No. 09-51[illegible]

In the Supreme Court of the United States

JIM HENRY PERKINS, ET AL., PETITIONERS

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff must demonstrate pecuniary loss in order to establish "actual damages" under the Privacy Act, 5 U.S.C. 552a.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 572 F.3d 868. The memorandum opinion of the district court (Pet. App. 19a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2009. A petition for rehearing was denied on August 5, 2009 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on October 26, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act (Act), 5 U.S.C. 552a, establishes requirements for Executive Branch agencies in their collection, maintenance, use, and dissemination of "records" containing information about an "individual" when those records are maintained as part of a "system of records." 5 U.S.C. 552a(a)(1)-(5) and (b). The Act also authorizes private civil actions to enforce its terms. 5 U.S.C. 552(g).

Certain provisions of the Act are enforceable only by an order of declaratory or injunctive relief. See 5 U.S.C. 552a(g)(4) (limiting damages to suits brought under "subsections (g)(1)(C) or (D)"). Other provisions of the Act authorize an award of money damages against the United States. To obtain monetary relief, a plaintiff first must establish that a covered agency violated one of the relevant provisions of the Act or a rule promulgated under the Act. See 5 U.S.C. 552a(g)(1)(C) and (D). Second, depending on the provision involved, the plaintiff either must demonstrate that the violation resulted in "a determination" that was "adverse" to him or had some other form of "adverse effect" on him. 5 U.S.C. 552a(g)(1)(C) and (D). Third, the plaintiff must show that the violation was "intentional or willful." 5 U.S.C. 552a(g)(4). Finally, the plaintiff must demonstrate that he sustained "actual damages * * * as a result of" the violation. 5 U.S.C. 552a(g)(4)(A); see *Doe* v. *Chao*, 540 U.S. 614, 624-625 (2004) (holding that a showing of "actual damages" is a necessary element of "a complete cause of action").

2. On January 22, 2007, an employee of the Department of Veterans Affairs (VA) reported that an external hard drive containing personal identifying information relating to more than 198,000 living veterans was miss-

ing from a safe in the VA's offices in Birmingham, Alabama. Pet. App. 2a, 20a. The FBI and the VA's Office of the Inspector General opened a criminal investigation. *Id.* at 21a. We have been advised that the missing hard drive has not been recovered. We further have been advised that no evidence has been uncovered that the information contained on the missing hard drive ever has been accessed or used fraudulently.

The VA took numerous steps to notify potentially affected veterans about the security breach and to advise them about how to proceed. The VA issued press releases about the security breach on February 2, 2007, and again on February 10, 2007. Pet. App. 3a. It also established a public hotline to answer veterans' questions, and began sending notification letters to veterans about the incident on February 12, 2007. *Id.* at 3a, 21a. In that initial mailing, the VA advised veterans to obtain a free credit report and to put a "fraud alert" on their credit cards. *Id.* at 3a. On April 30, 2007, the VA sent an additional letter to 198,760 then-living veterans in which it offered to provide them with free credit monitoring services for a one-year period. *Id.* at 21a.

3. Petitioners are veterans whose personal data were on the missing hard drive. Pet. App. 3a. On February 15, 2007—13 days after the VA's first public announcement about the missing hard drive—petitioners filed suit in federal district court. *Id.* at 4a. As subsequently amended, petitioners' nine-count complaint "includes two broad categories of claims: those seeking monetary damages under the Privacy Act, 5 U.S.C. § 552a(g) and those seeking declaratory and injunctive relief under the Administrative Procedure[] Act (APA), 5 U.S.C. §§ 702-706." Pet. App. 4a. The APA claims

"are based on the VA's alleged violations of" five statutes, including the Privacy Act. *Ibid.*

