No. 08-11102-G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JIM HENRY PERKINS and JESSIE FRANK QUALLS
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS;
JAMES B. PEAKE, M.D., SECRETARY OF VETERANS AFFAIRS; and
ROBERT T. HOWARD, ASSISTANT SECRETARY FOR INFORMATION AND TECHNOLOGY AND CHIEF INFORMATION OFFICER FOR VETERANS AFFAIRS
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE FEDERAL APPELLEES

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Perkins v. U.S. Dep't of Veterans Affairs,
No. 08-11102-G (11th Cir.)

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that, to the best of her knowledge, the following persons, in addition to those listed in appellant's opening brief filed on April 2, 2008, are the only ones who may have an interest in the outcome of this case:

Chaifetz, Samantha L.; Attorney, U.S. Department of Justice

Katsas, Gregory G.; Acting Assistant Attorney General

Stern, Mark B.; Attorney, U.S. Department of Justice

/s/ Samantha L. Chaifetz
SAMANTHA L. CHAIFETZ

JUNE 2008

STATEMENT REGARDING ORAL ARGUMENT

The judgment of the district court is correct and appellee does not believe oral argument is necessary. See Fed. R. App. P. 34(a)(2)(B)-(C). We stand ready to present argument, however, if the Court believes argument will facilitate its deliberations in this case.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Pages**

*Authorities chiefly relied upon are marked with an asterisk

Statutes

Rules

Legislative Materials

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331, 5 U.S.C. § 552a(g)(1), and 5 U.S.C. §§ 702, 703. See Second Am. Compl. ¶ 2, Record Excerpts ("RE") Tab 21. In a final order issued on January 8, 2008, the district court granted defendants' motion for summary judgment. See Mem. Op., RE Tab 46. Plaintiffs filed a timely notice of appeal on March 5, 2008. See Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly dismissed plaintiffs' claims under the Privacy Act, where plaintiffs did not suffer actual damages and therefore could not show all elements of a complete cause of action.

2. Whether the district court correctly dismissed plaintiffs' claims for injunctive and declaratory relief pursuant to the Administrative Procedure Act where plaintiffs identified no final agency action and no agency action contrary to law.

STATEMENT OF THE CASE

On January 22, 2007, a Veterans Health Administration Information Technology ("IT") Specialist assigned to the Birmingham Veterans Affairs Medical Center's Research Enhancement Award Program reported that an external hard drive was missing from his office. The missing drive had been used to back up data from the IT Specialist's computer and from a shared network. The research files on the missing drive are believed to contain personally identifiable information for 198,760 living veterans, including plaintiffs-appellants Jim Henry Perkins and Jessie Frank Qualls (collectively, "plaintiffs").

Plaintiffs Perkins and Qualls learned of the missing drive in February 2007 and contacted the public hotline established by the VA to address inquiries. The VA mailed letters to the plaintiffs in March and April 2007 advising them of the

disappearance of the external hard drive and offering them one year of free credit monitoring services and identity theft protection insurance.

The VA's Office of Inspector General ("VA OIG"), along with the Federal Bureau of Investigation ("FBI"), have conducted a criminal investigation. To date, the missing hard drive has not been recovered but there is no evidence that the data on the drive have been accessed or used fraudulently.

Plaintiffs' action seeks monetary relief for alleged violations of the Privacy Act of 1974, 5 U.S.C. § 552a, by the Department of Veterans Affairs ("VA"). Plaintiffs also seek broad declaratory and injunctive relief pursuant to the Administrative Procedure Act ("APA") for alleged failures by the agency to comply with the Privacy Act and other federal statutes — namely, the E-Government Act of 2002, the Trade Secrets Act, and the Veterans Benefits, Health Care, and Information Technology Act.

The district court granted summary judgment to the defendants. The court held that plaintiffs had failed to state a claim for actual damages under the Privacy Act and had identified no agency action subject to review under the APA. Plaintiffs appeal.

STATEMENT OF FACTS

A. Statutory Background.

The Privacy Act vests the district courts with jurisdiction over any civil action brought by an individual who has been adversely affected by a violation of the Act. See 5 U.S.C. § 552a(g)(1)(A)-(D). Certain provisions of the Act, addressed under § 552a(g)(1)(A) and (B), are enforceable by an order of injunctive relief. Id. § 552a(g)(2)-(3). In contrast, other portions of the Privacy Act, addressed under § 552a(g)(1)(C) and (D), are remedied only by monetary damages and are enforceable only when a plaintiff can show violations that were "intentional or willful" and resulted in "actual damages." Id. § 552a(g)(4).

Plaintiffs seek monetary relief under § 552a(g)(1)(D), a "catch-all" provision which authorizes a plaintiff to seek actual damages for intentional or willful violations of provisions of the Privacy Act not encompassed in the other sections providing for relief.

B. Factual Background.

1. The VA's Veteran Health Administration provides medical care to eligible beneficiaries. It also conducts research "to identify common organizational trends or facts from a wide variety of electronic databases and previously existing records, such as medical records of veterans who have been seen or evaluated for their health problems, which can be used to improve

the quality of health care." VA OIG Rep. at 2, RE Tab 33-3. Some of this research is done through programs within the VA known as Research Enhancement Award Programs ("REAP"). Id. at 3.

