

No. 08-11102-G

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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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;  
JAMES PEAKE, 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.

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

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**BRIEF OF APPELLANTS, JIM HENRY PERKINS AND  
JESSE FRANK QUALLS**

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**ORAL ARGUMENT REQUESTED**

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**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
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iii. Parties:

- (1) Robert T. Howard, Defendant
- (2) R. James Peake, Defendant
- (3) Jim Henry Perkins, Plaintiff
- (4) Jessie Frank Qualls, Plaintiff
- (5) United States Department of Veterans Affairs, Defendant

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Counsel for Plaintiffs-Appellants

## **STATEMENT REGARDING ORAL ARGUMENT**

Plaintiffs-Appellants believe that oral argument would significantly aid the Court in resolving this appeal, particularly because the district court's decision creates an effective conflict between prior panel decisions of this Court and presents the Court with an opportunity to clarify its precedent in light of a recent Supreme Court decision.

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## **STATEMENT OF JURISDICTION**

The Veterans' claims arise principally under two federal statutes – the Privacy Act, 5 U.S.C. § 552a, and the Administrative Procedure Act, 5 U.S.C. § 702 *et seq.* The district court thus had jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES**

1. Whether the district court erred in dismissing the Veterans' Privacy Act claims for monetary relief when it misapplied this Court's precedent regarding the definition of "actual damages"?

2. Whether the district court erred in dismissing the Veterans' Administrative Procedure Act ("APA") claims for injunctive and declaratory relief when the Veterans seek review of final agency actions under the APA?

## STATEMENT OF THE CASE

### **I. Statement of Undisputed Facts**

#### **A. Jim Henry Perkins and Jesse Frank Qualls, Disabled Combat Veterans**

Plaintiffs Jim Henry Perkins and Jesse Franks Qualls (collectively, “the Veterans”) are residents of the State of Alabama and combat veterans of the war in Vietnam. (R.46 at 3.)<sup>1</sup> Both have been formally diagnosed by Defendant United States Department of Veterans Affairs (“VA”)<sup>2</sup> with chronic severe Post Traumatic Stress Disorder or “PTSD” as a result of their combat experience, and both receive on-going treatment from VA for their PTSD and its symptoms.<sup>3</sup> (*Id.*)

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<sup>1</sup> “R.#” refers to numbered entries in the district court docket sheet.

<sup>2</sup> Defendants are the United States Department of Veterans Affairs, its Secretary James B. Peake, and its Assistant Secretary for Information and Technology and Chief Information Officer Robert T. Howard (the later two in their official capacities). Defendants are collectively referred to as “VA” or “Defendants.”

<sup>3</sup> PTSD is an anxiety disorder that occurs after an individual experiences a traumatic event such as combat. Strong emotions caused by the event create changes in the brain that may result in PTSD – in other words, PTSD is both a physical and mental disorder. PTSD symptoms usually start soon after the traumatic event, but may be delayed until months or years later. Symptoms include bad memories of the event, avoiding situations or people that trigger memories of the event, staying away from relationships, losing interest in activities, hyper-arousal, sudden anger or irritability, difficulty sleeping, trouble concentrating, and fear for one’s safety. *See generally* U.S. Dep’t of Veterans’ Affairs, National Center for PTSD, Fact Sheet, *What is PTSD?*, available at [http://www.ncptsd.va.gov/ncmain/ncdocs/fact\\_shts/fs\\_what\\_is\\_ptsd.html](http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_what_is_ptsd.html).

Mr. Qualls served in the United States Army from 1959 to 1967. (R.40, Ex.2 at ¶1).<sup>4</sup> He served in active combat in Vietnam from 1965 to 1967 as a weapons squad leader in the Special Operations Unit of the 101<sup>st</sup> Airborne Division. (*Id.*) Before Vietnam, he served in Korea. (*Id.*) He has received medical benefits as a disabled veteran from VA since 1989 because of his PTSD. (*Id.* at ¶2.) In his personal time, Mr. Qualls plays an active role in the veterans' community, including serving as Commander for Veterans of Foreign Wars Post 8640, Commander of the Honor Guard for American Legion Post 11, and a President of the Black Veterans of America Association. (*Id.* at ¶3.)

Mr. Qualls experiences mental and physical symptoms from his PTSD. (*Id.* at ¶5.) These symptoms include anger outbursts, flashbacks, nightmares, sleeplessness, confusion, and isolation from his family and friends. (*Id.*) Mr. Qualls relies exclusively on VA for treatment for his PTSD (*id.* at ¶4), which

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<sup>4</sup> Documents 40 and 41 are not referenced on the district court docket sheet because they were filed under seal. *See* Northern District of Alabama, *Civil Administrative Procedures Manual for CM/ECF* (“Caution is recommended with regard to other personal identifiers, such as driver’s license, medical records, treatment and diagnosis, employment history, individual financial information and proprietary or trade secret information. . . . It is the sole responsibility of counsel and the parties to ensure that redaction of personal identifiers is done.”). Document 40 is Plaintiffs’ Notice of Filing Evidentiary Material in Opposition to Defendants’ Motion for Summary Judgment, and Document 41 is Plaintiffs’ Memorandum of Law In Opposition To Defendants’ Motion to Dismiss, or, In the Alternative, for Summary Judgment. Mr. Perkins’ and Mr. Qualls’ declarations (R.40, Ex.1, Ex.2) are provided in the Record Excerpts, but with specific medical treatment information and other sensitive information redacted.

includes participating in monthly group therapy sessions for combat veterans at the Birmingham VA (*id.* at ¶6). In these monthly sessions, Mr. Qualls learns about PTSD and methods to cope with his symptoms, and it is critical that he trust VA staff for these sessions and methods to be effective. (*Id.*) He also sees a VA doctor in Tuscaloosa every ninety days for treatment, and this doctor prescribes medications for his PTSD symptoms. (*Id.*)

Mr. Perkins served in the United States Marine Corps from September 1968 to February 1970. (R.40, Ex.1 at ¶1.) His service included a twelve-month tour of duty in Vietnam, where he was involved in active combat missions. (*Id.*) He has received medical benefits as a disabled veteran from VA since 2003 because of his PTSD. (*Id.* at ¶2.) In his personal time, he serves as Legislative Reporter for Disabled Veterans of America and helps widows of veterans apply for pension benefits from VA. (*Id.* at ¶3.)

Mr. Perkins experiences mental and physical symptoms from his PTSD. (*Id.* at ¶5.) These include sleeping problems, cold sweats, physical outbreaks, and isolation from certain family members and others. (*Id.*) Mr. Perkins relies exclusively on VA for treatment for his PTSD, which includes participating in weekly group therapy sessions at the VA clinic in Sheffield, Alabama. (*Id.* at ¶¶2,6.) In these sessions, Mr. Perkins learns about PTSD and methods to cope with his symptoms, and it is critical that he trust VA staff for these sessions and

methods to be effective. (*Id.*) He sees a VA doctor in Tuscaloosa every ninety days for treatment, and his doctor prescribes medications for his PTSD symptoms. (*Id.*)

**B. VA's Misuse and Unauthorized Disclosure of the Veterans' Personal Privacy Information**

Because Messrs. Perkins and Qualls are disabled veterans, VA maintains, stores, and uses their personal privacy information, including their social security number ("SSN"), date of birth, and health information such as diagnosis and lab results. (R.33-3 at 1; R.46 at 2-3.) VA stores the Veterans' information on multiple computer databases that are subject to the requirements of the Privacy Act and other statutory and regulatory obligations. (R.33-3 at i, 7.) Access to the Veterans' information is therefore supposed to be restricted by multiple layers of physical, technical, and administrative security controls to prevent unauthorized access and disclosure. (*Id.* at vi.) As discussed below, however, VA failed to have these required controls in place and failed to observe them with respect to the Veterans' personal information at VA's facilities in Birmingham, Alabama. *See generally* (R.33-3.)<sup>5</sup>

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<sup>5</sup> The facts discussed here are documented in a report by the VA's Office of Inspector General detailing its administrative investigation into the mishandling of the Veterans' personal information at VA's Birmingham facility. *See Administrative Investigation, Loss of VA Information, VA Medical Center, Birmingham, AL*, Report No. 07-01083-157 (June 29, 2007) ("VAOIG Report"). The facts in the VAOIG Report were treated as true by Defendants in their briefing

Beginning as early as December 2003 and continuing until January 2007, VA gave its employee (pseudonym “John Doe”) unfettered access to its Privacy Act databases that included the Veterans’ personal information. (R.33-3 at 22-24.) The VA employed John Doe as an information technology (“IT”) specialist, working at the Birmingham VA in its Research Enhancement Award Program (“REAP”). (R.33-3 at i.) He did not use the Veterans’ personal information for processing their claims or providing medical services to them; instead, John Doe used the information for “medical research” that was beyond the scope of his assigned work. (*Id.* at v, vii, 20.) The Veterans did not know of John Doe’s research and did not consent to VA’s disclosure of their personal information to him. (R.21 at ¶50.)

In the course of this “research,” John Doe accessed and downloaded the Veterans’ personal information (including their names, SSNs, dates of birth, personal health information, and data that allowed the linking of this information) from VA’s databases to at least one portable hard drive without securing the information with the required encryption technology (*Id.* at i, vii), which violated

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at the district court and also by the district court for purposes of its summary judgment ruling. (R.33 at 1; R.46 at 2-3.) Plaintiffs likewise assume the truth of these facts for purposes of this appeal. A copy of the VAOIG Report is included in the Record Excerpts at (R.33-3), and an electronic copy can be downloaded at <http://www.va.gov/oig/51/FY2007rpts/VAOIG-07-01083-157.pdf>.

the Privacy Act and VA security rules (*Id.* at iv, vii, 30).<sup>6</sup> He further transported their information off VA premises on at least one occasion (*Id.* at 8), again violating VA security rules (R.33-3 at iv, 16; R.16, Ex.12 at 12.) He then stored their information in an unsecured office in a privately-owned building located in a known high crime area of downtown Birmingham (R.33-3 at 18; R.46 at 2.)

