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* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.[1] EPIC has participated as *amicus curiae* in several cases before this Court and other courts concerning the application of federal statutes that seek to protect privacy, including *FCC v. AT&T*, 131 S. Ct. 1177 (2011) (personal privacy exemptions in the Freedom of Information Act of 1966); *Doe v. Chao*, 540 U.S. 614 (2003) (Privacy Act of 1974); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003) (personal privacy exemptions in the Freedom of Information Act of 1966); *Reno v. Condon*, 528 U.S. 141 (2000) (Drivers Privacy Protection Act of 1994); *Chicago Tribune v. University of Illinois*, No. 10-0568, 2011 WL 982531 (N.D. Ill. Mar. 7, 2011), *appeal docketed*, No. 11-2066 (7th Cir. Apr. 1, 2011) (Family Educational Rights and Privacy Act of 1974);

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[1] Letters of Consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. *Amicus* lodged with the Court Petitioners' and Respondent's letters of consent contemporaneous with the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. EPIC Fellows Khaliah Barnes and Alan Butler contributed to the preparation of this brief.

United States v. Councilman, 385 F.3d 793 (1st Cir. 2004) (Electronic Communications Privacy Act of 1986); and *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396 (N.D. Tex. 2009), *appeal docketed*, No. 09-10420 (5th Cir. Apr. 29, 2009) (Video Privacy Protection Act of 1988).

EPIC's Advisory Board includes leading scholars and technical experts concerned about the protection of privacy in the modern era.

EPIC routinely urges effective enforcement of privacy laws in the United States. Effective enforcement of privacy laws, such as the Privacy Act of 1974, requires full compensation for the broad range of harms associated with privacy violations. Because the general structure of privacy law and the specific text of the Privacy Act, and relevant legislative history, show that this is precisely what Congress intended, the Court should hold that actual damages include non-pecuniary harms arising from Privacy Act violations.

The Ninth Circuit Court's determination that the Privacy Act does not distinguish between pecuniary and non-pecuniary harms reflects the intent of Congress in the enactment of the privacy law.

SUMMARY OF THE ARGUMENT

At issue in this case is whether a plaintiff, whose sensitive medical information was willfully disclosed by a federal agency in violation of the Privacy Act of 1974, may recover damages for his mental and emotional distress.

The agency claims that mental and emotional distress do not constitute "actual damages" under the Act. However, mental and emotional damages are just the sort of harms for which privacy laws routinely provide compensation. And the Privacy Act's legislative history makes clear that Congress intended to include mental and emotional distress as one component of "actual damages."

Moreover, in establishing the obligations for the protection of personal information that are placed on federal agencies that collect and use personal information, Congress did not intend to allow agencies to sidestep statutory requirements by pointing to the non-pecuiniary character of harm suffered as a result of their own willful acts. Such an interpretation of the damages provision set out in the Act would undermine the statutory structure and lead agencies to be less careful in the protection of personal information within their control.

The civil remedy provision in the Privacy Act, like similar provisions in numerous privacy statutes, provides for the recovery of actual damages and includes a liquidated damages provision precisely because of the difficulty of measuring harm in privacy cases. Lawmakers have long incorporated such stipulated damages provisions in privacy statutes to ensure effective enforcement and to

safeguard personal information. Privacy laws routinely provide for recovery when a party demonstrates mental or emotional distress caused by a privacy violation, and more broadly when an agency has failed to uphold its obligations to protect the personal data within its care. Providing broad remedies is particularly important in privacy cases, where scholars and the courts have long recognized the difficulty in demonstrating pecuniary damages.

The legislative history of the Privacy Act, as well as a significant government report that provided the basis for the Act, make clear Congress's intent to provide meaningful remedies for violations of individuals' privacy rights and to ensure that federal agencies could not skirt their obligations to safeguard the personal information that they collect. Congress explicitly recognized the particular risks to privacy that could result from unlawful disclosures and thus included damages provisions that would enable the public to enforce the legal protections against wrongful disclosure. Congress intended "actual damages" to embrace the broad range of harms caused by privacy violations in order to deter and compensate for the unlawful disclosure of personal information.

ARGUMENT

I. Privacy Laws Routinely Provide for Recovery of a Broad Range of Damages, Including Mental And Emotional Distress

A. Privacy Laws Routinely Provide Compensation for Mental and Emotional Distress as a Component of Actual Damages

Privacy laws seek to impose obligations on those entities, public and private, that collect and use personal information and to create rights for individuals whose personal information is held by others. For example, the Privacy Act requires federal agencies to ensure accuracy, provide security and limit the use of the information to the purposes for which it was collected. Individuals are given the statutory right to inspect and correct information about them that is held by the agency. These provisions promote government transparency and accountability. They typify the foundational principles that animate much of privacy law in the United States – data collectors have legal obligations, and individuals have rights concerning their personal information.

