Supreme Court, U.S.
FILED
09-513 OCT 26 2009
OFFICE OF THE CLERK

No. ________

In The

Supreme Court of the United States

JIM HENRY PERKINS AND JESSIE FRANK QUALLS,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ERIC SHINSEKI, IN HIS OFFICIAL CAPACITY AS SECRETARY OF VETERANS AFFAIRS, AND ROBERT T. HOWARD, IN HIS OFFICIAL CAPACITIES AS ASSISTANT SECRETARY FOR INFORMATION AND TECHNOLOGY AND CHIEF INFORMATION OFFICER,
Respondents.

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

---

PETITION FOR WRIT OF CERTIORARI

CAROLINE SMITH GIDIERE
ANDREW P. CAMPBELL
LEITMAN, SIEGAL, PAYNE & CAMPBELL
2100-A SOUTHBRIDGE PARKWAY
SUITE 450
BIRMINGHAM, ALABAMA 35209
205-803-0051

P. STEPHEN GIDIERE III
Counsel of Record
MICHAEL D. FREEMAN
GREGORY C. COOK
ALEXIA BOWERS BORDEN
BALCH & BINGHAM LLP
1901 SIXTH AVENUE N.
SUITE 1500
BIRMINGHAM, ALABAMA 35203
205-251-8100

Attorneys for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Question Presented for Review

The Privacy Act grants citizens the right to recover from the Government "actual damages sustained by the individual as a result of [an agency's intentional or willful] refusal or failure [to comply with the requirements of the statute], but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. § 552a(g)(4)(A). In *Doe v. Chao*, 540 U.S. 614 (2004), this Court held that "[t]he statute guarantees $1,000 only to plaintiffs who have suffered some actual damages." *Id.* at 627. This Court further noted in *Doe* that "[t]he Courts of Appeals are divided on the precise definition of actual damages," with some Courts of Appeals restricting actual damages to pecuniary losses only and some allowing recovery for mental injury and emotional distress. *Id.* at 627 n.12. Here, the Court of Appeals affirmed the dismissal of Petitioners' Privacy Act claims based solely on the fact that Petitioners suffered mental injury and related physical symptoms, but not pecuniary losses. App., *infra*, 11a.

Thus, the question presented is the question left unanswered by *Doe*: Whether "actual damages" under the Privacy Act, 5 U.S.C. § 552a, are restricted to pecuniary losses only.

List of Parties

Petitioners are Jim Henry Perkins and Jessie Frank Qualls, two Vietnam combat veterans ("the Veterans"). Plaintiff Greg Fanin was dismissed without prejudice at the District Court and is not a Petitioner here.

Respondents are the United States Department of Veterans Affairs, its Secretary Eric Shinseki, and its Assistant Secretary for Information and Technology and Chief Information Officer Robert T. Howard (the later two in their official capacities only) (collectively "the VA").

Table of Contents

Question Presented for Review i

List of Parties ii

Table of Contents iii

Table of Cited Authorities vi

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

A. The Privacy Act 2

B. The VA's Privacy Act Violations in Birmingham, Alabama 4

C. The Veterans' Injuries 6

D. District Court Proceedings 8

E. The Court of Appeals' Decision 9

Reasons for Granting the Petition 11

I. There is a Conflict Among the Circuits on the Meaning of "Actual Damages" in the Privacy Act 11

II. The Court of Appeals' Decision is Wrong . 14

A. The Court of Appeals' Decision is Contrary to this Court's Precedent and the Statutory Text 14

B. The Court of Appeals' Decision Conflicts with this Court's Interpretation of the Privacy Act's Legislative History 17

III. The United States Agrees that the Meaning of "Actual Damages" in the Privacy Act is an Issue of National Significance 18

A. The Issue is Recurring and has Far-Reaching Impacts 19

B. The Circuit Conflict Encourages Forum Shopping and Produces Inequitable Results 20

C. Legal Recognition of Veterans' PTSD and its Impacts Should be a National Priority 22

Conclusion 24

Appendix

Appendix A: Court of Appeals Opinion (June 17, 2009) 1a

Appendix B: District Court Opinion and Order (January 8, 2008) 19a

Appendix C: Court of Appeals Order Denying Rehearing (Aug. 5, 2009) 36a

Appendix D: The Privacy Act, 5 U.S.C. § 552a(e)(10), (g)(1)(D), (g)(4) (Excerpts) 38a

Appendix E: Petition of the United States for Rehearing En Banc, *Jacobs v. National Drug Intelligence Center*, No. 07-40776 (5th Cir. Dec. 24, 2008) (Excerpts) 40a

Table of Cited Authorities

Cases

Am. Fed'n of Gov't Employees v. Hawley,
543 F. Supp. 2d 44 (D.D.C. 2008) 12

Carey v. Piphus,
435 U.S. 247 (1978) 14, 15

DiMura v. FBI,
823 F. Supp. 45 (D. Mass. 1993) 12

Doe v. Chao,
306 F.3d 170 (4th Cir. 2002) 2, 12, 14

Doe v. Chao,
540 U.S. 614 (2004) . . . . *passim*

Fitzpatrick v. IRS,
665 F.2d 327 (11th Cir. 1982) . . . 2, 9, 10, 12, 17

Hudson v. Reno,
130 F.3d 1193 (6th Cir. 1997) 12

Jacobs v. Nat'l Drug Intelligence Center,
548 F.3d 375 (5th Cir. 2008), *reh'g denied en banc*, No. 07-40776 (Jan. 6, 2009) 13

