No. 10-1024

In the
SUPREME COURT OF THE UNITED STATES

FEDERAL AVIATION ADMINISTRATION, ET AL.,
Petitioners
v.
STANMORE CAWTHON COOPER,
Respondent.

On Writ Of Certiorari to the
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF THE RESPONDENT

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STATEMENT OF INTEREST OF THE NATIONAL WHISTLEBLOWER CENTER[1]

The National Whistleblower Center (Center) is a nonprofit, tax-exempt, non-partisan, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. In both the public and private sector, the Center assists employees who have suffered retaliation due to reporting violations of law or disclosing matters in the interest of public health and safety. The Center aids employee whistleblowers who have been involved in environmental protection, nuclear safety, government accountability, and the advocacy of important public policy.

In addition to its involvement in whistleblower litigation, the Center remains active in the education and advocacy of whistleblower protection. The Center sponsors and participates in public education programs and training seminars throughout the country. Furthermore, the Center operates an Attorney Referral Service for whistleblowers (with attorney members in 36 states) and maintains an in-depth and informative Internet web site at www.whistleblowers.org. Since 1990, the Center has participated before this Court as *amicus curiae* in a number of cases that directly impact the rights of

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[1] Pursuant to Rule 37.6, the Center states that no monetary contributions were accepted for the preparation or submission of this *amicus curiae* brief and that its counsel authored this brief in its entirety. Counsel for all parties have consented to the filing of an *amici curiae* brief by the Center.

whistleblowers, including, *English v. General Electric,* 496 U.S. 72 (1990); *Haddle v. Garrison,* 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens,* 529 U.S. 765 (2000); *Beck v. Prupis,* 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002), and *Doe v. Chao,* 540 U.S. 614 (2004).

Persons assisted by the Center have a direct interest in the outcome of this case. The Privacy Act is a key piece of legislation to ensure that the privacy rights of citizens are protected. Whistleblowers who report wrongdoing by Federal agencies and government officials frequently are subject to violations of privacy. It cannot be over-stated how vital avenues of legal redress, including rights available under the Privacy Act, are to those courageous employee-whistleblowers, both actual and potential, who put the public good before their own careers and who face violations of their privacy as a result of taking unpopular positions. Protecting the privacy of these individuals is an essential component in encouraging employees to reveal severe abuses of power and dangerous industrial practices. It is surely an incontrovertible fact that, even under the best of circumstances, whistleblowers run enormous risks and suffer retaliation for reporting wrongdoing. If the Privacy Act does not provide remedies for actual non-pecuniary harms (such as for emotional distress and humiliation), then whistleblowers face even greater disincentives to expose misconduct or violations of law.

SUMMARY OF THE ARGUMENT

In order to combat the widespread government abuse of power and misuse of personal information that existed in the years preceding 1974, Congress created a remedy through the Privacy Act to compensate individuals who fell victim to such "intentional or willful" governmental abuses and deprivation of personal privacy rights. Congress intended to encourage the widest possible citizen enforcement of civil remedies to effectuate the legislative purposes for passing the Privacy Act. The doctrine of sovereign immunity or other cannons of statutory construction do not limit the reach of "actual damages" to preclude recovery of non-pecuniary compensatory damages that are actually incurred when the Privacy Act is violated.

In the preamble to the Act, Congress expressly required all Federal agencies to be subject to suit for "any damages" resulting from "intentional or willful" violations of the Privacy Act. Congress also expressly stated, *inter alia,* in the Act's preamble that the "right to privacy is a personal and fundamental right protected by the Constitution." Permitting recovery of non-pecuniary damages is necessary to effectuate the stated congressional purpose to provide for recovery of "any damages" for violations of these personal and fundamental rights, because victims whose privacy has been violated most commonly suffer non-pecuniary harm in the form of mental anguish, humiliation and reputational harm, which is actually incurred and well documented. Whistleblowers, like other Privacy

Act plaintiffs, actually suffer emotional distress or embarrassment as a direct result of intentional or willful Privacy Act violations committed by Federal agencies.

To prevent such further widespread abuses by the Federal government Congress enacted the Privacy Act damages provision to permit the recovery of damages actually incurred when they suffer an "adverse effect" resulting from a "willful or intentional" violation of the Act.