When provided in privacy statutes, damages provisions do not simply provide compensation for harm suffered; they also aim to ensure compliance with statutory obligations by entities that collect and use personal data. To further that objective, the Privacy Act provides for recovery of "actual damages sustained by the individual as a result of the refusal or failure," by a federal agency to uphold its obligations under the Act. 5 U.S.C. § 552a(g)(4)

(2011). Those actual damages include harms suffered as a result of the privacy violation, which includes mental and emotional damages. When privacy laws provide for recovery of "actual damages," courts routinely award compensation for mental and emotional distress. These harms go to the core of what privacy statutes aim to protect – the non-pecuniary impacts of privacy violations.

Many different statutes protect the privacy of personal information. These statutes provide various civil remedies for privacy violations, including recovery for mental and emotional distress. Common law tort and constitutional remedies for privacy violations also allow recovery for mental and emotional distress. Many privacy statutes contain damage provisions similar to the Privacy Act, and courts routinely interpret these provisions as including mental and emotional distress. The Restatement (Second) of Torts also includes mental and emotional distress in its provision on damages for privacy violations. Courts have embraced the Restatement and regularly grant recovery of mental and emotional damages in privacy cases.

The Fair Credit Reporting Act ("FCRA") sets guidelines for consumer reporting agencies that collect and sell access to data about individuals' creditworthiness. 15 U.S.C. § 1681b (2011). The FCRA permits recovery of damages for mental and emotional distress caused by violations of the Act. In *Cortez v. Trans Union, LLC* the Third Circuit held:

> In allowing suits for damages, Congress certainly intended to allow compensation for the very kind of harm that the FCRA was intended to prevent. This is not legislation mandating a

> safety standard to prevent physical injury. It is legislation designed to facilitate banking and the extension of credit while protecting consumers from the kind of injury that will almost certainly result when erroneous information is inserted into a credit report. Thus, damages for violations of the FCRA allow recovery for humiliation and embarrassment or mental distress even if the plaintiff has suffered no out-of-pocket losses.

Cortez v. Trans Union, LLC, 617 F.3d 688, 719 (3d Cir. 2010); *see also Bryant v. TRW*, 689 F.2d 72, 77 (6th Cir. 1982).

The Fair Debt Collection Practices Act ("FDCPA") protects the privacy of alleged debtors by limiting communications made by debt collectors. 15 U.S.C. § 1692C (2011). The FDCPA imposes civil liability on "any debt collector who fails to comply" with its provisions, including "any actual damages sustained." 15 U.S.C. § 1692C(a) (2011). Mental and emotional distress are compensable damages under the FDCPA's "actual damages" provision. For example, individuals' stress resulting from false threats of suit has been recognized as a compensable injury in private suits under the FDCPA. *E.g., United States v. Nat'l Fin. Services*, 98 F.3d 131, 140 (4th Cir. 1996); *Carrigan v. Central Adjustment Bureau,* 502 F.Supp. 468 (N.D. Ga. 1980); *Nelson v. Equifax Info. Services*, 522 F. Supp. 2d 1222, 1235 (C.D. Cal. 2007); *McGrady v. Nissan Motor Acceptance*, 40 F. Supp. 2d 1323, 1338 (M.D. Ala. 1998).

The federal wiretap act, as amended by the Electronic Communications Privacy Act of 1986

("ECPA"), prohibits the interception and disclosure of wire, oral, and electronic communications. 18 U.S.C. § 2511 (2011). The Act provides statutory damages for violations of the Act. 18 U.S.C. § 2520(c)(1)(A); 18 U.S.C. § 2520(c)(1)(B); 18 U.S.C. § 2520(c)(2)(B); 18 U.S.C. § 2707(c). The United States Court of Appeals for the D.C. Circuit interpreted an earlier version of ECPA to permit collection of damages for mental and emotional distress. *Halperin v. Kissinger*, 606 F.2d 1192, 1207-08 (D.C. Cir. 1979) *aff'd in part, cert. dismissed in part*, 452 U.S. 713, 101 S. Ct. 3132, 69 L. Ed. 2d 367 (1981) (holding that violations of the federal wiretap act that cause emotional distress and mental anguish entitle plaintiffs to recovery).

