings of anger and betrayal." App. 24a.

2. On February 25, 2005, Doe filed a complaint alleging that the Department of Veterans Affairs, Dr. Hall, and then-Secretary R. James Nicholson, in his official capacity, were liable under the Privacy Act for the unauthorized disclosure of Doe's medical history. The case against Dr. Hall was dismissed without prejudice, *see Bruce v. United States*, 621 F.2d 914, 916 n.2 (8th Cir. 1980) (explaining that "the Act provides for civil remedies only against the agency, not individuals"), and the remaining defendants ("the Government") sought summary judgment on the Privacy Act claims. *See* App. 21a & n.2.

The district court, Judge Schiltz, deemed the facts of Doe's case to be "egregious and largely undisputed." App. 27a n.3. In particular, the court found that it was "undisputed that information about Doe's HIV-positive status and his use of marijuana is contained in records subject to the Privacy Act, that Dr. Hall himself generated some of those records, and that Dr. Hall disclosed information contained in the records without Doe's prior written

consent." *Id.* at 25-26a. Describing Dr. Hall's treatment of Doe as "deplorable," "almost incomprehensible," and "appalling," the district court stated that, "[u]nder any law worthy of the name 'privacy act,' Doe should be able to sue Dr. Hall or the government agency that employed him." *Id.* at 25a, 31a.

Judge Schiltz nonetheless concluded that he was bound by Eighth Circuit precedent holding that "the only disclosure actionable under section 552a(b) is one resulting from a retrieval of the information initially and directly from [a] record contained in a system of records." App. 26a (quoting *Olberding v. U.S. Dep't of Defense*, 709 F.2d 621, 622 (8th Cir. 1983) (per curiam)). As the district court explained, "because Dr. Hall did not learn that Doe was HIV-positive and using marijuana from a [retrieved] record" but "[r]ather . . . learned this information from Doe" directly, Dr. Hall was, "as the Eighth Circuit interprets the Privacy Act, . . . free . . . to disclose this extraordinarily private information to anyone and everyone." App. 26a, 31a (emphasis omitted).

The court recognized, however, that "other circuits have interpreted the Act in a manner that would give Doe a remedy on the facts presented here." App. 27a. Judge Schiltz explained that the D.C. Circuit has held that the retrieval rule "does not apply when the agency official who improperly disclosed private information was also responsible for generating a record containing that private information." *Id.* at 29a (citing *Bartel v. FAA*, 725 F.2d 1403, 1310-11 (D.C. Cir. 1984)). And he expressed his "sympathy for the *Bartel* rule, under which Doe would be entitled to relief." *Id.* "If the Eighth Circuit were inclined to reexamine the holding of *Ol-*

berding," the court suggested, "this case presents an appropriate vehicle." *Id.* at 27a n.3. Because the district court itself was "foreclosed by *Olberding* from adopting the *Bartel* rule," the court granted the Government's motion for summary judgment. *Id.* at 29a, 31a.

3.a. In an opinion written by Judge Diana E. Murphy, the court of appeals affirmed. The court reiterated that "the only disclosure actionable under section 552a(b) is one resulting from a retrieval of information initially and directly from the record contained in the system of records." App. 8a. The court refused "to impose liability for" what it deemed to be "disclosure[] of independently acquired information," reasoning that to do so would "extend the Act beyond its purpose" and create "an intolerable burden" on agencies. *Id.* at 9a.

The court rejected Doe's "argument . . . that the retrieval rule should not apply when the contents of a record are disclosed by the person who prepared the record"—the "so-called scrivener exception" to the retrieval rule that was adopted by the D.C. Circuit in *Bartel* and the Ninth Circuit in *Wilborn v. HHS*, 49 F.3d 597 (9th Cir. 1995). App. 10a. The court of appeals recognized that the Ninth Circuit in *Wilborn* refused to allow an agency to claim exemption from the Act based on "independent knowledge" where that knowledge "had arisen from the creation of" the record. *Id.* at 11a. The court nonetheless attempted to distinguish *Wilborn* and *Bartel* from Doe's case on the ground that both involved situations in which "an employee's personal information was [initially] acquired from an agency's system of records" before being incorporated into a new record

and disclosed. *Id.* "[I]n any event," the court concluded, "*Olberding* forecloses use of Doe's requested exception in [the Eighth] Circuit." App. 12a.