Congress expressly waived sovereign immunity to provide for the recovery of any damages actually resulting from such violations. Congress did not delegate to the Privacy Protection Commission its authority to define the term "actual damages" in the Privacy Act or to decide whether the Act provides for the recovery of non-pecuniary compensatory damages. The Commission's recommendations were flawed and never acted upon or adopted by Congress. Additionally, this Court owes no deference to the Commission. Rather, when the Privacy Act was enacted in 1974, Congress was fully aware that the term "actual damages" included recovery for non-pecuniary compensatory damages and the text of the statute makes clear the intent to provide for recovery of damages that are actually incurred as a result of intentional or willful violations. To construe the statute narrowly, and to limit damages to out of pocket losses, not only conflicts with Act's stated legislative purpose, but it would also eviscerate the Act's remedial purpose and leave victims of intentional or willful violations without a remedy.

ARGUMENT

I. DENYING RECOVERY OF EMOTIONAL DISTRESS DAMAGES ACTUALLY INCURRED WOULD FRUSTRATE THE STATUTORY PURPOSES OF THE PRIVACY ACT

The Congressional purpose for enacting the Privacy Act of 1974 was both to encourage "the widest possible citizen enforcement" of the Act's remedial protections, *see* S. Rep. No. 1183, 93rd Cong., 2d Sess. at 1, 83, *reprinted in* U.S. Code Cong. & Ad. News at 6916 & 6997 (hereinafter "USCAN"), *and Legislative History of the Privacy Act of 1974*, at 154, 236 (1976) (hereinafter "*Sourcebook*"); and, by so doing, to redress and prevent serious governmental abuses resulting in the violation of the privacy rights of citizens. *Id.*, USCAN at 6916, 6917; *Sourcebook* at 154-55 (remarks of Sen. Ervin) ("It is designed to prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of law-abiding citizens produced in recent years from actions of some over-zealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases, of personal files held by Federal agencies.").

Obviously, Congress considered the government abuse of power and misuse of personal information that existed in the years preceding 1974 when it created a remedy through the Privacy Act to compensate individuals who fell victim to such "intentional or willful" governmental abuses and

deprivation of personal privacy rights. Among the many concerns cited by members of Congress for enacting the Privacy Act included the "creation of the 'Plumbers,' a White House unit, and "secret" and illegal "wire-taps" and selective disclosure or misuse of private information for "political purposes," *see Sourcebook* at 795-798 (remarks of Sen. Nelson), and "Watergate and related scandals" that "have brought to light a callous disregard for the law and for the sanctity of individual rights . . . " *Sourcebook* at 800 (remarks of Sen. Jackson).

Congressional findings set forth in the preamble of the Act also expressly provide, *inter alia*, that the "right to privacy is a personal and fundamental right protected by the Constitution." *See* P.L. 93-579, 88 Stat. 1896, the Privacy Act of 1974, Congressional Findings and Purpose § 2(a) (reprinted at 5 U.S.C. § 552a Note).[2] Due to the nature of the privacy rights at issue, Congress created the damages remedy in 5 U.S.C. § 552a(g)(4) "with reference to the nature of the interests protected by" the Act. *See Carey v.*

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[2] *See also, Sourcebook* at 769 (remarks of Sen. Ervin) (the Act implements "those recognized values of Western jurisprudence and democratic constitutional government" and "they are the principles upon which our own Constitution rests"); *id.* at 803 (remarks of Sen. Goldwater) ("By privacy, I mean . . . the right to be protected against disclosure of information given by an individual in circumstances of confidence, and against disclosure of irrelevant embarrassing facts relating to one's own private life . . . . " and "what the U.S. Supreme Court has referred to as the embodiment of 'our respect for the inviolability of the human personality,' and as a right which is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'").

Piphus, 435 U.S. 247, 265 (1978). Permitting the award of "actual damages" for non-pecuniary harm and emotional distress under 5 U.S.C. § 552a(g)(4) is fully consistent with the purposes and other provisions of the Privacy Act.

Significantly, the Privacy Act's preamble specifically waives sovereign immunity "by requiring Federal agencies" to "be subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." *See* P.L. 93-579, 88 Stat. 1896, Congressional Findings and Purpose § 2(b)(6) (reprinted in 5 U.S.C. § 552a Note) (emphasis added). *Also see, Johnson v. Dept. of Treasury, Internal Revenue Serv.,* 700 F.2d 971, 975 (5th Cir. 1983) (noting preamble), modified in part on other grnds by *Doe v. Chao,* 540 U.S. 614 (2004). Surely, damages for non-pecuniary harm actually incurred are a type of "*any* damages" for which suit has been expressly consented as stated in the Act's preamble.