VA officials knowingly facilitated John Doe's illegal access to and downloading of the Veterans' information. (R.33-3 at v-vii.) VA officials knew of the unsecured environment in which John Doe accessed and stored the Veterans' information, but they nonetheless allowed him continued unfettered access. (*Id.*) VA knowingly failed to conduct an adequate background check of John Doe prior to giving him access to the Veterans' information and granting him programmer level privileges to its databases. (*Id.* at v, 18.) VA officials failed to supervise John Doe's activities and did not issue to John Doe required training materials about encrypting and securing the Veterans' personal information. (R.33-3 at 40; R.21 at ¶19.) VA officials granted John Doe access to the Veterans' personal information on multiple VA databases, including its VistA database, its VISN 7 Data Warehouse, and its National Patient Care Database (which included a nationwide database of SSNs). (R.33-3 at 22-24, 30-32.) Not only did VA

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<sup>6</sup> "Encryption is a way to protect data stored on a computer. Generally, a computer software program has scrambled information stored on a computer so that it becomes illegible." (R.33-5, Attach. D at 2)

officials give him this “carte-blanche” access, VA officials purchased and provided to John Doe a portable external hard drive knowing that it did not include the required encryption technology (*id.* at iv, 15-17) and without following VA procurement procedures designed to protect privacy (*id.* at 20). This encryption software was readily available, but VA officials testified that they did not want to pay for it. (R.16, Ex.14 at 3-4) (Rep. Bachus: “Is there technology there to have encrypted the data on the hard drive in Birmingham?” Ms. Regan [VAOIG]: “You can encrypt the data that you store on the hard drive. There is software that allows you to encrypt the data when you transfer it . . . . [O]ne of the main issues with respect to this is cost.”).

VA officials further knowingly maintained inadequate physical security at John Doe’s VA office location, despite knowing that the Veterans’ personal information was stored on a portable hard drive there. (R.33-3 at iv-v, 17-18.) In fact, VA officials knew as early as December 2006 that the front door to John Doe’s office (where multiple unencrypted hard drives were stored) was left unlocked at night by VA staff in a known high crime area. (*Id.* at v, 18.)

On January 22, 2007, VA’s mishandling of the Veterans’ personal information came to a head. On that day, John Doe reported to VA officials that the VA-owned portable hard drive assigned to him, which contained the Veterans’ unencrypted personal information, could not be located. (R.33-3 at 1; R.46 at 2.)

After John Doe made his report, VA gave him continued unsupervised access to his desktop computer, and he deleted multiple files from his computer in an effort to hide the extent of the data he had downloaded and the magnitude and impact of its loss. (R.33-3 at ii, 8-9.)

On January 23, 2007, VA's Office of Inspector General ("VAOIG") interviewed John Doe and secured his desktop computer for forensic analysis. On January 24, 2007, the Federal Bureau of Investigation ("FBI") joined the investigation and offered a \$25,000 reward for the hard drive. (R.33-3 at ii, 8, 9; R.46 at 3.) The hard drive has not been recovered (R.33-3 at i; R.46 at 3), and the criminal investigation remains open. (R.33-3 at ii.)

VAOIG conducted a formal investigation into the mishandling of the Veterans' personal information in order to identify the conditions at the Birmingham VA that put the Veterans' information at risk. (R.33-3.) VAOIG interviewed dozens of VA officials under oath and reviewed internal VA reports, purchasing documents for the hard drive, e-mails, meeting minutes, and other computer data. (*Id.* at 5, 8.) VAOIG conducted a forensic analysis of John Doe's desktop computer and his office's shared network. (*Id.* at 5.) After its investigation, VAOIG made the following conclusions, among others:

- VA's security plan did not comply with VA security rules, and the plan's inadequacies permitted transfer of the Veterans' personal information when there were not adequate procedures in place to protect the security of the data. (R.33-3 at iv.)

- The Director of the Birmingham VA moved John Doe to new office space without ensuring that information security needs were sufficiently evaluated and without ensuring adequate physical security measures. (*Id.* at iv.)
- VA officials improperly designated John Doe’s position sensitivity level as moderate risk, which was inconsistent with his programmer privileges, resulting in a less extensive background investigation. (*Id.* at v.)
- VA officials improperly gave John Doe “carte-blanche” access to multiple VA databases, allowing him to accumulate and store vast amounts of individually identifiable health information about the Veterans and others that was beyond the scope of his research projects. (*Id.* at v, 22-24.)
- John Doe’s access to and use of the Veterans’ personal information did not comply with the Privacy Act or the Health Insurance Portability and Accountability Act of 1996. (*Id.* at vii, viii.)
- VA’s failure to limit access to the Veterans’ personal information and its failure to develop, disseminate, and follow VA policies and procedures governing accessing to its databases, created a situation in which John Doe improperly accumulated a vast amount of personally identifiable information and individually identifiable health information from multiple sources without the controls to properly safeguard the data. (*Id.* at viii.)
- John Doe and his fellow employees were hardly supervised at all. Many of the problems found by VAOIG might have been prevented if the daily operations of the office were effectively managed and supervised. However, the Director and her subordinate managers frequently were not physically present at the office to supervise and manage daily operations, and the Director’s supervisor of record, in fact, was the supervisor in name only and provided no supervision. (*Id.* at 40.)

VAOIG made sixteen (16) specific remedial recommendations in light of its findings. (R.33-3 at ix-xi.) After VAOIG made these recommendations and others, the Government Accountability Office (“GAO”) later concluded that the Veterans’ and other veterans’ personal information remains at risk in VA’s hands. *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) (“Because [GAO and VAOIG] recommendations have not yet been implemented, unnecessary risk exists that the personal information of veterans and others would be exposed to data tampering, fraud, and inappropriate disclosure.”).

### **C. The Impact of VA’s Security Failures on the Veterans**

Messrs. Perkins and Qualls first became aware that their personal information may have been unlawfully disclosed and compromised when they heard news reports about security failures at the Birmingham VA in February 2007. (R.33-3 at ii; R.40, Ex.1 at ¶7, Ex.2 at ¶7.) VA attempted to keep the incident concealed after learning of the breach on January 22, but it was forced to acknowledge the incident to Congress and in a press release on February 2, after a local television station broke the story. (R.33-3 at 10; R.16, Ex.1.) According to the February 2 news reports and releases, VA had lost a portable hard drive from its Birmingham facility that contained personal and medical information on about

48,000 veterans. (R.33-3 at ii; R.16, Ex.1.) In a subsequent press release on February 10, VA stated that the lost hard drive contained information on approximately 535,000 individuals. (R.33-3 at 10; R.16, Ex.2.)

Because the Veterans receive medical treatment from VA in Alabama, after hearing these reports they strongly suspected that their own information was involved. (R.40, Ex.1 at ¶7, Ex.2 at ¶7.) Mr. Perkins called the public “hotline” established by VA for this incident, but VA would not tell him whether or not his information was on the hard drive. (R.40, Ex.1 at ¶8.) Mr. Perkins was told by VA that individuals whose information had been compromised would be notified in writing. (*Id.*)

It was not until the Veterans received letters from VA dated March 13, 2007 – nearly two months after VA knew of its security breaches – that they were told by VA their personal information had been compromised. (R.40, Ex.1 at ¶9, Ex.2 at ¶8.) The letter the Veterans received from VA stated that their SSN, date of birth, and health information such as diagnoses and lab results may be on the missing hard drive. (R.33-3 at iii, 9; R.46 at 3.) VA’s letter said that the Veterans should take several actions on their own to protect themselves. (R.33-5, Attach. B.) First, VA told the Veterans to obtain and review a free copy of their credit report. (*Id.*) Mr. Perkins and Mr. Qualls 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.) Mr. Perkins and Mr. Qualls 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.) VA said that if the Veterans received a “follow-up letter,” it would tell them how to obtain a credit monitoring service at no cost. (*Id.*)

In fact, unbeknownst to the Veterans, “VA senior management” had already concluded sometime before February 7 (well over a month before sending the Veterans the March 13 letter) “that anyone whose SSN was thought to be contained in any of the missing files [] should be notified and offered credit protection.” (R.33-3 at 11) (emphasis added). Despite having already made this decision, VA told the Veterans in the March 13 letter that the decision had not been made and that they would only be offered this service “[i]f VA determines” they are at risk. (R.33-5, Attach. B.) It was not until April 30, 2007, that VA finally sent a “follow-up letter” offering no-cost credit monitoring, and it only offered the monitoring for a one-year period, even though the hard drive had not been recovered and secured. (R.33-5, Attach. C.)

Faced with this confusing and incomplete information from VA and the concrete risk of identity theft that VA advised them of,<sup>7</sup> the Veterans took actions themselves in an effort to protect their credit and identity. (R.40, Ex.1 at ¶¶12,13, Ex.2 at ¶¶9,10,11.) The Veterans actively monitored their own credit and financial accounts.<sup>8</sup> (*Id.*) Even with VA’s offer of one year credit monitoring, it was still necessary for the Veterans 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 VA’s actions. (R.40, Ex.1 at ¶13, Ex.2 at ¶11.) According to peer-reviewed literature from VA researchers, “laboratory studies suggest that individuals with PTSD show augmented sympathetic responses to stress challenges relative to control groups.” 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

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<sup>7</sup> According to the President’s Task Force on Identity Theft, a “SSN standing alone can generate identity theft [and] [c]ombinations of information can have the same effect.” President’s Identity Theft Task Force, Summary of Interim Recommendations, at ii (Sept. 16, 2006), *available at* <http://www.usdoj.gov/ittf/reports.htm>. “[T]hieves can use accepted identifiers like social security numbers [] to open new financial accounts and incur charges and credit in an individual’s name, but without that person’s knowledge.” *Id.* at i.