Then, writing for herself alone, *see infra* p. 9; App. 15a, 19a, Judge Murphy stated that the opinion in *Olberding* was "consistent" with the Guidelines promulgated by the Office of Management and Budget ("OMB") to interpret the Act and consistent with "the Act's legislative history," which she read to "indicate[] that Congress was concerned predominantly with the increasing use of computers and sophisticated information systems and the potential abuse of such technology." App. 12a-14a. Given that focus, Judge Murphy explained, she was "not persuaded that Congress intended the Act to reach disclosures such as Dr. Hall's." *Id.* at 14a.

b. Senior Judge David R. Hansen "concur[red] in the court's judgment" "[b]ecause [the panel] [was] bound by *Olberding*[]." App. 15a. He wrote separately, however, to express his view that "*Olberding's* holding is broader than necessary," and to note that, "if [the panel] were writing on a clean slate, [he] would recognize a 'scrivener's exception' to the judge-created retrieval rule." *Id.*

Beginning with the text of the statute, Judge Hansen noted that the "Act itself does not define 'disclose' and does not specifically require that the information disclosed be retrieved directly from the record." App. 16a. Courts "generally apply some type of retrieval requirement," he explained, because they conclude "the Privacy Act does not prohibit the disclosure of information that also happens to be contained in a system of records when the informa-

tion disclosed was actually learned from an independent source." *Id.* Prohibiting those disclosures, the courts have concluded, would place an "intolerable burden" on agencies. *Id.*

"Nonetheless," Judge Hansen continued, "there are limited circumstances that justify an exception to the general retrieval rule," such as when "adherence to the . . . rule would allow an official to circumvent the Act with respect to a record he himself initiated by simply not reviewing the record before reporting its contents." App. 17a (internal alternations and quotation marks omitted). Judge Hansen stated that he would hold actionable "disclosures made by the author of a record of information the author learned and recorded in the course of creating the record." *Id.* That "narrowly-defined exception[,] recognized by the D.C. Circuit and the Ninth Circuit[,] . . . [would] further[] rather than thwart[] the purpose of the Privacy Act without imposing an intolerable burden on federal agencies." *Id.* at 18a. To hold otherwise, he explained, is to create "an absurd result" that "turns the Privacy Act on its head." *Id.*

c. The third member of the panel, Judge Gruender, also concurred "in the judgment" and concurred "in the opinion except as to parts II.C and II.D," App. 19a—the sections of the opinion in which Judge Murphy (1) reasoned that "Section 552a(b) does not prohibit disclosure of information independently acquired" and that the court's application of the retrieval rule was consistent with OMB Guidelines and the history of the Act, and (2) rejected policy-based arguments against the application of the retrieval rule. *Id.* at 12a-14a.

4. The court of appeals denied the petition for rehearing and rehearing *en banc*. App. 33a-34a. Judges Bye, Melloy, Smith, and Gruender would have granted the petition for rehearing *en banc*. *Id.* at 33a. Judge Hansen, who had taken senior status in 2003, was not permitted to vote on whether to grant rehearing. *See* Eighth Circuit Internal Operating Procedure IV(D) ("[t]he judge who has taken senior status does not participate in the vote to determine whether to grant a rehearing petition").

REASONS FOR GRANTING THE PETITION

The decision below permits a government employee who obtains personal information for inclusion in an official record to disclose that information so long as he does not retrieve the record he created before disclosure. That holding conflicts with decisions from the D.C. Circuit and the Ninth Circuit, both of which have held that record-creators may not escape the Act's broad prohibition against unauthorized disclosure. Review is warranted to resolve the conflict in the courts of appeals.

Review is also warranted because the decision of the court of appeals runs contrary to the plain text, purpose, and legislative history of the Privacy Act, none of which supports the strict application of the judicially-created retrieval rule embraced below. Moreover, if the broad prohibition against disclosure that Congress enacted in Section 552a(b) is to be tempered to alleviate an alleged burden on federal agencies, it should not be done in such a way as to make the most sensitive information provided to the Government the least protected by the Act.

The question presented is a recurring one of ever-increasing importance. The proper interpretation of the Privacy Act's prohibition on disclosure has long troubled district courts and courts of appeals, and it continues to vex the federal judiciary as the Government seeks to collect additional information about its citizens. The decision below puts at risk for disclosure any information a citizen provides to a government official for a government record, so long as the official refrains from consulting the record before sharing the information with others. That risk of disclosure—and the concomitant reluctance to disclose that it will surely inspire among citizens—benefits neither individuals nor the Government, and it should not be allowed to persist.

