No. 08-11102-G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JIM HENRY PERKINS and JESSIE FRANK QUALLS,
on their own behalf and on behalf of all others similarly situated,

Appellants,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS;
ERIC SHINSEKI, in his Official Capacity as Secretary of Veterans Affairs; and
ROBERT T. HOWARD, in his Official Capacities as Assistant Secretary for
Information and Technology and Chief Information Officer for Veterans Affairs,

Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama, Southern Division
2:07-CV-00310

PETITION FOR REHEARING EN BANC

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

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

June 26, 2009

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for Plaintiffs-Appellants Jim Henry Perkins and Jessie Frank Qualls certifies that the following is a complete list of the persons and entities that have an interest in the outcome of this case:

i. Judge: The Honorable Inge Prytz Johnson, United States District Judge

ii. Attorneys and Law Firms:

(1) Balch & Bingham LLP, Law Firm for Plaintiffs-Appellants, Jim Henry Perkins and Jessie Frank Qualls

(2) Alexia Bowers Borden, Attorney for Plaintiffs-Appellants, Jim Henry Perkins and Jessie Frank Qualls

(3) Leitman, Siegal, Payne & Campbell, Law Firm for Plaintiffs-Appellants, Jim Henry Perkins and Jessie Frank Qualls

(4) Andrew P. Campbell, Attorney for Plaintiffs-Appellants, Jim Henry Perkins and Jessie Frank Qualls

(5) Gregory C. Cook, Attorney for Plaintiffs-Appellants, Jim Henry Perkins and Jessie Frank Qualls

(6) Caroline Smith Gidiere, Attorney for Plaintiffs-Appellants, Jim Henry Perkins and Jessie Frank Qualls

(7) P. Stephen Gidiere III, Attorney for Plaintiffs-Appellants, Jim Henry Perkins and Jessie Frank Qualls

(8) David M. Glass, United States Department of Justice

(9) Heather R. Phillips, United States Department of Justice

(10) John R. Tyler, United States Department of Justice

(11) Joyce White Vance, United States Department of Justice

iii. Parties:

(1) Robert T. Howard, Defendant

(2) Eric Shinseki, Defendant

(3) Jim Henry Perkins, Plaintiff

(4) Jessie Frank Qualls, Plaintiff

(5) United States Department of Veterans Affairs, Defendant

P. Stephen Gidiere III

Counsel for Plaintiffs-Appellants

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that en banc review is necessary to overrule *Fitzpatrick v. IRS*, 665 F.2d 327 (11th 1982), which holds that the phrase "actual damages" in the Privacy Act is restricted to pecuniary losses only. *Fitzpatrick* has not stood the test of time. The rationale and result of *Fitzpatrick* are abrogated by the Supreme Court's decision in *Doe v. Chao*, 540 U.S. 614 (2004). *Fitzpatrick*'s view of "actual damages" is contrary to every published decision of this Court to address the meaning of "actual damages" since 1982. It adopts an artificial distinction between economic and non-economic damages based on a faulty statutory construction that is not supported by the text of the Privacy Act, the statute's legislative history, or the black letter legal meaning of "actual damages." *Fitzpatrick* is antiquated and unfairly closes the courthouse doors—as a matter of law—to victims of demonstrated mental injury like the Veterans in this case.

I further express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to and inconsistent with the following decision of the Supreme Court of the United States: *Doe v. Chao*, 540 U.S. 614 (2004), which "changed the landscape of the Privacy Act," slip op. at 11, and also rejected *Fitzpatrick*'s interpretation of the Privacy Act's legislative history, in

favor of the Fifth Circuit's contrary interpretation in *Johnson v. Dep't of Treasury*, 700 F.2d 971 (5th Cir. 1983).