<sup>8</sup> VA advised affected veterans that “[b]ecause SSNs were on this portable hard drive, we advise individuals to monitor financial accounts continuously for suspicious activity as a matter of good practice.” (R.33-5, Attach. D at 4)

MILITARY MEDICINE 7:536 (2004). In other words, individuals with PTSD react differently and more strongly to stressors than do individuals without PTSD. *Id.* In the Veterans' case, their PTSD and its symptoms were aggravated and triggered by the stressors of not knowing exactly what information about them VA had lost, by receiving multiple complicated letters from VA about the incident and what they should do, by having to take steps on their own to protect their credit and identity, and by being faced with the prospect of monitoring their credit and financial accounts for an indefinite period of time because VA could not (and still cannot) account for their information. (R.40, Ex.1 at ¶13, Ex.2 at ¶11.)

The situation is particularly acute for the Veterans because VA is their only source for PTSD treatment, and the incident and VA's handling of it caused them to lose trust in VA's ability to protect them. (*Id.*) As a result, the group therapy that the Veterans receive for their PTSD no longer works as effectively to address their symptoms as it did before the incident, and their ability to cope suffered a set back. (*Id.*) The Veterans have suffered worsening of their PTSD physical symptoms, including increased sleeplessness, isolation, anxiety, and anger. (*Id.*) Mr. Perkins's doctor at VA prescribed additional medication for him in an effort to control Perkins' PTSD symptoms. (R.40, Ex.1 at ¶13.) Mr. Qualls' doctor at VA increased his dosage of a drug he was taking to treat insomnia and depression, in order to address his worsening PTSD symptoms. (R.40, Ex.2 at ¶11.) Mr. Qualls

also experienced complications during a hospital stay from his worsening PTSD symptoms, and his medications were adjusted as a result. (*Id.*)

## **II. Course of Proceedings**

This case was filed on February 15, 2007. (R.1.) Mr. Perkins joined as a plaintiff when the first amended complaint was filed March 14, 2007 (R.5), and Mr. Qualls joined when the second amended complaint was filed April 25, 2007 (R.21).<sup>9</sup>

The Veterans' second amended complaint includes nine (9) counts related to Defendants' alleged violations of five (5) federal statutes that contain requirements and prohibitions related to the security and confidentiality of personal privacy information. (R.21.) These five statutes are the Privacy Act, 5 U.S.C. § 552a; the E-Government Act of 2002, Pub. L. No. 107-347, 2002 H.R. 2458 (2002) (codified at 44 U.S.C. § 3501 note); the Federal Information Security Management Act ("FISMA"), 44 U.S.C. §§ 3541-48; the Trade Secrets Act, 18 U.S.C. § 1905; and the Veterans Benefits, Health Care, and Information Technology Act of 2006 ("VBHITA"), 38 U.S.C. §§ 5701 *et seq.* (R.21 at ¶1.)<sup>10</sup>

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<sup>9</sup> Plaintiff Greg Fanin was dismissed without prejudice under Rule 41(a)(1)(i). (R.18; R.20.)

<sup>10</sup> The Veterans' second amended complaint contains class action allegations, but there were no motions or rulings on class action status prior to the district court's dismissal of all of the Veterans' claims.

Counts 1 through 5 seek monetary damages and declaratory and injunctive relief for Defendants' violations of five different provisions of the Privacy Act. The claims for monetary damages are brought under the private right of action in the Privacy Act. *See* 5 U.S.C. § 552a(g). The claims for injunctive relief for Defendants' violations of the Privacy Act are brought under the private right of action in the APA. *See* 5 U.S.C. § 702. Counts 6 through 9 seek declaratory and injunctive relief under the APA for Defendants' violations of the E-Government Act, the FISMA, the Trade Secrets Act, and the VBHITA.

On April 23, 2007, the Veterans filed a motion for a preliminary injunction and supporting evidentiary materials. (R.14; R.15; R.16.) Among the preliminary relief sought by the Veterans was an order requiring Defendants to comply with the VBHITA (38 U.S.C. § 5724) by conducting the required independent risk analysis of the Birmingham data breach in order to determine the nature and extent of credit protection services that should be provided to the Veterans (and thereafter to require Defendants to provide those services) and an order requiring Defendants to install encryption software on all computers located at the Birmingham VA to comply with VA Directive 6504 and the VBHITA (38 U.S.C. § 5723). (R.14.) The Veterans requested a hearing on their motion. (*Id.*)

The district court denied the Veterans' request for a hearing. Instead, on April 26, 2007, the district court granted Defendants' motion to stay the case

pending completion of VAOIG's formal investigation. (R.23.) The district court stayed the case until sixty days after VAOIG issued the final version of its report.<sup>11</sup>

*(Id.)*

On June 29, 2007, VAOIG issued its final report, the findings of which were discussed above. (R.24.) On October 26, 2007, Defendants filed an opposition to the Veterans' preliminary injunction motion (R.30), a motion to dismiss or in the alternative for summary judgment with supporting evidentiary materials (including an affidavit of an undeposed VA official) (R.32; R.33), and a motion to stay the Rule 23(f) conference and report (R.31). The district court immediately granted Defendants' motion to stay, preventing the Veterans from conducting any discovery. (R.35.)

On November 27, 2007, the Veterans filed a memorandum of law in opposition to the motion to dismiss or in the alternative for summary judgment along with evidentiary material in opposition to summary judgment detailing their injury and damages (including declarations from Messrs Perkins and Qualls). (R.40; R.41.) These filings were made under seal pursuant to court order, because they contained specific information about the Veterans' medical treatment,

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<sup>11</sup> Defendants were given thirty days to review VAOIG's draft report and to recommend changes prior to the final report being issued. (R.11 at 8.) The Veterans, like the general public, have only been provided with the final report and have seen none of the underlying or supporting materials, and certainly were not allowed to comment on or review the draft report.

symptoms, and diagnoses. (R.39.) Among other things, the Veterans requested VA's motion be denied or a ruling deferred under Rule 56(f) because they had not been allowed any discovery. (R.41 at 59.)

On January 8, 2008, the district court entered a memorandum opinion and order granting Defendants' motion for summary judgment and dismissing the Veterans' entire case. (R.46; R.47.) The district court dismissed the Veterans' five claims for monetary damages under the Privacy Act because it concluded that the Veterans "cannot establish that they have suffered actual damages" under Eleventh Circuit precedent. (R.46 at 13.) The district court further granted summary judgment on the Veterans' claims for declaratory and injunctive relief under the APA because it concluded that "[t]here is *no evidence* that these failures [to comply with various provisions of federal statutes] can be attributed to a conscious decision by the VA to violate the law or that the VA was aware that the violations were occurring and did nothing to remedy them." (R.46 at 15-16) (emphasis added). This factual finding led the district court to conclude that there had been no "final agency action" that could be challenged under the APA.

The Veterans' notice of appeal was timely filed on March 5, 2008. (R.48.)

### **III. Standard of Review**

The district court dismissed the Veterans' claims on summary judgment, a decision this Court reviews de novo. *Times Publ'g Co. v. Dep't of Commerce*, 236

F.3d 1286, 1288 n.1 (11th Cir. 2001). Thus, the question is whether, viewing the facts in the light most favorable to the Veterans, VA met its burden of demonstrating that there is no genuine issue of material fact such that judgment is warranted as a matter of law. *See* Fed. R. Civ. P. 56(c).

## SUMMARY OF THE ARGUMENT

The district court was wrong to conclude that “actual damages” under the Privacy Act is limited to “proven pecuniary losses.” (R.46 at 12.) “Actual damages” can also include demonstrated physical or mental injuries, as the Veterans have established here. *See Perry v. Bureau of Prisons*, 371 F.3d 1304, 1305 (11th Cir. 2004) (holding that allegations of physical consequences to the plaintiff “alleged the necessary elements to state a claim under the Privacy Act”); *Johnson v. Dep’t of Treasury*, 700 F.2d 971, 986 (5th Cir. 1983) (holding that “proven mental and physical injuries” are compensable under the Privacy Act). The district court’s exclusive reliance on language to the contrary in this Court’s decision in *Fitzpatrick v. I.R.S.*, 665 F.2d 327 (11th Cir. 1982), was incorrect because that language 1) conflicts with a more recent panel decision of this Court; 2) is dicta; 3) is contrary to the weight of authority from other courts of appeals that have directly addressed the issue; 4) has been fatally undermined by the Supreme Court’s decision in *Doe v. Chao*, 540 U.S. 614 (2004); and 5) is directly contrary to the ordinary and usual meaning of “actual damages” as applied by this Court. The Veterans have proven their “actual damages” with undisputed evidence, and their monetary claims should be remanded to the district court for further proceedings, including a determination of the amount of each Veterans’ recovery.

The district court was also wrong to dismiss the Veterans' claims for declaratory and injunctive relief under the APA based on its premature (and incorrect) conclusion that "[t]here is no evidence that these failures can be attributed to a conscious decision by the VA to violate the law or that the VA was aware that the violations were occurring and did nothing to remedy them." (R.46 at 15-16.) First, the district court made this factual determination in the light most favorable to VA (the movant), which is procedurally improper on summary judgment. Second, substantial evidence in the record contradicts the court's factual conclusion. Finally, VA's intent "to violate the law" is irrelevant as a matter of law under the APA. The Veterans have challenged discrete, identifiable "final agency actions" that are properly reviewed under the standards of the APA. The Veterans' claims for declaratory and injunctive relief should be remanded to the district court for further proceedings, including for consideration of the Veterans' motion for preliminary injunction.