The Equal Credit Opportunity Act ("ECOA") bars creditors from discriminating against applicants on the basis of color, race, sex, national original, marital status, age, or the fact that an applicant's income derives from a public assistance program. 15 U.S.C. § 1691 (2011). The ECOA provides for statutory damages sustained as a violation of the Act. Courts consistently interpret the Act's statutory damages provision to be triggered by mental and emotional distress. *E.g. Fischl v. Gen. Motors Acceptance*, 708 F.2d 143, 148 (5th Cir. 1983); *Anderson v. United Finance,* 666 F.2d 1274 (9th Cir. 1982); *Smith v. Anchor Building*, 536 F.2d 231, 236 (8th Cir. 1976); *Williams v. Matthews*, 499 F.2d 819, 829 (8th Cir. 1974), *cert. denied* 419 U.S. 1021, 1027, 95 S.Ct. 495, 42 L.Ed.2d 294; *Jeanty v. McKey & Poague*, 496 F.2d 1119, 1121 (7th Cir. 1974); *Seaton v. Sky Realty*, 491 F.2d 634, 636 (7th Cir. 1974); *Steele v. Title Realty*, 478 F.2d 380, 384 (10th Cir. 1973).

The Employee Polygraph Protection Act ("EPPA") prohibits employers from discharging, disciplining, or

discriminating against employees based upon lie detector test results. 29 U.S.C. § 2002 (2011). Employees may collect statutory damages for violations of the Act. 29 U.S.C. § 2005 (2011). Courts routinely award statutory damages for EPPA violations that cause mental and emotional distress. *E.g. Dilworth v. LaSalle-Chicago 24-Hour Currency Exchange,,* No. 02-7543, 2004 WL 524665 (N.D. Ill. March 12, 2004) (jury awarded plaintiff $6,000); *Albin v. Cosmetics Plus, N.Y.,* No. 97-2670, 2001 WL 15676 (S.D.N.Y. Jan. 5, 2001) (jury awarded plaintiff $75,000 in lost wages and $5,000 for emotional distress; court upheld award and granted plaintiff's request for prejudgment interest on the lost wages award, calculated at a 6% rate); *Mennen v. Easter Stores,* 951 F.Supp. 838 (N.D. Iowa 1997) (court awarded plaintiff $18,225.35 in lost wages, $4,098.22 in prejudgment interest on lost wages award, and $15,000 for emotional distress); *Jones v. Confidential Investigative Consultants,* No. 92-1566, 1994 WL 127261 (N.D. Ill. April 12, 1994) (jury awarded plaintiff $90,000; court declared judgment to be void because it was obtained in violation of Bankruptcy Code's automatic stay)." *Lyles v. Flagship Resort*, 371 F. Supp. 2d 597, 604-05 (D.N.J. 2005).

The Internal Revenue Code prohibits the disclosure of taxpayer return information under certain circumstances. 26 U.S.C. §6103 (2010). A taxpayer whose return is disclosed in violation of Section 6103 or Section 6104(c) can bring an action for civil damages. These damages include:

> (1) the greater of--
>
> (A) $1,000 for each act of unauthorized inspection or disclosure of a return or return

> information with respect to which such defendant is found liable, or
>
> **(B)** the sum of--
>
> **(i)** the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure, plus
>
> **(ii)** in the case of a willful inspection or disclosure or an inspection or disclosure which is the result of gross negligence, punitive damages…

15 U.S.C. §7431 (2010). The "actual damages" described in this section include damages for mental and emotional distress, *Hrubec v. Nat'l R.R. Passenger Corp.*, 829 F. Supp. 1502, 1506 (N.D. Ill. 1993) ("As with the right to privacy generally, when violated, the outstanding damage is mental and/or emotional distress."), even in cases against the United States. *Ward v. United States,* 973 F. Supp. 996 (D. Colo. 1997) (holding that taxpayer was entitled to damages for mental distress).

The Restatement (Second) of Torts makes clear that "[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." Restatement (Second) of Torts §652A(1) (1977). When a plaintiff's right of privacy has been invaded, the Restatement provides that they can recover for (1) "harm to [their] interest," (2) "mental distress … suffered," and (3) "special damage." Restatement (Second) of Torts §652H. Courts frequently award damages for mental and emotional distress in privacy tort cases. *See, e.g., Braun v. Flynt*, 726 F.2d 245, 250-51 (5th Cir. 1984) ("an invasion of privacy claim is founded on mental anguish, under Texas law")*; Davis v. Creditors Interchange Receivable Mgmt., LLC*, 585 F. Supp. 2d

968, 977 (N.D. Ohio 2008) ("The tort of invasion of privacy is designed to compensate the victim for mental suffering, shame, or humiliation.") (*citation omitted*); *Staruski v. Continental Telephone Co. of Vermont,* 154 Vt. 568, 574, 581 A.2d 266, 269 (Vt.1990) (damages for invasion of privacy are recoverable as stated in § 652H "even if the injury suffered is mental anguish alone."); *Huskey v. Nat'l Broad. Co., Inc.*, 632 F. Supp. 1282, 1293 (N.D. Ill. 1986) ("By their very nature, contracts not to invade privacy are contracts whose breach may reasonably be expected to cause emotional disturbance."); *LeCrone v. Ohio Bell Telephone Co.,* 120 Ohio App. 129, 131 (1963) (invasion of privacy protects "primarily a mental [interest] rather than an economic or pecuniary interest.").