I. The Courts Of Appeals Are Divided On The Question Presented.

As the district court recognized, App. 27a, the courts of appeals are divided on the question whether the Privacy Act allows an agency official who acquires an individual's personal information in the process of making a record to disclose that information, so long as he does not physically retrieve the record before disclosure. The D.C. Circuit and Ninth Circuit have held that the Act does not permit an official to disclose information under those circumstances. The court of appeals in this case held the contrary, App. 8a-12a, creating a direct conflict on this "key provision" of the Act, *see* Committee on Government Operations United States Senate & Committee on Government Operations, House of Representatives, Subcommittee on Government Information and Individual Rights, *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-*

579): Source Book on Privacy 884 (1976) ("Source Book") (statement of Representative Moorhead (Nov. 20, 1974)).

1. Both the D.C. Circuit and the Ninth Circuit have adopted a "scrivener's exception" to the retrieval rule to govern whether an unauthorized disclosure is permitted by Section 552a(b). The D.C. Circuit first addressed the issue in *Bartel v. FAA*, 725 F.2d 1403 (D.C. Cir. 1984). The court began by recognizing that other courts had held that "the [Privacy] Act prohibits nonconsensual disclosure of any information that has been retrieved from a protected record." *Id.* at 1408. But the court refused to adopt the Government's position "that all information not 'retrieved' from a record . . . fall[s] outside of the Privacy Act's protection," *id.* at 1409, holding instead that the Act "restrict[s] an agency official's discretion to disclose information in a record that he may not have read but that he had a primary role in creating and using, where it was because of that record-related role that he acquired the information in the first place." *Id.* at 1411. The court in *Bartel* refused to allow an agency official to "circumvent [the Act] with respect to a record he himself initiated by simply not reviewing [the record] before reporting its contents or conclusions." *Pilon v. Dep't of Justice*, 73 F.3d 1111, 1117 (D.C. Cir. 1996) (alterations in original) (quoting *Bartel*, 725 F.2d at 1409).

In *Wilborn v. HHS*, 49 F.3d 597 (9th Cir. 1995), the Ninth Circuit "agree[d] with the District of Columbia Circuit" and adopted the scrivener's exception to the retrieval rule. *Id.* at 601. In *Wilborn*, a plaintiff brought suit under the Privacy Act after an Administrative Law Judge ("ALJ") disclosed, without

authorization, both the existence and contents of a Performance Improvement Plan ("PIP") that the ALJ created for the plaintiff. The court recognized the general rule, adopted by other courts of appeals, that "if a party discloses information obtained independently of any records, such a disclosure does not violate the Act, even if identical information is contained in the records." *Id.* at 600. The court concluded, however, that any "independent" knowledge that is "gained by the creation of records[] cannot be used to sidestep" the Act. *Id.* at 600-01. Thus, the court held, "even though [the ALJ] may not have physically retrieved the disclosed information" from a system of records before disclosure, the unauthorized disclosure violated the Act. *Id.* at 601.

2. The court of appeals in this case held the opposite, creating a direct conflict with the D.C. Circuit and the Ninth Circuit. The court insisted that "the only disclosure actionable under section 552a(b)" is one "resulting from a retrieval of the information initially and directly from the record contained in the system of records." App. 8a. It rejected Doe's request that it apply the scrivener's exception of *Bartel* and *Wilborn* and stated that the issue was "foreclose[d]" by *Olberding*. *Id.* at 12a.

3. Despite the plain conflict between the court of appeals' strict application of *Olberding* and the scrivener's exception adopted by the Ninth and D.C. Circuits, and the court's holding that application of those decisions was "foreclose[d]" by *Olberding*, the court of appeals also attempted to "distinguish[]" *Bartel* and *Wilborn* on the ground that they involved situations in which "an employee's personal information was acquired from an agency's system of re-

cords"—not from the plaintiff himself—and then "eventually released by officials involved with the data retrieval." App. 11a-12a. In other words, the court read *Bartel* and *Wilborn* as holding liable officials who had, at one point, retrieved information from a system of records before creating a new record and disclosing it. That distinction is both factually incorrect and legally untenable.

