

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

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## SUMMARY OF THE ARGUMENT IN REPLY

Defendants' entire argument on the Veterans' Privacy Act claims is a strict, bright-line application of the "pecuniary losses" language in *Fitzpatrick v. I.R.S.*, 665 F.2d 327 (11th Cir. 1982). Under their reading, the victim of multiple flagrant violations of the Privacy Act who suffers specific, diagnosed physical and emotional injury as a result (but no "out-of-pocket" expenses) is entitled to absolutely no relief under the Privacy Act. Under their reading, the government agency responsible for the injury will incur no liability and will have no accountability. That was not the holding of *Fitzpatrick*. And for many reasons, it should not be the holding in this case. This Court has recognized since *Fitzpatrick* that the phrase "actual damages" "clearly" includes emotional distress as a compensable injury, an argument that Defendants simply do not answer.<sup>1</sup> Further, the Supreme Court has abrogated one of the fundamental underpinnings of *Fitzpatrick* (that a victim who did not show pecuniary loss is entitled to the \$1,000 minimum award, costs, and attorney fees). Since *Fitzpatrick* many courts (including this Court) have declined to endorse the bright-line formulation pushed by Defendants here. The "pecuniary losses" language in *Fitzpatrick* does not and should not control the outcome of the Veterans' Privacy Act claims.

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<sup>1</sup> See *Banai v. Secretary, U.S. Dep't of Housing*, 102 F.3d 1203, 1207 (11th Cir. 1997) (holding that "anger, embarrassment, and emotional distress are clearly compensable injuries" under the plain meaning of the statutory phrase "actual damages," which is also used in the Fair Housing Act).

As to the Veterans' Administrative Procedure Act ("APA") claims, Defendants completely abandon the District Court's rationale for dismissal. Their alternative arguments for affirmance are without merit. The Veterans are challenging discrete, identifiable final agency actions that are properly reviewed under the APA. The District Court's judgment should be reversed, and this case remanded for further proceedings on all of the Veterans' Privacy Act and APA claims.

## ARGUMENT

### **I. There is No Support for a Bright-Line Rule Allowing Only Narrowly Defined “Pecuniary Losses” in All Cases**

Defendants argue that the “pecuniary losses” language in *Fitzpatrick* has “continued vitality” and that “[the Supreme Court’s *Doe v. Chao*] decision and other decisions of the past two decades provide no basis for setting aside this Court’s holding in *Fitzpatrick*.” Appellees’ Brief at 20-21. That is absolutely wrong, and Defendants say little to justify these bald assertions. The Supreme Court’s decision in *Doe v. Chao* and subsequent decisions by this Court and others call for a close scrutiny and narrow reading of the *Fitzpatrick* decision.

First, Defendants do not address the Veterans’ contention that the Supreme Court’s decision in *Doe v. Chao* abrogates one of the fundamental underpinnings of *Fitzpatrick*. See Appellants’ Principal Brief at 38-40. Specifically, Defendants do not dispute that the true holding of *Fitzpatrick* was that the plaintiff who did not prove pecuniary loss was nonetheless entitled to the \$1,000 minimum award, costs, and attorney fees. *Id.* at 39. The Supreme Court in *Doe v. Chao* fundamentally altered *Fitzpatrick*’s articulation of the “actual damages” requirement in this regard, which supports the Veteran’s request that this Court address the nature and scope of the *Fitzpatrick* decision and clarify that the *Fitzpatrick* holding does not

categorically prevent non-pecuniary damages from qualifying as “actual damages.”<sup>2</sup>

Second, Defendants fail to cite even a single decision in which this Court has relied on *Fitzpatrick* for the law on “actual damages.” It is hard to imagine how *Fitzpatrick* could be *the* definitive decision in the Circuit on the complete meaning of “actual damages,” as Defendants claim, when it is not cited by this court for that concept at all. In point of fact, in *Fitzpatrick*’s over 25 years of existence, no panel of this Court has relied on its reasoning or result when considering the phrase “actual damages” in the Privacy Act context or any other context—and that’s because it doesn’t sweep as broadly as Defendants claim. *See, e.g., Kehoe v. Fidelity Fed. 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*); *Perry v. Bureau of Prisons*, 371 F.3d 1304, 1305 (11th Cir. 2004) (failing to cite *Fitzpatrick* and holding that the plaintiff stated a claim under the Privacy Act, including satisfying the element of “actual damages,” where he alleged no pecuniary losses but only that the Bureau of Prisons “willfully and intentionally transferred [him] pursuant to inaccurate prison records, which, abridged upon [his]

