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FAA v. Cooper: How the Court Stripped the Privacy Act of its Purpose and Meaning

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FAA V. COOPER: HOW THE COURT STRIPPED THE PRIVACY ACT OF ITS PURPOSE AND MEANING

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I. INTRODUCTION

Congress passed the Privacy Act of 1974[1] (the "Act") in order "to provide certain safeguards for an individual against an invasion of personal privacy" by federal agencies.[2] To that end, the Act sets forth a comprehensive framework regulating federal agencies in the management of an individual's confidential records.[3] It also contains a civil remedies provision that allows an individual to bring civil lawsuits against the federal government and to recover "actual damages" for an agency's violation of the Act that has had an adverse effect on the individual.[4]

The term "actual damages" does not have a plain or ordinary meaning,[5] and Congress did not provide a clear definition of it in the Act.[6] Thus, the meaning of "actual damages," as used in the civil

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1. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552a (2006 & Supp. IV 2011)).

2. *See id.* § 2(b). "In 1974, Congress was concerned with curbing the illegal surveillance and investigation of individuals by federal agencies that had been exposed during the Watergate scandal." OFFICE OF PRIVACY AND CIVIL LIBERTIES, U.S. DEP'T OF JUSTICE, OVERVIEW OF THE PRIVACY ACT 4 (2010) [hereinafter OVERVIEW OF THE PRIVACY ACT], *available at* http://www.justice.gov/opcl/1974privacyact.pdf, *quoted in* FAA v. Cooper, 132 S. Ct. 1441, 1462 (2012) (Sotomayor, J., dissenting).

3. 5 U.S.C. § 552a (2006 & Supp. IV 2011).

4. *See id.* § 552a(g)(1)(D), (g)(4)(A).

5. *See* discussion *infra* Part III.

6. *See* discussion *infra* Part III.

remedies provision of the Act, has been the subject of much debate, and lower courts had been split on the question of whether actual damages are limited to pecuniary losses or whether they also include nonpecuniary losses such as mental or emotional distress.[7]

In March of the 2011–2012 term, however, the U.S. Supreme Court decided *FAA v. Cooper*[8] and resolved the lower courts' disagreement over the meaning of the term "actual damages" in the Act. In *Cooper*, Stanmore Cooper, a private pilot, filed suit against three federal agencies, claiming that they violated the Act by disclosing his confidential information and that their violation caused him mental and emotional distress.[9] Since the Court could have plausibly construed the Act's civil remedies provision to mean that Congress did *not* intend to waive the federal government's sovereign immunity from liability for only nonpecuniary harm, the Court held that the term "actual damages," in the context of the Privacy Act, refers only to economic or pecuniary losses.[10] Cooper was thus unable to recover under the Act.[11]

The Court's ruling creates a troubling gap between the substantive and remedial provisions of the Act and leaves a large number of injured individuals without any form of meaningful relief. Thus, this Comment argues that the Court incorrectly determined in *FAA v. Cooper* that Congress could have intended the civil remedies provision of the Act to offer relief only to those individuals who have suffered some form of economic or pecuniary harm. Part II of the Comment lays out the relevant factual and procedural backgrounds, and Part III explains the Court's reasoning and analysis. Part IV then argues that the Court (1) failed to recognize clear congressional intent reflected in the Act's context, language, and purpose; and (2)

7. For example, both the Eleventh Circuit and the Sixth Circuit had interpreted "actual damages" under the Act to mean strictly pecuniary losses. *See, e.g.*, Fanin v. U.S. Dep't of Veterans Affairs, 572 F.3d 868, 872 (11th Cir. 2009); Hudson v. Reno, 130 F.3d 1193, 1207 (6th Cir. 1997); Fitzpatrick v. IRS, 665 F.2d 327, 328 (11th Cir. 1982). The Ninth Circuit and the Fifth Circuit, however, had adopted a more liberal interpretation of "actual damages" to include nonpecuniary losses as well. *See, e.g.*, Cooper v. FAA, 622 F.3d 1016, 1035 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1441 (2012); Johnson v. Dep't of Treasury, IRS, 700 F.2d 971, 986 (5th Cir. 1983).

8. 132 S. Ct. 1441 (2012).

9. *Id.* at 1446–47.

10. *Id.* at 1456.

11. *Id.*

improperly relied on *Doe v. Chao*[12] and the Act's legislative history to find ambiguity and apply the sovereign immunity canon. Finally, Part V concludes by explaining the significant implications of the Court's narrow reading of the term "actual damages." It also calls upon Congress to legislatively overturn the Court's holding by amending the Act to clearly state that violations of the Act entitle injured individuals to awards of monetary damages for both economic and noneconomic injuries.

