

No. 10-1024

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**In the Supreme Court of the United States**

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FEDERAL AVIATION ADMINISTRATION, ET AL.,  
PETITIONERS

*v.*

STANMORE CAWTHON COOPER

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**REPLY BRIEF FOR THE PETITIONERS**

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**TABLE OF CONTENTS**

	Page
I. The sovereign-immunity canon requires that “actual damages” be given its narrower interpretation as including only pecuniary harm . . . . .	3
II. The Privacy Act does not permit claims for mental or emotional distress . . . . .	6

**TABLE OF AUTHORITIES**

Cases:

<i>Adams Fruit Co. v. Barrett</i> , 494 U.S. 638 (1990) . . . . .	18
<i>American Stevedores, Inc. v. Porello</i> , 330 U.S. 446 (1947) . . . . .	6
<i>Ardestani v. INS</i> , 502 U.S. 129 (1991) . . . . .	4
<i>Beik v. Thorsen</i> , 363 A.2d 1030 (Conn. 1975) . . . . .	7
<i>Bowen v. City of New York</i> , 476 U.S. 467 (1986) . . . . .	4
<i>Canadian Aviator, Ltd. v. United States</i> , 324 U.S. 215 (1945) . . . . .	6
<i>Childers v. San Jose Mercury Printing &amp; Pub. Co.</i> , 38 P. 903 (Cal. 1894) . . . . .	9
<i>Daniels v. Coleman</i> , 169 S.E.2d 593 (S.C. 1969) . . . . .	7
<i>Department of the Army v. Blue Fox, Inc.</i> , 525 U.S. 255 (1999) . . . . .	3
<i>Doe v. Chao</i> , 540 U.S. 614 (2004) . . . . .	<i>passim</i>
<i>Electric Furnace Corp. v. Deering Milliken Research Corp.</i> , 325 F.2d 761 (6th Cir. 1963) . . . . .	11
<i>Gladstone Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1979) . . . . .	13
<i>Glenn v. Gidel</i> , 496 S.W. 2d 692 (Tex. Civ. App. 1973) . . .	11

II

Cases—Continued:	Page
<i>Guzman v. Western State Bank</i> , 540 F.2d 948 (8th Cir. 1976) .....	7
<i>Hardboard Mach. Co. v. Coastal Prods. Co.</i> , 289 F. Supp. 496 (M.D. Ga. 1967) .....	11
<i>Indian Towing Co. v. United States</i> , 350 U.S. 61 (1955) .....	4
<i>Irvin v. Department of Veterans Affairs</i> , 498 U.S. 89 (1990) .....	4
<i>John R. Sand &amp; Gravel Co. v. United States</i> , 552 U.S. 130 (2008) .....	5
<i>Lane v. Peña</i> , 518 U.S. 187 (1996) .....	3, 4, 16, 18
<i>Lehman v. Nakshian</i> , 453 U.S. 156 (1981) .....	3
<i>Library of Congress v. Shaw</i> , 478 U.S. 310 (1986) .....	3
<i>M&amp;S Furniture Sales Co. v. Edward J. DeBartolo Corp.</i> , 241 A.2d 126 (Md. 1968) .....	11
<i>Molzof v. United States</i> , 502 U.S. 301 (1992) ....	4, 6, 10, 15
<i>Morvant v. Lumbermens Mut. Cas. Co.</i> , 429 F.2d 495 (5th Cir. 1970) .....	7
<i>Nalder v. Crest Corp.</i> , 472 P.2d 310 (Idaho 1970) .....	7
<i>OPM v. Richmond</i> , 496 U.S. 414 (1990) .....	18
<i>Peine v. Murphy</i> , 377 P.2d 708 (Haw. 1962) .....	7
<i>Pension Benefit Guar. Corp. v. LTV Corp.</i> , 496 U.S. 633 (1990) .....	18
<i>Rayonier Inc. v. United States</i> , 352 U.S. 315 (1957) .....	4
<i>Reist v. Manwiller</i> , 332 A.2d 518 (Pa. Super. Ct. 1974) ...	7
<i>Richlin Sec. Serv. Co. v. Chertoff</i> , 553 U.S. 571 (2008) ....	5
<i>Smith v. United States</i> , 507 U.S. 197 (1993) .....	4
<i>Standifer v. Val Gene Mgmt. Servs., Inc.</i> , 527 P.2d 28 (Okla. Ct. App. 1974) .....	11