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<sup>2</sup> Ironically, if *Fitzpatrick* were still the law, there would be no question that the Veterans are entitled to \$1,000, costs, and attorney fees.

Right to Petition protected under the First Amendment of the United States Constitution.”); *Banai*, 102 F.3d at 1207. The “actual damages” portion of the *Fitzpatrick* decision is a relic in this Circuit, and it should be distinguished (because it is not a bright-line rule) or expressly overruled (because it is wrong).<sup>3</sup>

Third, Defendants do not dispute that the “pecuniary losses” language in *Fitzpatrick* is contrary to the weight of authority from other circuits that have considered the issue. Appellees’ Brief at 19 n.9 (noting Fifth and Tenth Circuit decisions supporting the Veterans). Defendants try to argue that the Fourth Circuit’s decision in *Doe III* is not against them (*id.* at 19-20 n.9), but that argument fails in the face of both the majority and concurring opinions in that case. *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.”); *id.* at 198 n.13 (explaining that the majority opinion “commits this circuit to the position that

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<sup>3</sup> The Veterans have not argued that *Perry* “overturned sub silentio” *Fitzpatrick*, as Defendants claim. Appellees’ Brief at 16. Instead, the Veterans have pointed out the obvious conflict between the holding of *Perry* and the “pecuniary losses” language in *Fitzpatrick* and have argued that the conflict counsels either a narrow reading of *Fitzpatrick* or, should a panel determine such a narrow reading is not possible under the prior panel rule, en banc review either upon initial hearing or rehearing. Appellants’ Principal Brief at 28-9, 36 n.28.

the term ‘actual damages’ includes at least emotional distress that would qualify as ‘demonstrable’ under [the Fourth Circuit’s decision in] *Price*”) (Michael, J., concurring in part and dissenting in part). Clearly, *Fitzpatrick* is an outlier.

Finally, while there may be isolated district courts in the past that have agreed with Defendants’ position (Appellees’ Brief at 20 n.9), the clear trend among district courts is to follow the Veterans’ position on “actual damages.” In fact, a few days before the Veterans filed their principal brief, the United States District Court for the District of Columbia issued a decision that squarely supports the Veterans’ claims for actual damages based on their “non-pecuniary” physical and mental injuries. *See Am. Fed’n of Gov’t Employees v. Hawley*, 543 F. Supp. 2d 44 (D.D.C. 2008). In that decision, the district court held that “actual damages” under the Privacy Act include “general compensatory damages, such as pain and suffering and non-pecuniary losses.” *Id.* at 53. Defendants do not cite *Hawley* in their brief, despite citing to several other decisions from the District Court for the District of Columbia that they ask this Court to follow. Appellees’ Brief at 17 n.7.

Because the *Hawley* case involved basic facts similar to those in the present case (although the agency’s Privacy Act violations there were much less egregious and pervasive than Defendants’ here), the Veterans submit that the case is particularly instructive and that it illustrates how courts handle Privacy Act cases today. In *Hawley*, the Transportation Security Administration (“TSA”)

“discovered that a hard drive was ‘missing from a controlled area at the TSA Headquarters Office of Human Capital.’” 543 F. Supp. 2d at 45. The hard drive contained personal information on approximately 100,000 individual TSA employees, including their names and social security numbers. *Id.* The *very next day* after the hard drive was discovered missing, the Administrator of TSA informed employees of the incident and stated that they would be provided credit monitoring services. *Id.*<sup>4</sup>