The Privacy Act, the preamble to the Act, and the legislative history of the Act, repeatedly emphasize the importance of protecting personal privacy as a fundamental and constitutional right, and reflect a strong intent that the civil remedies and enforcement provisions further the Act's compensatory and deterrent goals. In order to avoid the absurd result of Privacy Act plaintiffs meeting the injury-in-fact and causation requirements and proving an intentional violation but having no remedy, Congress created a remedy that permits

recovery of damages that are actually incurred by the plaintiff.

To be eligible to bring a damages claim under the Privacy Act, a plaintiff must show there was an "adverse effect" resulting from the violation. 5 U.S.C. §§ 552a(g)(1)(C) and (g)(1)(D).[3] The most common "adverse effect" demonstrated by victims of Privacy Act violations is the personal effects that are suffered (such as non-pecuniary and non-physical effects like emotional distress, emotional distress or trauma) when personal or embarrassing information is improperly disclosed by a Federal agency without their consent. *See, e.g., Jacobs v. National Drug Intelligence Center,* 548 F.3d 375, 377-378 (5th Cir. 2008).

Whistleblowers and other unpopular critics of Federal agencies often confront the intentional public disclosure of their personal and embarrassing information that is supposed to be held in confidence by Federal agencies. The unauthorized release of such information by Federal agencies violates of Privacy Act's no disclosure without consent rule. 5 U.S.C. § 552a(b).

For example, the Federal Bureau of Investigation made unauthorized public releases of personal, embarrassing and confidential information about the FBI laboratory scientist and agent who

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[3] The "reference in §552a(g)(1)(D) to 'adverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing . . . . " *Doe v. Chao,* 540 U.S. 614, 624 (2004).

reported very serious allegations that called into question the scientific integrity of the FBI crime lab and high profile prosecutions that relied on the lab's evidence, while at the same time, the FBI refused to provide that whistleblower with access to the information that the agency had released to others. *See Whitehurst v. FBI,* C.A. No. 96-572, slip op. (Feb. 5, 1997, D.D.C.). The Justice Department later agreed to settle that Privacy Act case where the whistleblower sought non-pecuniary emotional damages for the alleged violation of his privacy rights by the FBI to discredit him.[4]

The Department of Defense's unauthorized release of information from its security and personnel files about Linda Tripp is another example of the type of government abuse the Privacy Act was intended to combat. *Tripp v. Dep't. of Defense,* 219 F.Supp.2d 85, 87 (D.D.C. 2002) (The Defense Department "conceded liability for the particular disclosure to *The New Yorker* journalist as a violation of the anti-disclosure provision of the Privacy Act, 5 U.S.C. § 552a(b)."). The government's admitted violation of the Privacy Act as a means to discredit Ms. Tripp demonstrates how the government can misuse information in reprisal against unpopular whistleblowers and for political purposes. Ms. Tripp sought non-pecuniary damages

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[4] *See Justice Dept. to Pay Settlement to FBI Whistle-Blower Whitehurst*, LOS ANGELES TIMES (March 12, 1998), http://articles.latimes.com/1998/mar/12/news/mn-28216.

under the Privacy Act and the Defense Department later entered into a settlement.[5]

It is only by the recovery of damages for any harms that qualify as an "adverse effect" under 5 U.S.C. §§ 552a(g)(1)(C) and (g)(1)(D), and are proven to be actually incurred resulting from intentional or willful violations, such as intentional disclosure of embarrassing personal information by Federal agencies in violation of 5 U.S.C. § 552a(b), that the Privacy Act's statutory purposes can be fulfilled. However, a restrictive interpretation of the Act, as Petitioners urge, that narrows the scope of actual damages "would frustrate the purposes of the civil remedy" and enforcement provisions because litigants who prove intentional or willful violations of the Act would frequently be left without any remedy, and "an inadequate recovery would reduce both the deterrent impact on the government and the incentives for citizen enforcement." *See* Frederick Z. Lodge, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 FORDHAM L. REV. 611, 622 (1984). *Also see, Johnson,* 700 F.2d at 977. To interpret the phrase "actual damages" in 5 U.S.C. § 552a(g)(4) to exclude damages for non-pecuniary losses for emotional distress (a harm that provides standing to sue) will frustrate the purposes of the Act and leave Privacy Act plaintiffs without any remedy at all.