### III

Cases—Continued:	Page
<i>United States v. Aetna Cas. &amp; Sur. Co.</i> , 338 U.S. 366 (1949) .....	4
<i>United States Dep't of Energy v. Ohio</i> , 503 U.S. 607 (1992) .....	20
<i>United States v. Nordic Village, Inc.</i> , 503 U.S. 30 (1992) .....	3, 4, 6
<i>United States v. Rice</i> , 327 U.S. 742 (1946) .....	5
<i>United States v. Yellow Cab Co.</i> , 340 U.S. 543 (1951) ....	14
<i>Waples-Platter Cos. v. General Foods Corp.</i> , 439 F. Supp. 551 (N.D. Tex. 1977) .....	7
<i>Wetzel v. Gulf Oil Corp.</i> , 455 F.2d 857 (9th Cir. 1972) ...	11
Statutes:	
Fair Credit Reporting Act, 15 U.S.C. 1681 <i>et seq.</i> .....	13
Fair Debt Collection Practices Act, Pub. L. No. 95-109, Title VIII, § 813, 91 Stat. 881 (15 U.S.C. 1692k) .....	14
Fair Housing Act, 42 U.S.C. 3601 <i>et seq.</i> .....	13
Fair Housing Act, Pub. L. No. 90-284, Title VIII, § 812(c), 82 Stat. 88 .....	14
Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 <i>et seq.</i> .....	4
28 U.S.C. 2674 .....	14, 15
Privacy Act of 1974, Pub. L. No. 93-579, 5 U.S.C. 552a <i>et seq.</i> :	
§ 3, 88 Stat. 1901 .....	14
§ 5(e)(2)(B)(iii), 88 Stat. 1907 .....	9, 14, 19
5 U.S.C. 552a(b) .....	12
5 U.S.C. 552a(e)(1) .....	12

IV

Statutes—Continued:	Page
5 U.S.C. 552a(e)(2) .....	12
5 U.S.C. 552a(e)(10) .....	16, 18
5 U.S.C. 552a(e)(11) .....	12
5 U.S.C. 552a(g)(1)(D) .....	12
5 U.S.C. 552a(g)(4) .....	12, 18
5 U.S.C. 552a(g)(4)(A) .....	20
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 645-646 (26 U.S.C. 7431) .....	14
Okla. Stat. tit. 12, § 1442 .....	11
 Miscellaneous:	
33 Am. Jur. <i>Libel and Slander</i> § 5 (1941) .....	11
120 Cong. Rec. (1974):	
p. 36,955 .....	17
p. 36,956 .....	17
Dan B. Dobbs, <i>Handbook on the Law of Remedies</i> (1st ed. 1973) .....	8, 10, 11
George E. Frasier, Note, <i>An Alternative to the General-Damage Award for Defamation</i> , 20 Stan. L. Rev. 504 (1968) .....	11
OMB, <i>Privacy Act Guidelines</i> , 40 Fed. Reg. 28,970 (1975) .....	18
Privacy Protection Study Comm'n, <i>Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission</i> (1977) . . . .	10, 13
William L. Prosser, <i>Handbook of the Law of Torts</i> (4th ed. 1971) .....	9, 10, 11

Miscellaneous—Continued:	Page
Restatement of Torts (1939) .....	10, 11
Restatement (Second) of Torts (1977) .....	10, 11, 12

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Contradicting the conclusions of the Privacy Protection Study Commission and every court of appeals that has addressed the question presented, respondent contends (Br. 8) that the term “actual damages” has an accepted “plain meaning” that “clearly encompasses compensation for proven mental or emotional distress.” That contention is unsupported. The term has no such plain meaning as a general matter: even respondent ultimately acknowledges (Br. 50 n.5) that “actual damages” in a federal statute can sometimes refer exclusively to pecuniary harm. The term also has no such plain meaning at common law: not only could common-law “actual damages” refer to purely pecuniary harm, but that would be the most natural interpretation in a context, like the Privacy Act, where the term is distinguished from “general damages.” And the term has no such plain meaning in the Privacy Act: to the extent that

respondent tries to derive one from unrelated statutes, other parts of the Privacy Act, and the asserted purpose of the Act, he essentially repeats the errors of the court of appeals.

The untenability of respondent's "plain meaning" argument is fatal to his position. As the court of appeals correctly recognized, if "actual damages" is "susceptible of two plausible interpretations, then the sovereign immunity canon requires [a] court to construe the term narrowly in favor of the Government, holding that nonpecuniary damages are not covered." Pet. App. 34a. Respondent briefly contends that the sovereign-immunity canon is inapplicable here, but his contention is at odds with well-settled law and largely presupposes the correctness of his plain-meaning argument.

In any event, as the government's opening brief demonstrates, interpreting "actual damages" in the Privacy Act to exclude awards for mental and emotional distress is not only a "plausible" construction, but the best construction. As both this Court and the Privacy Protection Study Commission have recognized, the Privacy Act's requirement of "actual damages" as a prerequisite to recovery mirrors the common-law remedial scheme for defamation per quod, in which recovery was available only upon proof of economic loss. Gov't Br. 22-25. And respondent offers no meaningful answer to the demonstration in the government's opening brief that damages for mental or emotional distress would fall within the common-law definition of "general damages"—a type of damages that Congress expressly declined to authorize in the Privacy Act. *Id.* at 25-29.