I further express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to and inconsistent with the following precedents of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *Banai v. Dep't of Housing*, 102 F.3d 1203, 1207 (11th Cir. 1997) (holding that "anger, embarrassment, and emotional distress are clearly compensable injuries" under the plain meaning of the statutory phrase "actual damages," which is also used in the Fair Housing Act); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1203 n.30 (11th Cir. 2007) ("[M]ental pain and suffering ... is an element of actual or compensatory, as distinguished from exemplary or punitive, damages.") (quoting 25 C.J.S. Damages § 94) (alteration in original); *Perry v. Bureau of Prisons*, 371 F.3d 1304, 1305 (11th Cir. 2004) (holding that a plaintiff "alleged the necessary elements to state a claim under the Privacy Act" without alleging any economic damages).

P. Stephen Gidiere III
Attorney of Record for Plaintiffs-Appellants

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STATEMENT OF THE ISSUE THAT MERITS EN BANC REVIEW

1. Whether the phrase "actual damages" in the Privacy Act is restricted to pecuniary losses only.[1]

SUMMARY OF THE ARGUMENT

Fitzpatrick should be overruled for four reasons. First, its rationale and result are abrogated by the Supreme Court's seminal Privacy Act decision in *Doe v. Chao*, 540 U.S. 614 (2004). *Doe* "changed the landscape of the Privacy Act," slip op. at 11, and also rejected *Fitzpatrick*'s interpretation of the Privacy Act's legislative history, in favor of the Fifth Circuit's contrary interpretation in *Johnson v. Dep't of Treasury*, 700 F.2d 971 (5th Cir. 1983). Second, *Fitzpatrick*'s threshold conclusion that "actual damages" "has no 'plain meaning' in the legal lexicon," 665 F.2d at 329, conflicts with all other published decisions of this Court since 1982 that consider the plain meaning of the statutory phrase "actual damages." Third, it conflicts with better-reasoned decisions of the majority of other circuits that have addressed the issue. Fourth, it is antiquated and unfair because it closes the courthouse doors *as a matter of law* to victims who have suffered real demonstrated mental injury from a willful violation of the Privacy Act like the Veterans here.

[1] Rehearing is not requested on the panel's decision on the Veteran's declaratory and injunctive claims under the Administrative Procedures Act.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

This case was filed on February 15, 2007. It includes two categories of claims: those seeking monetary damages under the Privacy Act, 5 U.S.C. § 552a(g), and those seeking declaratory and injunctive relief under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 702-06.[2] The district court granted VA summary judgment on all claims. (R.46 at 2.) Its sole basis for dismissing the monetary claims was that plaintiffs offered no proof of pecuniary loss. (R.46 at 12-13.)

On appeal, the panel affirmed in part, reversed in part, and remanded. It affirmed dismissal of the claims for monetary damages based on *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982), which held that "actual damages" in the Privacy Act "meant pecuniary losses only." Slip op. at 10. It reversed the dismissal of eight of the nine claims for declaratory and injunctive relief. *Id*. at 20.

B. Statements of Facts

The facts are undisputed. In 2006, the Birmingham VA Medical Center purchased fifteen external hard drives. Slip op. at 4.[3] VA purchased the hard

[2] Defendants are the U.S. Department of Veterans Affairs, its Secretary Eric Shinseki, and its Assistant Secretary Robert T. Howard (the later two in their official capacities). They are collectively referred to as "VA."

[3] The bulk of the facts discussed here and in the panel's opinion are documented in a report by the VA's Office of Inspector General. *See*

drives knowing they did not include required encryption technology (R.33-3 at iv, 15-17) and without following procurement rules designed to protect privacy (*id.* at 20). Encryption software was available, but VA officials testified that they did not want to pay for it. (R.16, Ex.14 at 3-4.)

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

The VA failed to adequately supervise John Doe and granted him access to VA databases beyond the requirements of his job and the scope of his background check, from which he downloaded veterans' information to the hard drive. Slip op. at 4; (R.33-3 at v, 18, 40.) He was given "carte blanche" access to multiple VA databases, including a nationwide database of social security numbers. (R.33-3 at

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Administrative Investigation, Loss of VA Information, VA Medical Center, Birmingham, AL, Report No. 07-01083-157 (June 29, 2007) ("VAOIG Report"). A copy of the VAOIG Report is included in the record (R.33-3), and an electronic copy is at http://www.va.gov/oig/51/FY2007rpts/VAOIG-07-01083-157.pdf.