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[5] *See* "Defense Dept. settles with Linda Tripp," USA Today (Nov. 3, 2003), http://www.usatoday.com/news/washington /2003-11-03-tripp-lawsuit_x.htm.

II. THE PRIVACY ACT DOES NOT PRECLUDE RECOVERY OF EMOTIONAL DISTRESS DAMAGES

A narrow construction of the term "actual damages" is not reasonable under the applicable standards of statutory construction, nor does the doctrine of sovereign immunity apply. Accordingly, it is not appropriate to construe the Privacy Act to preclude an award of emotional distress damages actually incurred by the Respondent.

Petitioners' argument in support of a narrow construction relies, in part, on the report of the Privacy Protection Commission in 1977. Pet. Br., pp. 19-22. However, Congress did not delegate to the Privacy Commission congressional authority to define the term "actual damages" in the Privacy Act or to decide whether the Act provides for the recovery of non-pecuniary compensatory damages. Rather, the Commission was asked to review a much more narrow question, whether the Federal government should be liable for general damages for violations of the two provisions of the Act which confer standing to sue. *See Doe v. Chao,* 540 U.S. 614, 622 (2004). Specifically, Congress asked the Commission to study "whether the Federal Government should be liable for general damages incurred by an individual as the result of a willful or intentional violation of the provisions of sections 552a (g)(1)(C) or (D) of title 5, United States Code." P.L. 93-579, § 5(c)(2)(B)(iii), 88 Stat. 1907.

The Commission's recommendations were flawed. In its report, the Commission relied only on the Act's legislative history and the statute to conclude that the term "actual damages" was intended to be synonymous with "special damages" in defamation cases. *Personal Privacy in an Information Society: The Report of the Privacy Protection Commission*, Chapter 13 (July 1977). However, the Commission's report in this respect is incomplete and does not analyze the case law that was in effect prior to passage of the Privacy Act that defined "actual damages" to include emotional distress damages. Nor does the Commission construe the Act in accordance with its purpose or evaluate whether precluding monetary recovery for emotional distress as "actual damages" would frustrate the Privacy Act's purpose.

Congress never acted upon or adopted the Commission's recommendations or unsupported opinions. Petitioners cite no authority to support according deference to a post-enactment Commission report that was unsupported by any citations to relevant legal authorities or legislative history, and that was never adopted by Congress. There is no basis at all for this Court to accord any deference or weight to the Privacy Commission's post-enactment report when construing the meaning of the Privacy Act's damages provision. *See Bruesewitz v. Wyeth LLC,* 131 S. Ct. 1068, 1081-82 & n.72 (2011) (Scalia, J.) (post-enactment remarks and reports by members of Congress are not a "legislative history" in any sense or a "legitimate tool of statutory interpretation); *see also id.* at 1092 (Sotomayor, J.

dissenting) (describing such materials as a hazardous basis from which to infer the intent of the enacting Congress").

By contrast, the term "actual damages" was understood in the general law and by Congress in 1974 to include recovery for non-pecuniary harm, such as for emotional distress, humiliation and damage to reputation, as well as pecuniary harm. Resp. Br., pp. 12-13. When Congress enacted the Privacy Act it expressly stated that the statute's purpose was to prove a remedy to include redress such non-pecuniary harm. *Id.* at pp. 14-17. The prevailing common law and dictionary definition of "actual damages" in use at the time the Privacy Act was enacted included awards for proven emotional distress injuries. *Id.* at pp. 18-25. Additionally, the contemporaneous construction of other federal statutes enacted prior to the Privacy Act shows that Congress had used the terms "actual damages" and "compensatory damages" as synonymous terms to include awards for non-pecuniary harm. *Id.* at pp. 25-33.

To narrowly construe the Privacy Act's damages provision to preclude recovery of damages for documented emotional distress or humiliation that is actually suffered by a Privacy Act plaintiff, as urged by the Petitioners, would misconstrue the commonly understood meaning of the term "actual damages" when Congress enacted the Privacy Act. This Court should construe the Privacy Act in accordance with Congress' intent to create a viable remedy to redress the harm most commonly suffered by persons whose

privacy rights are violated when both non-pecuniary harm and willful or intentional violations of the Act are actually proven.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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