Johnson, v. Dep't of Treasury,
700 F.2d 971 (5th Cir. 1983) 12, 15, 18

Memphis Cmty. Sch. Dist. v. Stachura,
477 U.S. 299 (1986) 15

Mitchell v. Dep't of Veterans Affairs,
310 Fed. App'x 351 (11th Cir. 2009) 22

Montemayor v. Fed. Bureau of Prisons,
No. 02-1283, 2005 WL 3274508 (D.D.C. Aug. 25, 2005) 12

Nken v. Holder,
-- U.S. --, 129 S. Ct. 1749 (2009) 16

Papse v. Bureau of Indian Affairs,
No. 99-0052-E-BLW, 2007 WL 1189369 (D. Idaho Apr. 20, 2007) 12

Parks v. IRS,
618 F.2d 677 (10th Cir. 1980) 12

Pope v. Bond,
641 F. Supp. 489 (D.D.C. 1986) 12

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 17

Swenson v. U.S. Postal Service,
No. S-87-1282, 1994 U.S. Dist. LEXIS 16524 (E.D. Cal. Mar. 10, 1994) 23

Time, Inc. v. Hill,
385 U.S. 374 (1967) 15

United States v. Kubrick,
444 U.S. 111 (1979) 16

Statutes

5 U.S.C. § 552(f) 19

5 U.S.C. § 552a 1
5 U.S.C. § 552a(1) 19
5 U.S.C. § 552a(e)(10) 4, 16
5 U.S.C. § 552a(g)(1)(A)-(D) 3
5 U.S.C. § 552a(g)(1)(D) 3, 4, 16
5 U.S.C. § 552a(g)(4) 4
5 U.S.C. § 552a(g)(4)(A) 1
26 U.S.C. § 7432(b)(1) 15
28 U.S.C. § 1254(1) 1
Privacy Act of 1974, Pub. L. No. 93–579, § 2(a)(5), 88 Stat. 1896 (1974) 3

Rules

11th Cir. R. 30-1 5

Other Authorities

Todd C. Buckley et al., *Preventive Health Behaviors, Health-Risks Behaviors, Physical Morbidity, and Health-Related Role Functioning Impairment in Veterans with Post-Traumatic Stress Disorder*, 169 Military Medicine 7:536 (2004) 8

Government Accountability Office, Information Security: Protecting Personally Identifiable Information (2008), http://www.gao.gov/new .items/ d08343.pdf 20

The Office of the Federal Register, The Privacy Act Compilation, http://www.federalregister.gov/ Privacy/AGENCIES.aspx (last visited Oct. 16, 2009) 19

Restatement (Second) of Torts § 652H cmt. b (1976) 15

U.S. Dep't of Veterans Affairs, Administrative Investigation, Loss of VA Information, VA Medical Center, Birmingham, AL, Report No. 07-01083-157 (June 29, 2007) ("VAOIG Report"), available at http://www.va.gov/oig/51/FY2007rpts/VAOIG-07-01083-157.pdf . . . 4, 5, 6

U.S. Dep't of Veterans Affairs, History of the National Center for PTSD, http://ncptsd.kattare.com/ncmain/about/nc_overview/history.html (last visited Oct. 16, 2009) 23

U.S. Dep't of Veterans Affairs, National Center for PTSD, Fact Sheet, What is PTSD?, http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp (last visited Oct. 16, 2009) 2

The White House, President Obama Announces the Creation of a Joint Virtual Lifetime Electronic Record (Apr. 9, 2009), http://www.whitehouse.gov/the_press_office/President-Obama-Announces-the-Creation-of-a-Joint-Virtual-Lifetime-Electronic-Reco/ (last visited Oct. 16, 2009) 19

Jim Henry Perkins and Jessie Frank Qualls respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Opinions Below

The opinion of the Court of Appeals (App., *infra*, 1a-18a) is reported at 572 F.3d 868 (11th Cir. 2009). The decision of the District Court granting the VA's motion for summary judgment (App., *infra*, 19a-35a) is unreported.

Statement of Jurisdiction

The final judgment of the Court of Appeals was entered on June 17, 2009. App., *infra*, 1a. The Court of Appeals denied a timely petition for rehearing en banc on August 5, 2009. App., *infra*, 36a-37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The Privacy Act contains a private right of action that entitles an individual to recover from the Government "actual damages sustained by the individual as a result of [an agency's intentional or willful] refusal or failure [to comply with the requirement of the statute], but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. § 552a(g)(4)(A). The relevant portions of the Privacy Act, 5 U.S.C. § 552a, are reproduced at App., *infra*, 38a-39a.

Statement of the Case

The United States District Court for the Northern District of Alabama granted summary judgment on the Privacy Act claims brought by the Veterans against the VA following a data breach at the VA's facilities in Birmingham, Alabama. The sole basis for dismissal was the District Court's conclusion that the Veterans had not established "actual damages" because they "have not alleged (or proven) that they have suffered any pecuniary losses as a result of the missing external hard drive," even though they had "alleged and proven that they have suffered mental injuries such as aggravation of their PTSD symptoms."[1] App., *infra*, 29a. The Court of Appeals affirmed the judgment dismissing the Veterans' Privacy Act claims based solely on its prior decision in *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982), which held that "'actual damages' under the Privacy Act means only pecuniary losses." App., *infra*, 9a, 11a.