22-24, 30-32.) He kept the unencrypted hard drive in a VA facility with an inadequate security plan, and VA officials knew as early as December 2006 that the front door to John Doe's office was left unlocked at night in a known high crime area. Slip op. at 4; (R.33-3 at iv-v, 17-18.)

On January 22, 2007, John Doe reported the hard drive missing. Slip op. at 4; (R.33-3 at 1; R.46 at 2.) The VA's Office of Inspector General and the Federal Bureau of Investigation conducted investigations. The hard drive was not recovered. (R.33-3 at i; R.46 at 3.)

Mr. Perkins and Mr. Qualls are Vietnam combat veterans with chronic severe post-traumatic stress disorder ("PTSD"). Slip op. at 3. Both receive medical treatment from VA in Alabama. *Id*. Because of their PTSD, both participate in group therapy sessions and receive medical benefits from the VA, and both see a doctor several times a year to update their PTSD prescriptions. *Id*.

Upon learning of the data breach from press reports, the Veterans became worried that their own personal and medical information had been compromised. (R.33-3 at ii; R.40, Ex.1 at ¶7, Ex.2 at ¶7.) Mr. Perkins called the public "hotline" established by VA, but VA would not tell him whether or not his information had been compromised. (R.40, Ex.1 at ¶8.) He was told he would be notified in writing. (*Id.*); Slip op. at 3. It was not until March 13, 2007—nearly two months after VA knew of its security breaches—that the Veterans were told by VA that

their personal data had been compromised. (R.40, Ex.1 at ¶9, Ex.2 at ¶8.) VA's letter said they should take several actions on their own to protect themselves. (R.33-5, Attach. B.) First, VA told the Veterans to obtain and review their credit report. (*Id.*) They did this. (R.40, Ex.1 at ¶10, Ex.2 at ¶9.) Second, VA told the Veterans to contact the Federal Trade Commission ("FTC") and put a "fraud alert" on their credit accounts. (R. 33-5, Attach. B.) They contacted the FTC number VA provided, but were confused by what they were told. (R.40, Ex.1 at ¶11, Ex.2 at ¶10.) Third, VA told the Veterans that they would receive "a follow-up letter" "[i]f VA determines that your information or you are at risk as a result of this incident." (R.33-5, Attach. B.) It was not until April 30, 2007, that VA finally sent its "follow-up letter" offering credit monitoring only for one year, even though the hard drive was not recovered. (R.33-5, Attach. C.)

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

The Veterans' PTSD and its physical symptoms were triggered and aggravated by these events. (R.40, Ex.1 at ¶13, Ex.2 at ¶11.) According to peer-reviewed literature from VA researchers, individuals with PTSD react differently

and more strongly to stressors than do individuals without PTSD.[4] In the Veterans' case, their PTSD and its symptoms were aggravated and triggered by the stressors of responding to VA's loss of their information and the risk of identity theft, and their loss of trust in the VA as the sole provider of their medical care. Slip op. at 4; (R.40, Ex.1 at ¶13, Ex.2 at ¶11.) The Veterans suffered worsening of their PTSD physical symptoms, including increased sleeplessness, isolation, anxiety, and anger. Slip op. at 4; (R.40, Ex.1 at ¶13, Ex.2 at ¶11.) Mr. Perkins has received additional medication from his doctor, and Mr. Qualls has had his dosage increased. Slip op. at 5 ((R.40, Ex.1 at ¶13, Ex.2 at ¶11.)