Courts have held that mental and emotional distress damages are particularly important in privacy cases where a plaintiff's HIV status was revealed. *Nolley v. County of Erie*, 802 F. Supp. 898, 904-05 (W.D.N.Y. 1992) (granting damages to an inmate whose HIV status was revealed as a result of a county holding center policy: "Unwarranted release of this information is virtually certain to cause some injury, yet be the type of injury that is very difficult to prove. It is also likely to cause mental distress"). These damages compensate and deter disclosure of sensitive, reputation threatening, medical information in the much the same way as *per se* defamation cases. *See Nolley*, at 903 (citing *The Right to Privacy*, *supra*, at 219); *Hamilton v. Lumbermen's Mut. Cas. Co.*, 82 So. 2d 61 (La. Ct. App. 1955) (citing *The Right to Privacy*, *supra*, at 219).

B. Privacy Laws Routinely Provide for Recovery of a Wide Range of Damages to Ensure that a Meaningful Remedy Is Available for the Wrongful Disclosure of Private Information

Privacy laws seek to impose a set of obligations on those entities, public and private, that collect and use personal information and to create rights for individuals whose personal information is held by others. In these statutory schemes, the damage provisions do not simply provide compensation for harm suffered; they ensure that the full range of obligations are upheld by entities that collect and use personal data. To further that objective, privacy statutes routinely provide for recovery of a wide range of damages, including liquidated damages. Liquidated damage provisions recognize the broad range of harms caused when a privacy right is violated and acknowledge the inherent difficulty in proving pecuniary harms when a privacy law is violated. Liquidated damages also offer a meaningful remedy when the actual harms suffered might be difficult to quantify, but are nonetheless serious. It is consistent with the use of these damage provisions in privacy laws to recognize both pecuniary and non-pecuniary harms.

Privacy laws contain liquidated damages provisions precisely because violations of an individual's privacy are uniquely difficult to quantify. A price cannot be placed on humiliation, mental suffering, or any other ills arising from violations of an individual's privacy. This Court has held "liquidated damages serve a particular useful

function when damages are uncertain in nature or amount or are unmeasurable." *Rex Trailer Co. v. United States*, 350 U.S. 148, 153 (1956) (internal quotation and citation omitted). Damages arising from privacy violations are "quintessential example[s] of damages that are uncertain and possibly unmeasurable." *Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209, 1213 (11th Cir. 2005).

The Privacy Act of 1974 provides for recovery of "actual damages sustained by the individual as a result of the refusal or failure," in addition to attorney's fees. 5 U.S.C. § 552a(g)(4) (2011). The Stored Communications Act ("SCA") prohibits the unauthorized access to electronic communications services and provides for recovery of actual and liquidated damages "[in] the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000." 18 U.S.C. § 2707(c) (2011).

The Electronic Communications Privacy Act of 1986 ("ECPA"), an omnibus communications privacy law, which sets out a broad range of obligations for companies that collect and use personal information for the provision of communications services also contains numerous provisions establishing liquidated damages. For example, the Act bars illegal interception of electronic communications and states "if the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or

statutory damages of not less than $50 and no more than $500." 18 U.S.C. § 2520(c)(1)(A) (2011). Another ECPA section provides for statutory damages of no less than $100 and no more than $1,000 to victims who have had their privacy violated under ECPA on previous occasions. 18 U.S.C. § 2520(c)(1)(B) (2011). For more than two violations of ECPA, the penalties are as follows:

> [I]n any other action under this section, the court may assess as damages whichever is the greater of (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

18 U.S.C. § 2520(c)(2)(B) (2011). ECPA bars unlawful access to stored communications. The Act provides for recovery of a plaintiff's actual damages and disgorgement of profits from a violator, "but in no case shall a person entitled to recover receive less than the sum of $1,000." 18 U.S.C. § 2707(c) (2011).