II. STATEMENT OF THE CASE

The Federal Aviation Administration (FAA) requires pilots to obtain a pilot certificate and a medical certificate in order to operate an aircraft.[13] Because the FAA did not issue medical certificates to persons with the human immunodeficiency virus (HIV) at the time Cooper was diagnosed with HIV in 1985, Cooper did not apply for a medical certificate.[14]

Cooper later applied for a medical certificate in 1994 without disclosing his HIV status or the antiretroviral medication he had been taking for his virus, and the FAA issued him a medical certificate.[15]

In 1995, Cooper's health deteriorated, and he applied for long-term disability benefits with the Social Security Administration (SSA) under Title II of the Social Security Act.[16] As part of this process, Cooper disclosed his HIV status to the SSA and received benefits from August 1995 to August 1996.[17]

Cooper then renewed his medical certificate with the FAA in 1998, 2000, 2002, and 2004, each time withholding information about his HIV status and medication.[18]

Cooper's intentional concealment of his medical condition was revealed in 2002, when the Department of Transportation (DOT) and the SSA launched "Operation Safe Pilot," a joint criminal investigation aimed at identifying pilots who were medically unfit but had received FAA certifications to fly.[19] As part of the

12. 540 U.S. 614 (2004).
13. 14 C.F.R. § 61.3(a), (c) (2011).
14. *Cooper*, 132 S. Ct. at 1446.
15. *Id.*
16. *Id.*; 42 U.S.C. §§ 401–34 (1994).
17. *Cooper*, 132 S. Ct. at 1446.
18. *Id.*
19. *Id.* at 1446–47.

investigation, the DOT provided the SSA with the names and other identifying information of forty-five thousand pilots who were licensed in Northern California.[20] The SSA compared this information with the names of individuals who had received long-term disability benefits under the Social Security Act.[21] The SSA then provided the DOT with a spreadsheet of its results, which revealed that Cooper held a current medical certificate despite also having received benefits from the SSA.[22] The FAA determined that it would not have issued Cooper a medical certificate if he had truthfully disclosed his HIV status.[23]

Cooper admitted to the investigators that he intentionally concealed information about his medical condition from the FAA.[24] Thereafter, the FAA revoked Cooper's pilot certificate for fraudulent omissions, and a grand jury indicted him "on three counts of making false statements to a Government agency, in violation of 18 U.S.C. § 1001."[25] Cooper "pleaded guilty to one count of making and delivering a false official writing," and he received two years of probation and a fine of $1,000.[26]

Cooper then filed suit against the FAA, DOT, and SSA (collectively the "Government") in the U.S. District Court for the Northern District of California.[27] He claimed that the Government violated the Act by sharing his confidential information[28] and alleged that the unlawful disclosure "caused him 'humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress.'"[29] Cooper did not allege pecuniary or economic losses.[30]

20. *Id.* at 1446.
21. *Id.* at 1446–47.
22. *Id.*
23. *Id.* at 1447.
24. *Id.*
25. *See id.*
26. *Id.*
27. *Id.*
28. *Id.* 5 U.S.C. § 552a(b) prohibits agencies from "disclos[ing] any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b) (2006).
29. *Cooper*, 132 S. Ct. at 1447 (quoting Appendix to the Petition for a Writ of Certiorari at 120a, *Cooper*, 132 S. Ct. 1441 (No. 10-1024)).
30. *Id.*

The district court granted summary judgment in favor of the Government.[31] It determined that, while the Government violated the Act and there was a triable issue as to whether its violation was intentional or willful,[32] Cooper was not entitled to recover any damages because he failed to allege any pecuniary or economic losses.[33] Relying on various decisions in which the Ninth Circuit held that "actual damages" meant "economic loss" in some contexts and "emotional distress and humiliation" in others,[34] the district court determined that "the term 'actual damages' is facially ambiguous."[35] The court then applied the sovereign immunity canon,[36] construed the term in favor of the Government, and held that "mental distress alone does not satisfy the Privacy Act's actual damages requirement."[37]

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded.[38] Recognizing that the term "actual damages" is in fact ambiguous, the court applied traditional tools of

31. Cooper v. FAA, 816 F. Supp. 2d 778, 781 (N.D. Cal. 2008), *rev'd*, 622 F.3d 1016 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1441 (2012).

32. *See id.* at 790.

> With certain exceptions, it is unlawful for an agency to disclose a record to another agency without the written consent of the person to whom the record pertains. One exception to this nondisclosure requirement applies when the head of an agency makes a written request for law enforcement purposes to the agency that maintains the record. The agencies in this case could easily have shared [Cooper's] medical records pursuant to the procedures prescribed by the Privacy Act, but the District Court concluded that they failed to do so.