**I. THE SOVEREIGN-IMMUNITY CANON REQUIRES THAT  
“ACTUAL DAMAGES” BE GIVEN ITS NARROWER INTER-  
PRETATION AS INCLUDING ONLY PECUNIARY HARM**

There is no dispute that the civil-remedies provision of the Privacy Act is a waiver of the United States’ sovereign immunity. Accordingly, under the longstanding strict-construction canon for such waivers, a “plausible” interpretation favoring the government “is enough to establish that a reading imposing monetary liability on the Government is not ‘unambiguous’ and therefore should not be adopted.” *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). Respondent’s attempts to avoid application of that principle in this case are unavailing.

A. Respondent first asserts that once “Congress has made an express waiver of immunity authorizing a monetary exaction,” the strict-construction canon plays no role in interpreting the extent of the monetary exaction Congress has authorized. Br. 42 (emphasis omitted). That assertion cannot be reconciled with this Court’s repeated recognition that the strict-construction rule applies not only in determining the existence of a waiver, but also in determining its “scope.” *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Lane v. Peña*, 518 U.S. 187, 192 (1996); see also, *e.g.*, *Lehman v. Nakshian*, 453 U.S. 156, 160-161 (1981). As cases cited in the government’s opening brief (at 16-18) demonstrate, even when a statute unambiguously permits some monetary recovery from the government, the question whether that statute authorizes a particular monetary remedy is a separate question of “scope” as to which the sovereign-immunity canon applies with full force. Indeed, respondent himself favorably cites a case, *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (cited at Resp. Br. 42), in which the Court applied the canon to conclude that a civil-rights statute authorizing damages liabil-

ity against the United States did not authorize an award of prejudgment interest. *Id.* at 319.

Additional cases cited by respondent do not establish a contrary rule. Many of those cases concern the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* See Resp. Br. 33, 42-43 (citing *Smith v. United States*, 507 U.S. 197 (1993); *Molzof v. United States*, 502 U.S. 301 (1992); *Rayonier Inc. v. United States*, 352 U.S. 315, 319-320 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955); *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949)). The Court has recognized that the FTCA contains particularly “sweeping language,” reflecting Congress’s “clear intent,” and has emphasized that cases construing the FTCA “do not \* \* \* eradicate the traditional principle that the Government’s consent to be sued must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires.” *Nordic Village*, 503 U.S. at 34 (internal quotation marks and citations omitted).

Other cases cited by respondent involve a particular rule that statutes of limitations in actions against the government are generally subject to equitable tolling. See Br. 33, 42 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990); *Bowen v. City of New York*, 476 U.S. 467 (1986)). Those cases do not control application of the strict-construction rule in other contexts—in particular, where, as in this case, the availability of a monetary remedy is at issue. See, *e.g.*, *Lane*, 518 U.S. at 192 (applying canon to deny a damages remedy and citing *Irwin* favorably); *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (applying canon to deny attorney’s fees and distinguishing *Irwin*). Monetary-exaction cases like this one lie at the core of the separation-of-powers concerns animating the sovereign-immunity canon, and disregarding the canon in such cases

would create an unacceptable risk of usurping Congress's exclusive authority over the Treasury. Gov't Br. 15-16.

Respondent suggests (Br. 43-44) that even though a monetary exaction is at issue in this case, the Court's decision in *Doe v. Chao*, 540 U.S. 614 (2004), must be read as rejecting the applicability of the sovereign-immunity canon to the Privacy Act's civil-remedies provision. *Doe*, however, said nothing about abandoning the sovereign-immunity canon in the context of the Privacy Act, nor did it give any reason why such a special exception from the Court's sovereign-immunity precedents would be appropriate. Cf. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008) ("Courts do not normally overturn a long line of earlier cases without mentioning the matter."). Rather, the Court had no need to address the sovereign-immunity canon in *Doe*, because it was adopting the government's narrowing construction of the Act. 540 U.S. at 616-627.

B. Respondent's remaining objection to applying the sovereign-immunity canon in this case rests on a mischaracterization of the government's position. The government, he asserts, is "urg[ing] that the sovereign immunity canon displace other tools of construction." Resp. Br. 41. That is not the government's argument. The government does not dispute that the sovereign-immunity canon would be immaterial if, as in cases cited by respondent, statutory-construction rules aside from the canon itself were to demonstrate that the government's interpretation of "actual damages" is without a reasonable basis. See *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008) (declining to find sovereign-immunity argument dispositive when there was no "ambiguity left for us to construe") (cited at Resp. Br. 44); *United States v. Rice*, 327 U.S. 742, 753 (1946) (declining to find sovereign-immunity argument dispositive when it sought to "create doubts" in "[s]tatutory language and

objective” that otherwise exhibited “reasonable clarity”) (cited at Resp. Br. 42); *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222-224 (1945) (declining to find sovereign-immunity argument dispositive when text and congressional intent were sufficiently clear) (cited at Resp. Br. 42); cf. *Molzof*, 502 U.S. at 306 (concluding that language was clear without expressly mentioning sovereign-immunity canon) (cited at Resp. Br. 43); *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 450 (1947) (same) (cited at Resp. Br. 43).