In August 2006 the Director of the Birmingham REAP approved the purchase of fifteen external hard drives because electronic space for REAP research files on the Birmingham VA Medical Center server was nearing capacity. Id. at iv, 15, 17. The drives were purchased for on-site use only, and employees were to store them in a locked safe. Id. at iv, 15-17.[1]

2. On Monday morning, January 22, 2007, an IT Specialist assigned to the Birmingham REAP Data Unit, referred to here as John Doe, checked the safe where he normally locked up his external hard drive and found that it was missing. Id. at 7. There were no signs of forced entry and no indication that the safe had been broken into. Id.

As a computer programmer for the VA, Doe worked with national VA databases and helped to design statistical programs to support research projects. Id. at 4. Doe used his external hard drive "to back up data related to VA research projects contained on [his] desktop computer, as well as to store other

[1] An external hard drive is a device for storing information (e.g., word processing documents, databases, and other files). To access the data, the drive is typically connected to a computer by a cable. External hard drives serve a function similar to that of flash drives (sometimes called memory sticks) but external hard drives may have significantly larger storage capacity.

data that he was working on from a shared network." Id. at i. The research-related data files on the missing hard drive are believed to contain personally-identifiable information for close to 200,000 living veterans, including plaintiffs Jim Henry Perkins and Jessie Frank Qualls. Id. at 11-12; Mem. Op. at 3-4, RE Tab 46.[2]

Doe immediately reported the incident, and the FBI and the VA's Office of Inspector General quickly launched investigations, including a forensic analysis to ascertain the contents of the drive. VA OIG Rep. at 7-9, RE Tab 33-3; see also Maginnis Decl. ¶ 3, RE Tab 33-5.

On February 2 and February 10, the VA issued press releases concerning the incident, limiting the information made public so as not to interfere with the ongoing investigations. VA OIG Rep. at 10, RE Tab 33-3. The VA also established a call center to answer veterans' questions. See Maginnis Decl. ¶ 10 and attachments, RE Tab 33-5; see also Perkins Decl. ¶ 8, RE Tab 40-1

[2] As the VA OIG report notes, some of this information was only identifiable through scrambled social security numbers. VA OIG Rep. at 22-23, RE Tab 33-3. At the time, there was no VA policy in effect that required the encryption of sensitive data on removable computer storage devices, unless those devices were carried outside a VA facility. Id. at 16. Accordingly, none of this information was encrypted. The VA OIG Report states that a regional internal memorandum issued on August 7, 2006 (around the time that the drives were obtained) called for encryption of sensitive data stored on portable devices but did not make clear whether this applied to devices obtained for on-site use. VA OIG Rep. at 22-23, RE Tab 33-3. Officials at the Birmingham VA believed it did not. Id.

(asserting that plaintiff Perkins made use of the call center). Between February 12 and March 12, 2007, the VA mailed notification letters to veterans or their survivors to inform them of the disappearance of the external hard drive. VA OIG Rep. at iii, RE Tab 33-3; Maginnis Decl. ¶ 7, RE Tab 33-5. Plaintiffs Perkins and Qualls received letters mailed on or about March 12, 2007, informing them that their names, SSNs, dates of birth, and health information may have been contained in one of the files on the missing drive. The March 2007 letter explained that the VA would provide additional notification if it was determined that their information was at risk and that they would, in that event, be offered credit monitoring. Attach. B to Maginnis Decl., RE Tab 33-5.

On April 30, the VA mailed letters to 198,760 living persons – including the plaintiffs – explaining that their information may have been put at risk and offering them one year of free credit monitoring services and identity theft insurance. See Attach. C to Maginnis Decl.; see also Maginnis Decl. ¶¶ 7-9, RE Tab 33-5.

On June 29, 2007, the VA OIG announced that the external hard drive had not been recovered and that the investigation had proved "inconclusive" in determining how it disappeared. VA OIG Rep. at 7-8, RE Tab 33-3. The Inspector General also announced that "there is no indication that the data on the missing

external hard drive has been further compromised or used to commit Medicare fraud." Id. at 7.

C. Prior Proceedings.

1. Plaintiffs filed suit in February 2007, alleging that they had experienced emotional distress and mental anxiety as a result of the reported data breach and the defendants' actions. See Second Am. Compl. ¶ 54, RE Tab 21. In declarations, plaintiffs characterized their alleged harm as the aggravation of their previously diagnosed Post Traumatic Stress Disorders ("PTSD"). Both Perkins and Qualls claim "increased sleeplessness, isolation, anxiety, and anger." Perkins Decl. ¶ 13, RE Tab 40-1; Qualls Decl. ¶ 11, RE Tab 40-2. Perkins asserted in his November 2007 declaration that his VA doctor "added [a drug] to the drugs that [he was] taking to try to control [his] PTSD symptoms," and Qualls reported in his November 2007 declaration that his doctor at the VA had "[r]ecently * * * increased [his] dosage" of a drug he had been taking to treat insomnia and depression. Perkins Decl. ¶ 13, RE Tab 40-1; Qualls Decl. ¶ 11, RE Tab 40-2.