4. The district court granted summary judgment in favor of respondents. Pet. App. 19a-33a. With respect to petitioners' claims for money damages under the Privacy Act, the district court noted that "[t]he Eleventh Circuit has held that the term 'actual damages as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries.'" *Id.* at 26a (additional internal quotation marks omitted) (quoting *Fitzpatrick* v. *IRS*, 665 F.2d 327, 331 (11th Cir. 1982)). Because petitioners "ha[d] not alleged (or proven) that they suffered any pecuniary losses as a result of the missing external hard drive," the district court concluded that they had failed to "establish that they have suffered actual damages," and thus were ineligible for monetary relief under the Privacy Act. *Id.* at 29a-30a. The district court also concluded that respondents were entitled to summary judgment with respect to plaintiffs' claims for declaratory and injunctive relief under the APA. *Id.* at 30a-32a.

5. A unanimous panel of the court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-18a.

With respect to petitioners' claims for money damages under the Privacy Act, the court of appeals affirmed the district court's holding that petitioners had failed to "offer[] evidence sufficient to create a genuine issue of material fact as to each element of a claim." Pet. App. 5a; see *id.* at 5a-11a. The court acknowledged that other courts "have stated that mental injury alone can qualify as 'actual damages'" under the Privacy Act, *id.* at 11a, but it agreed with the district court that its

previous decision in *Fitzpatrick* had interpreted that term to require "pecuniary losses," *id.* at 6a, and it rejected petitioners' assertion that this Court's subsequent decision in *Doe* had undermined *Fitzpatrick*'s holding with respect to that point, *id.* at 9a-10a. The court of appeals thus affirmed the district court's judgment with respect to Count 9 of plaintiff's complaint "and as to Counts 1 through 5 insofar as they seek monetary damages." *Id.* at 18a.

In contrast, the court of appeals reversed the district court's grant of summary judgment with respect to the APA claims and remanded for further proceedings. Pet. App. 12a-18a. The court of appeals rejected the district court's reasoning "that the APA claims could not survive summary judgment because there was no evidence that the VA had consciously decided to violate the law and the procedures were being corrected," concluding that "[t]he language of the APA does not state or imply * * * that an agency must consciously violate the law before a meritorious claim can arise." *Id.* at 13a. The court of appeals thus remanded to permit the district court "to perform the retail level, claim-by-claim analysis of the APA claims in the first instance." *Id.* at 16a-17a.

ARGUMENT

Petitioners renew their claim (Pet. 11-23) that "actual damages" under the Privacy Act, 5 U.S.C. 552a, are not restricted to pecuniary losses. That contention does not merit further review.

1. The petition for a writ of certiorari should be denied because this case is in an interlocutory posture. The court of appeals reversed the district court's judgment at least in part with respect to eight of the nine

counts in petitioners' complaint and remanded to the district court for further proceedings on those counts. Pet. App. 18a. Following the district court's final disposition of the case, petitioners will be able to raise their current claims—together with any other claims that may arise as a result of the additional proceedings on remand—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of" the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari).[1]

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[1] Following the court of appeals' remand in this case, petitioners agreed to the dismissal of several of their remaining claims but continue to pursue relief in the district court on four counts of their second amended complaint, including several claims based on the Privacy Act. See 07-cv-310 Docket entry No. 56 (N.D. Ala. Nov. 20, 2009) (Status Report) (asserting claims under 5 U.S.C. 552a(c)(1) and (e)(10)). The latest round of briefing on the remaining counts will not be complete until March 19, 2010. See 07-cv-310 Docket entry No. 59 (N.D. Ala. Dec. 14, 2009).