## ARGUMENT

### **I. The District Court Erred in Dismissing the Veterans' Privacy Act Claims for Monetary Relief**

#### **A. The Privacy Act Gives the Veterans a Private Right of Action for Monetary Relief**

Congress enacted the Privacy Act in 1974 in recognition that “in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary . . . to regulate the collection, maintenance, use, and dissemination of information by such agencies.” Privacy Act of 1974, § 2(a)(5), 88 Stat. 1896. To accomplish this goal, the statute “gives agencies detailed instructions for managing their records and provides for various sorts of civil relief to individuals aggrieved by failures on the Government’s part to comply with the requirements.” *Doe v. Chao*, 540 U.S. 614, 618 (2004).<sup>12</sup>

The Privacy Act itself creates four distinct private causes of action against a federal agency for violations of the statute. *See* 5 U.S.C. § 552a(g)(1)(A)-(D). The

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<sup>12</sup> *Doe v. Chao*, 540 U.S. 614, 618 (2004), is the only pure Privacy Act decision that the Supreme Court has issued in the more than thirty years since that statute was enacted. In addition to the Supreme Court’s decision, the decisions by the district court and Fourth Circuit in the case are instructive here. For convenience sake, the Veterans’ brief cites these decisions in chronological order, as follows: *Doe v. Herman*, 1998 WL 34194937 (W.D. Va. Mar. 18, 1998) (*Doe I*); *Doe v. Herman*, 2000 WL 34204432 (W.D. Va. July 24, 2000) (*Doe II*); *Doe v. Chao*, 306 F.3d 170 (4th Cir. 2002) (*Doe III*); *Doe v. Chao*, 540 U.S. 614 (2004) (*Doe IV*); *Doe v. Chao*, 346 F. Supp. 2d 840 (W.D. Va. 2004) (*Doe V*); *Doe v. Chao*, 435 F.3d 492 (4th Cir. 2006) (*Doe VI*); *Doe v. Chao*, 2006 WL 2038442 (W.D.Va. July 19, 2006) (*Doe VII*); and *Doe v. Chao*, 511 F.3d 461 (4th Cir. 2007) (*Doe VIII*).

provision that applies here is subsection (g)(1)(D) – a catch-all that allows a claim for “any other” violations of the statute. That provision states:

(g)(1) Civil remedies

Whenever an agency

...

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 U.S.C. § 552a(g)(1)(D).<sup>13</sup> The statute further delineates what types of relief are authorized by the Privacy Act under this catch-all provision if the agency acted in an intentional or willful manner, namely: “(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and (B) the costs of the action together with reasonable attorney fees as determined by the court.” 5 U.S.C. § 552a(g)(4).

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<sup>13</sup> The “other” violations that occurred in this case include, for example, VA’s violation of § 552a(e)(10), a provision that requires VA to “establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect 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.” 5 U.S.C. § 552a(e)(10). It has already been conclusively determined that VA “did not ensure proper security controls were in place to safeguard data” and “did not take adequate physical office space security measures.” (R.33-3 at 15, 17) (capitalization omitted).

Thus, reading these provisions together, an individual will prevail on a claim for monetary relief under subsection (g)(D) if he shows 1) that the agency has violated a provision of the Privacy Act, 2) that the violation adversely affected the individual, 3) that the violation was intentional or willful,<sup>14</sup> and 4) that the individual has sustained either actual damages and/or costs and reasonable attorney fees. 5 U.S.C. § 552a(g); *Perry v. Bureau of Prisons*, 371 F.3d 1304, 1305 (11th Cir. 2004) (setting out elements of Privacy Act claim). *See also Doe VI*, 435 F.3d at 496 (“[T]he statute does not require a showing of actual damages under (g)(4)(A) in order to receive costs and reasonable attorney fees under (g)(4)(B).”).<sup>15</sup> As discussed below, the Veterans have more than satisfied these elements, and the district court’s conclusion to the contrary should be reversed.

**B. The Veterans Have Suffered Actual Damages Consistent with this Court’s Precedent**

The sole reason the district court granted summary judgment on the Veterans’ Privacy Act claims is that it concluded that the Veterans could not prove

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<sup>14</sup> The “intentional or willful” standard in the Privacy Act is only “somewhat greater than gross negligence.” *See Edison v. Dep’t of the Army*, 672 F.2d 840, 846 (11th Cir. 1982). *See also Andrews v. Veterans Admin. of U.S.*, 838 F.2d 418, 425 (10th Cir. 1988) (“[P]remeditated malice is not required to establish a willful or intentional violation of the Privacy Act”).

<sup>15</sup> *See also Fitzpatrick*, 665 F.2d at 330 (stating that the provision for costs and attorney fees in the Privacy Act is an “additional element[] of recovery” that provides “an incentive to sue” to maintain compliance with the statute).

“actual damages.” (R.46 at 12-13.)<sup>16</sup> The district court relied exclusively on language in this Court’s decision in *Fitzpatrick v. I.R.S.*, 665 F.2d 327, 331 (11th Cir. 1982), to conclude that the Privacy Act “limit[s] actual damages to proven pecuniary losses.” (*Id.* at 12.) Because the district court also found that the Veterans “have only alleged and proven that they have suffered mental injuries” and “have not alleged (or proven) that they have suffered any pecuniary losses as a result of the missing external hard drive,” it dismissed all of the Veterans’ Privacy Act claims for monetary relief. (R.46 at 12-13.) The district court was wrong both about the law on “actual damages” and about the undisputed facts concerning the nature of the Veterans’ injuries.

### **1. Actual Damages is Not Limited to Pecuniary Losses**

The district court was wrong that this Circuit’s precedent only recognizes out-of-pocket pecuniary losses as “actual damages” under the Privacy Act. The sole basis for the district court’s conclusion was language in this Court’s 1982 decision in *Fitzpatrick*. *Fitzpatrick* was a Privacy Act case where the plaintiff offered testimony that he had become “paranoid,” “deeply depressed,” and “withdraw[n] from social activities” because the IRS had disclosed that “he had

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<sup>16</sup> Although the district court did not address the other three elements of the Veterans’ Privacy Act claims (that VA violated the Privacy Act; that the violations adversely affected the Veterans; and that they were intentional or willful), there can be no serious dispute that those elements are met here (or at least that there is a dispute of fact as to whether they are). *See* (R.41 at 11-27.)

been suffering from mental distress.” 665 F.2d at 328-9. The plaintiff did not offer any evidence of a diagnosed medical condition, physical consequences, or the need for medical treatment or medication. *Id.* This Court found the plaintiff’s injury to be only a “general mental injury” and held that he was entitled to the statutory minimum award of \$1,000, costs, and attorney fees, but no more. *Id.* at 331. The *Fitzpatrick* panel went onto say that “‘actual damages’ as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment, or other non-quantifiable injuries.” 665 F.2d at 331.

In the present, the district court case found this statement in *Fitzpatrick* about “pecuniary losses” to be controlling and held that the Veterans’ proven physical and mental injuries could not support a claim for monetary relief under the Privacy Act. (R.46. at 12-13.) The district court was wrong for several reasons.

First, in a more recent Privacy Act decision, this Court reversed a district court’s dismissal of a plaintiff’s Privacy Act claim in a case where no pecuniary losses were alleged or could be proven. *See Perry*, 371 F.3d at 1305. In *Perry*, this Court held that the plaintiff 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.*<sup>17</sup> Thus, under this Court’s precedent, the physical consequences of a Privacy Act violation (in *Perry*, the transfer of the plaintiff to another prison) can be the basis for recoverable “actual damages” under the Privacy Act even when no pecuniary losses are alleged or can be proven. *Id.*<sup>18</sup>

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<sup>17</sup> The district court here said it was disregarding the holding in *Perry* because the *Perry* panel did not discuss or distinguish the language in *Fitzpatrick* about “pecuniary losses.” (R.46 at 11.) But *Perry* is not unusual in this regard. Other Privacy Act decisions by this Court after *Doe IV* have discussed and made rulings on Privacy Act damages issues without mentioning *Fitzpatrick* at all. *See, e.g., Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209, 1214-15 (11th Cir. 2005) (discussing status of “actual damages” requirement post-*Doe IV* with no mention of *Fitzpatrick*); *Brown v. Dep’t of Justice*, 169 Fed. Appx. 537, 540-41 (11th Cir. 2006) (relying on *Perry* and *Kehoe* for law on Privacy Act claims, not *Fitzpatrick*).

<sup>18</sup> To the extent *Perry* requires a plaintiff’s injury be related to the violation of a constitutional right, the Veterans here have alleged facts constituting a violation of their constitutional right to privacy, which has been recognized by this Court as a right to the confidentiality of intimate personal information given to a government official in confidence. *See Plante v. Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978) (“There is another strand to the right to privacy properly called the right to confidentiality.”); *Pryor v. Reno*, 171 F.3d 1281, 1288 n.10 (11th Cir. 1999) (noting that the court previously “acknowledged a constitutional right to privacy only for *intimate personal information given to a state official in confidence*”), *rev’d on other grounds*, 528 U.S. 1111 (2000) (emphasis in original).

Second, the holding of *Perry* is consistent with this Court’s broader discussion of “actual damages” in *Fitzpatrick*. In *Fitzpatrick*, this Court relied on legislative history recognizing that “secondary consequences” of “loss of reputation, chilling of constitutional rights, *or mental suffering*” can be awarded as actual damages under the Privacy Act. 665 F.2d at 331 (emphasis added). At a minimum, the Veterans’ aggravated PTSD symptoms can be characterized as secondary consequences under this language in *Fitzpatrick*.