Plaintiffs sought monetary relief for alleged violations of five subsections of the Privacy Act. They asserted that the VA violated 5 U.S.C. § 552a(b), which restricts permissible disclosures, by disclosing information to the IT Specialist John Doe and possibly to unidentified third parties when the drive disappeared. See Second Am. Compl. ¶ 50, RE Tab 21. Plaintiffs

also allege that defendants failed to make accountings required by 5 U.S.C. § 552a(c)(1); that defendants were prohibited by 5 U.S.C. § 552a(e)(1) from maintaining personal information and medical information on the external hard drive; that defendants failed to establish rules of conduct and provide training required by 5 U.S.C. § 552a(e)(9); and that defendants failed to establish appropriate safeguards as required by 5 U.S.C. § 552a(e)(10). See id. ¶¶ 57-58, 65, 71-72, 79.

In addition to their claim for monetary relief under the Privacy Act, plaintiffs also sought declaratory and injunctive relief based on the VA's alleged failure to comply with the Privacy Act, as well as several other federal statutes. Plaintiffs asserted a failure to conduct Privacy Impact Assessments, in violation of the E-Government Act of 2002, 44 U.S.C. § 3501 note; failure to maintain confidentiality, in violation of the VA Claims Confidentiality Statute, 38 U.S.C. § 5701, and the Trade Secrets Act, 18 U.S.C. § 1905; and failure to comply with the Veterans Benefits, Health Care, and Information Technology Act ("VBHITA") of 2006, 38 U.S.C. § 5701 et seq.,[3] or

[3] Plaintiffs' response to the government's motion for summary judgment, infra, clarified their intent to allege specifically a failure to comply with Title IX of the VBHITA – referred to as the Department of Veterans Affairs Information Security Enhancement Act ("VAISEA") of 2006, 38 U.S.C. §§ 5721-28. More generally, plaintiffs' response also clarified their intent to bring these claims for equitable relief pursuant to the APA. As noted infra, on appeal, plaintiffs do not raise their APA claims premised on the VA Claims Confidentiality Statute or the FISMA.

the Federal Information Security Management Act of 2002 ("FISMA"), 44 U.S.C. §§ 3541-48. See Second Am. Compl. ¶¶ 87-108, RE Tab 21.

2. On January 8, 2008, the district court granted defendants' motion for summary judgment. Order and Mem. Op., RE Tabs 46-47. The court observed that, under Fitzpatrick v. IRS, 665 F.2d 327 (11th Cir. 1982) and Doe v. Chao, 540 U.S. 614, 124 S. Ct. 1204 (2004), plaintiffs were required to establish pecuniary losses to satisfy the Privacy Act's "actual damages" requirement, 5 U.S.C. § 552a(g)(4). See Mem. Op. at 8-13, RE Tab 46. The court held that plaintiffs had not alleged or proffered any evidence of pecuniary losses and therefore were not entitled to recover under the Privacy Act, 5 U.S.C. § 552(g)(1)(D), (4). See Mem. Op. at 13, RE Tab 46. The court also rejected plaintiffs' claims for injunctive or declaratory relief under the APA on the ground that plaintiffs' had not properly identified final agency action subject to judicial review. See id. at 15-16.

SUMMARY OF ARGUMENT

Plaintiffs seek damages under the Privacy Act based upon the disappearance of a VA-owned hard drive that is believed to have contained their personal information. Plaintiffs allege that as a result of the missing drive they have experienced aggravation of their pre-existing PTSD symptoms – namely, increased sleeplessness, isolation, anxiety, and anger.

Plaintiffs do not, however, maintain that the events at issue directly or indirectly caused them any pecuniary damages.

As the district court held, the absence of a claim for pecuniary damages requires dismissal of plaintiffs' Privacy Act claims. The Supreme Court made clear in Doe v. Chao, 540 U.S. 614, 124 S. Ct. 1204 (2004) that to have "a complete cause of action" for monetary relief under the Privacy Act, a plaintiff must plead and prove intent or willfulness on the agency's part, as well as actual damages caused by the violation. 540 U.S. at 624-25, 124 S. Ct. at 1210-11. This Court has long established that "actual damages" for purposes of the Privacy Act encompass only pecuniary losses. Fitzpatrick v. IRS, 665 F.2d 327 (11th Cir. 1982). Applying these two decisions, the district court correctly entered summary judgment for the government.

Plaintiffs offer no ground for setting aside that judgment. Asserted factual distinctions between this suit and Fitzpatrick are without legal relevance. Nor are plaintiffs correct in suggesting that this Court sub silentio overruled Fitzpatrick in a per curiam opinion that did not address the scope of actual damages under the Privacy Act.

2. The district court also properly dismissed plaintiffs' claims for sweeping injunctive relief that would require a general overhaul of agency IT security. Plaintiffs invoke general directives of the Privacy Act and several other statutes, but

point to no final agency action subject to review under the Administrative Procedure Act. Nor do plaintiffs fare better by characterizing their action as an attempt to compel agency action unlawfully withheld. As the Supreme Court made clear in Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 124 S. Ct. 2373 (2004), such relief is in the nature of mandamus and can be used only to compel the performance of discrete, non-discretionary acts required by law. Plaintiffs identify no such specific, required actions and Southern Utah leaves no doubt that a court may not entertain requests for broad programmatic relief of the type asserted here.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment. Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1363 (11th Cir. 2007).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' CLAIMS UNDER THE PRIVACY ACT WHERE PLAINTIFFS COULD NOT ESTABLISH ACTUAL DAMAGES.