A. The Privacy Act

Congress enacted the Privacy Act in 1974 in recognition that "'in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary . . . to regulate the collection, maintenance, use, and dissemination of information by such agencies.'" *Doe v.*

---

[1] Post-Traumatic Stress Disorder or "PTSD" is a well-recognized anxiety disorder that occurs after an individual experiences a traumatic event such as combat. *See generally* U.S. Dep't of Veterans Affairs, National Center for PTSD, Fact Sheet, What is PTSD?, http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp (last visited Oct. 16, 2009).

Chao, 540 U.S. 614, 618 (2004) (quoting the Privacy Act of 1974, Pub. L. No. 93–579, § 2(a)(5), 88 Stat. 1896 (1974)). To accomplish this goal, the statute "gives agencies detailed instructions for managing their records and provides for various sorts of civil relief to individuals aggrieved by failures on the Government's part to comply with the requirements." *Id.*

The Privacy Act contains four private rights of action against a federal agency for violations of the statute. *See* 5 U.S.C. § 552a(g)(1)(A)-(D). The provision that applies here is subsection (g)(1)(D). That provision states:

> Whenever an agency—(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 U.S.C. § 552a(g)(1)(D). The statute further sets out the relief that is available under this provision if the agency acted in an "intentional or willful" manner:

> [T]he United States shall be liable to the individual in an amount equal to the sum of—(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and (B) the

> costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4).

Among the "other" violations of the Privacy Act that can be redressed through section 552a(g)(1)(D) is an agency's failure to "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity *which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.*" 5 U.S.C. § 552a(e)(10) (emphasis added).

B. The VA's Privacy Act Violations in Birmingham, Alabama

The salient facts are largely undisputed.[2] In 2006, the Birmingham VA Medical Center purchased fifteen external hard drives. App., *infra*, 3a. The VA purchased the hard drives knowing they did not

---

[2] The bulk of the facts discussed here and in the Court of Appeals' opinion are documented in an investigation report issued by the VA Office of Inspector General. *See* U.S. Dep't of Veterans Affairs, Administrative Investigation, Loss of VA Information, VA Medical Center, Birmingham, AL, Report No. 07-01083-157 (June 29, 2007) ("VAOIG Report"). The VAOIG Report was part of the record (C.A. R. 33-3), and an electronic copy is available at http://www.va.gov/oig/51/FY2007rpts/VAOIG-07-01083-157.pdf. The District Court stayed proceedings to allow the VA Office of Inspector General to conduct its investigation and submit its report. At no point in this litigation has the United States disputed or called into question any of the facts reported in the VAOIG Report.

include required encryption technology and without following procurement rules designed to protect privacy. VAOIG Report iv, 15-17, 20. Encryption software was available, but VA officials testified that they did not want to pay for it. C.A. R. 16, Ex.14 at 3-4.[3]

One of the hard drives was assigned to a VA information technology specialist working in Birmingham (pseudonym "John Doe"). App., *infra*, 20a. In violation of the Privacy Act and other federal laws, John Doe used the hard drive to store personal information of more than 198,000 living veterans—including their unencrypted names, social security numbers, birth dates, and healthcare files. App., *infra*, 2a, 4a. Among them are Petitioners Jim Henry Perkins and Jessie Frank Qualls. App., *infra*, 3a. The hard drive contained a "treasure trove of private data"—"a pocket-sized gold mine for identity thieves." App., *infra*, 2a.

The VA failed to adequately supervise John Doe's activities. App., *infra*, 4a; VAOIG Report 40-41. It granted him access to VA databases beyond the requirements of his job and the scope of his background check, from which he downloaded veterans' personal information to the hard drive. App., *infra*, 4a; VAOIG Report v, 22-24, 40. He was given "carte blanche" access to multiple VA databases,

---

[3] The briefing rules of the Eleventh Circuit require the filing of Record Excerpts in lieu of an Appendix. 11th Cir. R. 30-1. Thus, this petition uses the convention "C.A. R. #" to refer to portions of the record before the Court of Appeals that are not included in the Appendix to this petition. These numbers also correspond to the numbered entries in the District Court docket.

including a nationwide database of social security numbers. VAOIG Report 22-24, 30-32. He kept the unencrypted hard drive with this information in a VA facility with an inadequate security plan, and VA officials knew as early as December 2006 that the front door to the office used by John Doe and other VA employees was left unlocked at night in a known high crime area. VAOIG Report iv-v, 17-18.

On January 22, 2007, John Doe reported the hard drive missing. App., *infra*, 3a; VAOIG Report 1; C.A. R. 46 at 2. He successfully deleted files from his computer to hide the extent of his activities. VAOIG Report 8-9. The VA's Office of Inspector General and the Federal Bureau of Investigation conducted investigations. The hard drive was not recovered. VAOIG Report i; C.A. R. 46 at 3.

C. The Veterans' Injuries

Mr. Perkins and Mr. Qualls are Vietnam combat veterans with chronic severe Post-Traumatic Stress Disorder ("PTSD"). App., *infra*, 3a. Both receive medical treatment from VA hospitals in Alabama. App., *infra*, 3a, 21a. To treat their PTSD, both participate in group therapy sessions at the VA and see a VA doctor several times a year who prescribes medications for their PTSD and other conditions. App., *infra*, 3a.