Cooper, 132 S. Ct. at 1447 n.2 (citations omitted) (citing 5 U.S.C. § 552a(b), (b)(7)).

33. *See Cooper*, 816 F. Supp. 2d at 792.

34. *Id.* at 791. In *Ryan v. Foster & Marshall, Inc.*, the Ninth Circuit held that, for purposes of the Securities Exchange Act, 15 U.S.C. § 78bb(a), "actual damages" requires "some form of economic loss." 556 F.2d 460, 464 (9th Cir. 1977). In *Mackie v. Rieser*, the Ninth Circuit again held that, in the context of copyright infringement, "actual damages" must include some form of "objective[ly]" measurable financial loss. 296 F.3d 909, 917 (9th Cir. 2002). For violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, however, the Ninth Circuit held that emotional distress and humiliation alone can constitute "actual damages." Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995).

35. *Cooper*, 816 F. Supp. 2d at 791.

36. *See id.* at 792. Under the sovereign immunity canon, "a waiver of [the federal government's] sovereign immunity must be 'unequivocally expressed' in statutory text." *Cooper*, 132 S. Ct. at 1448 (citing Lane v. Pena, 518 U.S. 187, 192 (1996)). "Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *Cooper*, 132 S. Ct. at 1448 (citations omitted).

37. *Cooper*, 816 F. Supp. 2d at 792.

38. Cooper v. FAA, 622 F.3d 1016, 1035 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1441 (2012).

statutory interpretation[39] and concluded that "Congress clearly intended that when a federal agency intentionally or willfully fails to uphold its record-keeping obligations under the [Privacy] Act, and that failure proximately causes an adverse effect on the plaintiff, the plaintiff is entitled to recover for both pecuniary and nonpecuniary injuries."[40] The court reasoned that to hold otherwise "would be an unreasonable construction of the Act."[41]

The Government petitioned for panel rehearing and rehearing en banc, but the Ninth Circuit denied the petitions.[42] The Government then petitioned the Supreme Court for review, and the Court granted certiorari.[43]

III. REASONING OF THE COURT

The issue before the Court was whether the Privacy Act waived the Government's sovereign immunity from liability for nonpecuniary harms such as mental or emotional distress.[44] This required the Court to determine whether Congress unequivocally intended the term "actual damages," as used in the Act's civil-remedies provision, to include damages for mental or emotional distress.[45] In a 5−3 decision,[46] the Court held that Congress did *not* unequivocally authorize damages for nonpecuniary harms and that, therefore, the Act did not waive the Government's sovereign immunity from liability for Cooper's strictly nonpecuniary losses.[47]

The subject remedial provision of the Act allows an individual to bring a civil action against a federal agency that "fails to comply with [the provisions of the Act] . . . in such a way as to have an adverse effect on [the] individual."[48] If the agency's violation is found to be "intentional or willful," the United States is liable for

39. *See id.* at 1028−29, 1035. The court looked to "intrinsic sources"—the plain meaning of the statute—and, upon determining that there is no plain meaning to "actual damages," looked to "extrinsic sources," such as the Act's legislative history and the use of the term "actual damages" in other statutes. *Id.* at 1028−33.

40. *Id.* at 1035.

41. *Id.* at 1030.

42. *See id.* at 1019.

43. FAA v. Cooper, 132 S. Ct. 1441, 1448 (2012).

44. *See id.* at 1446, 1448.

45. *Id.* at 1448.

46. *Id.* at 1445. Justice Kagan did not participate in the decision. *Id.* at 1456.

47. *Id.* at 1456.

48. 5 U.S.C. § 552a(g)(1)(D) (2006).

"actual damages sustained by the individual as a result of the refusal or failure [to comply], but in no case shall a person entitled to recovery receive less than the sum of $1,000."[49]

Writing for the majority in *Cooper*, Justice Alito stated that "'actual damages' is a legal term of art"[50] and that "[e]ven as a legal term, . . . the meaning of 'actual damages' is far from clear."[51] The Court also pointed to the term's "chameleon-like quality"[52] and then applied other tools of statutory construction to examine the meaning of the term within the specific context of the Act.[53]

The Court first stated the purpose of the Act: "[T]o establish safeguards to protect individuals against the disclosure of confidential records 'which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.'"[54] The Court then noted that "the Act serves interests similar to those protected by defamation and privacy torts"[55] and that it previously has recognized in *Doe v. Chao* that the Act's remedial provision "'parallels' the remedial scheme for the common-law torts of libel *per quod* and slander."[56] Based on the parallels previously drawn, the Court relied heavily on defamation and privacy torts to infer a plausible congressional intent of the Act.[57]

49. *Id.* § 552a(g)(4)(A).