Third, the “pecuniary losses” language in *Fitzpatrick* is dicta, as a close review of the facts presented there shows.<sup>19</sup> The *Fitzpatrick* panel concluded that the plaintiff had “proved only that he suffered a *general* mental injury from the disclosure.” 665 F.2d at 331 (emphasis added). This led the court to hold that the plaintiff was entitled to the \$1,000 statutory minimum award, costs, and reasonable attorney fees, but not more. *Id.* (emphasis added). The panel’s further statement that only “pecuniary losses” can be “actual damages” was not necessary to its decision because the plaintiff there did not present *demonstrated individualized*

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<sup>19</sup> This explains why the subsequent panel in *Perry* was not bound by this language in *Fitzpatrick* and why no other panel of this Court has relied on it. See *Scott v. Taylor*, 470 F.3d 1014, 1017 (11th Cir. 2006) (discussing a prior panel decision and stating that certain comments in that decision “were dicta and not binding on future panels”); *Swann v. Southern Health Partners, Inc.*, 388 F.3d 834, 837 (11th Cir. 2004) (“[T]he prior panel rule does not extend to dicta.”).

physical or mental injuries.<sup>20</sup> In other words, it was only necessary for the *Fitzpatrick* panel to decide that the plaintiff’s generalized mental injuries did not meet the “actual damages” standard; it was not necessary for it to decide the entire universe of what other injuries might. The language, therefore, is dicta and does not prevent a subsequent panel from deciding if the Veterans’ particular injuries here qualify as “actual damages.” See *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000) (per curiam) (“The holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case which produced the decision.” (quotation marks and citation omitted)); *Aron v. United States*, 291 F.3d 708, 716 (11th Cir. 2002) (Carnes, J., concurring) (“All that is said which is not necessary to the decision of an appeal given the facts and circumstances of the case is dicta.”).<sup>21</sup>

The district court here nonetheless found the “pecuniary losses” language in *Fitzpatrick* to be binding on it because “*Fitzpatrick* has been cited by the Supreme Court and multiple district courts for the definition of actual damages in the

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<sup>20</sup> In contrast, as discussed below, the Veterans here do not seek to recover actual damages for their “generalized” mental injuries, but for the *demonstrated individualized physical and mental injuries* caused by VA’s Privacy Act violations, which is consistent with the holdings of both *Perry* and *Fitzpatrick*.

<sup>21</sup> Admittedly, the opinion in *Fitzpatrick* uses the words “we hold” in the introduction. 665 F.2d at 328. Those prefatory words, however, do not alter the reality that the *Fitzpatrick* panel was not presented with the factual circumstances of a plaintiff who had demonstrated individualized physical and mental injuries.

Eleventh Circuit.” (R. 46 at 11) (citing *Doe IV*, 540 U.S. at 627 n.12). The district court read too much into these casual characterizations by other courts, and this Court is certainly not bound by them.<sup>22</sup> The Supreme Court—the only other court that can bind this Circuit—was very clear in its *Doe IV* decision that “the precise definition of actual damages” “is not before us.” *Doe IV*, 540 U.S. at 627 n.12.<sup>23</sup> It specifically did “*not* suggest that out-of-pocket expenses are necessary for recovery of the \$1,000 minimum” provided in the statute. *Id.* (emphasis added). Thus, the Supreme Court in *Doe IV* left it to the courts of appeals to decide what constitutes actual damages. *Id.* It was after the Supreme Court did so that this Court held in *Perry* that physical consequences to the plaintiff were sufficient. 371

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<sup>22</sup> Not all courts cite *Fitzpatrick* in the way the district court described. Other courts read *Fitzpatrick* as the Veterans do, to hold that a plaintiff’s generalized mental injuries entitle him to the \$1,000 statutory minimum award, costs, and reasonable attorney fees, but not more. *See, e.g., Orekoya v. Mooney*, 330 F.3d 1, 7 (1st Cir. 2003) (citing *Fitzpatrick* for the proposition that “Five circuits have held that an allegation of emotional distress was sufficient to show adverse effect, and that a plaintiff asserting emotional distress could recover at least \$1,000”); *Wiley v. Veterans Affairs*, 176 F. Supp. 2d 747, 757-58 (E.D. Mich. 2001) (rejecting this Court’s holding in *Fitzpatrick* and holding instead that “plaintiff’s claim for emotional damages is not one entitling him to recovery” of the \$1,000 statutory minimum).

<sup>23</sup> The only issue that was definitively decided in *Doe IV* is that the statute guarantees the \$1,000 minimum award “only to plaintiffs who have suffered *some* actual damages.” 540 U.S. at 627 (emphasis added). *See also Kehoe*, 421 F.3d at 1214 (explaining that “the Supreme Court [in *Doe IV*] held that plaintiffs must prove some measure of actual damages to be awarded \$1,000.00 pursuant to the Privacy Act”).

F.3d at 1305. The district court’s myopic focus on the “pecuniary losses” language in *Fitzpatrick* was thus in error, and its decision should be reversed.

**2. The Undisputed Evidence is that the Veterans have Suffered Demonstrated Individualized Injuries**

The undisputed evidence is that the Veterans suffered *demonstrated individualized physical and mental injuries* from VA’s actions in the form of increased sleeplessness, isolation, anxiety, anger, and the need to take additional medications. The district court’s characterization of the Veterans’ injuries as only “mental injuries” is overly narrow and ignores the undisputed evidence in the record. (R.46 at 12.)<sup>24</sup>

Messrs. Perkins and Qualls are veterans of military combat in Vietnam. (R.40, Ex.1 at ¶1, Ex.2 at ¶1.) As a result of their combat experience, both suffer from chronic severe PTSD. (R.40, Ex.1 at ¶4, Ex.2 at ¶4.) They have been diagnosed with PTSD by VA and receive individualized treatment from VA doctors and healthcare professionals for their respective symptoms. (*Id.*)

When Defendants misused the Veterans’ personal and health information, they violated the trust and sense of safety necessary for the Veterans’ PTSD

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<sup>24</sup> Importantly, the district court concluded that the Veterans “have [] alleged and proven that they have suffered mental injuries such as aggravation of their PTSD symptoms and anxiety over their financial security.” (R.46 at 12) (emphasis added). Thus, it is not the case here, as it was in *Fitzpatrick*, that the Veterans have only alleged “generalized” mental injuries. The Veterans’ injuries here are demonstrated, individualized, and undisputed.

treatment. (R.40, Ex.1 at ¶13, Ex.2 at ¶11.) Defendants further placed the physical and mental burden on the Veterans to try to remedy the situation that Defendants had created—thus placing stressors on the Veterans’ conditions, and worsening their specific physical symptoms (including increased sleeplessness, isolation, anxiety, and anger) and requiring them to resort to additional medications.<sup>25</sup> (R.40, Ex.1 at ¶¶8, 10, 11, 12, 13, Ex.2 at ¶¶9, 10, 11.) Because VA is the Veterans’ only source for PTSD treatment, these stressors are particularly acute and serve as triggers for the Veterans’ PTSD symptoms. (R.40, Ex.1 at ¶13, Ex.2 at ¶11.) This is more than enough evidence to survive a motion for summary judgment and to present a triable issue of fact on actual damages. *See Stafford v. Soc. Sec. Admin.*, 437 F. Supp. 2d 1113, 1122-23 (N.D. Cal. 2006) (denying government’s motion for summary judgment on Privacy Act claim and holding that “Plaintiffs’ own statements are sufficient to raise a triable issue of fact whether the damages were casually connected to the disclosure, and therefore to defeat Defendant’s motion for summary judgment on both the adverse effect and actual damages elements.”).

The fact that the Veterans’ PTSD was a pre-existing condition not initially caused by Defendants’ Privacy Act violations is not a reason to disallow or

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<sup>25</sup> According to peer-reviewed literature from VA researchers, “laboratory studies suggest that individuals with PTSD show augmented sympathetic responses to stress challenges relative to control groups.” Buckley, *supra*, at 7:536. In other words, individuals with PTSD react differently and more strongly to certain stressors than do individuals without PTSD.

discount their actual damages. It is a well-established principle – derived from tort law – that a defendant “takes the plaintiff as he finds him.” *Cohen v. Brown*, 10 Vet. App. 128, 141 (Mar. 7, 1997). *See also* *Murphy v. Turpin*, 159 Fed. App’x 945, 947 (11th Cir. 2005) (unpublished) (reversing the district court’s dismissal of plaintiff’s § 1983 claim under § 1915A where plaintiff alleged that defendant’s actions caused plaintiff’s “pre-existing back injury [to] worsen[.]”); *Henderson v. United States*, 328 F.2d 502, 504 (5th Cir. 1964) (“It is the law in Alabama that when one person negligently injures another so as to aggravate a pre-existing condition, the negligent actor is liable for all injuries proximately resulting therefrom even though a normal person’s injuries would have been much less severe. This is in agreement with the general rule applied elsewhere.”).<sup>26</sup>

In the present case, it is particularly appropriate to hold VA accountable for the physical and mental consequences to the Veterans resulting from an aggravation of their PTSD. VA doctors formally diagnosed the Veterans with PTSD and provide them with treatment for it. VA is intimately familiar with PTSD, its symptoms, and stressors – both generally and with respect to the

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<sup>26</sup> This is the “eggshell plaintiff rule.” The rule “has generally been applied to cases in which the cause and effect of an injury are physical but also has been applied when an emotional injury causes physical manifestations of distress.” *Cohen*, 10 Vet. App. at 141 (internal quotations omitted). At least one federal court of appeals has specifically applied the eggshell plaintiff rule to a veteran with pre-existing PTSD initially caused by combat in Vietnam. *See Doty v. Sewall*, 908 F.2d 1053, 1058-9 (1st Cir. 1990).