Upon learning of the VA's data breach from press reports, the Veterans became worried that their own personal and medical information had been compromised. C.A. R. 33-3 at ii; C.A. R. 40, Ex. 1 at ¶ 7, Ex. 2 at ¶ 7. Mr. Perkins called the public "hotline" established by the VA, but the VA would not

tell him whether or not his information had been compromised. C.A. R. 40, Ex. 1 at ¶ 8. He was told he would be notified in writing. *Id.*; App., *infra*, 3a. It was not until March 13, 2007—nearly two months after the VA knew of its security breaches—that the Veterans were finally told by the VA that their personal data had been compromised. C.A. R. 40, Ex. 1 at ¶ 9, Ex. 2 at ¶ 8. The VA's letter recommended that the Veterans take several actions on their own to protect themselves. C.A. R.33-5, Attach. B. First, the VA told them to obtain and review their credit report. *Id.* The Veterans did this. C.A. R. 40, Ex. 1 at ¶ 10, Ex. 2 at ¶ 9. Second, VA told them to contact the Federal Trade Commission ("FTC") and put a "fraud alert" on their credit accounts. C.A. R. 33-5, Attach. B. The Veterans contacted the FTC number the VA provided, but were confused by what they were told. C.A. R. 40, Ex. 1 at ¶ 11, Ex. 2 at ¶ 10. Third, the VA told the Veterans that they would receive "a follow-up letter" "[i]f VA determines that your information or you are at risk as a result of this incident." C.A. R. 33-5, Attach. B. It was not until April 30, 2007, that the VA finally sent its "follow-up letter" offering credit monitoring for one year. C.A. R. 33-5, Attach. C.

Faced with confusing and incomplete information from the VA, the Veterans took steps to protect themselves. C.A. R. 40, Ex. 1 at ¶¶ 12, 13, Ex. 2 at ¶¶ 9, 10, 11. Even with the VA's offer of one-year credit monitoring, they had to actively monitor their own credit and financial accounts, which they found frustrating and difficult.[4] *Id.*

---

[4] The VA advised affected veterans that "[b]ecause SSNs were on this portable hard drive, we advise individuals to monitor

The Veterans' PTSD and its physical symptoms were aggravated by the stress of dealing with the VA's loss of their personal information and the resulting risk of identity theft.[5] App., *infra*, 4a.; C.A. R. 40, Ex. 1 at ¶ 13, Ex. 2 at ¶ 11. The Veterans suffered worsening of their PTSD physical symptoms, including increased sleeplessness, isolation, anxiety, and anger. App., *infra*, 4a.; C.A. R. 40, Ex. 1 at ¶ 13, Ex. 2 at ¶ 11. To address these worsening symptoms, Mr. Perkins needed new medication from his doctor, and Mr. Qualls had his dosage increased. App., *infra*, 4a.; C.A. R. 40, Ex. 1 at ¶ 13, Ex. 2 at ¶ 11.

D. District Court Proceedings

This case was filed on February 15, 2007. Mr. Perkins joined as a plaintiff when the first amended complaint was filed March 14, 2007 (C.A. R. 5), and Mr. Qualls joined when the second amended complaint was filed April 25, 2007 (C.A. R. 21). The Veterans' second amended complaint contains claims for both monetary damages under the Privacy Act and injunctive relief under the Administrative Procedures Act ("APA"). After the case was stayed for several months so the VA could investigate the matter and file

---

financial accounts continuously for suspicious activity as a matter of good practice." C.A. R. 33-5, Attach. D at 4.

[5] According to peer-reviewed literature from VA researchers, individuals with PTSD react differently and more strongly to stressors than do individuals without PTSD. Todd C. Buckley et al., *Preventive Health Behaviors, Health-Risks Behaviors, Physical Morbidity, and Health-Related Role Functioning Impairment in Veterans with Post-Traumatic Stress Disorder*, 169 Military Medicine 7:536 (2004).

its report, the VA filed a motion to dismiss or in the alternative for summary judgment, and the District Court granted summary judgment on all claims on January 8, 2008. No discovery was conducted or allowed. C.A. R. 23, 35.

The District Court granted summary judgment on the Veterans' Privacy Act claims because it concluded that the Veterans "cannot establish that they have suffered actual damages" under Eleventh Circuit precedent. App., *infra*, 29a-30a. The sole basis for the District Court's conclusion was its finding that the Veterans "have not alleged (or proven) that they have suffered any pecuniary losses as a result of the missing external hard drive," even though they have "alleged and proven that they have suffered mental injuries such as aggravation of their PTSD symptoms." App., *infra*, 29a. The District Court further granted summary judgment on the Veterans' claims for declaratory and injunctive relief under the APA because it concluded that there had been "no final agency action" that could be challenged under the APA. App., *infra*, 32a-33a.