Plaintiffs seek damages pursuant to 5 U.S.C. § 552a(g)(1)(D) and § 552a(g)(4), which permit monetary recovery when a plaintiff can show that an agency violated a provision of the statute "in a manner which was intentional or willful" and resulted in "actual damages." As the Supreme Court explained in Doe v. Chao, to have "a complete cause of action" the plaintiffs must plead and prove

intent or willfulness on the agency's part, as well as actual damages caused by the violation. 540 U.S. at 624-25, 124 S. Ct. at 1210-11.

Accordingly, to prevail on their Privacy Act claims, Perkins and Qualls would be required to show: "'(1) that the government failed to [comply with a given section of the Privacy Act], (2) which failure proximately caused the adverse [effect], (3) that the agency failed intentionally or willfully to [comply with the Act], and (4) that the plaintiff suffered actual damages.'" Perry v. Bureau of Prisons, 371 F.3d 1304, 1305 (11th Cir. 2004) (per curiam) (quoting Rose v. United States, 905 F.2d 1257, 1259 (9th Cir. 1990)); see also Rice v. United States, 245 F.R.D. 3, 6 (D.D.C. 2007) (noting that under Doe "[p]roof of adverse effect alone does not entitle plaintiffs to recovery under the Privacy Act without a further showing of 'actual damages'").[4]

[4] Doe held that the "sole provision for recovering anything" under § 552a(g)(1)(D) requires proof of "actual damages" (and guarantees a statutory minimum of $1,000 provide that some measure of "actual damages" is shown). 540 U.S. at 620, 124 S. Ct. at 1208. Plaintiffs' brief arguably implies, without arguing, that the provision for recovering reasonable attorney's fees and costs could, even in the absence of any "actual damages," satisfy the requirements for a complete cause of action. See Pls. Br. at 26. Alluding to an issue in this fashion is insufficient to preserve it for appellate review, and the argument has thus been waived. See United States v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000); see also United States v. Higdon, 418 F.3d 1136, 1138 (11th Cir. 2005) (noting "this Court's prudential rule that issues not raised in the opening brief are waived").

We note, in any event, that, as the Supreme Court observed in Doe, such reasoning would "get the cart before the horse" because damages are the "recovery entitling a plaintiff to costs and fees."

In Fitzpatrick v. IRS, 665 F.2d 327 (11th Cir. 1982), this Court held 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." Id. at 331. The Court distinguished such injuries from "pecuniary losses resulting from a mental injury caused by an unlawful disclosure," which, it made clear, could be recoverable. Id. at 331 n.7; see also Doe, 540 U.S. at 627 n.12, 124 S. Ct. at 1212 n.12 (noting that Fitzpatrick sets forth this circuit's definition of "actual damages" as restricted to "pecuniary loss").

As the district court concluded, Fitzpatrick is dispositive of plaintiffs' Privacy Act claims. Plaintiffs do not purport to have any pecuniary losses – either direct or resulting from a

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540 U.S. at 625 n.9, 124 S. Ct. at 1211 n.9; see Doe v. Chao, 435 F.3d 492, 509 (4th Cir. 2006) (Michael, J., dissenting); Rice, 245 F.R.D. at 7 n.6; see also Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 107, 118 S. Ct. 1003, 1019 (1998) (noting that a plaintiff's interest in an award reimbursing his attorneys' fees and costs is "'insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim'" (quoting Lewis v. Continental Bank Corp., 494 U.S. 472, 480, 110 S. Ct. 1249, 1255 (1990)).

On remand in Doe v. Chao, the Fourth Circuit, in a decision that appeared to reflect the unusual circumstances of the litigation, instructed the district court that the plaintiffs could seek costs and fees but that the district court should take into account the failure to show compensable damages. Doe, 435 F.3d at 492. The district court then held that no fees should be awarded under this standard. See Doe v. Chao, 511 F.3d 461, 464 (4th Cir. 2007) (describing the district court's decision, 2006 WL 2038442 at *5 (W.D. Va. July 19, 2006)).

mental or emotional injury. See Mem. Op. at 12-13, RE Tab 46. They claim only to have suffered "aggravation of their PTSD symptoms and anxiety over their financial security." Id. at 12.[5]

Plaintiffs' efforts to distinguish Fitzpatrick are wide of the mark. Plaintiffs' maintain that their alleged injuries, in purported contrast to the plaintiff in Fitzpatrick, are "individualized" and accompanied by "specific physical symptoms." E.g., Pls. Br. at 33-34. That assertion, even if accurate, would not advance their argument. What is critical is that, like the plaintiff in Fitzpatrick, they allege no pecuniary losses.