Veterans in particular. Thus, VA officials easily could have foreseen that their mishandling of the Veterans' information would have consequences for the Veterans that it might not have for non-veterans (and even veterans without PTSD), and it is both reasonable and appropriate to hold Defendants accountable for the Veterans' actual damages.<sup>27</sup>

**C. The “Pecuniary Losses” Language in *Fitzpatrick*, as Applied by the District Court, is Wrong and Out-of-Step with Prevailing Privacy Act Jurisprudence**

Even if the “pecuniary losses” language in *Fitzpatrick* is not considered dicta (and the Veterans contend that it is), that language is wrong and should be clarified or corrected.<sup>28</sup> There are many reasons. The “pecuniary losses” language in *Fitzpatrick* conflicts with another decision of this Court (*i.e.*, *Perry*, as discussed

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<sup>27</sup> The President's Task Force on Identity Theft has concluded that “[s]ome affected populations may have more difficulty in taking [] self-protective steps” in the event their personal privacy information is placed at risk by a government agency. See President's Identity Theft Task Force, *supra*, note 7. This is certainly true with respect to PTSD patients, and that fact must necessarily be a part of any damages analysis here.

<sup>28</sup> Correction, of course, would require action by the Court sitting en banc. The Veterans have not requested hearing en banc at this time, because they believe *Fitzpatrick* and *Perry* can be reconciled in light of *Doe IV* consistent with the prior panel rule. However, should a panel of this Court determine otherwise, the Veterans submit that this case falls squarely within the genre of cases that should be considered en banc. See Fed. R. App. P. 35 (hearing or rehearing en banc is appropriate when it “is necessary to secure or maintain uniformity of the court's decisions”); 11th Cir. Rule 35-3 (“A petition for en banc consideration, whether upon initial hearing or rehearing, is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional importance in an appeal or other proceeding. . . .”).

above); it is contrary to the weight of authority from other circuits that have addressed the issue; it has been fatally undermined by the Supreme Court's decision in *Doe IV*; and it imposes limits on "actual damages" that do not exist in the statute itself or in any other understanding of the concept of actual damages in similar contexts.

### **1. Most Other Circuits Do Not Restrict Actual Damages Under the Privacy Act to Pecuniary Losses**

The "pecuniary losses" language in *Fitzpatrick* is out of step with the weight of authority from other courts of appeals that have considered the issue. The Fifth Circuit holds that a plaintiff "is entitled to compensation under the [Privacy] Act for his proven mental and physical injuries." *See Johnson*, 700 F.2d at 986. Likewise, the Fourth Circuit in *Doe III* held that the plaintiff had no actual damages because he "claimed no medical or psychological treatment, no purchase of medications (prescriptions or over-the-counter), no impact on his behavior, and no physical consequences." *Doe III*, 306 F.3d at 181.<sup>29</sup> *See also Parks v. I.R.S.*, 618 F.2d 677, 682-3, 685 (10th Cir. 1980) (stating that plaintiffs had "alleged viable claims for damages" where the only alleged adverse affect was "psychological harm").

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<sup>29</sup> As Judge Michael noted in his separate opinion concurring in part and dissenting in part, the Fourth Circuit's majority opinion "commits this circuit to the position that the term 'actual damages' includes at least emotional distress that would qualify as 'demonstrable' under [the Fourth Circuit's decision in] *Price*." *Doe III*, 306 F.3d at 198 n.22.

The Sixth Circuit is the only circuit that appears to have agreed with the restrictive view stated in *Fitzpatrick*. See *Hudson v. Reno*, 130 F.3d 1193, 1207 n.11 (6th Cir. 1997) (citing *Fitzpatrick* for alternative holding that “actual damages only mean out-of-pocket losses, not emotional distress”). The Sixth Circuit’s decision, however, did so as part of an alternative holding in that case and with no consideration of whether physical injuries (such as proved by the Veterans in the present case) would qualify. *Id.*

**2. *Doe v. Chao* Abrogates the Fundamental Underpinning of *Fitzpatrick***

This Court should clarify the law of this Circuit as to the types of “actual damages” recoverable under the Privacy Act because the Supreme Court’s decision in *Doe IV* abrogates the fundamental legal underpinning of *Fitzpatrick*. In *Doe IV*, the Supreme Court held that the Privacy Act guarantees the \$1,000 minimum award “only to plaintiffs who have suffered some actual damages.” 540 U.S. at 627.

Thus, *Doe IV* undermines the fundamental backdrop against which this Court decided the *Fitzpatrick* case. When *Fitzpatrick* was decided (22 years before *Doe IV*), the law of many courts, including this one, was that a plaintiff could recover the \$1,000 statutory minimum and costs and attorney fees, even without showing “actual damages.” 667 F.2d at 331. In fact, that was the true holding of *Fitzpatrick*—that the plaintiff who did not prove pecuniary loss was nonetheless

entitled to the \$1,000 minimum award and costs and attorney fees because of the government's willful Privacy Act violations. *Id.*

Fast forward to present day, and the combination of the holding of *Doe IV* (some actual damages required for statutory minimum award) and the remnant language in *Fitzpatrick* (actual damages is limited to pecuniary losses) creates an effective bar to enforcing compliance with the Privacy Act for the benefit of low-to-no income individuals.<sup>30</sup> Such a result is not consistent with the underlying rationale of *Fitzpatrick*. This Court's discussion of actual damages in *Fitzpatrick* was expressly premised on the understanding that the statutory minimum award of \$1,000 and costs and attorney fees would be available to individuals who suffered adverse affects as a result of a willful violation of the Privacy Act, even when they could not meet the Court's strict view of actual damages. *Fitzpatrick*, 665 F.2d at 330-1.<sup>31</sup> Now that this baseline understanding has been altered by *Doe IV*, the

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<sup>30</sup> As this Court found in *Fitzpatrick*, even a minimal award that includes costs and attorney fees provides an "incentive to sue" to maintain federal agency compliance with the statute. 667 F.2d at 330. Otherwise, there will be no real accountability, and federal agencies can wallow in their non-compliance for years, as is the case with VA here. (R.21 at ¶¶28-35.)

<sup>31</sup> As the Fifth Circuit explained in *Johnson*: "Interpreting 'actual damages' to include only out-of-pocket losses would not only preclude recovery in large numbers of cases but also run counter to Congress' intent to 'promote governmental respect for the privacy of citizens by requiring . . . agencies and their employees to observe . . . constitutional rules. Furthermore, such a restrictive interpretation would inhibit rather than encourage the 'widest possible citizen enforcement.'" 700 F.2d at 977.

Veterans respectfully submit that this Court should clarify that its discussion in *Fitzpatrick* was limited to the facts presented there and does not circumscribe the universe of demonstrable injuries that can give rise to actual damages under the statute.

### **3. This Court Does Not Restrict “Actual Damages” to Pecuniary Losses in other Contexts**

Restricting “actual damages” under the Privacy Act to only pecuniary losses also does not comport with this Court’s understanding of the concept of “actual damages” in other contexts. This Court’s interpretation of the term “actual damages” in the Fair Housing Act (“FHA”) is a prime example. The FHA entitles individuals who suffer discrimination in violation of the statute to recover “actual damages” – the exact term used in the Privacy Act. 42 U.S.C. § 3612(g)(3). This Court has held that, “[a]lthough the statute provides little guidance beyond this statement, anger, embarrassment, and emotional distress are clearly compensable injuries under this standard.” *Banai v. Secretary, U.S. Dept. of Housing*, 102 F.3d 1203, 1207 (11th Cir. 1997) (emphasis added).

This Court’s application of the term “actual injury” in the § 1983 context is similar. Under § 1983, although this Court does not permit recovery for the “abstract value” of a plaintiff’s constitutional rights, it recognizes that a plaintiff may properly “be awarded compensatory damages based on demonstrated mental and emotional distress, impairment of reputation, and personal humiliation.”

*Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000). *See also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307-08 (1986) (permitting the award of emotional distress damages for actions brought under § 1983).<sup>32</sup> The fact that the “monetary value of the injury is difficult to calculate” does not bar recovery.<sup>33</sup> *Slicker*, 215 F.3d at 1231.

There is no reason to treat the term “actual damages” any differently under the Privacy Act. The statutory language of the Privacy Act certainly does not limit recovery to pecuniary losses.<sup>34</sup> And there is good reason. The typical damage

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<sup>32</sup> This is the same approach taken by other courts of appeals that have recently considered the issue of actual damages in the Privacy Act context—damages for mental injuries are recoverable if they are *demonstrated* (but not if they are abstract and generalized). *See Doe III*, 306 F.3d at 180 (“Where [] a plaintiff can produce evidence that emotional distress caused chest pains and heart palpitations, leading to medical and psychological treatment which included a formal diagnosis of ‘major depressive disorder,’ as well as necessitated prescription medication, it is clear that some amount of compensatory damages for emotional distress is warranted.”).

<sup>33</sup> In the present case, it will be up to the trier of fact to determine if the Veterans are entitled to only the \$1,000 minimum guarantee or some larger amount. A district court is fully capable of doing this. *See, e.g., Swenson v. U.S. Postal Service*, 1994 U.S. Dist. Lexis 16524, \*53-4 (E.D. Cal. March 10, 1994) (awarding Privacy Act plaintiff \$3,000 in actual damages for “emotional distress” where agency’s violations “were neither egregious nor seriously disabling”).

<sup>34</sup> The legislative history of the Privacy Act indicates that the phrase “actual damages” was used to differentiate from “punitive damages” – not to limit recovery to only pecuniary losses. Early versions of the bill in both the Senate and the House allowed separate recovery of both “actual” and “punitive” damages. S. 3418 (Senate bill) and H.R. 16373 (House bill), *reprinted in* Joint Comm. on Gov’t Operations, *Legislative History of the Privacy Act of 1974: Sourcebook on Privacy*, at 27, 249 (1976), *available at*

caused by an invasion of privacy is mental or emotional injury, not pecuniary loss, 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. This Court should read the term “actual damages” in the Privacy Act consistent with the common understanding of that term to include physical and mental injuries like those suffered by the Veterans here, not just pecuniary losses. *See Anderson v. Cagle’s Inc.*, 488 F.3d 945, 955 (11th Cir. 2007) (“It is by now axiomatic that we interpret a statute with the aim of giving effect to the drafters’ intent. We do this, first, by reference to the plain meaning of the statute’s language, based on the words’ ordinary, contemporary, common meaning.”) (citation and internal quotation marks omitted).