a. To begin, the court of appeals erred as a matter of fact in suggesting that *Wilborn* and *Bartel* turned upon an official's acquisition of "an employee's personal information . . . from an agency's system of records" before disclosure. App. 11a. The court in *Bartel* explained that the defendant official had "requested an investigation concerning" the plaintiff and that "[d]ocuments collected pursuant to that investigation were placed in a Report," not that the defendant had obtained documents from the agency's system of records. 725 F.2d at 1405. And there is no reason to assume that he had. Agencies and agency officials maintain significant amounts of information that are not kept in systems of records as defined by the Act. *See, e.g.*, Privacy Act Guidelines—July 1, 1975, 40 Fed. Reg. 28949, 28952 (July 9, 1975) ("OMB Guidelines") (distinguishing official "agency records" contained in a system of records "from records which are maintained personally by employees of an agency but which are not agency records" and not governed by the Act).

Furthermore, the Ninth Circuit in *Wilborn* explicitly held that the ALJ had violated the Privacy Act by "disclosing *the existence* of the PIP" that he had created—not simply by disclosing the information in the PIP that had been retrieved initially from agency

records. 49 F.3d at 601 (emphasis added). The facts of *Wilborn* thus cannot be limited to once-retrieved information as the court of appeals suggested.

b. Even were the court of appeals' description of *Bartel* and *Wilborn* correct as a matter of fact, the court plainly missed the import of both decisions as a matter of law. The D.C. Circuit was unambiguous in its declaration that any interpretation of the Privacy Act that does not "[r]estrict an agency official's discretion to disclose information in a record that he may not have read but that he had a primary role in creating and using . . . . deprive[s] the Act of all meaningful protection of privacy." *Bartel*, 725 F.2d at 1411. And the Ninth Circuit in *Wilborn* likewise rejected the conclusion—embraced by the court of appeals in this case (App. 9a, 11a)—that information acquired for record-making purposes can truly be deemed "independent." 49 F.3d at 601.

In conjunction with OMB, the Department of Justice ("DOJ") itself has rejected the reading of *Bartel* and *Wilborn* espoused by the court of appeals below. In its *Privacy Act Overview*, which is prepared by the DOJ's Office of Information and Privacy in coordination with OMB and then provided to the chief Freedom of Information Act ("FOIA") officers and contacts at each federal agency and various congressional offices, *see* FOIA Post: New FOIA Guide & Privacy Act Overview To Be Published In November (May 31, 2006), *at* http://www.usdoj.gov/oip/foiapost/2006foiapost4.htm, the DOJ explains that "the Court of Appeals for the District of Columbia Circuit, in *Bartel v. FAA* . . . held that the 'actual retrieval' standard is inapplicable where a disclosure is undertaken by agency personnel who had a role in creat-

ing the record that contains the released information." U.S. Department of Justice, Office of Information and Privacy, *Freedom of Information Act Guide & Privacy Act Overview* 917 (2004) (hereinafter "DOJ Overview"). It similarly describes the Ninth Circuit in *Wilborn* as having "held that independent knowledge, gained by the creation of records, cannot be used to sidestep the Privacy Act." *Id.* at 918 (internal quotation marks omitted).

Those holdings, directly applicable to petitioner's case, make plain the conflict between the Eighth Circuit, on one hand, and the D.C. and Ninth Circuits, on the other. And they have been applied as such by a number of district courts. In *Stokes v. Commissioner, Social Security Administration*, 292 F. Supp. 2d 178 (D. Me. 2003), for example, an agency representative learned in the course of completing official paperwork that the plaintiff was HIV-positive. *Id.* at 180. She then disclosed that information to a third party in plaintiff's hospital room. *Id.* Citing *Bartel* and *Wilborn*, the district court explained that "agency employees who, like [the representative], create or initiate records are not shielded from the Privacy Act merely because they do not have to consult or retrieve those records before disclosing the information that they contain." *Id.* at 181; *see also Kassel v. U.S. Veterans' Admin.*, 709 F. Supp. 1194, 1201-1202 (D.N.H. 1989) (holding that the Government could not "rely on the retrieval rule to avoid liability for release of . . . information" where "[i]t appear[ed] that [the discloser of records] played a key role in the [litigation] in question" and therefore may have created the record that was disclosed); *cf. Fisher v. National Insts. of Health*, 934 F.