Notwithstanding these ongoing developments in the district court, petitioners assert that this Court's immediate review is appropriate because the remaining claims "are separate and distinct from the Privacy Act claims underlying this petition" for a writ of certiorari. Pet. 10 n.6. That assertion does not alter the interlocutory posture of this case, and it is incorrect in any event. Although the claims currently proceeding before the district court do not involve a request for money damages, the factual background of those claims is the same as that underlying petitioners' damages claims, and the ongoing litigation in the district

2. In any event, the decision of the court of appeals is correct. The Privacy Act authorizes monetary relief against the United States, and the requirement that the plaintiff plead and prove "actual damages" is part of the "complete cause of action." *Doe* v. *Chao*, 540 U.S. 614, 624 (2004). Accordingly, the proper interpretation of that term is guided by the "common rule, with which [this Court] presume[s] congressional familiarity," that the federal government is immune from suit unless it has expressly waived its sovereign immunity. *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992) (*Department of Energy*). Any waiver of immunity, moreover, must be "unequivocally expressed" and "not enlarged beyond what the language requires." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992) (internal alterations and quotation omitted).

This Court has made clear that the principle that waivers of sovereign immunity must be narrowly construed applies not only to determining the existence of a waiver but also to determining its scope. See, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (stating that the Court has "frequently held" that a statutory waiver of the United States' sovereign immunity must be "strictly construed, in terms of its scope, in favor of the sovereign"). In *Department of Energy*, for example, the Court applied that canon in construing the scope of the United States' waiver of its immunity against "sanctions" for violating the Clean Water Act, 33 U.S.C. 1251 *et seq.* 503 U.S. at 626-627. And in *Price* v. *United States*, 174 U.S. 373 (1899), the Court applied in the same principle in determining

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court could shed light on whether respondents engaged in "intentional or willful" conduct, which is an another essential element of a claim for money damages under the Privacy Act. See 5 U.S.C. 552a(g)(4).

whether a waiver of the government's immunity from suit for actual damages for property taken by Indians also encompassed a waiver of immunity for consequential damages. *Id.* at 375-376.

The Privacy Act does not define "actual damages," and the term has no consistently accepted meaning. See *Fitzpatrick* v. *IRS*, 665 F.2d 327, 329 (11th Cir. 1982) ("Unlike general, special, and compensatory damages, * * * 'actual damages' has no consistent legal interpretation," and "courts have used 'actual damages' in a variety of circumstances, with the interpretation varying with the context of use."); accord *Johnson* v. *IRS*, 700 F.2d 971, 974 (5th Cir. 1983) ("the term 'actual damages' has no plain meaning or consistent legal interpretation"); *Hudson* v. *Reno*, 130 F.3d 1193, 1207 n.11 (6th Cir. 1997) (same), cert. denied, 525 U.S. 822 (1998).[2] As a result, the term as used in the Privacy Act must be "narrowly interpreted," *ibid.*, and it is at least reasonable to construe "actual damages" as encompassing only pecuniary losses and excluding harms that are purely non-economic in nature. See *Fitzpatrick*, 665 F.2d at

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[2] See *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (1977) (finding "that there is no generally accepted definition of 'actual damages' in American law"); see also, *e.g.*, *Black's Law Dictionary* 416 (8th ed. 2004) (noting that "actual damages" may be termed "*compensatory damages*" but may also be termed "*tangible damages*" or "*real damages*"); 25 C.J.S. *Damages* § 3, at 320-321 (2002) (footnotes omitted) (explaining that "actual damages" may be used synonymously "with 'compensatory damages' and with 'general damages,'" but then noting that "actual damages" themselves "may be either general or special," and going on to explain that, alternatively, "actual damages" may be used "to indicate such losses as are actually sustained and are susceptible of measurement, and as used in this sense the phrase 'determinate pecuniary loss' has been suggested as a more appropriate designation").

331. Moreover, an examination of the Act as a whole, including the directive to the Privacy Protection Study Commission to submit a report on whether the federal government should also be liable for "general damages," see pp. 10-11, *infra*, confirms that that interpretation is correct.

This Court's decisions in *Carey* v. *Piphus*, 435 U.S. 247 (1978), and *Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986), on which petitioners rely (Pet. 14-15), are not to the contrary. Neither of those decisions involved the meaning of the statutory term "actual damages." In addition, there was no clear statement rule at issue in either *Carey* or *Stachura*, because the statute at issue in those cases (42 U.S.C. 1983) neither waives the United States' sovereign immunity nor abrogates the immunity possessed by the States. See *Quern* v. *Jordan*, 440 U.S. 332, 340-341 (1979).