50. *Cooper*, 132 S. Ct. at 1449 (citing Cooper v. FAA, 622 F.3d 1016, 1028 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1441 (2012)).

51. *Id.* The Court cited to the definition of "actual damages" provided in the Black's Law Dictionary available at the time of the enactment of the Act and concluded that it was of minimal guidance. *Id.* (citing BLACK'S LAW DICTIONARY 467 (rev. 4th ed. 1968)).

52. *Id.* at 1450. The Court provided examples of how the term "actual damages" has been interpreted differently in different statutes. For example, it has been interpreted to encompass nonpecuniary damages in the Fair Housing Act and the Fair Credit Reporting Act but has been limited to only pecuniary damages in the Federal Tort Claims Act and the Copyright Act of 1901. *Id.* at 1449.

53. *See id.* at 1450–53. Unlike the district court, which automatically resorted to the sovereign immunity canon after determining that the term is ambiguous in the statute, *Cooper v. FAA*, 816 F. Supp. 2d 778, 792 (N.D. Cal. 2008), *rev'd*, 622 F.3d 1016 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1441 (2012), the Supreme Court recognized that the sovereign immunity canon is merely one "tool for interpreting the law" and that it does not "displac[e] the other traditional tools of statutory construction." *Id.* at 1448 (alteration in original) (quoting Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008)).

54. *See id.* at 1450 (quoting 5 U.S.C. § 552a(e)(10)).

55. *Id.*

56. *Id.* at 1451 (citing Doe v. Chao, 540 U.S. 614, 625 (2004)).

57. *See id.* at 1450–53.

Under the common law torts of libel per quod and slander, plaintiffs are entitled to recover "general damages" so long as they first prove "special damages."[58] General damages "cover 'loss of reputation, shame, mortification, injury to the feelings and the like and need not be alleged in detail and require no proof.'"[59] Special damages, on the other hand, include only proven pecuniary loss.[60] The Court reasoned that the parallels between the Act and the torts of libel per quod and slander suggest that "Congress [likely] intended 'actual damages' in the Privacy Act to mean special damages . . . ."[61] Thus, the Court held that an individual must first demonstrate that he or she suffered some pecuniary or economic loss—"no matter how slight"—in order to recover the statutory minimum of $1,000 under the Act.[62]

The majority further supported this determination with the Act's legislative history.[63] It cited to an uncodified section of the Act in which the Privacy Protection Study Commission (PPSC), established by Congress to consider "whether the Federal Government should be liable for *general* damages," recommended that Congress allow recovery for general damages.[64] Because Congress never amended the Act to authorize "general damages," despite the PPSC's recommendation, the Court reasoned that "Congress [likely] intended 'actual damages' in the Privacy Act to mean special damages . . . ."[65]

For these reasons, the Court held that "it is plausible to read the statute . . . to authorize only damages for economic loss"[66] and that Congress did not unequivocally waive sovereign immunity from

58. *Id.* at 1451 (citing *Chao*, 540 U.S. at 625).

59. *Id.* at 1451 & n.7 (quoting 1 THOMAS M. COOLEY & D. AVERY HAGGARD, TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 164, at 579 (4th ed. 1932) [hereinafter COOLEY & HAGGARD]).

60. *Id.* at 1451 & n.6 (citing COOLEY & HAGGARD, *supra* note 59, § 164, at 580).

61. *See id.* at 1451.

62. *See id.* The Court also noted that it is insignificant that Congress used the term "actual damages" instead of "special damages" since Congress has often used those terms interchangeably. *See id.* at 1451–52.

63. *See id.* at 1452−53.

64. *Id.* at 1452 (emphasis added) (citing Privacy Act of 1974, Pub. L. No. 93-579, § 5(c)(2)(B)(iii), 88 Stat. 1896, 1907 (1974)).

65. *Id.* The majority also added that the fact that PPSC later "understood 'actual damages' in the Act to be 'a synonym for special damages'" further supports its holding. *Id.* at 1452−53 (quoting U.S. PRIVACY PROT. STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY: THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION 530 (1977)).

66. *See id.* at 1453 (citing United States v. Nordic Village, Inc., 503 U.S. 30, 34, 37 (1992)).

liability for nonpecuniary damages.[67] Thus, the Court applied the sovereign immunity canon and declined to "expand the scope of Congress's sovereign immunity waiver beyond what the statutory text clearly requires."[68]

IV. ANALYSIS OF THE *COOPER* COURT'S REASONING

The Supreme Court erred in *Cooper* by (1) failing to recognize the clear congressional expression of waiver of sovereign immunity; and (2) improperly relying on *Doe v. Chao* and the legislative history of the Act.