Supp. 464, 474 (D.D.C. 1996) (recognizing that *Bartel* had adopted a scrivener's exception but declining to apply it where plaintiff failed to demonstrate that agency officials learned of the disclosed information from the agency file "or through direct involvement in the investigation" in question).

Thus, as the district court in this case correctly recognized, "other circuits have interpreted the Act in a manner that would give Doe a remedy under the facts presented here." App. 27a; *accord id.* at 18a (Hansen, J., concurring) (explaining that Doe's case fits within "the necessary and narrowly-defined exception recognized by the D.C. Circuit and the Ninth Circuits"). If Doe had brought his case in the Ninth Circuit or D.C. Circuit, the Government's motion for summary judgment would have been denied.

II. The Court Of Appeals Erred In Holding That The Privacy Act Permits The Creator Of A Record To Disclose Its Content So Long As He Does Not Retrieve The Record Before Disclosure.

The court of appeals in this case held that petitioner's claim was "foreclose[d]" by the rule that "the only disclosure actionable under section 552a(b) is one resulting from a retrieval of the information initially and directly from the record contained in the system of records." *Olberding v. U.S. Dep't of Defense*, 709 F.2d 621, 622 (8th Cir. 1983) (per curiam). Judge Murphy alone justified the application of that rule by suggesting that it was consistent with the OMB Guidelines interpreting the Act and that "the Act's legislative history indicates that Congress was concerned predominantly with the increasing use of

computers and sophisticated information systems and the potential abuse of technology." App. 13a (internal quotation marks omitted). Accordingly, Judge Murphy explained, she was "not persuaded that Congress intended the Act to reach disclosures such as Dr. Hall's." *Id.* at 14a. The court of appeals in *Olberding* and Judge Murphy in the decision below were mistaken in their interpretation of the text, legislative history, OMB Guidelines, and purpose of the Privacy Act. Each weighs in favor of applying the scrivener's exception adopted by the Ninth and D.C. Circuits.

1. As Judge Hansen explained in his concurrence, the text of the Privacy Act does not require adoption of the "judge-created" retrieval rule applied by the court below. App. 15a.[3] On the contrary, the statute provides only that "[n]o agency shall disclose any record which *is contained in* a system of records." 5 U.S.C. § 552a(b) (emphasis added). That requirement limits disclosure based on the agency's retention of the information at issue, not the discloser's method of obtaining it. Had Congress wanted to make retrieval the touchstone for disclosure under the Privacy Act, it could have done so. *Cf. Doe v. Chao*, 540 U.S. 614, 621 n.2 (2004) ("Indeed, if adverse effect of intentional or willful violation were alone enough to make a person entitled to recovery, then Congress could have conditioned the entire subsection (g)(4)(A) as applying only to 'a per-

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[3] Although Judge Gruender did not join Judge Hansen's concurrence, he also declined to join the portion of the opinion in which Judge Murphy concluded that the retrieval rule was consistent with the text and history of the Act and the OMB Guidelines interpreting it. *See supra* p. 9.

son entitled to recovery.' That, of course, is not what Congress wrote.").

Nor can the court of appeals' refusal to adopt a scrivener's exception be squared with Section 552a(e), which mandates that, "when . . . information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs," "[e]ach agency shall . . . collect [such] information to the greatest extent practicable directly from the subject individual." 5 U.S.C. § 552a(e)(2). Under the court of appeals' reading of the statute, none of the information collected pursuant to this command would be protected from disclosure by the agency official in charge of collection. There is no reason to believe that Congress enacted a key ban on unauthorized disclosure in Section 552a(b) only to eliminate it a few subsections later by requiring agency officials to seek information from a source that would allow them to freely disclose it.

2. Judge Murphy further erred in relying on the Act's legislative history to conclude that Congress was so troubled by the threats posed by computerized record systems that it enacted a statute that failed to reach other, more basic, invasions of privacy. *See* App. 13a-14a. To the contrary, one of the statute's primary drafters described the Act as "promot[ing] accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems and data banks of the Federal government *and with respect to all of its other manual or mechanized files.*" Source Book 867 (statement of Senator Ervin to Members of the Government Op-

erations Committee) (emphasis added); *see also* OMB Guidelines, 40 Fed. Reg. at 28,957 (explaining that agencies would be required to develop procedures for "computer-based systems of records" as well as "small, regionally dispersed, manually maintained systems"), 28,964 (noting that agencies would be required to develop "adequate train[ing]" for personnel working with "paperwork" as well as "computer systems development and operations").