ARGUMENT

I. *Fitzpatrick* is Abrogated by the Supreme Court's Decision in *Doe v. Chao*

A. *Doe v. Chao* "Changed the Landscape of the Privacy Act"

As the panel correctly noted, the Supreme Court's decision in *Doe v. Chao*, 540 U.S. 614 (2004), "changed the landscape of the Privacy Act." Slip op. at 11. In *Doe*, the Supreme Court held that the Privacy Act's minimum award of $1,000 was not available unless the plaintiff suffered "some" amount of "actual damages." Slip op. at 11; *Doe*, 540 U.S. at 1205. This overrules the result of *Fitzpatrick*,

[4] *See* Todd C. Buckley, PhD, National Center for PTSD, *Preventive Health Behaviors, Physical Morbidity, and Health-Related Role Functioning Impairment in Veterans with Post-Traumatic Stress Disorder*, 169 MILITARY MEDICINE 7:536 (2004).

which was that the plaintiff there—who was deemed by this Court not to have suffered actual damages—was nonetheless entitled to $1,000, costs, and attorney fees. Slip op. at 11.

Fitzpatrick and *Doe* taken together mean that an individual *in this Circuit* cannot recover anything under the Privacy Act—not even the statutory minimum award—without showing an out-of-pocket monetary loss.[5] As the panel here noted, "Perkins and Qualls[] are worse off than Fitzpatrick in 1982, because after *Doe* they cannot get even the $1,000 statutory minimum award without showing some actual damages." Slip op. at 11. This means that the primary damage that occurs from an invasion of privacy—mental distress—cannot be remedied in this Circuit, even by a minimal award.[6] It also means that an individual beaten or harassed as a result of a federal agency's willful dissemination of his personal information can receive no compensation under the Privacy Act for his mental and physical injury *in this Circuit*. This is an unintended consequence of *Fitzpatrick* that should be rectified en banc.

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[5] The panel ignored, and thus effectively rejected, the Veterans' timely-raised argument that costs and attorney fees are recoverable absent proof of actual damages. Blue Brief at 26, Gray Brief at 8 n.7. This is another basis for rehearing.

[6] As the Fifth Circuit explained: "[t]he Supreme Court has indicated that the primary damage in 'right to privacy' cases is mental distress," and the Privacy Act "can hardly accomplish its purpose of protecting a personal and fundamental constitutional right if the primary damage resulting from an invasion of privacy is not recoverable under the major remedy of 'actual damages' that has been provided by Congress." *Johnson*, 700 F.2d at 977.

A further unintended consequence of *Fitzpatrick* and *Doe* is that there is little "incentive to sue" to maintain federal agency compliance with the Privacy Act in this Circuit. The citizen enforcement aspect of the Privacy Act was important to the *Fitzpatrick* panel and informed its holding that the plaintiff was entitled to $1,000, costs, and attorney fees. 665 F.2d at 330 (noting that Congress provided for "a $1,000 damage floor [and] costs and attorneys' fees . . . as additional elements of recovery" to insure an "incentive to sue"). Thus, absent en banc intervention, federal agencies will have much less incentive to comply with the Privacy Act at their facilities in this Circuit, and agencies can remain in non-compliance for years, as the VA has done.[7]

B. *Doe v. Chao* Corrects *Fitzpatrick*'s Misinterpretation of the Privacy Act's Legislative History

Fitzpatrick's conclusion that "actual damages" means only pecuniary losses hinged on that panel's interpretation of the Privacy Act's legislative history. 665 F.2d at 329 ("[W]e must turn to the legislative history and attempt to discern Congressional intent on this issue."). That interpretation has proven to be wrong.