A. The Cooper *Court Failed to Find a Clear Congressional Expression of Waiver*

First, Congress articulated in the Congressional Findings and Statement of Purpose attached to the Privacy Act that

> [t]he purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy 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 right under this Act.[69]

By stating that the Act is intended to subject the government to civil suit for *any* damages that result from the government's violation of the Act, Congress clearly expressed its intent, not to distinguish between types of damages, but to provide relief for all types of damages—pecuniary or nonpecuniary—that result from the government's violations.

The text of the Act itself also supports this congressional purpose and intent,[70] as pointed out by the Ninth Circuit and Justice Sotomayor in her dissent.[71] The text of § 552a(e)(10) of the Act requires federal agencies to "establish appropriate . . . safeguards to insure the security and confidentiality of records and to protect

67. *Id.* (citing Lane v. Pena, 518 U.S. 187, 192 (1996)).

68. *Id.*

69. Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), (b)(6), 88 Stat. 1896, 1896 (emphasis added).

70. *See* Frederick Z. Lodge, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 FORDHAM L. REV. 611, 621 (1984).

71. Cooper v. FAA, 622 F.3d 1016, 1030 (9th Cir. 2010), *rev'd* 132 S. Ct. 1441 (2012); FAA v. Cooper, 132 S. Ct. at 1458–59 (2012) (Sotomayor, J., dissenting).

against any anticipated threats or hazards to their security or integrity which could result in substantial harm, *embarrassment*, inconvenience, or unfairness to any individual on whom information is maintained."[72] Similarly, § 552a(g)(1)(C) offers civil remedies if an agency "fails to maintain any record concerning any individual . . . as is necessary to assure fairness in any determination relating to the . . . *character* . . . of . . . the individual that may be made on the basis of such record."[73] As some have noted, the interests protected by these provisions appear largely to be "dignitary interests that can only be measured in terms of mental or physical injury."[74] As such, there is good reason to conclude that Congress intended to provide relief for injuries to such interests by authorizing monetary awards for nonpecuniary damages.

Surely, that Congress sought to protect these dignitary interests does not necessarily lead to the conclusion that Congress also sought to remedy the injuries to such interests by waiving immunity for nonpecuniary damages. Justice Alito alluded to this point in *Cooper* by noting that even if the Act does not authorize damages for nonpecuniary harms, it provides other remedies, such as criminal sanctions and injunctive relief, for the government's violations.[75] However, the provisions that impose criminal sanctions are "solely penal and create no private right of action."[76] And injunctive relief, which is available only to allow individuals to amend upon request any records on them kept by the Government or to at least have such requests reviewed properly, does not award the injured individual any monetary damages.[77] Therefore, despite the availability of these alternate remedies under the Act, one must recognize that these do not *compensate* the injured individual and are, therefore, not particularly effective in providing direct, meaningful relief.

The common law tort of invasion of privacy, on the other hand, offers a more direct and tangible remedy. In consideration of the

72. 5 U.S.C. § 552a(e)(10) (2006) (emphasis added).

73. *Id.* § 552a(g)(1)(C) (emphasis added).

74. Lodge, *supra* note 70, at 621. "[T]hough economic or physical loss may be associated with the [dignitary] injury, the primary or usual concern is not economic at all, but vindication of an intangible right." *Id.* at 621 n.65 (quoting 2 DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.1, at 509 (1973)).

75. *See Cooper*, 132 S. Ct. at 1455 n.12 (citing 5 U.S.C. § 552a(i)).

76. OVERVIEW OF THE PRIVACY ACT, *supra* note 2, at 209−10; *see* 5 U.S.C. § 552a(i).

77. 5 U.S.C. § 552a(g)(1)(A)–(B); *see* OVERVIEW OF THE PRIVACY ACT, *supra* note 2, at 135.

nature of the harm that generally results from privacy invasions,[78] the tort entitles an injured individual to recover damages for "harm to his [or her] interest in privacy" and "mental distress proved to have been suffered if it is of a kind that normally results from such an invasion."[79] The tort also extends recovery to other nonpecuniary damages such as emotional distress and personal humiliation.[80] And because the common law privacy tort and the Act—the violations of which lead to the same type of harm—seek to protect the same interests,[81] certainly Congress was aware of these common law remedies when drafting the Act's remedial provision. Therefore, Congress very likely intended to incorporate these common law remedies into the Act in order to create a more effective and meaningful remedy for violations arising under the Act.[82]

The inference that Congress intended to incorporate the principles of the common law privacy tort is further established upon an examination of the text of the Act's civil remedies provision. Section 552a(g)(1)(D) authorizes an individual to bring an action against the government for violating the Act if the individual can show that he or she has suffered an "adverse effect" as a result.[83] Subsection (g)(4)(A) then allows recovery of a monetary award so long as the government's violation is found to have been intentional

78. Time, Inc. v. Hill, 385 U.S. 374, 384 n.9 (1967) (noting that the primary damage in right-of-privacy cases is mental distress); 2 DAN B. DOBBS, LAW OF REMEDIES § 7.1(1), at 259 (2d ed. 1993) (noting that an invasion of privacy often results only in an "affront to the plaintiff's dignity," "damage to his self-image," and mental distress); Lodge, *supra* note 70, at 621−22 (noting that "the type of damages most likely to occur" from violations of privacy rights is nonpecuniary).