Both the Drivers Privacy Protection Act ("DPPA") and the Video Privacy Protection Act ("VPPA") provide for court awards of "actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724 (b)(1)(a) (2011); 18 U.S.C. §2710 (c)(2)(A) (2011). The Telephone Consumer Protection Act ("TCPA") provides for liquidated damages. 47 U.S.C. § 227(b)(3)(B) (2011). The Act protects individuals from receiving repeated telemarketing calls, and individuals are entitled "to recover for actual monetary loss from such a

violation, or to receive up to $500 in damages for each such violation, whichever is greater." *Id.*

The Cable Communications Policy Act ("CPPA"), protects the privacy of cable televisions subscribers and provides for liquidated damages. 47 U.S.C. § 551(f)(2)(A) (2011). The Act provides for "actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher." *Id.* The Right to Financial Privacy Act of 1974 ("RFPA"), which was enacted the same year as the Privacy Act of 1974, permits plaintiffs to recover $100 per RFPA violation to ensure enforcement of the obligations contained in the Act. 12 U.S.C. § 3417 (a)(1) (2011). The Fair Credit Reporting Act ("FCRA") provides for the recovery of statutory damages.

Non-pecuniary harms resulting from privacy violations typically entitle victims to recover actual and liquidated damages. The Privacy Act's provision of actual damages is consistent with lawmakers' routine practice of providing broad remedies for privacy violations.

II. There is a Consensus Amongst Legal Experts that Privacy Laws Should Deter Violations of Privacy Interests by Recognizing a Broad Range of Privacy Harms

The Privacy Act of 1974, 5 U.S.C. § 552a (2010), and other privacy laws seek to protect individuals from suffering violations of privacy rights. These laws typically provide civil remedies to ensure private enforcement of privacy violations by the government or other third parties. The cornerstone

of the modern understanding of "privacy" in American law is the 1890 article by Samuel D. Warren and Louis D. Brandeis. The article begins:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.

Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). Warren and Brandies make clear that mental and emotional distress are just as real, and compensation for the distress just as necessary, as any economic or bodily injury:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Id. at 219.

As one of the current Justices once wrote:

> The traditional western conception of man has laid great emphasis on the worth of the individual; if this image is to be retained, if we are not to move beyond

> freedom and dignity, privacy must be vigilantly safeguarded.

SAMUEL ALITO, THE BOUNDARIES OF PRIVACY IN AMERICA 1 (1972) ("Report of the Chairman") (on file with *amici*).

Privacy laws typically regulate conduct that is likely to cause mental and emotional distress. Frederick Lodge, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 FORDHAM L. REV. 611 (1984) ("a restrictive view of actual damages, limiting such damages to pecuniary loss, would render the remedial provisions of the Act ineffective by excluding the type of damages most likely to occur from the recovery available under the Act"). Warren and Brandeis understood that privacy laws are critical in deterring privacy violations that cause mental and emotional distress. *The Right to Privacy*, *supra* at 219 ("even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.") Tort law has long provided remedies for intangible harms, such as those resulting from defamatory statements or torts against dignity. Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1283 (1976).

The damages recognized by the Privacy Act are broader and more important than simple pecuniary loss. The Privacy Act "requires agencies to take precautions to avoid causing 'substantial harm, embarrassment, inconvenience, or unfairness to any individual' who is the subject of a record." Lodge, *supra* at 621 (citing 5 U.S.C. §522a(e)(10)). In order to vindicate privacy violations, laws such as the Privacy Act, 5 U.S.C. §522a, must compensate for more than just pecuniary losses. In 1968 Professor,

and later Solicitor General, Charles Fried set out a powerful articulation of this right. He wrote, "privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust." Charles Fried, *Privacy,* 77 YALE L.J. 475-93 (1968), reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 203, 205 (ed. Ferdinand D. Schoeman 1984). He concludes:

> The concept of privacy requires, as we have seen, a sense of control and a justified acknowledged power to control aspects of one's environment . . . A legal right to control is control which is the least open to question and argument; it is the kind of control we are most serious about. As we have seen, privacy is not just an absence of information abroad about ourselves; it is a feeling of security in control over that information. By using the public, impersonal and ultimate institution of law to grant persons this control, we at once put the right to control as far beyond question as we can and at the same time show how seriously we take this right.

Id. at 219.

Privacy laws, such as the federal Privacy Act of 1974, seek to restore this control and the damage award is the means by which the "justified acknowledged power," in Professor Fried's phrase, is realized.

More recently, Professor Jerry Kang, a prominent legal scholar, has described the core human interests

underlying the right to privacy. First, privacy helps individuals avoid the embarrassment that accompanies the disclosure of certain personal details. Second, privacy helps to preserve human dignity, respect, and autonomy. Finally, privacy helps individuals construct intimacy with others. Jerry Kang, *Info. Privacy in Cyberspace Transactions,* 50 STAN. L. REV. 1193, 1212–16, 1260 (1998). Prominent privacy scholars have elaborated upon each of these purposes in order to "identify and animate the compelling ways that privacy violations can negatively impact the lives of living, breathing human beings," as Professor Ann Bartow put it:

> The embarrassment that results from privacy incursions is uniquely detrimental to humans, with irreparable effects on individuals.