In conducting its legislative history analysis, the *Fitzpatrick* panel thought that Congress' deletion of the phrase "general damages" from an earlier version of

[7] *See* GAO-07-1019, *Sustained Management Commitment and Oversight Are Vital to Resolving Long-standing Weaknesses at the Department of Veterans Affairs*, at 2, 8 (Sept. 2007) (reporting VA's serial non-compliance that causes "unnecessary risk [] that the personal information of veterans and others would be exposed to data tampering, fraud, and inappropriate disclosure.").

the bill meant that Congress intended a "more restrictive" view of "actual damages" "that *must* refer to pecuniary loss." *Fitzpatrick*, 665 F.2d at 330 (emphasis added). That interpretation of the legislative history, however, was discredited by the Supreme Court in *Doe*. The Supreme Court found in *Doe* that Congress' "deletion of 'general damages' from the bill is fairly seen, then, as a deliberate elimination of any possibility of *imputing* harm and awarding *presumed* damages." 540 U.S. at 623 (emphasis added). In other words, the legislative history shows that Congress was drawing the line at presumed or statutory damages, not mental or emotional injury.[8] Because its fundamental rationale is thus abrogated, *Fitzpatrick* should be overruled, or at least reconsidered, en banc.

II. *Fitzpatrick* is Contrary to Subsequent Decisions of this Court

A. A Generation of Jurisprudence Holds that "Actual Damages" is Not Restricted to Pecuniary Losses Only

Fitzpatrick's holding on "actual damages" is premised on the critical threshold conclusion that "'actual damages' has no 'plain meaning' in the legal lexicon." 665 F.2d at 329. That fundamental conclusion of *Fitzpatrick* is no longer valid in this Circuit. More recent published decisions of this Circuit hold

[8] Although *Doe* did not decide "the precise definition of actual damages," 540 U.S. at 627 n.12, the dissenting opinion noted the black letter rule that "[t]he plaintiff [in an invasion of privacy case] may also recover damages for emotional distress or personal humiliation that he proves to have been actually suffered by him. . . ." *Id*. at 634-5 n.4 (quoting 3 Restatement (Second) of Torts § 652H, p. 402, Comment *b* (1976)).

that the statutory phrase "actual damages" "clearly" includes emotional distress as a compensable injury and is not restricted to pecuniary losses only. *See Banai v. Dep't of Housing*, 102 F.3d 1203, 1207 (11th Cir. 1997) (holding that "anger, embarrassment, and emotional distress are clearly compensable injuries" under the plain meaning of the statutory phrase "actual damages," which is also used in the Fair Housing Act, even though "the statute provides little guidance beyond this statement").[9] *See also Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1203 n.30 (11th Cir. 2007) ("[M]ental pain and suffering ... is an element of actual or compensatory, as distinguished from exemplary or punitive, damages.") (quoting 25 C.J.S. Damages § 94) (alteration in original). Had the *Fitzpatrick* panel used this Court's current understanding of the plain meaning of "actual damages," the panel there would not have delved into the Privacy Act's legislative history and purported to discern some artificial restrictions on the types of recoverable "actual damages." *See Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) (Carnes, J.) (en banc) ("When the import of the words Congress has used is clear, as it is here,

[9] There is absolutely no distinction between the use of "actual damages" in the Privacy Act and in the Fair Housing Act ("FHA") and no basis for interpreting their plain meaning differently. *Compare* 5 U.S.C. § 552a *with* 42 U.S.C. § 3612(g)(3). As a textual matter, when Congress wants to limit recovery to economic loss only, it knows how to do so. *See* 26 U.S.C. § 7432 (limiting recovery against IRS agent for not releasing a lien to "actual direct economic damages sustained by the plaintiff") (emphasis added).

we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language.").

Even in the Privacy Act context, this Court now instinctively understands that "actual damages" is not restricted to pecuniary losses only, as evidenced by *Perry v. Bureau of Prisons*, 371 F.3d 1304 (11th Cir. 2004). In *Perry*, this Court reversed a district court's dismissal of a Privacy Act claim in a case where no pecuniary losses were alleged or could be proven. 371 F.3d at 1305. This Court held that the plaintiff in *Perry* stated a claim under the Privacy Act, including satisfying the element of "actual damages," when he alleged that the Bureau of Prisons "willfully and intentionally transferred him pursuant to inaccurate prison records, which, abridged upon his Right to Petition protected under the First Amendment of the United States Constitution." *Id.* (alterations omitted). Such a claim, this Court held, "alleged the necessary elements to state a claim under the Privacy Act." *Id.* There was no allegation of "pecuniary losses" in *Perry* (and it would be hard to imagine a scenario where an incarcerated prisoner could show any from a prison transfer). *Id.* Thus, the *Perry* panel understood instinctively that the physical consequences of a Privacy Act violation (the transfer of the plaintiff to another prison) can be the basis for recoverable "actual damages" even when no pecuniary losses are alleged or can be proven. *Id.*