79. RESTATEMENT (SECOND) OF TORTS § 652H (1977).

80. *Id.* § 652H, cmt. b. Other privacy statutes similarly provide monetary damages for nonpecuniary harms. See Brief of Amicus Curiae for Electronic Privacy Information Center (EPIC) in Support of Respondent at 6–11, *Cooper*, 132 S. Ct. 1441 (No. 10-1024) for a list of federal privacy statutes that recognize damages for mental and emotional distress.

81. *See supra* notes 55−56, 69−74 and accompanying text.

82. In *Johnson v. Department of Treasury, IRS*, the Fifth Circuit actually stated in a footnote that "Congress did indeed borrow from the common law tort . . . ." 700 F.2d 971, 977 n.10 (5th Cir. 1983), *abrogated on other grounds by* Doe v. Chao, 540 U.S. 614 (2004). The court pointed to a statement made by Senator Edmund Muskie during the congressional hearings: The Privacy Act "draws upon the constitutional and judicial recognition accorded to the right of privacy and translates it into a system of procedural and substantive safeguards against obtrusive Government information gathering practices." *Id.* (quoting 120 CONG. REC. 36,897 (1974), *reprinted in* SUBCOMM. ON GOV'T INFO. & INDIVIDUAL RIGHTS, JOINT COMM. ON GOV'T OPERATIONS, 94TH CONG., LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974, at 311 (1976) [hereinafter SOURCEBOOK]).

83. 5 U.S.C. § 552a(g)(1)(D) (2006).

or willful.[84] Because courts generally have accepted that mental or emotional distress constitutes an "adverse effect" under the Act,[85] it is unreasonable "[t]o recognize that the Act entitles one to actual damages for an adverse effect related to one's mental or emotional well-being, or one's character, . . . while holding that one injured under the Act cannot recover actual damages for nonpecuniary injuries . . . ."[86]

Thus, an examination of the Act's text, purpose, and overall context subjects the term "actual damages" to only one plausible interpretation and leads to the conclusion that Congress unequivocally intended to waive sovereign immunity from liabilities for nonpecuniary damages. Interpreting the term otherwise, as the *Cooper* Court did,[87] creates discrepancies between the Act's purpose and effect as well as in its substantive and remedial provisions.

B. The Cooper *Court Improperly Relied on* Doe v. Chao *and Legislative History*

To nonetheless reject a finding of clear congressional intent, the *Cooper* Court relied heavily on *Doe v. Chao* and the legislative history of the Act.[88] The *Cooper* Court concluded that the exclusion of the terms "special damages" and "general damages" from the Act, despite the parallels drawn between the Act and common law defamation torts, suggests that Congress could have intended "actual damages" to mean pecuniary damages.[89] The Court's conclusion, however, is unwarranted for three reasons.

First, nothing in the remedial scheme or purpose of the Act suggests that "actual damages" and "special damages" are synonymous terms. In defining "special damages" as proven pecuniary damages, the *Chao* Court expressly declined to hold that "actual damages," too, are limited to pecuniary losses.[90] Indeed, that Congress chose to use the term "actual damages" instead of "special

84. *Id.* § 552a(g)(4).

85. *See* Cooper v. FAA, 622 F.3d 1016, 1030 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1441 (2012) (citations omitted) (noting that in addition to the Ninth Circuit, "at least seven other [circuit courts] have recognized that a nonpecuniary harm, such as emotional distress, may constitute an adverse effect under the Act").

86. *Id.*

87. *See supra* notes 66−68 and accompanying text.

88. *See* discussion *supra* Part III.

89. *See* discussion *supra* Part III.

90. *See* Doe v. Chao, 540 U.S. 614, 622 n.5 (2004).

damages" despite the parallels makes it more likely that Congress did *not* intend to limit recovery to pecuniary damages.