## **II. The District Court Erred in Dismissing the Veterans’ Administrative Procedure Act Claims for Declaratory and Injunctive Relief**

In addition to their claims for monetary relief under the Privacy Act, the Veterans’ second amended complaint brings claims for declaratory and injunctive

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[www.loc.gov/rr/frd/Military\\_Law/LH\\_privacy\\_act-1974.html](http://www.loc.gov/rr/frd/Military_Law/LH_privacy_act-1974.html). The “punitive” damages provisions were later deleted, with only the “actual” damages remaining in the final bill. This Court uses the phrase “actual damages” to make the same distinction from “punitive damages.” *See, e.g., 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).

relief under the APA for VA's violations of specific provisions of five federal statutes. These five statutes are the Privacy Act, 5 U.S.C. § 552a; the E-Government Act of 2002, Pub. L. No. 107-347, 2002 H.R. 2458 (2002) (codified at 44 U.S.C. § 3501 note); the FISMA, 44 U.S.C. §§ 3541-48; the Trade Secrets Act, 18 U.S.C. § 1905; and the VBHITA, 38 U.S.C. §§ 5701 *et seq.*

The district court dismissed all of the Veterans' APA claims for the sole reason that it concluded the Veterans had not challenged any "final agency action" as that term is defined by the APA." (R.46 at 15.) The lynchpin of the district court's conclusion on this point was its factual finding that "[t]here is no evidence that these failures can be attributed to a conscious decision by the VA to violate the law or that the VA was aware that the violations were occurring and did nothing to remedy them." (*Id.* at 15-16.) The district court was fundamentally wrong both about the scope and nature of agency action (and inaction) that is reviewable under the APA and about the extent of the undisputed evidence regarding VA's knowledge of and participation in the illegal activities involving the Veterans' personal information. The Veterans have challenged discrete, identifiable final agency actions that are properly reviewed under the standards of the APA.

**A. The Administrative Procedure Act Gives the Veterans a Private Right of Action for Declaratory and Injunctive Relief**

As an initial matter, it is without question that the APA gives individuals like the Veterans a private right of action for declaratory and injunctive relief to

enforce substantive requirements found in federal statutes other than the APA itself.<sup>35</sup> In fact, the Supreme Court has expressly so held with respect to two of the specific statutes that the Veterans seek to enforce here – the Privacy Act and the Trade Secrets Act. *See Doe IV*, 540 U.S. at 620 n.1<sup>36</sup> (explaining that “the general provisions for equitable relief within the [APA]” authorize the award of equitable relief to victims of adverse effects from Privacy Act violations, even though “[t]he Privacy Act says nothing about standards of proof governing equitable relief that may be open to victims of adverse determinations or effects.”)<sup>37</sup>; *Chrysler Corp. v.*

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<sup>35</sup> The district court initially expressed some skepticism about this basic concept, but after briefing by the parties, did not ground its ultimate ruling on this point. (R.23 at 2-3 n.1.)

<sup>36</sup> The district court in *Doe I* explained in more detail why the APA allows injunctive relief for Privacy Act violations. In *Doe I*, plaintiffs moved for civil contempt against the government for its violation of a consent order regarding the agency’s handling of plaintiffs’ SSNs. *Doe I*, 1998 WL 34194937, at \*2. In response, the government argued that the district court had no jurisdiction to enter the injunction in the first place, so it could not be in contempt. *Id.* The district court disagreed and held that the APA empowers a district court to enter injunctive relief “to prevent a federal agency from consistently violating the federal Privacy Act.” *Id.* at \*7. The court observed that the APA provides a district court with “broad remedial powers” and “the APA [] serves as the backdrop upon which nearly all decisions of federal administrative agencies are reached.” *Id.* at \*5. Foregoing injunctive relief, the court reasoned, would run counter to the purposes of the statute because it “would render courts powerless to prevent an agency from systematically running roughshod over the rights the [Privacy] Act was promulgated to protect.” *Id.* at \*6. This holding by the district court subsequently was cited with approval by the Supreme Court in *Doe IV*, 540 U.S. at 620 n.1.

<sup>37</sup> No Eleventh Circuit precedent directly addresses whether the APA authorizes injunctive relief for violations of the Privacy Act. In *Edison*, this Court held that the Privacy Act itself authorizes only two types of injunctive relief (to

*Brown*, 441 U.S. 281, 317-9 (1979) (holding that the Trade Secrets Act “place[s] substantive limits on agency action. Therefore, [an agency’s] decision to disclose [the plaintiffs’ information] is reviewable agency action and [the plaintiff] is a person ‘adversely affected or aggrieved’ within the meaning of [5 U.S.C. § 702(a)].”).

The prerequisites for review under the APA are found at 5 U.S.C. § 702, which provides in relevant part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved<sup>38</sup> by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (emphasis added). The APA further defines “agency action” to “include[] the whole or a part of an agency rule, order, license, sanction, relief, or

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amend a record and to require production of illegally withheld records), and the court declined to “imply a broad right to injunctive relief” into the statute. 672 F.2d at 846. The *Edison* panel did not, however, consider whether the APA may provide an injunctive remedy. Here, the Veterans are not asking the court to imply a broad right to injunctive relief into the Privacy Act, only to award specific equitable relief under the standards of the APA consistent with 5 U.S.C. § 706 and *Doe IV*, 540 U.S. 620 at n.1.

<sup>38</sup> The Veterans submitted undisputed evidence that they have been adversely affected and aggrieved by the actions of VA that they challenge. (R.40, Ex.1, Ex.2.)

the equivalent or denial thereof, or *failure to act*.” 5 U.S.C. § 551(13) (emphasis added). Agency action is subject to judicial review only if it is “final agency action” or “[a]gency action made reviewable by statute.” 5 U.S.C. § 704.

“To be considered ‘final,’ an agency’s action: (1) ‘must mark the consummation of the agency’s decision-making process – it must not be of a merely tentative or interlocutory nature;’ and (2) ‘must be one by which rights or obligations have been determined, or from which legal consequences will flow.’” *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1280 (11th Cir. 2007) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78, (1997)) (internal citations and quotations omitted). In other words, “[t]he core question [in the finality determination] is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties.” *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). The equitable relief that a court can award under the APA includes declaring such agency action to be unlawful and compelling agency action unlawfully withheld or unreasonably delayed. *See* 5 U.S.C. § 706.

## **B. The Veterans Seek Review of Final Agency Actions**

In the present case, the Veterans’ second amended complaint challenges a number of actions by VA and its officials that fall within the definition of “final agency action” and are thus reviewable under the APA.

## **1. The Veterans Challenge Final Agency Actions Related to VA's Violations of the Privacy Act**

The Veterans' second amended complaint seeks review of several VA final actions that violate the Privacy Act. First, Plaintiffs seek review of VA's decisions to affirmatively grant John Doe access to its Privacy Act databases and give him the ability to download the Veterans' personal information therein without consent in violation of Privacy Act § 552a(b). (R.21 at ¶¶48-54.) Specific agency actions include VA's inaccurate security designation of John Doe (R.33-3 at v, 18-19); the granting of programmer level privileges to John Doe (*id.* at 19); the review of his access level (*id.*); and the granting of access to John Doe to VA's VISN 7 Data Warehouse, VistA system database, and National Patient Care Database (which includes a nationwide database of SSNs) (*id.* at 22-24, 30-32). These are discrete and identifiable agency actions by VA, and the undisputed evidence is that these decisions by VA have been fully consummated (*id.* at 18-19, 22-24, 30-32) and that Plaintiffs have been (and will continue to be) directly affected by them (R.40, Ex.1, Ex.2). Each of these actions is discrete agency action that constitute "final agency action" within the meaning of the APA. *See c.f., In Re Department of VA Data Theft Litigation*, 06-0506 (JR), Nov. 16, 2007 Memorandum Order, at 17 (holding that "broad allegations that the VA 'failed to ensure' that its 'processes,

policies, and procedures were adequately implemented’ do not state a challenge to discrete agency action”).<sup>39</sup>

Second, Plaintiffs seek review of VA’s failure to keep a record of the date, nature, and purpose of John Doe’s download or transfer of Plaintiffs’ information from its systems in violation of § 552a(c) of the Privacy Act. (R.21 at ¶¶55-62.) This includes failing to keep such records each time that John Doe illegally accessed VA’s databases, as described above. These failures by VA led directly to the confusion and misinformation about the extent of the data breach so much so that a call center was set up to answer questions about the data breach (R.33-5 at ¶10), which contributed to Plaintiffs’ injury (R.40, Ex.1 at ¶¶11-13, Ex.2 at ¶¶10-11). VA’s failure to make records of its disclosures to John Doe are final agency actions reviewable under the APA. *See Nat’l Parks Conservation Ass’n v. Norton*, 324 F.3d 1229, 1239 (11th Cir. 2003) (“[W]here an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers ‘final agency action’ review [under the APA.]”) (internal quotations omitted).

Third, the Veterans challenge VA’s decision to maintain their personal information on an unencrypted portable hard drive in violation of Privacy Act §

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<sup>39</sup> A copy of this Memorandum Order can also be found in the record at (R.45, Ex.1).

552a(e)(1). (R.21 at ¶¶63-69.) VA's actions in this regard include purchasing the external hard drive and assigning it to John Doe (R.33-3 at 15-16) and providing him unfettered access to its databases so he could transfer and maintain Plaintiffs' information on the hard drive. It is undisputed that it was not necessary for Plaintiffs' information to be maintained on the external hard drive assigned to John Doe in order to accomplish any statutory or regulatory purpose of VA, but VA provided it to him anyway for that purpose. (R.21 at ¶65; R.33-3 at 22.)