Ann Bartow, *A Feeling of Unease About Privacy Law,* 155 U. PA. L. REV. 52 (2007). As Professor Julie E. Cohen has written:

> The point [of privacy regulation] is not that people will not learn under conditions of no-privacy, but that they will learn differently, and that the experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior.

Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1425 (2000). Professor Cohen cites cognitive psychology research to demonstrate that embarrassment stunts social development and growth, neither of which is fungible or replaceable in human beings. *Id.* at 1425, n.195. Professor Jeffrey Rosen also observes: "knowledge of private

information poses special threats to individuals' ability to structure their lives in unconventional ways." Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2121 (2001). Professor Helen Nissenbaum does as well:

> [I]nsofar as privacy, understood as a constraint on access to people through information, frees us from the stultifying effects of scrutiny and approbation (or disapprobation), it contributes to material conditions for the development and exercise of autonomy and freedom in thought and action.

HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 82 (2010).

Professor Anita Allen-Castellitto expands further on the value of privacy protections, demonstrating that limiting the disclosure of embarrassing personal information strengthens the individual's capacity to experiment and comply with cross-cutting social roles, both in public and behind closed doors:

> Privacy has value as the context in which individuals work to make themselves better equipped for their familial, professional, and political roles. With privacy, I can try to become competent to perform and achieve up to my capacities, as well as to try out new ideas and practice developing skills.

Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 739-40 (1999).

A second set of interests underlying the right to privacy are interconnected: dignity, respect, and autonomy. Professor Francesca Bignami urges that "[e]ven in a world in which, thanks to technology, acquiring knowledge about others is virtually effortless, personal autonomy must be respected." Francesca Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 CORNELL INT'L L.J. 211, 223 (2008). Professor Rosen explains how the term applies to privacy law: "autonomy concerns the individuals' ability to maintain a sphere of immunity from social norms and regulations." Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2121 (2001). As Professor Nissenbaum has written:

> [E]ven when we are uncertain whether or not we are being watched, we must act as if we are. When this happens, when we have internalized the gaze of the watchers and see ourselves through their eyes, we are acting according to their principles and not ones that are truly our own.

HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 82 (2010). Professor Gary T. Marx has written:

> When the self can be technologically invaded without permission and even often without the knowledge of the person, dignity and liberty are diminished. Respect for the individual involves not causing harm, treating persons fairly through the use of universalistically applied valid

> measures, offering meaningful choices and avoiding manipulation and coercion. These in turn depend on being adequately informed.

GARY T. MARX, MURKY CONCEPTUAL WATERS: THE PUBLIC AND THE PRIVATE (2001).[2] Former OECD Official and Director of the Harvard Information Infrastructure Project Deborah Hurley adds that:

> Protection of privacy and personal data are important because they go profoundly to our sense of self, individual integrity, and autonomy and to our ability to express ourselves, to communicate with others, and to participate in the collective, all deep human needs.

Deborah Hurley, *A Whole World in One Glance: Privacy as a Key Enabler of Individual Participation in Democratic Governance,* 1 INT'L J. OF INTERNET TECH. AND SEC. TRANS. 2 (2007).

Finally, privacy law scholars highlight human beings' special relationship with the intimate details of their personal lives, which the right to privacy protects. Professor Allen has written that privacy is an essential precursor to "intimate relationships on which workable family and community life depend." Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 739 (1999). Professor Rosen explains:

> If individuals cannot form relationships of trust without fear that their

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[2] Available at http://web.mit.edu/gtmarx/www/murkypublicandprivate.html.

> confidences will be betrayed, the uncertainty about whether or not their most intimate moments are being recorded for future exposure will make intimacy impossible; and without intimacy, there will be no opportunity to develop the autonomous, inner-directed self that defies social expectations rather than conforms to them.

The Purposes of Privacy: A Response, 89 Geo. L.J. 2117, 2123-24 (2001). Professor Nissenbaum expands this point:

> There are two sides to this coin: our closest relationships of love and friendship are defined by our willingness to share information, yet we signal our trust in and respect for others by not insisting that they relinquish control over information to us.

HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 84 (2010).

Though the actual damage caused by a privacy violation may be difficult to quantify, privacy statutes routinely include broad damage provisions in order to compensate and vindicate the victim's right. Professor Allen writes that statutory privacy protections are intended to remedy "damage[d] feelings and sensibilities" rather than mere pecuniary injuries. ANITA L. ALLEN, PRIVACY LAW AND SOCIETY 113 (2007).