Second, there is nothing to suggest that "actual damages" and "general damages" are synonymous terms, either. As the *Cooper* Court explained, general damages "cover 'loss of reputation, shame, mortification, injury to the feelings and the like and need not be alleged in detail and require no proof.'"[91] This does not mean that general damages are equivalent to or limited to nonpecuniary damages; rather, it indicates only that general damages *can* include nonpecuniary damages that are not proven. In fact, the *Chao* Court stated that in the context of privacy and defamation torts, "general damages" mean *presumed* damages, and they are "calculated without reference to any specific harm."[92] Therefore, as the *Chao* Court held, "[t]he deletion of 'general damages' from the [Privacy Act] is fairly seen . . . as a deliberate elimination of any possibility of . . . awarding *presumed* damages,"[93] not as an elimination of awarding nonpecuniary damages.

Third, the discussion of general damages in the Act's legislative history further undermines the *Cooper* Court's reliance on legislative history. Prior to the enactment of the Act, the original House bill advocated a higher standard for holding the government liable. The House bill provided for "actual damages resulting from the willful, arbitrary, or capricious action of an agency."[94] The original Senate bill, on the other hand, was more generous to the injured individual and provided for "any actual damages sustained" as well as "punitive damages where appropriate."[95] Then, the Senate bill, as passed in November 1974, also provided for "general damages."[96] This was the only portion of the legislative history—other than the PPSC's

91. FAA v. Cooper, 132 S. Ct. 1441, 1451 (2012) (quoting COOLEY & HAGGARD, *supra* note 59, § 164, at 579).

92. *Chao*, 540 U.S. at 621.

93. *Id.* at 623 (emphasis added). Prior Supreme Court cases also distinguish between presumed and proven damages in the context of defamation torts, as opposed to distinguishing between pecuniary and nonpecuniary damages. *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 262–64 (1978); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974).

94. H.R. REP. NO. 93-1416, at 18 (1974), *reprinted in* SOURCEBOOK, *supra* note 82, at 311.

95. S. 3418, 93d Cong. § 304(b)(1), (b)(2) (as introduced by Senator Sam Ervin, May 1, 1974), *reprinted in* SOURCEBOOK, *supra* note 82, at 27.

96. S. 3418, 93d Cong. § 303(c)(1) (as passed by the Senate, Nov. 21, 1974), *reprinted in* SOURCEBOOK, *supra* note 82, at 371.

recommendation—mentioning the term "general damages."[97] Ultimately, the final version of the Act reflected a compromise between the more government-friendly House bill and the more citizen-friendly Senate bill. The Act dropped the Senate bill's proposal to grant punitive damages and general damages and lowered the House's proposed standard of recovery to just "willful or intentional" governmental action.[98]

This compromise, particularly the exclusion of "general damages," again provides little insight into whether Congress intended to eliminate monetary awards for nonpecuniary harms. Congress's rejection of PPSC's recommendation to allow recovery for general damages similarly has little, if any, bearing on that question. Accordingly, the exclusion of general damages from the Act does not, as the *Cooper* Court stated, "ma[ke] clear that [Congress] viewed [general damages and nonpecuniary damages] as mutually exclusive."[99] Rather, it indicates, at best, that Congress likely intended to eliminate any recovery for *presumed* damages—"without reference to any specific harm."[100]

Therefore, the *Cooper* Court's conclusion that it is plausible to interpret the remedial provision as encompassing only pecuniary damages lacks support.

V. CONCLUSION

The *Cooper* Court could have arrived at a clear answer to its question by using the traditional tools of statutory construction, and

97. A keyword search of the term "general damages" in the Privacy Act's legislative history, as compiled in the "Sourcebook" and reported in Westlaw, revealed that the term was used nine times in the legislative history. The term appears on page 371 of the Sourcebook as part of the Senate Bill that was passed in November 1974 and again on page 433 as part of the House Bill, as passed by the Senate. The term also appears in proposals for additional privacy legislation by Senator Sam Ervin and Representative Bella Abzug, dated before the final Senate and House bills were passed. S. 2963, 93d Cong. § 308(e) (as introduced by Senator Ervin, Feb. 5, 1974), *reprinted in* SOURCEBOOK, *supra* note 82, at 647; H.R. 13872, 93d Cong. § 552a(g)(1) (as introduced by Representative Abzug, Apr. 2, 1974), *reprinted in* SOURCEBOOK, *supra* note 82, at 733. Additionally, the term appears in four other places in the history, but is mentioned only in connection to the PPSC's role in determining whether general damages should be provided. *See* SOURCEBOOK, *supra* note 82, at 488, 855, 859, 987. Finally, the term appears in the summary of the amendments to S. 3418. SOURCEBOOK, *supra* note 82, at 768.

98. *See* Todd Robert Coles, *Does the Privacy Act of 1974 Protect Your Right to Privacy? An Examination of the Routine Use Exemption*, 40 AM. U. L. REV. 957, 974 (1991).