E. The Court of Appeals' Decision

The Court of Appeals affirmed in part and reversed in part. It affirmed the grant of summary judgment against the Veterans' Privacy Act claims based solely on it prior decision in *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982).[6] The Court of Appeals confirmed the

---

[6] The Court of Appeals' judgment is thus final with respect to Petitioners' Privacy Act claims for damages. The Court of Appeals reversed the District Court's dismissal of Petitioners' separate

circuit's bright line rule that "actual damages" in the Privacy Act "means only pecuniary losses." App., *infra*, 9a. The Court of Appeals recognized that this Court's decision in *Doe* "changed the landscape of the Privacy Act" and also overruled "the part of *Fitzpatrick* that had granted the plaintiff the statutory $1,000 minimum even though he had failed to demonstrate actual damages" under the Eleventh Circuit's test. App., *infra*, 10a. However, the Court of Appeals concluded that *Doe* did not overrule that part of *Fitzpatrick* dealing with the meaning of "actual damages" and noted that this Court had "declined to resolve" the circuit split. App., *infra*, 10a. Thus, because the Veterans "failed to show any pecuniary loss from the VA's data security breach," the Court of Appeals held that "the summary judgment against their claims for monetary damages is due to be affirmed." App., *infra*, 11a.

The Court of Appeals recognized "that most other circuits do not restrict 'actual damages' under the Privacy Act to pecuniary losses," but refused to reconsider its position. App., *infra*, 11a. The Court of Appeals also conceded that the combined effect of *Doe* and *Fitzpatrick* was that "plaintiffs in Fitzpatrick's shoes today, like Perkins and Qualls, are worse off than Fitzpatrick in 1982, because after *Doe* they cannot get even the $1,000 statutory minimum award without showing some actual damages." App., *infra*,

---

APA claims for declaratory and injunctive relief and remanded those claims. App., *infra*, 18a. The remanded APA claims are separate and distinct from the Privacy Act claims underlying this petition and seek wholly different relief. Thus, review by this Court is appropriate without waiting for final resolution of the APA claims.

10a. The Court of Appeals denied a timely petition for rehearing en banc without comment.

Reasons for Granting the Petition

The petition for certiorari should be granted. The Courts of Appeals are divided on the meaning of "actual damages" in the Privacy Act and in particular whether it means pecuniary losses only. Recent rulings demonstrate that the conflict will not be resolved without intervention by this Court. The Eleventh Circuit is on the wrong side of the circuit split—its decision conflicts with this Court's current precedent on "actual" damages, basic principles of statutory interpretation, and this Court's interpretation of the Privacy Act's legislative history. It is important to resolve the conflict because a federal remedial scheme cannot function efficiently or fairly without basic nationwide rules on the scope of liability. Even the United States has recently concluded that the issue presented here is "a recurring remedial issue of national significance" and that the current circuit split is "unnecessary" and undesirable. App., *infra*, 42a.

I. There is a Conflict Among the Circuits on the Meaning of "Actual Damages" in the Privacy Act

In *Doe*, this Court recognized that "[t]he Courts of Appeals are divided on the precise definition of actual damages" in the Privacy Act. *Doe v. Chao*, 540 U.S. 614, 627 n.12 (2004). The Courts of Appeals that have addressed the issue fall into two distinct groups. The Eleventh and Sixth Circuits apply a bright line rule that "actual damages" under the Privacy Act are limited to out-of-pocket pecuniary losses only. *See*

Fitzpatrick v. IRS, 665 F.2d 327, 331 (11th Cir. 1982); *Hudson v. Reno*, 130 F.3d 1193, 1207 & n.11 (6th Cir. 1997). In contrast, the Fourth, Fifth, and Tenth Circuits hold that other injuries, including mental injury and emotional distress, can qualify as "actual damages" under the Privacy Act without any pecuniary loss being shown. *See Doe v. Chao*, 306 F.3d 170, 181 (4th Cir. 2002);[7] *Johnson v. Dep't of Treasury*, 700 F.2d 971, 972-74, 986 (5th Cir. 1983); *Parks v. IRS*, 618 F.2d 677, 682-83 (10th Cir. 1980).[8]

This well-developed conflict will persist if not resolved by this Court. The Fifth Circuit recently reaffirmed its precedent that "actual damages" under the Privacy Act "includes emotional-distress damages" and

---

[7] The Fourth Circuit's decision in *Doe* "commits [the Fourth] circuit to the position that the term 'actual damages' includes at least emotional distress that would qualify as 'demonstrable.'" 306 F.3d at 198 n.13 (Michael, J.) (concurring in part and dissenting in part).

[8] There is also a clear split among district courts in circuits in which no definitive appellate decision has been issued. *Compare, e.g., Am. Fed'n of Gov't Employees v. Hawley*, 543 F. Supp. 2d 44, 53 (D.D.C. 2008) (holding that "actual damages" under the Privacy Act include "'general compensatory damages, such as pain and suffering and non-pecuniary losses'" (quoting *Montemayor v. Fed. Bureau of Prisons*, No. 02-1283, 2005 WL 3274508, at *5 (D.D.C. Aug. 25, 2005))), and *Papse v. Bureau of Indian Affairs*, No. 99-0052-E-BLW, 2007 WL 1189369, at *2 (D. Idaho Apr. 20, 2007) ("The Court . . . concludes that the term 'actual damages' in the Privacy Act includes damages for emotional distress."), *with Pope v. Bond*, 641 F. Supp. 489, 501 (D.D.C. 1986) ("[The] plaintiff is limited to recovery on his Privacy Act claim to out-of-pocket expenses."), and *DiMura v. FBI*, 823 F. Supp. 45, 48 (D. Mass. 1993) (holding that "'actual damages' [in the Privacy Act] does not include emotional damages").

denied en banc rehearing requested by the United States. *Jacobs v. Nat'l Drug Intelligence Center*, 548 F.3d 375, 376 (5th Cir. 2008), *reh'g denied en banc*, No. 07-40776 (Jan. 6, 2009). The Eleventh Circuit, in this case, has now re-affirmed its precedent that only pecuniary losses are recoverable and has refused to reconsider that precedent en banc. Thus, the conflict among the circuits—which took root over twenty-five years ago—is deeply entrenched and can only be resolved through the intervention of this Court.