In any event, as the district court concluded, plaintiffs' factual distinctions are without foundation. See Mem. Op. at 12-13, RE Tab 46. The plaintiff in Fitzpatrick offered highly specific evidence of physical symptoms allegedly resulting from the disclosures at issue. The plaintiff's psychiatrist offered uncontradicted testimony that the disclosures at issue had caused the plaintiff to become "paranoid" and that he had resulted in his "becoming deeply depressed and withdrawing from social activities." Fitzpatrick, 665 F.2d at 328-29. This proof was at least as specific as plaintiffs' allegations, made in their own declarations, that the symptoms of their pre-existing PTSD were

[5] Plaintiffs' complaint stated that they had suffered "pecuniary loss" but plaintiffs have never identified any specific pecuniary loss. On appeal they abandon entirely the claim that they have suffered any pecuniary or quantifiable loss.

aggravated by the prospect of potential identity theft, and which specify only "increased sleeplessness."[6] Perkins Decl. ¶ 13, RE Tab 40-1; Qualls Decl. ¶ 11, RE Tab 40-2; see Pls. Br. at 34-36.

Plaintiffs are on no firmer ground in urging that Fitzpatrick was overturned sub silentio by the per curiam decision in Perry v. Bureau of Prisons, 371 F.3d 1304 (11th Cir. 2004). See Pls. Br. at 28-30. The definition of "actual damages" was not raised by the parties or addressed by this Court in Perry. The decision instead considered whether the district court had improperly characterized the plaintiff's suit, brought pursuant to the Privacy Act, as a Bivens action. The panel set forth the elements a plaintiff must allege to avoid dismissal for failure to state a claim under the Privacy Act but did not examine the merits of the pro se plaintiff's claim. As the

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[6] Plaintiffs list as other physical symptoms "isolation, anxiety, anger," Pls. Br. at 33, but these are no more physical than the paranoia noted in Fitzpatrick, 665 F.2d at 328.

Moreover, even courts that have not required pecuniary losses to establish actual damages have anticipated or required evidence of physical consequences to establish cognizable emotional or mental injuries. See, e.g., Johnson v. Dep't of Treasury, IRS, 700 F.2d 971, 972-74 (5th Cir. 1983). Indeed, even if this circuit were to accept that mental injuries could suffice to satisfy actual damages, plaintiffs' allegations likely would not be deemed severe enough to warrant any award. See Dong v. Smithsonian Inst., 943 F. Supp. 69, 74 (D.D.C. 1996) (concluding that plaintiff's claim of sleeplessness was not severe enough to warrant an award of damages), rev'd on grounds of statutory inapplicability, 125 F.3d 877 (D.C. Cir. 1997); see also Rice, 245 F.R.D. at 6 (noting that uncorroborated declarations of "anger, dismay, anxiety, and fear" would, under any circumstances, be insufficient to establish "actual damages").

district court correctly concluded, Perry did not – and indeed, could not – overrule Fitzpatrick. See Swann v. S. Health Partners, Inc., 388 F.3d 834, 837 (11th Cir. 2004) ("Under the prior panel rule, [this Court] is bound by the holdings of earlier panels unless and until they are clearly overruled en banc or by the Supreme Court"); see also Mem. Op. at 10-11 (noting that Perry makes no mention of Fitzpatrick).[7]

Contrary to plaintiffs' understanding, decisions subsequent to Fitzpatrick have confirmed, rather than undermined, this Court's analysis of "actual damages." In the intervening quarter century, the Supreme Court has repeatedly stressed that there is "no doubt" that "waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text." United States v. Idaho ex rel. Dep't of Water Res., 508 U.S. 1, 6, 113 S. Ct. 1893, 1896 (1993); accord, e.g., Lane v. Pena, 518 U.S. 187, 192, 116 S. Ct. 2092, 2096 (1996). The Court has emphasized that the judicial task is "to discern the 'unequivocally expressed' intent of Congress, construing ambiguities in favor of immunity." United States v. Williams, 514 U.S. 527, 531, 115 S. Ct. 1611, 1616 (1995). Thus, the mere existence of a "plausible" reading of a

[7] Since Perry, courts have continued to recognize Fitzpatrick's holding that "damages under the Privacy Act are recoverable only for proven out-of-pocket losses," 665 F.2d at 328, as the rule of this circuit. See, e.g., Rice, 245 F.R.D. at 6; Stafford v. Soc. Sec. Admin., 437 F. Supp. 2d 1113, 1124 (N.D. Cal. 2006).

statutory waiver that excludes a plaintiff's damage claim "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." United States v. Nordic Village, Inc., 503 U.S. 30, 37 503 U.S. 30, 112 S. Ct. 1011, 1016 (1992); see also Lindh v. Murphy, 521 U.S. 320, 328 n.4, 117 S. Ct. 2059, 2064 n.4 (1997).[8]

As the Supreme Court has also made clear, this canon applies in determining the scope of a waiver as well as in making the initial determination of whether Congress has waived immunity at all. The Court has now "frequently held" that a statutory waiver of federal sovereign immunity must be "strictly construed, in terms of its scope, in favor of the sovereign." Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261, 119 S. Ct. 687, 691 (1999); see also, e.g., Dep't of Energy v. Ohio, 503 U.S. 607, 112 S. Ct. 1627 (1992).