The government does, however, dispute that respondent has made, or could make, such a demonstration. See Part II, *infra*. Respondent’s contention that the sovereign-immunity canon is “unhelpful” in cases where, *inter alia*, the relevant statute “expressly subject[s] the United States to liability for money damages using ‘customary’ legal terms whose meaning is borrowed from common law tradition and statutes and precedents in existence at the time of enactment” (Br. 42), simply begs the question whether such an “express[.]” waiver is present in this case. So long as the Court agrees with the government that it is at least “plausible” to construe “actual damages” as limited to pecuniary harm, then the sovereign-immunity canon compels the adoption of that construction. *Nordic Village*, 503 U.S. at 37.

## II. THE PRIVACY ACT DOES NOT PERMIT CLAIMS FOR MENTAL OR EMOTIONAL DISTRESS

The government demonstrates in its opening brief that the term “actual damages” in the Privacy Act is not only plausibly, but most reasonably, understood as limited to pecuniary harm. Gov’t Br. 21-35. In answering that argument, respondent advances (Br. 8) the novel contention that the “plain” legal meaning of “actual damages” neces-

sarily encompasses awards for mental and emotional distress. Regardless of the level of generality at which respondent frames it, that argument is unsound.

A. At certain points, respondent appears to suggest that the term “actual damages,” no matter the context, always includes awards for mental and emotional distress. See, *e.g.*, Br. 28 (suggesting that Congress must provide a clear textual statement when it intends to exclude such awards). That contention is untenable. The Privacy Protection Study Commission—the expert body Congress established in the Privacy Act and charged with studying the Act’s damages provision—along with every court of appeals to have addressed the question presented has found that the term “actual damages” can refer exclusively to pecuniary harm. Gov’t Br. 20-21. That uniform conclusion accurately reflects usage of the term by a number of authorities before and around the time of the Privacy Act’s enactment.<sup>1</sup>

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<sup>1</sup> In addition to the authorities cited in note 2, *infra*, which use “actual damage(s)” as a synonym for “special damage(s),” see, *e.g.*, *Guzman v. Western State Bank*, 540 F.2d 948, 953 (8th Cir. 1976) (using “actual damages” to mean “out-of-the-pocket pecuniary loss,” as distinct from “emotional and mental distress”); *Morvant v. Lumbermens Mut. Cas. Co.*, 429 F.2d 495, 496 (5th Cir. 1970) (using “actual damages” to refer to medical expenses and lost wages, as distinct from “pain and suffering”); *Waples-Platter Cos. v. General Foods Corp.*, 439 F. Supp. 551, 582-583 (N.D. Tex. 1977) (using “actual damage” to mean “economic damage”); *Beik v. Thorsen*, 363 A.2d 1030, 1031 (Conn. 1975) (*per curiam*) (using “actual damage” to mean “pecuniary loss”) (quoting Am. Jur. treatise); *Daniels v. Coleman*, 169 S.E.2d 593, 597-598 (S.C. 1969) (same); *Reist v. Manwiller*, 332 A.2d 518, 520 n.4 (Pa. Super. Ct. 1974) (using “actual damages” as distinct from “emotional distress” and “mental suffering”); *Nalder v. Crest Corp.*, 472 P.2d 310, 315 (Idaho 1970) (using “actual damages” as generally distinct from “damages for mental anguish”); *Peine v. Murphy*, 377 P.2d 708, 712 (Haw. 1962) (using “actual damages” to mean “pecuniary loss”); see also Gov’t Br. 20 (citing statutory-construction decisions of this Court).

In fact, respondent ultimately concedes the point. In a footnote towards the end of his brief (Br. 50 n.5), he disavows the position that “every federal statute that provides for ‘actual damages’ must be construed to provide for compensation for mental and emotional distress.” Accordingly, even in respondent's view, the mere appearance of the term “actual damages” in the text of a statute is not by itself sufficient to establish that Congress intended—let alone clearly and unequivocally intended—to authorize awards for mental and emotional distress.

B. As an apparent alternative to the more categorical argument, respondent contends that the term “actual damages” in the Privacy Act encompasses awards for mental and emotional distress because such awards were available at common law for “invasion of privacy and defamation by libel and slander per se.” Br. 9; see Br. 21-25, 50 n.5. That contention is misplaced. This Court has already observed that the remedial scheme in the Privacy Act differs from the remedial scheme for defamation per se (which awarded automatic damages for certain types of defamatory statements). *Doe*, 540 U.S. at 625; see, e.g., Dan B. Dobbs, *Handbook on the Law of Remedies* § 7.2, at 510-513 (1st ed. 1973) (Dobbs). And whatever role the common-law invasion-of-privacy tort may have played in the development of the Privacy Act, it did not provide the model for the Act's civil-remedies provision.