This case is an appropriate vehicle for addressing the circuit split. In *Doe*, this Court reserved decision on the meaning of "actual damages" because "the petition for certiorari did not raise it for . . . review." 540 U.S. at 627 n.12. Here, in contrast, the issue is squarely presented and is dispositive. The fact that the Veterans' injuries were not pecuniary losses was the sole basis upon which the District Court entered summary judgment dismissing the Veterans' Privacy Act claims and the sole basis upon which the Court of Appeals affirmed. App., *infra*, 11a, 29a-30a. Further, the Privacy Act claims that were dismissed are the Veterans' only claims for money damages, and the separate APA claims for declaratory and injunctive relief that were remanded seek wholly different relief and thus do not complicate this Court's review.

Moreover, unlike in *Doe*, the Veterans' injuries here are demonstrated and undisputed. In *Doe*, there was some question as to whether the plaintiff actually suffered mental injury in a demonstrated way. *See Doe*, 540 U.S. at 617-18 & n.12 (recounting Doe's conclusory allegations that he was "torn . . . all to pieces" and "greatly concerned and worried" and "assuming without deciding that the Fourth Circuit

was correct that Doe's complaints . . . did not rise to the level of alleging actual damages"). Here, in contrast, it is undisputed that the Veterans have suffered demonstrated mental injury, evidenced by traditional hallmarks such as physical manifestations and the need for prescription medication. App., *infra*, 4a, 22a, 29a. *See also Doe*, 306 F.3d at 180 ("Where . . . a plaintiff can produce evidence that emotional distress caused chest pains and heart palpitations, leading to medical and psychological treatment which included a formal diagnosis of 'major depressive disorder,' as well as necessitated prescription medication, it is clear that some amount of compensatory damages for emotional distress is warranted.").

II. The Court of Appeals' Decision is Wrong

A. The Court of Appeals' Decision is Contrary to this Court's Precedent and the Statutory Text

The Eleventh Circuit is on the wrong side of the circuit split. Its decision rests on the faulty premise that "non-pecuniary" injuries cannot be "actual injuries." That premise conflicts with this Court's jurisprudence. Under this Court's traditional view, terms like "actual injury" or "actual losses" are intended to distinguish between *demonstrated* injury and *presumed* injury—not between pecuniary and non-pecuniary losses. *Carey v. Piphus*, 435 U.S. 247, 263-64 & n.20 (1978) (contrasting "presumed" damages with damages "actually suffered" by the plaintiff and holding the later to be compensable under § 1983 including "mental suffering or emotional anguish"). Thus, harms like mental anguish and suffering are

traditionally compensable, so long as they are actually caused by the complained-of conduct. *See id.*; *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307-08 (1986) ("[C]ompensatory damages [under § 1983] may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering[,]' . . . damages grounded in determinations of plaintiffs' actual losses.") (internal citations and quotations omitted).

This approach to "actual damages" applies with particular force in the privacy context. As Justice Ginsberg noted in *Doe*, the traditional black letter rule is that "'[t]he plaintiff [in an invasion of privacy case] may also recover damages for emotional distress or personal humiliation that he proves to have been *actually suffered* by him." *Doe v. Chao*, 540 U.S. 614, 634-35 n.4 (2004) (Ginsberg, J., dissenting) (quoting Restatement (Second) of Torts § 652H cmt. b (1976)) (emphasis added). *See also Johnson v. Dep't of Treasury*, 700 F.2d 971, 977 ("The Supreme Court has indicated that the primary damage in 'right to privacy' cases is mental distress.") (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)).

There is no basis in the Privacy Act for deviating from the traditional view that "actual" damages include demonstrated mental injury and emotional distress. The text of the statute contains no limits on the types of actual damages that can be recovered. The text does not say "actual *pecuniary* damages" or "actual *economic* damages" or anything of the sort. When Congress wants to place such limits on an award of damages, it knows how to do so. *See, e.g.*, 26 U.S.C. § 7432(b)(1) (limiting recovery against IRS agent for

not releasing a lien to "actual *direct economic* damages sustained by the plaintiff") (emphasis added). Courts should be hesitant to read limitations into a statute where there are none, even in the context of a statute that waives sovereign immunity. *See United States v. Kubrick*, 444 U.S. 111, 117-118 (1979) ("We should also have in mind that the Act waives the immunity of the United States and that . . . we should not take it upon ourselves to extend the waiver beyond that which Congress intended. *Neither, however, should we assume the authority to narrow the waiver that Congress intended.*") (emphasis added) (citations omitted).