Those principles militate strongly against an expansive reading that would extend "actual damages" in the context of the Privacy Act beyond the pecuniary losses that this Court held were required in Fitzpatrick. See Hudson v. Reno, 130 F.3d 1193, 1207 & n.11 (6th Cir. 1997) ("recogniz[ing] the bedrock principle that

[8] The Court has explained that it interprets differently "broad" waivers of sovereign immunity such as those found in the "'sweeping language'" of the Federal Tort Claims Act and in "'sue and be sued' clauses" that subject federal agencies to suit much like private entities. See Nordic Village, 503 U.S. at 34, 112 S. Ct. 1014. No such waiver is at issue here.

courts must strictly construe waivers of sovereign immunity in favor of the sovereign and not enlarge the waiver beyond what the language requires" and holding, accordingly, that "actual damages under the Privacy Act do not include recovery for 'mental injuries * * * or other non-quantifiable injuries'"), cert. denied, 525 U.S. 822, 119 S. Ct. 64 (1998); Schmidt v. Dep't of Veterans Affairs, 222 F.R.D. 592, 594 (E.D. Wis. 2004) (recognizing the Privacy Act as a limited waiver of sovereign immunity and therefore concluding that "to the extent there may be ambiguity concerning whether the term 'actual damages' includes emotional distress as well as a pecuniary loss, the ambiguity must be resolved by construing the term narrowly"); see also Doe v. Chao, 306 F.3d 170, 179 (4th Cir. 2003) (applying the "principle of 'strict construction'" to hold that plaintiff must show actual damages to obtain statutory minimum damages under the Privacy Act), aff'd, 540 U.S. 614, 124 S. Ct. 1204.[9]

[9] Decisions of the Fifth and Tenth Circuits, decided shortly before and after Fitzpatrick, concluded that actual damages are not limited to pecuniary losses. Johnson v. Dep't of Treasury, IRS, 700 F.2d 971, 972-74 (5th Cir. 1983) (holding that mental anxiety, if adequately demonstrated, could satisfy the "actual damages" requirement, even in the absence of any pecuniary loss); Parks v. IRS, 618 F.2d 677, 682-83 (10th Cir. 1980). Notwithstanding plaintiffs' suggestion to the contrary, the Fourth Circuit has not decided whether the Privacy Act's actual damages encompass non-pecuniary losses. Doe, 306 F.3d at 180-81 (reasoning that "regardless of the disposition of that issue," plaintiff's claims would "fail for lack of evidentiary support," noting that plaintiff did not claim any medical or psychological treatment, purchase of medication, impact on behavior, or physical consequences), aff'd, 540 U.S. 524, 124 S. Ct. 1204 (affirming the majority's holding

Moreover, to the extent that Doe v. Chao casts light on the question, its observations also offer support for the continued vitality of this Court's analysis in Fitzpatrick. Although the Supreme Court did not consider the issue presented here, it looked to the common law tort of defamation in holding that a plaintiff seeking monetary recovery under the Privacy Act must show entitlement to actual damages to have a "complete cause of action." Doe, 540 U.S. at 625-26, 124 S. Ct. at 1211. In so holding, the Court noted that "[a]t common law, certain defamation torts were redressed * * * only when a plaintiff first proved some 'special harm,' i.e., 'harm of a material and generally of a pecuniary nature.'" Id.; see id. at 621, 124 S. Ct. at 1209; cf. Fitzpatrick, 665 F.2d at 331 (discussing the meaning of "special damages" in defamation suits, in support of the panel's holding). As noted, Doe plainly did not address the precise question presented by the plaintiffs here. Equally clearly, however, that decision and other decisions of the past

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without reviewing the circuit's treatment of the definition of actual damages).

Several district courts have held that only pecuniary damages are cognizable. See, e.g., Wiley v. Dep't of Veterans Affairs, 176 F. Supp. 2d 747, 757-58 (E.D. Mich. 2001) (adopting narrow construction of "actual damages"); DiMura v. Fed. Bureau of Investigation, 823 F. Supp. 45, 48 (D. Mass. 1993). District courts in the District of Columbia have reached varying conclusions. See Rice, 245 F.R.D. at 6 (noting conflicting decisions and leaving issue unresolved because, in any event, plaintiffs uncorroborated declarations of "anger, dismay, anxiety, and fear" were insufficient to establish "actual damages").

two decades provide no basis for setting aside this Court's holding in Fitzpatrick.

Finally, in light of the district court's disposition, it did not reach other grounds that would warrant dismissal of plaintiffs' Privacy Act claims. Accordingly, we do not address those arguments here, but would expect to re-assert them in the event of a remand.[10]

II. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF PURSUANT TO THE APA WHERE PLAINTIFFS DID NOT IDENTIFY ANY FINAL AGENCY ACTION CONTRARY TO LAW.

Invoking the Administrative Procedures Act, plaintiffs seek sweeping declaratory and injunctive relief for asserted violations of the Privacy Act in combination with several other statutes.[11] Plaintiffs assert that they are entitled to relief for (1) the agency's failure to conduct a Privacy Impact Assessment, pursuant to the E-Government Act, 44 U.S.C. § 3501 note, in connection with the procurement of external hard drives, (2) disclosures to John Doe allegedly in violation of the Trade

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[10] The government urged that plaintiffs' allegations and evidence do not establish that the asserted violations were "intentional or willful," 5 U.S.C. § 552a(g)(4). In addition, plaintiffs' allegations and evidence do not establish an adequate causal connection between their Privacy Act complaints and their asserted injuries.