Under the common law at the time the Privacy Act was enacted, a plaintiff asserting a claim for “certain dignitary invasions, such as libels [and] invasions of privacy,” could obtain an award of “general damages” for “the affront to [his] dignity and the emotional harm done.” Dobbs § 3.2, at 139; see also, e.g., William L. Prosser, *Handbook of the Law of Torts* § 112, at 761 (4th ed. 1971) (Prosser) (observing that certain defamation plaintiffs could recover “‘general’

damages” for “wounded feelings or humiliation”) (footnote omitted). Such an award is not, however, available under the Privacy Act. Instead, the Act “indicates beyond serious doubt that general damages are not authorized,” because a provision for “general damages” was deleted from the bill and the Act instead directed the Privacy Protection Study Commission to study whether the civil-remedies provision should be amended to include “general damages.” *Doe*, 540 U.S. at 622-623; see Privacy Act § 5(c)(2)(B)(iii), 88 Stat. 1907 (assigning 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” 5 U.S.C. 552a(g)(1)(C) or (D)). That express textual directive forecloses respondent’s argument that “actual damages” in the Privacy Act include the sort of “general damages for outrage to feelings and loss of reputation” that were recoverable in a common-law action for defamation per se or invasion of privacy. Br. 22-23 (quoting *Childers v. San Jose Mercury Printing & Pub. Co.*, 38 P. 903, 904 (Cal. 1894)).

Respondent briefly asserts (Br. 54-56) that the Act’s exclusion of “general damages” precludes awards for mental or emotional distress only when such distress is presumed, and not when such distress is proven. He relies on statements from the government’s *Doe* brief and this Court’s *Doe* decision recognizing that “general damages” can be presumed without proof. Resp. Br. 55-56. But those statements do not address, and certainly do not refute, the full common-law definition of “general damages” as a particular *type* of damages (here, including awards for mental or emotional distress) that could *either* be presumed (in the absence of evidence) *or* be proven (if evidence was available). Gov’t Br. 26-27; see, *e.g.*, Restatement of Torts § 904 & cmt. a (1939) (First Restatement); see Restatement (Sec-

ond) of Torts § 904 & cmt. a (1977) (similar) (Second Restatement); Dobbs § 3.2, at 139; Prosser § 112, at 761. That common-law background, which respondent does not meaningfully dispute, should be controlling. As respondent recognizes, it is a “‘cardinal rule’ of statutory construction” that Congress “presumably knows and adopts” the well-known common-law definitions of terms that it uses. Br. 18 (quoting *Molzof*, 502 U.S. at 307).

Contrasted with the “general damages” that the Act precludes, the “actual damages” that the Act permits are best understood as limited solely to recovery for pecuniary harm. In the defamation and invasion-of-privacy context, the only other potential types of damages, aside from “general damages,” were “proof of actual economic harm and \* \* \* punitive damages.” Dobbs § 3.2, at 139. There is no dispute that the Act precludes punitive damages, so once “general damages” are eliminated, the only remaining category of damages that the Act could allow is recovery for actual economic loss.

Tellingly, that is exactly how the Privacy Protection Study Commission understood the Act’s “actual damages” provision. It recognized that the “general damages” Congress had declined to authorize would have included awards for mental and emotional distress. *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (1977) (*Privacy Commission Report*). And it contrasted those “general damages” with the “actual damages” that Congress had in fact authorized. *Ibid.* “[W]ithin the context of the Act,” the Commission concluded, the term “actual damages” was “intended as a synonym for special damages as that term is used in defamation cases,” which were limited to damages for “loss of \* \* \* tangible pecuniary benefits.” *Ibid.*



This Court has likewise recognized that the Act’s civil-remedies provision “parallels” the common-law remedial scheme for defamation per quod, in which, because the alleged defamation fell outside the categories of statements deemed harmful per se, proof of pecuniary harm was a necessary prerequisite for recovery. *Doe*, 540 U.S. at 625-626; see Gov’t Br. 22-25; First Restatement §§ 575 & cmts. a-c, 623 cmt. a; Second Restatement §§ 575 & cmts. a-c, 623 cmt. a; Dobbs, § 7.2, at 511-512, 520. Contrary to respondent’s suggestion (Br. 20 n.2, 52-53), courts, legislatures, and treatises referring to such purely pecuniary losses in the defamation per quod context sometimes used the term “actual damages” (or “actual damage”) in place of the term “special damages” (or “special damage”).<sup>2</sup> And Congress

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<sup>2</sup> See, e.g., *Wetzel v. Gulf Oil Corp.*, 455 F.2d 857, 862 (9th Cir. 1972) (defining “libel per quod” as requiring “valid and sufficient evidence of actual damage”); *Electric Furnace Corp. v. Deering Milliken Research Corp.*, 325 F.2d 761, 765 (6th Cir. 1963) (defining “libel per quod” as requiring “proof of actual damages, proximately caused by the libel”); *Hardboard Mach. Co. v. Coastal Prods. Co.*, 289 F. Supp. 496, 498 (M.D. Ga. 1967) (defining “per quod actions” for libel as requiring a plaintiff “to show that the language used did produce actual damage”) (quoting 33 Am. Jur. *Libel & Slander* § 5, at 41 (1941)); *Glenn v. Gidel*, 496 S.W. 2d 692, 697 (Tex. Civ. App. 1973) (defining slander “actionable per quod” as “actionable only in view of actual damages resulting from slanderous words”); *Standifer v. Val Gene Mgmt. Servs., Inc.*, 527 P.2d 28, 30-31 (Okla. Ct. App. 1974) (defining slander “per quod” based on statutory requirement of “actual damage”) (citing Okla. Stat. tit. 12, § 1442); *M&S Furniture Sales Co. v. Edward J. DeBartolo Corp.*, 241 A.2d 126, 128 (Md. 1968) (defining defamation per quod as requiring a showing that the “words or [expressive] conduct caused actual damage”); Prosser § 112, at 754 (explaining that “slander, in general, is not actionable unless actual damage is proved”); cf. George E. Frasier, Note, *An Alternative to the General-Damage Award for Defamation*, 20 Stan. L. Rev. 504, 512 n.28 (1968) (explaining that state statutes have used the term “actual damages” to mean “special damages”).