99. FAA v. Cooper, 132 S. Ct. 1441, 1452 (2012).

100. Doe v. Chao, 540 U.S. 614, 621−23 (2004).

so it did not need to "seek refuge in a canon of construction"[101]—namely, the sovereign immunity canon. But this is precisely what the Court did. As a result, it adopted an overly restrictive and literal interpretation of the term "actual damages" in the Act's civil remedies provision. The Court required an unnecessarily explicit articulation of congressional intent of waiver when proper application of the traditional modes of statutory interpretation already pointed to only one plausible interpretation of "actual damages."[102] This insistence, however, unnecessarily burdens Congress with the need to intervene and amend legislation when it has already expressed its intent clearly.[103] And as Justice Stevens stated in his dissenting opinion in *United States v. Nordic Village*,[104] "the interest in requiring the Congress to draft its legislation with greater clarity or precision does not justify a refusal to make a good-faith effort to ascertain the actual meaning of the message it tried to convey in a statutory provision that is already on the books."[105]

More importantly, the *Cooper* Court has created a significant barrier for the large majority of individuals who will seek relief under the Act. Despite the substantive duties and restraints that the Act imposes upon federal agencies, the Court's holding reduces the government's incentives to comply with the Act. And it also reduces the incentives for injured individuals to bring civil actions against the

101. *Cooper*, 132 S. Ct. at 1456 (Sotomayor, J., dissenting) (citing Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589−90 (2008)).

102. In doing so, the Court undermined Congress's purpose and refused to give effect to it. *See* Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 564–65 (1998) (noting that an interpretation of statutory text that is too rigorous actually presents the danger of "undermin[ing] Congress' purpose in enacting a statute").

103. *See* United States v. Nordic Village, Inc., 503 U.S. 30, 45 (1992) (Stevens, J., dissenting); *see also* John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009−20, 2019 (2006) (quoting W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1974) ("[W]e do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it 'to take the time to revisit the matter and to restate its purpose in more precise English . . . .'"); John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1128 (1993) (arguing against a strict application of the sovereign immunity canon because it is a "judge-made rule of strict construction of waivers of sovereign immunity" and refusing to look at contrary legislative history because it is just "another piece of judicially-crafted armor plate").

104. 503 U.S. 30 (1992).

105. *Id.* at 45 (Stevens, J., dissenting).

government.[106] Thus, there is now a "disconnect between the Act's substantive and remedial provisions,"[107] rendering the Act "[t]oothless."[108] This gap will become even more troubling as technological advances improve the government's ability to collect and disseminate large quantities of data and, consequently, to invade privacy interests.[109]

Therefore, Congress should override the *Cooper* Court's decision by amending the text of the Act's civil remedies provision (§ 552a(g)(1)(C)) to include language explicitly specifying, like they do with the common law tort of invasion of privacy, that "actual damages" include nonpecuniary harms, such as mental or emotional distress, and that monetary awards are allowed for those harms. Only by satisfying the "Court's . . . insistence on 'clear statements'" will Congress be able to restore meaning and force to its protective intent behind the Privacy Act.[110]

106. Even if an agency violates a provision of the Act, many individuals are unlikely to receive any compensation from the government. Alex Kardon, *Damages Under the Privacy Act: Sovereign Immunity and a Call for Legislative Reform*, 34 HARV. J.L. & PUB. POL'Y 705, 710 (2011); *see also Cooper*, 132 S. Ct. at 1459 (Sotomayor, J., dissenting) (explaining that agencies can "intentionally or willfully forgo establishing safeguards to protect against [invasions of privacy] and no successful private action could be taken against [them] for the harm Congress identified").

107. *Cooper*, 132 S. Ct. at 1459 (Sotomayor, J., dissenting).

108. Kardon, *supra* note 106, at 710 (alteration in original) (internal quotation marks omitted) (citing Anne S. Kimbol, *The Privacy Act May Be Toothless*, HEALTH L. PERSP., Sept. 2008, at 4, *available at* http://www.law.uh.edu/healthlaw/perspectives/2008/(AK)%20privacy%20act.pdf). Another commentator even stated that a narrow reading of the term "actual damages" "mak[es] a total mockery of the Privacy Act." *Id.* (quoting Daniel Solove, *The Nature of Privacy Harms: Financial and Physical Harm vs. Emotional and Mental Harm*, CONCURRING OPINIONS (Jan. 15, 2010), http://www.concurringopinions.com/archives/2010/01/the-nature-of-privacy-harms-financial-and-physical-harm-vs-emotional-and-mental-harm.html); *see also* Lodge, *supra* note 70, at 621–22 (stating that a restrictive interpretation "would render the remedial provisions of the Act ineffective" and "frustrate the intended purpose of the civil remedy").

109. *See* Lillian R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 457 (1995).

110. *Nordic Village*, 503 U.S. at 45 (Stevens, J., dissenting).