In fact, the surrounding statutory context of the Privacy Act strongly suggests that Congress sought to address non-pecuniary damages through the statute's remedial scheme. Among the "other" violations of the Privacy Act that can be redressed through a claim under section 552a(g)(1)(D) is an agency's failure to "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity *which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.*" 5 U.S.C. § 552a(e)(10). The VA's violation of this provision is one of the bases of the Veterans' Privacy Act claims here. App., *infra*, 25a. The Eleventh Circuit's rule fails to take this broader statutory context into account, as it should. *See Nken v. Holder*, -- U.S. --, 129 S. Ct. 1749, 1756 (2009) ("[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the

broader context of the statute as a whole.'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

B. The Court of Appeals' Decision Conflicts with this Court's Interpretation of the Privacy Act's Legislative History

The Eleventh Circuit's conclusion in *Fitzpatrick* that "actual damages" means only pecuniary losses hinged exclusively on what has proven to be a misinterpretation of the Privacy Act's legislative history. *Fitzpatrick v. IRS*, 665 F.2d 327, 329 (11th Cir. 1982) ("[W]e must turn to the legislative history and attempt to discern Congressional intent on this issue."). In conducting its legislative history analysis, the Eleventh Circuit thought that Congress' deletion of the phrase "general damages" from an earlier version of the bill meant that Congress intended a "more restrictive" view of "actual damages" "that *must* refer to pecuniary loss." *Id.* at 330 (emphasis added). This is a lynchpin of the Court of Appeals' decision. *Id.* That interpretation of the legislative history, however, was discredited by this Court's later decision in *Doe*. This Court's opinion in *Doe* concluded that Congress' "deletion of 'general damages' from the bill is fairly seen, then, as a deliberate elimination of any possibility of *imputing* harm and awarding *presumed* damages." *Doe v. Chao*, 540 U.S. 614, 623 (2004) (emphasis added). In other words, as explained by this Court, the legislative history shows that Congress was drawing the line at presumed or statutory damages, not mental or emotional injury. Thus, post-*Doe*, the

Eleventh Circuit's justification for a narrow interpretation of "actual damages" is discredited.[9]

III. The United States Agrees that the Meaning of "Actual Damages" in the Privacy Act is an Issue of National Significance

The meaning of "actual damages" in the Privacy Act is an issue of national significance that should be settled by this Court. The issue involves a federal remedial scheme that applies to scores of federal agencies across the Executive Branch and to millions of individuals whose personal information those agencies handle and are obligated to protect. Even the United States concedes that the issue is "a recurring remedial issue of national significance" and that the current circuit split is "unnecessary" and undesirable. App., *infra*, 42a. Further, the lack of a nationwide rule encourages forum shopping and produces unfair results as between identical victims of the same Privacy Act violation. Finally, the Eleventh Circuit's rule is premised on an antiquated view of mental health in general and PTSD in particular and does not reflect modern scientific and societal views.

---

[9] The Fifth Circuit saw the fallacy in the Eleventh Circuit's reasoning years ago and criticized it as a "nonsequitur." *Johnson v. Dep't of Treasury*, 700 F.2d 971, 982 n.29 (5th Cir. 1983) (rejecting *Fitzpatrick*'s conclusion that "actual damages" "must refer to out-of-pocket loss"). The Fifth Circuit correctly follows this Court's interpretation of the Privacy Act's legislative history and, as a result, holds that "actual damages" can include mental injury. *See id.* at 982 (explaining that the deletion of "general damages" "was rejecting liability for presumed damages," as this Court later found in *Doe*).

A. The Issue is Recurring and has Far-Reaching Impacts

The scope of "actual damages" under the Privacy Act is a recurring issue that affects a significant portion of the federal government and a large number of individuals. The requirements of the Privacy Act apply broadly to any "federal agency." 5 U.S.C. §§ 552a(1), 552(f). At present, 173 federal agencies are subject to the statute. *See* The Office of the Federal Register, The Privacy Act Compilation, http://www.federalregister.gov/Privacy/AGENCIES.aspx (last visited Oct. 16, 2009). These agencies maintain an immeasurable number of federal records containing the personal privacy information of millions of Americans. And the trend is for more and more personal information—including veterans' sensitive medical information—to be stored electronically by federal agencies and thus subject to increased risk of misuse and loss. For example, the President has recently announced a database "that will ultimately contain administrative and medical information from the day an individual enters military service throughout their military career, and after they leave the military." *See* The White House, President Obama Announces the Creation of a Joint Virtual Lifetime Electronic Record (Apr. 9, 2009), http://www.whitehouse.gov/the_press_office/President-Obama-Announces-the-Creation-of-a-Joint-Virtual-Lifetime-Electronic-Reco/ (last visited Oct. 16, 2009).

Further, all of these Privacy Act records are subject to a recent dramatic rise in the number of data breach incidents at federal agencies involving personal privacy information. As reported by the Government Accountability Office:

> During fiscal year 2006, federal agencies reported a record number of [data breach] incidents to the U.S. Computer Emergency Readiness Team (US-CERT). For example, in 2006 there were 5,146 incident reports—a substantial increase over the 3,569 incidents reported in 2005. During this period, US-CERT recorded a dramatic rise in incidents where either physical loss or theft or system compromise resulted in the loss of personally identifiable information.

Government Accountability Office, *Information Security: Protecting Personally Identifiable Information* 5 (2008), http://www.gao.gov/new.items/d08343.pdf. Even a single one of these incidents is likely to impact a large number of individuals. In the present case alone, for example, approximately 200,000 veterans were victims of the same Privacy Act violations by the VA. This does not mean that all, or even most, of the individuals impacted by a large scale data breach will necessarily suffer the same type of demonstrated mental injury that the Veterans suffered here. But it does mean that the issue presented here is very likely to recur and should be addressed and resolved in a uniform manner by this Court.