While the statutory language providing for damages varies by statute, there is no significant difference in the purpose. As Justice Scalia wrote in

concurrence in *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Services*:

> [I]t would be no more rational to reject the normal meaning of 'prevailing party' because some statutes produce the same result with different language, than it would be to conclude that, since there are many synonyms for the word 'jump,' the word 'jump' must mean something else.

532 U.S. 589, 614-15 (2001) (Scalia, J., concurring). Where there is an intentional violation of a privacy statute, awards of mental and emotional damages ensure compensation for the victim and deter future violations. Compensation and deterrence are the two main goals of the civil remedies provided in section 552A of the Privacy Act. Frederick Lodge, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 FORDHAM L. REV. 611, 619 (1984).

III. Legislative Materials Relevant to the Privacy Act Demonstrate That Congress Contemplated Remedying Non-pecuniary Harms With the Privacy Act

The history of the Privacy Act indicates a clear intent to establish a remedy scheme that would ensure compliance with the Act's mandate and provide broad relief. The federal advisory committee report that preceded the Act put forth a full range of damage provisions, including liquidated damages, actual damages, and punitive damages. These recommendations were reflected in the House and Senate bills, the final text of the Act, as well as the OMB Guidelines that followed passage.

A. The HEW Advisory Committee Report of 1973

The Privacy Act of 1974 was enacted out of a growing concern for the rights of citizens in the face of advancing technology. The Act was the legislative culmination of extensive academic research that revealed the many threats to individual privacy and autonomy in the wake of increasingly powerful computer databases. One of the most influential studies to which the Congress looked when drafting the Privacy Act was the 1973 report *Records, Computers, and the Rights of Citizens*, prepared for the Department of Health, Education and Welfare ("HEW Report"). The federal advisory committee that produced the report sought to determine the limitations that should be placed on the application of computer technology to record keeping about citizens. *Id.* at 33. The advisory committee foresaw that sensitive or personal information could be compromised when compiled into vast databases that lacked regulatory oversight. *Id.* at 28. Ultimately, the HEW Report outlined a series of recommendations that became the basis of the Privacy Act of 1974.

To address the lack of privacy protections in automated record keeping systems, the HEW Report recommended the enactment of legislation establishing a Code of Fair Information Practices that would govern all automated personal data systems. *Id.* at 50. The Code articulated basic informational privacy principles, and allocated rights and responsibilities in the collection and use of personal information. *Id.* The Code of Fair Information Practices proposed by the HEW Report provides:

- There must be no personal-data record-keeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information obtained about him for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.

Id. at 41.

These highly influential principles formed the basis of the Privacy Act of 1974 and many privacy laws since. R. Turn and W.H. Ware, *Privacy and Security Issues in Information Systems*, in ETHICAL ISSUES IN THE USE OF COMPUTERS 133, 138 (Deborah G. Johnson & John W. Snapper eds. 1985). See also Robert Gellman, *Does Privacy Law Work?* in TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE 193, 196 (Philip E. Agre & Marc Rotenberg, eds.) ("The articulation of principles of fair information practices may be the computer age's most significant policy development with respect to privacy.").

Of particular concern to the advisory committee was its recommended strong legal remedies for privacy violations. HEW Report at 36. "Unless injury to the individual can be translated into reasonably substantial claims for damages, the individual ordinarily has little incentive to undertake a lawsuit. Few people can afford to bring suit against a well-defended organization solely for moral satisfaction." *Id.* The advisory committee recommended "the enactment of legislation establishing a Code of Fair Information Practices for all automated personal data systems." *Id.* at 50. Regarding violations of the Act, the HEW Report said:

> The Code should give individuals the right to bring suits for unfair information practices to recover actual, liquidated, and punitive damages, in individual and class actions. It should also provide for recovery of reasonable attorney's fees and other costs of litigation incurred by individuals who bring successful suits.

Id. The Privacy Act, enacted a year after the HEW Report was released, implemented many of the advisory committee's recommendations, including a broad and effective damages provision for violations of the Act.

B. Legislative History of the Privacy Act of 1974

The civil remedy provision in the Privacy Act was the result of a series of amendments to and compromises between the Senate bill, S. 3148, and the House bill, H.R. 16,373. Early versions of the bills imposed "actual" as well as "punitive" and

"liquidated" damages for certain violations. The eventual compromise retained the "actual damages" provision (with a statutory minimum of $1,000), where the violation is "intentional or willful," but not a "punitive damages" provision. The Congressional debates reinforced this distinction between punitive and liquidated damages, which would be available without specific proof of injury, and actual damages. *E.g.,* House Comm. on Gov't Operations and Senate Comm. on Gov't Operations, 94th Cong., 2d Sess., *Legislative History of the Privacy Act of 1974 -- S. 3418 (Pub. L. No. 93-579)*, 886-87 (1976) (hereinafter *Legislative History*) (Rep. Abzug) (discussing assessments of "actual damages" in contrast to "punitive damages").[3]