used the term “actual damages” in that way in the civil-remedies provision of the Privacy Act.

The Privacy Act’s unprecedented substantive scope gave Congress good reason to be cautious about expanding the government’s damages liability any further. Many potential Privacy Act violations that could result in damages suits had no substantive analogue in the common-law torts respondent identifies (or any other common-law tort). The Act would potentially allow a damages suit alleging, for example, that a government agency intentionally or willfully maintained more information than necessary about someone, see 5 U.S.C. 552a(e)(1); improperly collected material information about someone from third parties rather than the person himself, see 5 U.S.C. 552a(e)(2); or failed to provide timely notice in the Federal Register of a new routine use for someone’s records, see 5 U.S.C. 552a(e)(11). 5 U.S.C. 552a(g)(1)(D) and (4). None of those administrative activities would have been actionable at common law. Even the Privacy Act’s disclosure-related provision sweeps much more broadly than the common law: the very subject of respondent’s claim in this case—the interagency information-sharing in Operation Safe Pilot—would not, for example, have constituted common-law invasion of privacy. Compare, *e.g.*, Second Restatement § 652D & cmt. a (no invasion of privacy unless there is communication to the public), with 5 U.S.C. 552a(b) (forbidding disclosure to “any person” unless authorized by the Act).

The adverse consequences of extending broad common-law remedial schemes, including awards for mental and emotional distress, to *sui generis* suits against the United States under the Privacy Act were potentially quite serious when the Act was passed (and remain so today). Congress therefore proceeded guardedly, “restrict[ing] recovery to specific pecuniary losses until the Commission could weigh

the propriety of extending the standard of recovery.” *Privacy Commission Report* 530. And after receiving the Commission’s report, Congress ultimately left the Act where it originally stood: without a provision for mental-distress or emotional-distress awards.

C. As another alternative to the more categorical plain-meaning argument, respondent asserts (Br. 50 n.5) that the term “actual damages” necessarily includes awards for mental and emotional distress whenever the term is used in the context of “a violation of federal civil rights.” This appears to be a reference to his contention (Br. 25-32) that the construction of “actual damages” in the Privacy Act should track the construction that some lower courts have given to “actual damages” in the context of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* (FCRA), and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* (Fair Housing Act or FHA). Respondent’s effort to analogize the Privacy Act to these textually and contextually dissimilar statutes is unavailing.

The government’s opening brief explains why a single district court’s construction of FCRA’s materially different civil-remedies provision, in a private tort dispute decided after the term “actual damages” had already been introduced into drafts of the Privacy Act, has no relevance to this case. Gov’t Br. 41-42. And even the Ninth Circuit considered the FHA, which “broadly prohibits discrimination in housing throughout the Nation,” *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 93 (1979), to be insufficiently “analogous in time, purpose, and subject matter” to allow for a legitimate comparison to the Privacy Act. Pet. App. 32a n.2. Moreover, as was the case with the Tax Reform Act cited by the petitioner in *Doe*, the FHA’s text is “too far different from the language of the Privacy Act to serve as any sound basis for analogy.” *Doe*, 540 U.S. at 626.

Among other things, the FHA’s civil-remedies provision was not a waiver of the United States’ sovereign immunity (as the Privacy Act’s is), and the FHA did not expressly preclude recovery for “general damages” (as the Privacy Act does). Compare Fair Housing Act, Pub. L. No. 90-284, Title VIII, § 812(c), 82 Stat. 88, with Privacy Act of 1974, Pub. L. No. 93-579, §§ 3, 5(c)(2)(B)(iii), 88 Stat. 1901, 1907.<sup>3</sup>

D. Respondent also repeatedly attempts to compare the Privacy Act to the FTCA. The comparison is inapt. The primary liability provision under the FTCA does not use the term “actual damages.” It instead provides that the United States “shall be liable” for certain tort claims “in the same manner and to the same extent as a private individual” under relevant state law, subject to the proviso that prejudgment interest and punitive damages are not recoverable. 28 U.S.C. 2674. That language is much more expansive than the Privacy Act’s waiver for “actual damages.” See, e.g., *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951) (“The Federal Tort Claims Act waives the Government’s immunity from suit in sweeping language.”); see also p. 4, *supra*. Respondent’s observation (e.g., Br. 27) that the