Fitzpatrick cannot stand along side the decisions in *Banai*, *Sheely*, *Perry*, and other decisions of this Court holding that the phrase "actual damages" includes emotional, mental, and physical injury.[10] En banc review is required to resolve the conflict among this Court's decisions as to the plain meaning of "actual damages."

B. The Meaning of "Actual Damages" Will Be a Recurring Issue in the Circuit

The issue of whether the statutory phrase "actual damages" is restricted to pecuniary losses only will be a recurring one in this Circuit. Other federal statutes similar to the Privacy Act use the same phrase "actual damages," and this Court has yet to decide which of its views on the meaning of "actual damages" it will apply under those statutes. *See, e.g.*, *Levine v. World Fin. Network Nat. Bank*, 437 F.3d 1118, 1124-25 (11th Cir. 2006) (noting that several circuits hold that "actual damages" in the Fair Credit Reporting Act "may include compensation for emotional distress in the absence of physical injury or out-of-pocket expenses" but not reaching the issue). In fact, this Court's failure to provide a definitive statement as to the plain meaning of the statutory phrase "actual damages" has produced inconsistent results in the district courts on this basic issue. *See McLean v. GMAC*, 2008 WL 1956285 *11 (S.D. Fla. May 2, 2008) (discussing conflicting

[10] *Dep't of Housing v. Blackwell*, 908 F.2d 864 (11th Cir. 1990) (upholding $40,000 award for emotional distress as "actual damages" under FHA); *Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000) (holding that "actual injury" under § 1983 includes "compensatory damages based on demonstrated mental and emotional distress, impairment of reputation, and personal humiliation.").

holdings of district courts in the Eleventh Circuit as to whether the phrase "actual damages" in various consumer protection statutes includes non-pecuniary damages). En banc review is necessary to secure and maintain uniformity of decisions in this Circuit and provide guidance to the district courts.

III. *Fitzpatrick* is Contrary to Decisions of Other Circuits

There is a clear split in the circuits on the meaning of "actual damages" in the Privacy Act, as the panel noted. Slip op. at 12. The Fourth, Fifth, and Tenth Circuits hold that mental injury can qualify as "actual damages" without pecuniary loss. *See Doe v. Chao*, 306 F.3d 170, 181 (4th Cir. 2002);[11] *Johnson, v. Dep't of Treasury*, 700 F.2d 971, 972-74 (5th Cir. 1983); *Parks v. IRS*, 618 F.2d 677, 682-83 (10th Cir. 1980).[12] The Fifth Circuit's analysis of the Privacy Act's legislative history has proven to be the correct one, not this Court's. *See Johnson*, 700 F.2d at 982 (explaining that the deletion of "general damages" "was rejecting liability for presumed damages," as the Supreme Court later held in *Doe*). In fact, the Fifth Circuit criticized this Court's analysis of the legislative history on this point as a "nonsequitur." *Id*. at 982 n.29 (rejecting *Fitzpatrick*'s conclusion that "actual

[11] *Doe* "commits [the Fourth] circuit to the position that the term 'actual damages' includes at least emotional distress that would qualify as 'demonstrable'[.]" 306 F.3d at 198 n.22 (Michael, J.) (concurring in part and dissenting in part).