The original Senate bill, S. 3418, introduced in the Senate Committee on Government Operations, provided for both actual and punitive damages for any violation of the Privacy Act. S. 3418, 93d Cong. §304(b) (1974), *reprinted in* Legislative History at 27. The parallel House bill, H.R. 16373, originally provided for actual damages in all cases, with additional punitive damages if the violation was "willful, arbitrary, or capricious." H.R. 16373, 93d Cong. §304(b) (1974), *reprinted in* Legislative History at 250-51. From the outset, Congress recognized that violations of an individual's privacy required compensation beyond pecuniary, out-of-pocket expenses.

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[3] *Available at at http://www.loc.gov/rr/frd/Military_Law/pdf/LH_privacy_act-1974.pdf*

The House Committee on Government Operations reported out H.R. 1673 on September 24, but removed the provision on punitive damages. Representatives Abzug, Moss, Stanton, Gude, Burton, Fascell, Culver, Collins, Rosenthal, and Conyers expressed concern about the absence of punitive damages, proposed in the House measure, since "[a]ctual damages resulting from an agency's misconduct will, in most cases, be difficult to prove and this will often preclude an adequate remedy at law." Legislative History at 330. The representatives considered the inclusion of punitive damages, "or, at the very least, liquidated damages," to be "essential." *Id.* And there is no indication that the Congressional debates sought to distinguish between pecuniary and non-pecuniary losses

Representative Fascell unsuccessfully offered an amendment to essentially restore the original damages language of H.R. 16373. *Id.* at 919. This amendment would have made actual damages available for all violations of the Privacy Act, with punitive damages for willful, arbitrary, or capricious violations. *Id.* at 919-20. Representative McCloskey opposed this amendment. He was concerned about subjecting the United States to potentially limitless punitive damages. *Id.* at 922. But he did not suggest that the solution would be to exclude recovery for non-pecuniary harms. Representative Eckhardt pointed out that in the absence of the Fascell amendment, a person who had suffered any amount of actual damage because of the negligence of an agency would be unable to recover. *Id.* The Fascell amendment was ultimately rejected, as it was identical to language rejected by the committee below. *Id.* at 924. After additional debate, the bill was passed by the House. *Id.* at 983.

That same day, the Senate considered S. 3418 as reported out by the Committee on Government Operations. *Id.* at 763. The Committee offered several amendments to the bill, which at the time allowed a plaintiff to sue the individual agent responsible for the Privacy Act violation. *Id.* at 768. Instead, the Committee recommended that only the agency be liable, and that the plaintiff should be able to recover both actual and general damages, with a provision for liquidated damages "of say $1,000." *Id.* The bill was thus passed providing for actual and general damages, but not punitive or liquidated damages removed from any injury or harm. *Id.* The debate over punitive damages was a major point of contention, but it was never disputed that provable, compensable harms caused by a willful government violation were sufficient under (g)(4).

C. The OMB Guidelines of 1975

In 1975, the OMB issued authoritative regulations for agencies implementing the Privacy Act, pursuant to section 6 of the Privacy Act that also gives the OMB continuing powers to oversee agencies' implementation of the Act. Pub. L. 93-579, §6. Office of Management and Budget, Guidelines for Implementing Section 552a of Title 5 of the United States Code, (1975) ("OMB Guidelines"), reprinted in Legislative History at 1015. Among other things, the OMB Guidelines explicate the requirements for civil remedies available to plaintiffs under subsection (g)(1). OMB Guidelines at 76.

The OMB Guidelines enumerate three requirements for an individual to sue under subsection (g)(1)(D): it "must be shown" that the action was "intentional or willful"; there was "an injury or harm to the individual"; and the "injury was

causally related to that alleged agency failure." *Id.* at 76. This excerpt indicates the OMB's interpretation of the phrase "actual damage" in 5 U.S.C. §552a(g)(4)(A) as an "injury or harm" that is "causally related" to the agency failure. There is no indication that the type of "injury" shown cannot be mental and emotional in nature.

Congress explicitly delegated to the OMB the task of developing guidelines for the application of the Privacy Act. 5 U.S.C. § 552a(v). The OMB Guidelines clearly indicate that "actual damages" require a showing of injury or harm causally related to the agency failure, but not an injury narrowly defined as pecuniary. OMB Guidelines at 76-67. Since the OMB Guidelines are a reasonable interpretation of a statute that the OMB was charged with overseeing, the court should defer to the agency's interpretation of the statute. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

CONCLUSION

Amicus respectfully asks this Court to deny Petitioners' motion and uphold the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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