Petitioners also assert (Pet. 17-18) that the Privacy Act's legislative history supports the view that the term "actual damages" includes non-pecuniary harms. That argument is doubly flawed. First, this Court has made clear that "legislative history has no bearing on the ambiguity point." *Nordic Vill.*, 503 U.S. at 37; accord *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (stating that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text").

Second, the statute's history refutes any suggestion that the term "actual damages" was meant to include non-pecuniary harms. As several lower courts have observed, the legislative history of the Privacy Act indicates that Congress, "concerned about the drain on the treasury created by a rash of Privacy Act suits, indicated its intention to limit 'actual damages' to 'out-of-pocket' expenses." *Pope* v. *Bond*, 641 F. Supp. 489, 501

(D.D.C. 1986) (citations omitted); see *Fitzpatrick*, 665 F.2d at 330 ("Throughout the Privacy Act debate, a central concern was the scope of potential government liability for damages.").

In addition, as this Court noted in *Doe*, the Senate version of the bill that became the Privacy Act "would have authorized an award of 'actual *and general* damages sustained by any person," but the italicized language "was trimmed from the final statute." 540 U.S. at 622-623 (quoting S. 3418, 93d Cong., 2d Sess. § 303(c)(1) (1974) (as passed by the Senate)) (emphasis added). Instead, the final legislation established a Privacy Protection Study Commission and charged it with preparing a report regarding various matters, including "*whether* the Federal Government should be liable for general damages incurred by an individual as a result of a willful or intentional violation" of certain provisions of the Privacy Act. Privacy Act of 1974, Pub. L. No. 93-579, § 5(c)(2)(B)(iii), 88 Stat. 1907 (emphasis added).

This legislative history "indicates beyond serious doubt that general damages are not authorized" under the Privacy Act. *Doe*, 540 U.S. at 622. This Court also has noted the "parallel[ism]" between the Privacy Act's remedial scheme and that of "certain defamation torts" that at common law required a plaintiff to "prove[] some special harm, *i.e.*, harm of a material and generally of a pecuniary nature." *Id.* at 625 (internal quotation marks and citation omitted). Accordingly, as the Privacy Protection Study Commission concluded, the most natural conclusion is that the term "actual damages" in the Privacy Act is "intended as a synonym for special damages as that term is used in defamation cases," which were limited to "tangible pecuniary" losses and excluded "intangible" injuries such as "loss of reputation, chilling of

constitutional rights, or mental suffering (where unaccompanied by other secondary consequences)." *Fitzpatrick*, 665 F.2d at 331 (quoting *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (1977)).

Finally, petitioners' suggestion (Pet. 21) that the court of appeals' decision renders the Privacy Act's remedial scheme a failure misapprehends the limited role of damages under the Privacy Act. There is no question that Congress did not make damages available for all violations of the Privacy Act. For example, notwithstanding the fact that both types of violation can cause both pecuniary and non-pecuniary harms, no damages are available for an agency's unlawful refusal to grant an individual access to his records or to amend his record. See 5 U.S.C. 552a(g)(4) (listing provisions whose violation authorize money damages). And even when an agency violates a provision that potentially authorizes money damages, such damages are unavailable unless the violation "was intentional or willful," *ibid.*, regardless of the nature or degree of harm suffered by the plaintiff as a result. By the same token, concern about exposing the federal fisc to claims for non-pecuniary, intangible harms—which have no market values and thus are particularly difficult to quantify objectively—is neither novel nor irrational.

3. As this Court observed in *Doe*, there is a conflict in the circuits about "the precise definition of actual damages" under the Privacy Act. 540 U.S. at 627 n.12. That conflict, however, has existed for more than 25 years, and it is narrower than petitioners assert. In addition, this case would not be an appropriate vehicle for resolving the conflict in any event.