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<sup>3</sup> Similar defects undermine the claim of one of respondent’s amici that “[m]any privacy statutes contain damages provisions similar to the Privacy Act, and courts routinely interpret those provisions as including mental and emotional distress.” EPIC Amicus Br. 6. The amicus makes little effort to compare the text and structure of the statutes it cites to the text and structure of the Privacy Act. See *id.* at 6-15. The amicus’s argument, moreover, relies on lower-court opinions, and the federal-court opinions he cites (other than FHA-related cases also cited by respondent) all post-date the Privacy Act—as do some of the statutes themselves. See *Doe*, 540 U.S. at 626-627 (rejecting reliance on post-1974 materials in interpreting Privacy Act); see, e.g., Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 645-646 (26 U.S.C. 7431); Fair Debt Collection Practices Act, Pub. L. No. 95-109, Title VIII, § 813, 91 Stat. 881 (1977) (15 U.S.C. 1692k).

government may be subject to state-law emotional-distress or mental-distress remedies under the FTCA is accordingly irrelevant for purposes of interpreting the Privacy Act. In particular, and contrary to respondent's contention (*e.g.*, Br. 19), this Court's construction of the FTCA's exception for "punitive damages" in *Molzof v. United States, supra*, has no material bearing on the meaning of the Privacy Act's waiver of sovereign immunity for "actual damages."

Respondent also cites another portion of the FTCA, which provides that in certain cases where the act or omission of a government employee has resulted in someone's death, "the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." 28 U.S.C. 2674. That language is unhelpful to respondent. To begin with, Congress's use of the disjunctive phrase "actual or compensatory damages" undercuts respondent's repeated assertion (*e.g.*, Br. 19) that the phrase "actual damages" is always synonymous with "compensatory damages." Furthermore, Congress's recognition that "pecuniary injuries" constitute a "measur[e]," as opposed to a limitation, of "actual or compensatory damages," reinforces the conclusion that such damages can appropriately be defined solely by reference to economic harm. 28 U.S.C. 2674; see also Gov't Br. 20 (citing examples of statutes and cases that define "actual damages" in purely pecuniary terms). Finally, even assuming "actual or compensatory damages" in the FTCA wrongful-death context could be read to encompass nonpecuniary harm, that would furnish no basis for finding an unequivocal waiver of sovereign immunity for claims of such harm under the "actual damages" provision of the Privacy Act, given the distinct text, background, and purposes of that Act.

E. To the extent that respondent alternatively bases his argument on sources intrinsic to the Privacy Act legislation, those sources provide him with no meaningful support. To begin with, respondent’s discussion of the preamble and other non-remedial provisions of the Privacy Act (Br. 13-17) fares no better than the similar discussion in the Ninth Circuit’s opinion. As the government explained in its opening brief, neither the expressly subsidiary—and descriptively inaccurate—language of the preamble, nor any other general reference to the Act’s purposes, controls the construction of the operative text of the “actual damages” provision. Gov’t Br. 37-41.

The only new twist respondent offers on the Ninth Circuit’s discussion rests on a misreading of the Act’s text. Respondent characterizes a Privacy Act provision requiring agencies to safeguard their records as imposing that requirement for the purpose of preventing “pecuniary and nonpecuniary ‘harm,’ including ‘embarrassment, inconvenience, or unfairness’” to people whose information is in those records. Br. 17 (quoting 5 U.S.C. 552a(e)(10)) (emphasis omitted). But contrary to respondent’s characterization, that provision does not list “embarrassment,” “inconvenience,” and “unfairness” as forms of “harm.” Rather, the provision is phrased disjunctively—“harm, embarrassment, inconvenience, *or* unfairness,” 5 U.S.C. 552a(e)(10) (emphasis added)—such that “embarrassment,” “inconvenience,” and “unfairness” are all distinguished from “harm.” None of those terms, moreover, provides a definition of “actual damages.”

Respondent’s discussion of the Act’s legislative history (Br. 35-41) similarly fails to advance his position. As a threshold matter, “legislative history cannot supply a [sovereign-immunity] waiver that does not appear clearly in any statutory text.” *Lane*, 518 U.S. at 192. And in any

event, the legislative record, which demonstrates Congress's strong concern about protecting the public fisc, militates strongly against respondent's construction of "actual damages." Gov't Br. 29-32.