B. The Circuit Conflict Encourages Forum Shopping and Produces Inequitable Results

The circuit split on the meaning of "actual damages" encourages forum shopping and discourages efficient administration of cases. Here, the Veterans responsibly chose to file their case in the federal district in which they live and in the city in which the

data breach occurred. This was the least burdensome venue for them (they travel to Birmingham for their medical care) and the most convenient venue for witnesses and the VA. Their reward for choosing the most logical forum is that they are entitled to no recovery because of the narrow rule that persists in the Eleventh Circuit.

Thus, the current state of the law discriminates against victims of Privacy Act violations based simply on where they live and file suit. Had another one of the 200,000 veterans impacted by this data breach suffered injuries like the Veterans and filed suit in the Fifth Circuit, they would have been entitled to at least $1,000 and their costs and attorney fees because that circuit recognizes such injuries as "actual." But by filing in the circuit where the violation occurred, the Veterans are entitled to nothing. That result is wrong, and it should not be allowed to persist.

The harshness of the Eleventh Circuit's narrow rule is further exacerbated post-*Doe*. Prior to *Doe*, even in circuits with a strict and limited view of "actual damages" (like the Eleventh Circuit), a plaintiff could enforce the requirements of the Privacy Act by seeking the statutory minimum $1,000 and costs and attorney fees. *Doe* changed this. In the words of the Court of Appeals here, "*Doe* changed the landscape of the Privacy Act." App., *infra*, 10a. The combined result of the bright line drawn in *Doe* and the bright line drawn by the Eleventh Circuit is that the Privacy Act is a toothless tiger and utterly fails as a remedial scheme. As the Eleventh Circuit candidly conceded, "plaintiffs in Fitzpatrick's shoes today, like Perkins and Qualls, are worse off than Fitzpatrick in 1982, because after *Doe* they cannot get even the $1,000 statutory

minimum award without showing some actual damages." App., *infra*, 10a. The present case is but one recent example of this draconian result. *See, e.g.*, *Mitchell v. Dep't of Veterans Affairs*, 310 Fed. App'x 351, 354 & n.3 (11th Cir. 2009) (holding that Gulf War veteran who alleged aggravated depression as a result of the VA's disclosure of his personal information to a child support claimant was entitled to no award because "*Doe* made clear that the Privacy Act guarantees $1,000 only to plaintiffs who have suffered some actual damages" and "mental injury alone is insufficient to show 'actual damages.'") (internal citations and quotations omitted)).

C. Legal Recognition of Veterans' PTSD and its Impacts Should be a National Priority

Whether aggravated PTSD and other mental injuries are recognized as "actual" injuries under federal remedial statutes like the Privacy Act is an issue of national significance that merits consideration by this Court. Review is warranted because societal attitudes and scientific knowledge about mental illnesses and conditions have advanced dramatically in the twenty-five-plus years that have elapsed since the Eleventh Circuit first barred recovery for mental injury. This is especially true regarding war-induced mental trauma like PTSD. Our nation's experiences in Vietnam, Afghanistan, and Iraq have taught us that PTSD is *real*, with *actual* consequences. According to the VA's National Center for Posttraumatic Stress Disorder:

> Scientific and clinical interest in [PTSD] has grown exponentially in the past 20 years. It is no longer considered an isolated problem for

> Vietnam veterans. PTSD is recognized as a major public health problem and a behavioral health problem for military veterans and active duty personnel subject to the traumatic stress of war, dangerous peacekeeping operations, and interpersonal violence.[10]

Unfortunately, the Eleventh Circuit's view of "actual" damages does not reflect this modern understanding of PTSD. Instead, the restrictive view of the Eleventh Circuit reflects an uninformed notion that mental injury is ephemeral and unquantifiable. Experience has debunked that outdated view.

In point of fact, federal courts today know how to assess and value actual mental injury. *See, e.g., Swenson v. U.S. Postal Service*, No. S-87-1282, 1994 U.S. Dist. LEXIS 16524, *53-54 (E.D. Cal. Mar. 10, 1994) (awarding Privacy Act plaintiff $3,000 in actual damages for "emotional distress" where agency's violations "were neither egregious nor seriously disabling"). A bright line rule barring recovery for all mental injury, no matter how severe and evident, is simply not justified or necessary. Military veterans, and others in the care of the federal government, deserve to have their actual injuries recognized, not marginalized, in federal remedial schemes like the one in the Privacy Act. Given the entrenched position of the Eleventh Circuit, review by this Court is the only way that is ever going to happen.

---

[10] U.S. Dep't of Veterans Affairs, History of the National Center for PTSD, http://ncptsd.kattare.com/ncmain/about/nc_overview/history.html (last visited Oct. 16, 2009).

Conclusion

The petition for writ of certiorari should be granted. The Eleventh Circuit's minority view on the meaning of "actual damages" should be rejected and its judgment in this case reversed.

Respectfully submitted,

P. Stephen Gidiere III
Counsel of Record
Michael D. Freeman
Gregory C. Cook
Alexia Bowers Borden
BALCH & BINGHAM LLP
1901 Sixth Avenue N., Suite 1500
Birmingham, Alabama 35203
205-251-8100

Caroline Smith Gidiere
Andrew P. Campbell
LEITMAN, SIEGAL, PAYNE & CAMPBELL
2100-A SouthBridge Parkway, Suite 450
Birmingham, Alabama 35209
205-803-0051

Attorneys for Petitioners