Whatever Congress's concerns with respect to computerized records, both the text of the Act and its legislative history demonstrate that Congress carefully considered and addressed the privacy issues associated with medical records, which may or may not be computerized. *See* 5 U.S.C. § 552a(a)(4) (specifically defining "record" to include a "medical history"), (a)(5) (defining "system of records" in terms not limited to computerized records); Source Book 204 (S. Rep. No. 93-1183 (Sept. 26, 1974)) (Act "would cover such activities as . . . reporting personal disclosures contained in personnel and medical records"); OMB Guidelines, 40 Fed. Reg. at 28957 (discussing legislative history suggesting that Congress was particularly concerned with the process for disclosing medical records to subjects of those records). Although Congress was undoubtedly alarmed by the threat to privacy posed by computerized systems of information, that concern did not blind it to the numerous other invasions of privacy in which government officials might engage. And the statute Congress enacted—the "the first congressional action on a comprehensive Federal privacy law since the adoption of the fourth amendment to the Constitution," Source Book 986 (statement of Representative Moor-

head (Dec. 18, 1974))—is, according to both its text and its legislative history, far more comprehensive than the court of appeals' technology-focused retrieval rule allows.

3. In addition to lacking any foundation in the text or history of the Act, the decision below lacks any basis in the interpretive guidelines issued by OMB. Judge Murphy reasoned that application of the retrieval rule here was "consistent with the guidelines promulgated by [OMB]" because "[t]he OMB guidelines clarify that the term record as used in the Act does not include 'a record contained in someone's memory.'" App. 12a-13a. But that relies on OMB's definition of "record," not "disclosure," *see* OMB Guidelines, 40 Fed. Reg. at 28,951, and it is undisputed in this case that "Dr. Hall disclosed information contained *in the records* [he created] without Doe's prior written consent [to disclose]." App. 26a (emphasis added).

In addition, the OMB Guidelines make plain that, whenever possible, the Act should be interpreted to limit disclosure, not to allow it. *See* 40 Fed. Reg. at 28,953 ("Nothing in the privacy act should be interpreted to authorize . . . disclosures of records, not otherwise permitted or required, to anyone other than the individual to whom a record pertains pursuant to a request by the individual for access to it."). And in addressing other provisions of the Act, the Guidelines de-emphasize control of the physical records themselves. *See id.* at 28,951 ("To have effective control of a system of records does not necessarily mean to have physical control of the system."); *id.* at 28,957 ("Neither the requirements [of the Act] to grant access nor to provide copies necessarily re-

quire that the physical record itself be made available.").

4. Finally, the court of appeals in *Olberding* suggested that adoption of the retrieval rule was necessary because a contrary interpretation of the Act would make an agency liable whenever officials disclosed information that "they kn[e]w or ha[d] reasonable grounds to believe . . . [may] be found in a record contained in a system of records," thus placing an "intolerable burden" on agency personnel, who would be required to verify that any information they sought to convey was not contained in the agency's system of records. App. 9a; *see Olberding,* 709 F.2d at 622. The court's reasoning in this regard is flawed on multiple grounds.

First, this Court has on numerous occasions made clear that courts are not free to rewrite statutes because they disagree with the policy choices made by Congress. *See, e.g., Dodd v. United States,* 545 U.S. 353, 359 (2005) ("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted."); *see also U.S. Dep't of Defense v. Fed. Labor Relations Authority*, 510 U.S. 487, 498 (1994) (declining an "invitation to rewrite" the Privacy Act and FOIA). The court of appeals was not entitled to limit the applicability of the Section 552a(b) because it believed the statute to be too burdensome. That choice has already been made, in favor of privacy, by Congress.

Second, there is no reason to believe that the straightforward interpretation of Section 552a(b) would lead to the type of absurd results suggested by

the court of appeals. As the district court noted at oral argument on the Government's motion for summary judgment, *see* Tr. 44-45 (Sept. 1, 2006), the Privacy Act limits the availability of civil remedies to those cases "in which the court determines that the agency acted in a manner which was intentional or willful." 5 U.S.C. § 552a(g)(4). Thus, if an agency official is unaware that the information he or she discloses is contained in a record in a system of records within the agency, presumably there is no violation of the Act and no "intolerable burden" on officials to check records before speaking.