Fourth, the Veterans challenge certain identifiable agency actions related to VA's failure to adequately train and supervise John Doe in violation of Privacy Act § 552a(e)(9). (R.21 at ¶¶70-77.) Discrete agency actions include VA's failure to issue handbooks to provide direction for implementing information security requirements, including VA Directives 6500 (August 4, 2006), 6502 (June 30, 2003), and 6504 (June 7, 2006). (*Id.* at ¶72.) Issuance of these handbooks is a non-discretionary duty. *See* 38 U.S.C. §§ 5722(b) and 5723(b)(2). Other actions include executing a part-time physician service agreement with John Doe's supervisor that authorized her to be physically located at an alternative work site, failing to provide a position description for John Doe's supervisor, and failing to conduct performance appraisals for her. (R.33-3 at 42.) As a result of these actions and inactions by VA, John Doe worked essentially unsupervised. (*Id.* at 40.)

Fifth, the Veterans challenge certain identifiable agency actions related to VA's failure to establish appropriate safeguards in violation of Privacy Act § 552a(e)(10). (R.21 at ¶¶78-84.) These include VA's decision to purchase external hard drives without the required encryption software, which was a violation of VA security rules (R.21 at ¶80; R.33-3 at 15-17); its decision to relocate John Doe's office to rented space in a private office building without ensuring that its information security needs were sufficiently evaluated and without ensuring that physical security measures were in place (R.21 at ¶80; R.33-3 at 17); and its decision to utilize physical security measures that "were inconsistent with generally accepted business security practices." (R.33-3 at 20).

## **2. The Veterans Challenge Final Agency Actions Related to VA's Violations of Other Information Security Statutes**

The Veterans' APA claims are also premised on discrete final actions by VA that violate specific information security requirements of statutes other than the Privacy Act. First, the Veterans challenge several actions by VA that violate Section 208 of the E-Government Act of 2002. (R.21 at ¶¶85-90.) These include VA's procurement of external hard drives (including the one assigned to John Doe) without conducting a Privacy Impact Assessment ("PIA"), ensuring review of the PIA by Defendant Howard, or making the PIA publicly available to the Veterans via VA's website, the *Federal Register*, or other means. (R.21 at ¶87.) This procurement decision has already been made and consummated by VA (R.33-3 at

15-17), and these information security prerequisites are non-discretionary. *See* 44 U.S.C. § 3501 note, § 208(b)(1).

Second, the Veterans challenge several actions by VA that violate the Trade Secrets Act, 18 U.S.C. § 1905. (R.21 at ¶¶91-94). These include VA’s granting of programmer privileges to John Doe in 2004 (R.21 at ¶93; R.33-3 at 19), and granting him access to its VISN 7 Data Warehouse, VistA system databases, and its National Patient Care Database (R.21 at ¶93; R.33-3 at 22-24, 30-32.) These illegal disclosures by VA to John Doe are violations of the Trade Secrets Act<sup>40</sup> and are reviewable under the APA. *See Chrysler Corp.*, 441 U.S. at 317-19 (holding that the Trade Secrets Act “place[s] substantive limits on agency action. Therefore, [an agency’s] decision to disclose the [the plaintiffs’ information] is reviewable agency action and [the plaintiff] is a person ‘adversely affected or aggrieved’ within the meaning of [5 U.S.C. § 702(a)].”).

Third, the Veterans challenge several actions by VA that violate the VBHITA, 38 U.S.C. §§ 5701 et seq. (R.21 at ¶¶95-103.) These actions include VA’s failure to issue handbooks to provide direction for implementing information security requirements, including VA Directives 6500 (August 4, 2006), 6502 (June 30, 2003), and 6504 (June 7, 2006) in violation of 38 U.S.C. §§ 5722(b) and

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<sup>40</sup> The Trade Secrets Act applies not only to business information, but also to “personal information” as is involved here. *Chrysler Corp.*, 441 U.S. at 285.

5723(b)(2) (R.21 at ¶102); granting John Doe access to its VISN 7 Data Warehouse, VistA system databases, and its National Patient Care Database (R.33-3 at 22-24, 30-32) in violation of 38 U.S.C. § 5723(d)(2); procuring and assigning the external hard drive to John Doe without encryption software approved by the National Institute of Standards and Technology as required by VA security rules and in violation of 38 U.S.C. §§ 5722(c) and 5723(f) (R.21 at ¶101; R 33-3 at 15-16); and failing to conduct an independent risk analysis of the data breach involving the Veterans' personal information and thereafter to provide the Veterans with the credit protection services called for by the analysis, as required by 38 U.S.C. § 5724 (R.21 at ¶F; R.14 at ¶3).

**C. The District Court Only Superficially Addressed the Veterans' APA Claims**

The district court's only response to the Veterans' detailed APA claims was to say, in so many words: *it looks like VA didn't mean to violate the law and it seems to be cleaning up its act.* (R.46 at 16.) Here is the sum total of the district court's reasoning in its own words:

There is no evidence that these failures can be attributed to a conscious decision by the VA to violate the law or that the VA was aware that the violations were occurring and did nothing to remedy them. In fact, after the external hard drive was reported missing, the VA investigated the disappearance and is now in the process of implementing new procedures to prevent a similar disclosure in the future. Therefore [,] there is no final agency action.

(*Id.* at 15-16.)

There are many problems with this analysis. First, it is entirely unmoored from the legal standards that are used to determine if there is “final agency action” subject to APA review. Whether VA knew that its actions were “illegal” is irrelevant. This is not a criminal prosecution. It is a civil action to enforce certain administrative law requirements that were enacted for the Veterans’ benefit and protection. So long as the Veterans are adversely affected by an agency action that reflects the “consummation of the agency’s decision-making process,” or an inaction that is unreasonably delayed or unlawfully withheld, they are entitled to judicial review of that action or inaction. That is exactly what the Veterans’ lawsuit attempts to do.

Second, the district court’s factual conclusion that there was no “conscious decision” by VA giving rise to the Veterans’ injuries is completely unsupported by the record in this case. The district court did not provide any supporting citations for its factual conclusions about VA’s knowledge or culpability. Nor could it have. The undisputed evidence is that VA was completely aware of, and complicit in, the security violations that occurred with respect to the Veterans’ personal information. As just one example, no less than six (6) senior VA officials consciously approved of the procurement of the external hard drive, which the Veterans claim was a violation of the Privacy Act, the E-Government Act, and the VHBITA. (R.33-3 at 15-16, 20) (“The REAP Director and others *decided* to

purchase external drives with insufficient consideration given to data security needs”) (emphasis added).<sup>41</sup> VA officials also *consciously* gave John Doe his inaccurate security designation (*id.* at v, 18-19); *consciously* granted him programmer level privileges (*id.* at 19); *consciously* reviewed his access level in January 2006 (*id.*); and *consciously* granted him access to VA’s VISN 7 Data Warehouse, VistA system databases, and National Patient Care Database (*id.* at 22-24, 30-32). These are exactly the types of discrete, identifiable, and deliberate agency actions that are subject to review under the APA. *See Alabama v. U.S. Army Corps of Engineers*, 382 F. Supp. 2d 1301, 1325 (N.D. Ala. 2005) (“[A] person bringing an action under the APA must challenge discrete, final agency actions, and may not bring claims that are merely broad, generic attacks on entire administrative programs.”) (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 890 & n.2 (1990)); *Florida Keys Citizens Coalition Inc. v. West*, 996 F. Supp. 1254, 1257 (S.D. Fla. 1998) (holding that plaintiff had challenged “specific agency action that is reviewable under the APA,” including the agency’s failure to maintain certain records, explaining that “the APA provides jurisdiction to consider the purportedly unlawful actions and instances of inaction by Defendants”).

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<sup>41</sup> These include the Director of VA’s Birmingham REAP, the Research Service Administrative Officer, and the Network Administrator for the VHA Research and Development Computing Center. (R.33-3 at 15-16.)

These decisions were not only conscious, they were done with full knowledge of the specific risks to the Veterans' personal information that later materialized. Defendants have repeatedly been warned to improve security and contingency plans, control access to information systems, complete background investigations and annual security awareness training, and improve physical security controls. *See* (R.16, Ex.18 at 11-12.) VA's Inspector General has specifically warned Defendants of the need to "[s]tore essential backup data in secure areas," which of course was not done here. (*Id.* at 12.) Despite these repeated warnings, Defendants have knowingly failed to implement remedial recommendations of VA's Inspector General. (*Id.*)

Finally, the district court's conclusion that VA is "now in the process of implementing new procedures to prevent a similar disclosure in the future" is simply not supported by the factual record. (R.46 at 16.) Again, the district court provided no record citation for this sweeping statement. And that is because there was absolutely no evidence submitted that would substantiate such a conclusion. The Veterans would have conducted discovery on this point, but they were prohibited by the district court from conducting *any discovery whatsoever* by virtue of the court's multiple stay orders. (R.23; R.35.) The district court's grant of summary judgment on this basis—with no supporting evidence and no discovery—is due to be reversed. Any necessary remedial measures that the

Defendants may have taken after the fact are relevant, if at all, only as to what type of injunctive relief is ultimately appropriate, and are irrelevant to whether there was final agency action that was contrary to law and due to be held unlawful under the APA.

### **CONCLUSION**

For these reasons, the district court's judgment should be reversed and this case remanded for further proceedings.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 32-4, the undersigned counsel for Plaintiffs-Appellants certifies that the foregoing Principal Brief contains 13,953 words, as measured by the word count function of the word processing application used to prepare the brief, and excluding the items listed in Eleventh Circuit Rule 32-4.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of April 2008, a true and correct copy of the foregoing brief of Plaintiffs-Appellants was served on the following by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

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