[12] Only the Sixth Circuit has followed the approach in *Fitzpatrick*, but with no rationale of its own. *Hudson v. Reno*, 130 F.3d 1193, 1207 n.11 (6th Cir. 1997).

damages" "must refer to out-of-pocket loss"). The Fifth Circuit recently re-affirmed its position that "actual damages" under the Privacy Act "includes emotional-distress damages." *See Jacobs v. Nat'l Drug Intelligence Center*, 548 F.3d 375 (5th Cir. 2008). The Fifth Circuit's analysis has stood the test of time, and it should be adopted by this Court en banc.

IV. *Fitzpatrick* is Antiquated and Unfair

Fitzpatrick was decided when the Privacy Act was in its childhood, just eight years old. A full generation later, this Court can make a more informed decision on the appropriate scope of liability under the statute. For example, we now know that restricting "actual damages" to pecuniary loss only is not needed to stop massive pay-outs from the federal Treasury. The Government concedes such fears are baseless. *Doe*, 540 U.S. at 636 (quoting Government counsel: "[W]e have not had a problem with enormous recoveries against the Government up to this point.") (Ginsberg, J., dissenting).

And times have changed since *Fitzpatrick*. In 1982, personal computers linked to nationwide databases did not sit on the desks of every federal employee and contractor as they do today. There were no pocket-sized external hard drives that could store "treasure trove[s] of private data." Slip op. at 2. Federal agencies today possess and handle an extraordinary amount of private citizen data, the majority in electronic format. The clear trend is for more and more personal

information—including veterans' medical information—to be stored electronically and subject to instantaneous loss.[13] Thus, there is an acute need today, that was not present in 1982, to provide individuals with the "incentive to sue" to maintain federal agency compliance with the data security provisions of the Privacy Act.

Attitudes about mental illnesses have also changed since *Fitzpatrick*, especially toward war-induced mental trauma like PTSD. Vietnam, Afghanistan, and Iraq have taught us that PTSD is *real*, with *actual* consequences. According to the VA's National Center for Posttraumatic Stress Disorder:

> Scientific and clinical interest in [PTSD] has grown exponentially in the past 20 years. It is no longer considered an isolated problem for Vietnam veterans. PTSD is recognized as a major public health problem and a behavioral health problem for military veterans and active duty personnel subject to the traumatic stress of war, dangerous peacekeeping operations, and interpersonal violence.[14]

Unfortunately, *Fitzpatrick* does not reflect today's mores in this regard. At base, *Fitzpatrick* trivializes mental injury, says it is worth nothing, and dismisses it. That is wrong, and it should it be corrected by this Court en banc.

CONCLUSION

The petition for en banc review should be granted and *Fitzpatrick* overruled.

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[13] *See* The White House, *President Obama Announces the Creation of a Joint Virtual Lifetime Electronic Record* (Apr. 9, 2009) (announcing a database "that will ultimately contain administrative and medical information from the day an individual enters military service throughout their military career, and after they leave the military"), *available at* www.whitehouse.gov/the_press_office.

[14] History of the National Center for PTSD, *available at* www.ncptsd.va.gov/ncmain/about/nc_overview/history.html.

Respectfully submitted,

Counsel for Plaintiffs-Appellants

June 26, 2009

Counsel for Plaintiffs-Appellants:

P. Stephen Gidiere III
Gregory C. Cook
Alexia Bowers Borden
BALCH & BINGHAM LLP
1901 Sixth Avenue N., Suite 1500
Birmingham, Alabama 35203
205-251-8100 (voice)
205-488-5694 (facsimile)
E-mail: sgidiere@balch.com

Caroline Smith Gidiere
Andrew P. Campbell
LEITMAN, SIEGAL, PAYNE & CAMPBELL
2100-A SouthBridge Parkway, Suite 450
Birmingham, Alabama 35209
205-803-0051 (voice)
205-803-0053 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June 2009, a true and correct copy of the foregoing Petition was served on the following by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

Samantha L. Chaifetz
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 7248
Washington D.C. 20530-0009

Joyce White Vance
U.S. Attorney, Northern District of Alabama
1801 4th Avenue North
Birmingham, Alabama 35203-2101

P. Stephen Gilbert III

Counsel for Plaintiffs-Appellant