Third, even if the straightforward interpretation of Section 552a(b) would place a burden on agency personnel that borders on the absurd and thus requires some sort of modifying interpretation, the court of appeals' "solution" goes far beyond anything necessary to make the statute rational. As the D.C. Circuit noted in *Bartel*, "it would hardly seem an 'intolerable burden' to restrict an agency official's discretion to disclose information in a record that he may not have read but that he had a primary role in creating and using." 725 F.2d at 1411. The Ninth Circuit in *Wilborn* agreed, holding that adoption of a scrivener's exception "hardly places an intolerable burden on an agency." 49 F.3d at 602.

Certainly it is not too much to ask that agency officials seek authorization before disclosing information that they learned in the process of creating a government record. As recognized now by the D.C. Circuit, the district court, and the concurrence, respectively, any other interpretation would itself "deprive the Act of all meaningful protection of privacy," *Bartel*, 725 F.2d at 1411, create a Privacy Act not

"worthy of the name," App. 25a, and "turn the Privacy Act on its head," *Id.* at 18a. Indeed, under the decision below, anything a scrivener remembers is fair game for disclosure. This makes the most memorable information—likely the most sensitive, private, or damaging—the least likely to be covered by the Act. If there is some absurdity to be corrected, therefore, the rule applied by the court of appeals is anything but the solution.

III. The Proper Interpretation Of The Privacy Act Is A Recurring Issue Of Ever-Increasing Importance.

The question whether an agency official may disclose personal information in a record he or she created if he or she does so by recollection rather than retrieval is a recurring issue of national significance. District courts and the courts of appeals have long debated the proper interpretation of the prohibition against disclosure in Section 552a(b)—the section of the Act that the House Report deemed "one of the most important, if not the most important, provisions of the bill." Source Book 305 (H.R. Rep. 93-1416 (Oct. 2, 1974)). The decision of the court of appeals has profound and troubling consequences not only for personal privacy but also for federal programs that depend upon individuals' willingness to share personal information with the Government and for the doctor-patient relationship.

1. Although this Court has interpreted provisions of the Privacy Act that govern damages and relate to FOIA claims, *see, e.g., U.S. Dep't of Defense*, 510 U.S. 487, important provisions of the Act, like Section 552a(b), have gone unaddressed and created confu-

sion in the lower courts. *See* DOJ Overview 889 (noting that the statute's "imprecise language, limited legislative history, and somewhat outdated regulatory guidelines" have in many respects "rendered it a difficult statute to decipher and apply"). As noted above, the court of appeals' decision is in conflict with decisions from the D.C. Circuit and Ninth Circuit, as well as the district court decisions applying *Bartel* and *Wilborn*. The scope of the retrieval rule is a key sticking point under the Privacy Act.

Moreover, those cases are just the tip of the iceberg. As the DOJ has recognized in its overview, "[a]dding to the interpretation difficulties" associated with the Privacy Act "is the fact that many Privacy Act cases are unpublished district court decisions." Overview 889. Such cases are, not infrequently, brought by litigants acting pro se, which may exacerbate the difficulties courts have experienced in interpreting the Act. *See, e.g.*, *Krueger v. Mansfield*, No. 06 C 3322, 2008 WL 2271493, at *1 (N.D. Ill. May 30, 2008) (noting that plaintiff was proceeding pro se, and, although "[plaintiff] requested appointment of counsel at the beginning of the case[,] . . . the court denied it").

The court of appeals' decision creates more than a notable legal dispute. It misinterprets "the primary act that regulates the federal government's use of personal information," United States General Accounting Office, Report to the Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate, *Privacy Act: OMB Leadership Needed to Improve Agency Compliance* 5 (June 2003), placing at risk the vast amounts of personal information to

which agency personnel are privy. As this Court noted thirty years ago:

> The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.

Whalen v. Roe, 429 U.S. 589, 605-06 (1977).

As the General Accountability Office has recognized, moreover, the Government's need for and collection of information has only increased in recent years. It has become "easier than ever for agencies to acquire data on individuals, analyze it for a variety of purposes, and share it with other governmental and nongovernmental entities," and the threat of terrorism "put[s] additional pressure on agencies to extract as much value as possible from the information available to them, adding to the potential for compromising privacy." United States General Accountability Office, Testimony Before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives, *Privacy: Key Challenges Facing Federal Agencies* 1 (May 17, 2006).