[11] For claims brought under § 552a(g)(1)(D), the Privacy Act provides for monetary relief but does not provide a cause of action for declaratory and injunctive relief. See, e.g., Doe, 540 U.S. at 635, 124 S. Ct. at 1217 (Ginsburg, J., dissenting); Edison, 672 F.2d at 846; Parks, 618 F.2d at 684.

Secrets Act, 18 U.S.C. § 1905; and (3) agency inactions alleged to violate the VBHITA/VAISEA, 38 U.S.C. §§ 5722-23. See Pls. Br. at 50-52.[12] As the district court concluded, none of these claims identifies agency action that provide the basis for review under the APA and a court would, in any event, lack authority to order relief under the APA for plaintiffs' claims.

Under the APA, a court may set aside final agency action that it determines to be arbitrary, capricious or contrary to law, 5 U.S.C. § 706(2), and may "compel agency action unlawfully withheld or unreasonably delayed," id. § 706(1), subject to the proviso that the "only agency action that can be compelled under the APA is action legally required." Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63, 124 S. Ct. 2373, 2379 (2004). As the Supreme Court explained in Southern Utah, review in both cases is limited to "circumscribed, discrete agency actions." Id. at 62-63, 124 S. Ct. at 2378-79.

Plaintiffs urge that a court could review as "final agency action" acts including the downloading of information by John Doe, the purchasing of external hard drives without encryption software, and the failure to provide Doe's supervisor with a position description and failure to conduct performance

[12] Plaintiffs abandon their APA claim for "failure to provide information security protections in violation of the Federal Information Security Management Act, 44 U.S.C. §§ 3541-48," and their claim under the VA Claims Confidentiality Statute, 38 U.S.C. § 5701. Second Am. Compl. ¶¶ 104-08, RE Tab 21.

appraisals. See Pls. Br. at 47-50. Even assuming that the alleged actions were causally related to plaintiffs' claimed injuries, they plainly do not constitute final agency action. Two conditions must be satisfied for agency action to be considered final: "First the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 1168 (1997) (citation omitted). As the district court concluded, none of the actions cited by plaintiffs remotely satisfies these requirements.

Indeed, the gravamen of plaintiffs' claims is that the VA has not taken actions that it believes are required by law. Plaintiffs fail, however, to identify discrete, legally-compelled actions that the agency was required to take and therefore could properly be ordered under the APA. Relief compelling agency action under the APA is in the nature of mandamus, limited to the enforcement of "a specific, unequivocal command," "the ordering of a precise, definite act * * * about which [an official] had no discretion whatever." S. Utah, 542 U.S. at 63, 124 S. Ct. at 2379 (quotation marks and citations omitted). Thus, "[t]he limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law." Id. at 65,

124 S. Ct. at 2380. As the Supreme Court emphasized in Southern Utah, challenges to "[g]eneral deficiencies in [agency] compliance * * * lack the specificity requisite for agency action." 542 U.S. at 66, 124 S. Ct. at 2381.

For example, plaintiffs assert that the VA has failed to adopt appropriate safeguards with respect to all Privacy-Act protected information in its possession. See Second Am. Compl. ¶ 79, RE Tab 21. That claim seeks to challenge the whole of the agency's compliance with the safeguards provision of the Privacy Act, 5 U.S.C. § 552a(e)(10), which requires that agencies establish measures to protect the "security and confidentiality of records" that are "appropriate" in light of any "anticipated threats or hazards to their security or integrity."[13] The Act gives agencies ample authority to assess the relevant threats and determine reasonable safeguards. See Kostyu v. United States, 742 F. Supp. 413, 417 (E.D. Mich. 1990) ("Agencies have broad discretion to chose among alternative methods of securing their

[13] Subsection (e)(10) provides that agencies must:

> 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).

records commensurate with their needs, objectives, procedures, and resources.").[14]

Plaintiffs similarly fail to identify any mandated duty in the other federal statutes on which they rely; they neither point to affirmative statutory violations nor indicate what discrete actions were allegedly unlawfully withheld. The E-Government Act, § 208(b), contains a broad mandate to conduct Privacy Impact Assessments to ensure "sufficient" protections for the privacy of personal information. 44 U.S.C. § 3501 note (providing that Assessments be made public only "if practicable"). The Trade Secrets Act, 18 U.S.C. § 1905, contains a general prohibition against unauthorized divulgences. And the VBHITA/VAISEA, 38 U.S.C. §§ 5722-23, contains a general directive to "establish and maintain a comprehensive Department-wide information security

[14] Indeed, it is because of the recognized need for agency discretion, given "the variety of technical security needs of the many different agency systems * * * as well as the cost and range of possible technological methods of meeting those needs," that the Privacy Act does not include "a set of technical standards for security of systems" and instead "merely require[s] [agencies] to establish those administrative and technical safeguards which it determines appropriate and finds technologically feasible for the adequate protection of the confidentiality of the particular information it keeps against purloining, unauthorized access, and political pressures to yield the information improperly to persons with no formal need for it." S. Rep. No. 93-1183, reprinted in 1974 U.S. Code Cong. & Admin. News 6916, 6969. The Senate Report accompanying the Privacy Act notes that the Act "provides reasonable leeway for agency allotment of resources" by permitting the agency "a certain amount of 'risk management' whereby administrators weigh the importance and likelihood of the threats against the availability of security measures and considerations of cost." Id.

program," Id. § 5722(a).[15] Cf. S. Utah, 542 U.S. at 64-65, 124 S. Ct. 2379-80 (holding that a claim to compel agency action "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take" (emphasis in original), and that allegations of a failure to fulfill general statutory objectives are inadequate).