Respondent identifies no direct statement by any Member of Congress to the effect that "actual damages" includes awards for mental and emotional distress. The only statement addressing that issue is Representative Eckhardt's comment, on a version of the bill that provided for "actual damages," that "[t]here is nothing in this that would provide for any damages beyond [a plaintiff's] actual out-of-pocket expenses." 120 Cong. Rec. 36,956 (1974). Respondent asserts (Br. 53-54) that the comment referred to a hypothetical that Representative Eckhardt had posed two paragraphs earlier, about someone who had lost a job and associated wages as a result of a government record "falsely indicat[ing] his having been discharged when he had in fact resigned." 120 Cong. Rec. 36,955-36,956. But that interpretation overlooks the intervening paragraph, in which Representative Eckhardt spoke more generally of "a person who is actually injured" by a Privacy Act violation. *Id.* at 36,956. And even if respondent's view of a connection to the hypothetical were correct, it would not blunt the force of Representative Eckhardt's recognition that the only "damages" the plaintiff with lost wages could recover would be "out-of-pocket expenses," and not, for example, any award for mental or emotional distress arising from the dissemination of false information that he had been fired from government service.<sup>4</sup>

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<sup>4</sup> One of respondent's amici attempts to bolster respondent's construction of "actual damages" by pointing to the 1975 Privacy Act Guidelines issued by the Office of Management and Budget (OMB). EPIC Amicus Br. 30-31. This Court found those guidelines unhelpful in *Doe*, 540 U.S. at 627 n.11, and they are similarly uninformative here.

F. Lastly, respondent argues that the Act’s privacy-protective purpose requires that its civil-remedies provision be construed to permit claims for mental and emotional distress. *E.g.*, Resp. Br. 33-35. A reference to general statutory purposes cannot establish a waiver of federal sovereign immunity. “[W]here a cause of action is authorized against the federal government, the available remedies are not those that are ‘appropriate,’ but only those for which sovereign immunity has been expressly waived.” *Lane*, 518 U.S. at 197 (citation omitted).

The argument, in any event, lacks substantial force. It is undoubtedly true that protecting people from unnecessary “embarrassment” and the like was one of Congress’s goals in passing the Privacy Act. 5 U.S.C. 552a(e)(10). But Congress did not pursue that goal singlemindedly. As the government pointed out in its opening brief, “[n]o legislation pursues its purposes at all costs,” and deciding how far a particular statute should go “is the very essence of legislative choice.” Gov’t Br. 38 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-647 (1990)). Here, “it is undisputed” that, although Congress wanted to provide some civil remedies for Privacy Act violations, it also “did not want to saddle the Government with disproportionate liability.” *Doe*, 540 U.S. at 637 (Ginsburg, J., dissenting).

Respondent contends (Br. 57-58) that the restriction of monetary liability to certain “intentional or willful” violations, 5 U.S.C. 552a(g)(4), was by itself a sufficient limita-

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The guidelines do not state that the Privacy Act permits awards for mental or emotional distress, see OMB, *Privacy Act Guidelines*, 40 Fed. Reg. 28,970 (1975); no deference would in any event be owed to a federal agency’s interpretation of a provision administered solely by the courts, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-650 (1990); and the United States’ sovereign immunity cannot be waived by executive action, see *OPM v. Richmond*, 496 U.S. 414, 424-434 (1990).



tion on the liability of the United States. But had Congress shared that view, it would not have categorically precluded an award of “general damages,” even for intentional or willful violations. Privacy Act § 5(c)(2)(B)(iii), 88 Stat. 1907.

Respondent goes so far as to claim (Br. 34) that it would have been “absurd” for Congress not to have included awards for mental and emotional distress in the Privacy Act. As previously explained (pp. 12-13, *supra*), however, the Privacy Act exposed the government to liability in new ways under a broad new administrative-law framework that regulated the handling of agency records across the government. It was not only reasonable, but prudent, for Congress to proceed with caution by restricting monetary recovery to pecuniary harm and reserving the issue of awards for mental and emotional distress for further study by the Privacy Protection Study Commission and then by Congress. *Ibid.* And to the extent that the absence of further legislation providing such awards requires an affirmative explanation, the government’s opening brief explains several reasons why drawing the line between pecuniary and nonpecuniary harm made sense. Among other things, a pecuniary-harm requirement assures that a plaintiff’s damages will be objectively provable, readily quantifiable, and unlikely to result in extreme, uncapped monetary awards against the United States. Gov’t Br. 32-35. Congress, moreover, could reasonably have viewed the existence of pecuniary harm as a workable proxy for circumstances serious enough to warrant a damages award—a distinction that the common law had long drawn in cases of defamation per quod. See *Doe*, 540 U.S. at 625-626.

Respondent errs in suggesting (Br. 35) that allowing recovery only in cases of pecuniary harm “simply create[s] incentives for aggrieved individuals to incur small pecuniary losses as a basis for suit.” A plaintiff who manufactures

his own pecuniary harm will not be able to show damages arising “as a result of” a Privacy Act violation, 5 U.S.C. 552a(g)(4)(A), and will thus be ineligible to recover either those damages or the statutory minimum of \$1000. Furthermore, respondent’s construction of “actual damages” would create the far more troubling incentive for potential plaintiffs to claim difficult-to-disprove mental or emotional damages far in excess of \$1000. Had Congress in fact intended to countenance that result, or to allow awards for mental or emotional distress at all, it would have expressed that intent clearly and unequivocally in the statutory text, as this Court’s precedents require. *United States Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992). Congress’s use of the ambiguous term “actual damages,” particularly in combination with its express exclusion of “general damages,” does not express, let alone clearly and unequivocally express, any such intent.

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Solicitor General*

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