As this Court noted in *Doe*, see 540 U.S. at 627 n.12, the Eleventh Circuit's 1982 decision in *Fitzpatrick* (which formed the basis for the Eleventh Circuit's decision in this case) conflicts with the Fifth Circuit's 1983 decision in *Johnson*. Compare *Fitzpatrick*, 665 F.2d at 331 ("we hold that 'actual damages' as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries"), with *Johnson*, 700 F.2d at 972 ("This Court holds that the term 'actual damages' under the Privacy Act does indeed include damages for physical and mental injury for which there is competent evidence in the record, as well as damages for out-of-pocket expenses.").

Since *Johnson* was decided in 1983, no other court of appeals has adopted its interpretation of the words "actual damages" in the Privacy Act. To the contrary, "the weight of authority suggests that actual damages under the Privacy Act do not include recovery for mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries." *Hudson*, 130 F.3d at 1207 (internal quotation marks omitted); see *Jacobs* v. *National Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (following *Johnson*'s holding as binding circuit precedent, but declining to decide "whether a present-day analysis of damages recoverable under the Privacy Act would differ from *Johnson*" in light of current sovereign immunity jurisprudence).

Petitioners err in asserting (Pet. 12) that the Fourth and Tenth Circuits have held that "mental injuries and emotional distress[] can qualify as 'actual damages' under the Privacy Act without any pecuniary loss being shown." The Fourth Circuit decision on which petitioners rely flagged the issue and then expressly refrained

from deciding it. See *Doe* v. *Chao*, 306 F.3d 170, 181 (2002) ("Under these circumstances, we need not reach the issue of whether the term 'actual damages' as used in the [Privacy] Act encompasses damages for non-pecuniary emotional distress because, regardless of the disposition of that issue, Buck Doe's claims fail for lack of evidentiary support."), aff'd, 540 U.S. 614 (2004); see also *Albright* v. *United States*, 732 F.2d 181, 185-186 (D.C. Cir. 1984) ("find[ing] no need to reach" whether "damages under the Privacy Act are * * * limited to out-of-pocket expenses").

There likewise is no conflict between the court of appeals' decision in this case and the Tenth Circuit's pre-*Fitzpatrick* and pre-*Johnson* decision in *Parks* v. *IRS*, 618 F.2d 677 (1980). *Parks* did state that plaintiffs who alleged that they "suffered psychological harm" as a result of Privacy Act violations had stated "viable claims for damages * * * which [were] sufficient to withstand [a] motion to dismiss." *Id.* at 683, 685. In reaching that conclusion, however, the Tenth Circuit never considered the meaning of the words "actual damages," and it appears that the parties to that case did not raise the issue presented here. See *id.* at 680 (summarizing the district court's reasoning and the parties' positions on appeal). Indeed, contrary to this Court's later holding in *Doe*, see 540 U.S. at 624-625, the *Parks* court appears to have viewed a plaintiff's ability to establish "actual damages" as going to the determination of the proper remedy rather than to the plaintiff's ability to state a claim for monetary relief in the first place. See 618 F.2d at 683.[3]

[3] Petitioners also assert (Pet. 12 n.8) that there is "a clear split among district courts in circuits in which no definitive appellate decision has been issued." Any such conflicts can be resolved by the courts of appeals and provide no basis for this Court's review.

Regardless of whether the longstanding and currently narrow conflict in the circuits would warrant this Court's resolution in an appropriate case in the future,[4] the issue does not warrant review at this time. As noted previously, this case currently is in an interlocutory posture, and further developments in the district court may shed light on whether plaintiffs' claims for money damages under the Privacy Act would fail for reasons that are independent of those raised by this petition for a writ of certiorari. See pp. 5-6 & note 1, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The same issue currently is pending before the Ninth Circuit in *Cooper* v. *FAA*, No. 08-17074 (argued Jan. 13, 2010).