The nature of the requested relief underscores the extent to which plaintiffs do not seek to compel a discrete action but instead seek "wholesale improvement of [the VA's information systems] by court decree." Lujan v. Nat'l Wildlife Fund, 497 U.S. 871, 891, 110 S. Ct. 3177, 3190 (1990) (emphasis in original).[16] Plaintiffs ask that the Court enjoin defendants from operating its "computer systems and other information technologies" at the VA offices in Birmingham "without appropriate safeguards to ensure the security and privacy of the Personal Information and the Medical Information and similar information and to protect

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[15] With regard to these statutes, plaintiffs claim to have been "adversely affected and damaged," Second Am. Compl. ¶¶ 91-94, 95-103, but do not describe the resulting harm or how it is linked to specific violations of these statutes. For example, plaintiffs have not identified any injury resulting from the absence of a Privacy Impact Assessment. While plaintiffs assert that defendants' actions violated the Trade Secrets Act and VAISEA, they point to no specific provisions of these statutes, nor provide a factual basis from which a court could infer harm from such violations.

[16] The Supreme Court warned in Lujan that the APA does not allow plaintiffs to "seek wholesale improvement of [the VA] by court decree, rather than in the office of the Department or the halls of Congress, where programmatic improvements are normally made." 497 U.S. at 891, 110 S. Ct. at 3190.

against anticipated threats or hazards to the security and integrity of these records." Second Am. Compl. at 34, ¶ B, RE Tab 21. Plaintiffs also ask the Court to permanently enjoin the VA and all of its employees "from downloading, copying, or in any way transferring any record * * * subject to Privacy Act requirements * * * at [the VA's] offices and facilities in the Birmingham, Alabama area until an independent panel of experts or Court-appointed special master determines that Defendants are in full compliance" with the Privacy Act, E-Government Act of 2002, and the other statutes addressed in the complaint, and to enjoin under the same conditions any "downloading or copying to any device capable of storing, containing, or transferring any record." Id. ¶¶ D, E. Plaintiffs further ask the Court to order defendants to prepare and publish handbooks "for implementing VA directives * * * related to privacy and information security," and "to establish procedures, requirements, and penalties" to ensure compliance. Id. ¶ C.

This is precisely the type of wholesale programmatic relief that the Supreme Court has held to be unavailable. As the Court declared in Southern Utah, the APA "empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing how it shall act.'" Id. at 64; see also Lujan, 497 U.S. at 894, 110 S.

Ct. at 3191. Plaintiffs instead ask the Court to manage and direct the agency's exercise of highly discretionary acts.

Plaintiffs do not come to grips with the crucial difficulties in their claims cited by the district court. Instead, they assert that the court's opinion failed to discuss their APA claims with adequate specificity. See Pls. Br. at 52. The court was not required to deal with plaintiffs' claims at greater length than it deemed necessary. Its reasoning was clear and correct, concluding that plaintiffs had failed to identify agency actions subject to review under the Administrative Procedures Act. Mem. Op. at 15-16, RE Tab 46. The court had no need to explore in greater detail plaintiffs' general allegations, which failed to identify the precise nature of supposed violations or identify discrete actions that might fall within the scope of judicial review, and which repeatedly failed to identify a causal link between general alleged violations and plaintiffs' alleged harm.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JUNE 2008

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 11th Cir. R. 32-1, I certify that the foregoing Brief of the Appellee is monospaced, has 10.5 or fewer characters per inch, and contains 6962 words, as counted by Corel WordPerfect 12.

/s/ Samantha L. Chaifetz
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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2008, I served copies of the foregoing Brief of the Appellees on the following, by overnight Federal Express:

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STATUTORY ADDENDUM

5 U.S.C. § 552a

§ 552a. Records maintained on individuals.

(a) Definitions.--For purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;
(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;
(3) the term "maintain" includes maintain, collect, use, or disseminate;
(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;
(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual

* * *

(b) Conditions of disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
(2) required under section 552 of this title;
(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

* * *

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

* * *

(c) Accounting of certain disclosures.--Each agency, with respect to each system of records under its control, shall--

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--
(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and
(B) the name and address of the person or agency to whom the disclosure is made;
(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;
(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and
(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

* * *

(e) Agency requirements.--Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

* * *

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

* * *

(10) 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;

* * *

(g) (1) Civil remedies.--Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(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.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents

of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(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. §§ 702, 704, 706

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved 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. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.