Putting such information at risk for disclosure will inhibit the flow of information necessary for a working government. The ability of the Government to attract qualified employees, for example, will be

hampered once applicants realize that information obtained from any interview, background check, or benefits form is free to be shared so long as the record-creating investigator, supervisor, or human resources employee remembers it.

The problems do not end with employment. The Internal Revenue Service, which offers senior citizens, low-income persons, and service personnel assistance with tax preparation,[4] might experience a disruption in tax collection when those individuals refuse to seek assistance because they are unwilling to share personal information with the Government. Individuals who have been discriminated against in their public or private employment may likewise be unwilling to explore remedies with the Equal Employment Opportunity Commission ("EEOC") if they know that information can be shared. *See generally Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1165 (2008) (Thomas, J., dissenting) (noting that EEOC's "Intake Questionnaire" assures that complainant's identity will be kept confidential and "contains a Privacy Act statement on the back, prominently referenced on the front of the form"). Applications for Social Security Disability Insurance will be similarly hampered if the disability is one, like HIV infection, that is particularly sensitive. *See, e.g.*, *Stokes*, 292 F. Supp. 2d 178.

2. The court of appeals' decision also does great damage to the doctor-patient relationship more generally. As the district court observed, the rule applied by the court of appeals would have permitted

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[4] *See generally* http://www.irs.gov/individuals/article/0,,id=107626,00.html (last accessed September 30, 2008).

Dr. Hall to stand on a table in the VAMC cafeteria, hoist a megaphone, and broadcast Doe's confidential health history to anyone willing to listen. App. 26a. As noted above, that interpretation is not consistent with the text or history of the Act. *See supra* pp. 18-23. It is also inconsistent with the deeply rooted public policy protecting the confidentiality of doctor-patient communications.

As this Court has recognized, if patients cannot rely on their doctors to keep private information private, the health care they receive will suffer: "[The physician-patient privilege is] rooted in the imperative need for confidence and trust. . . . . [T]he physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." *Trammel v. United States,* 445 U.S. 40, 51 (1980). Since virtually all information in a patient's medical record can be attributed to a history provided to the doctor, government doctors will have little to work with if patients do not believe that there are serious consequences for violation of their trust.

Indeed, although the facts of Doe's case are "egregious," App. 27a n.3, they are, unfortunately, not unique. The court of appeals' decision in this case has already persuaded one court to hold that no information given by a patient to a governmental healthcare provider is protected under the Privacy Act, regardless of who discloses the information. *Krueger*, 2008 WL 2271493, at *8. In *Krueger*, the court cited *Doe* for the proposition that information in the plaintiff's federal medical chart, which was provided to an ambulance service taking her to another hospital, was not protected by the Privacy Act

if the source of the information could be traced to the plaintiff-patient:

> If [Plaintiff] did provide the information that was contained in her emergency room chart [at a government hospital], then there would be no violation of the Privacy Act upon its disclosure. Because [Plaintiff] fails to point to evidence that the information was not obtained from her, or some other source that was not a "record which is contained within a system of records," the government's motion for summary judgment as to this disclosure is granted.

Id. at *8. The decision below thus immunizes an agency for disclosures made by any of its employees, not just the doctor to whom the information is initially provided. The Act does not permit such disclosure, and the Government can ill afford the consequences of a contrary interpretation.

IV. This Case Presents An Ideal Vehicle For Review.

As the district court recognized, this case presents a highly suitable vehicle for resolving the conflict over the adoption of a scrivener's exception to the retrieval rule. *See* App. 27a n.3. Petitioner made and properly preserved his argument in favor of the exception. *See supra* pp. 6-7. The facts of this case are, as the district court found, "egregious and largely undisputed." App. 27a n.3. There is no question that Dr. Hall disclosed information contained in federal records that he created and that Doe did not authorize him to do so. *Id.* at 25a-26a. The only is-

sue before this Court, therefore, would be the proper resolution of the conflict between the court of appeals below, on one hand, and the Ninth Circuit and the D.C. Circuit on the other. This Court should grant the petition to resolve that conflict and restore the protection of privacy the Act requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 8, 2008