In response to the incident, four TSA employees filed suit under the Privacy Act seeking actual damages. *Id.* at 46. The employees did not assert any out-of-pocket expenses or pecuniary harm, and TSA moved to dismiss on that basis. *Id.* at 53. The district court denied the motion, and held that “actual damages” includes “general compensatory damages, such as pain and suffering and non-pecuniary losses.” *Id.* (quoting *Montemayor v. Fed. Bureau of Prisons*, 2005 WL 3274508, at \*5 (D.D.C. Aug. 25, 2005)).<sup>5</sup> This approach, the court noted, was “the

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<sup>4</sup> Contrast the present case, where Defendants stonewalled and waited nearly two months to inform the Veterans of the loss of their personal information and a month and a half more to provide them credit monitoring. (R.40, Ex.1 at ¶9, Ex.2 at ¶8; R.33-5, Attach. C.) This delay is one source of the Veterans’ injuries. (R. 40, Ex.1, at ¶¶12, 13, Ex.2 at ¶¶9,10,11.)

<sup>5</sup> After the district court made this ruling in *Hawley*, that case was referred to mediation before a magistrate judge. *See* Order Referring Action to United States Magistrate Judge John M. Facciola for the Purpose of Mediation, Case No. 07-00855-HHK, Doc. 11 (May 7, 2008) (referring case to mediation to conclude on or about August 20, 2008).

recent trend at the district court level.” *Id.*<sup>6</sup> The Veterans submit that this approach should apply here as well. *See* Appellants’ Principal Brief at 27-33, 36-42.<sup>7</sup>

## **II. The Veterans’ Injuries are Demonstrated and Undisputed**

The damages incurred by the Veterans here are concrete, have been diagnosed by a medical doctor, and would pass the test set forth in *Fitzpatrick*. Defendants disagree and argue that the Veterans’ injuries are indistinguishable from those of the plaintiff in *Fitzpatrick*. Appellees’ Brief at 15-16. That is patently incorrect. The Veterans submitted undisputed evidence of a specific diagnosed medical disorder that was aggravated by Defendants’ actions and which caused them, among other things, to suffer physical symptoms and resort to additional medications. (R.40, Ex. 1 at ¶¶4, 13, Ex. 2 at ¶¶4, 11.)<sup>8</sup> These facts go

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<sup>6</sup> Similar recent holdings from other districts include *Papse v. Bureau of Indian Affairs*, 2007 WL 1189369, at \*2 (D. Idaho Apr. 20, 2007) (“The Court . . . concludes that the term ‘actual damages’ in the Privacy Act includes damages for emotional distress.”).

<sup>7</sup> Defendants are wrong that the Veterans have waived the argument, based on the Fourth Circuit’s holding in *Doe VI* and language in *Fitzpatrick*, that costs and attorney fees are an additional element of recovery that can be awarded even in the absence of actual damages. Appellees’ Brief at 13-14 n.4. The Veterans expressly raised that argument in their principal brief, and it is an additional reason the district court erred in dismissing the Veterans’ Privacy Act claims. *See* Appellants’ Principal Brief at 26 & n.15. Clearly, Defendants are aware of the Veterans’ argument in this regard, as they provided an extensive counter argument. Appellees’ Brief at 13-14 n.4.

<sup>8</sup> “R.#” refers to numbered entries in the district court docket sheet.

well beyond the evidence in *Fitzpatrick*,<sup>9</sup> and they are the hallmarks of compensable “demonstrated” mental injury. *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.”). *See also Fitzpatrick*, 665 F.3d at 331 (explaining that “secondary consequences” of “loss of reputation, chilling of constitutional rights, or mental suffering” can be awarded as actual damages under the Privacy Act).<sup>10</sup> The Veterans’ testimony on these facts is more than enough

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<sup>9</sup> For this reason, a panel of this Court can reverse the dismissal of the Veterans’ Privacy Act claims without running afoul of the prior panel rule. *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 that 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.”). In order to provide this Court with a more complete understanding of the limited facts that were presented to the panel in *Fitzpatrick*, counsel for the Veterans requested a copy of the court file for that appeal prior to filing their principal brief. After much ado, the National Archives and Records Administration (“NARA”) (which maintains this Court’s older files) has advised counsel for the Veterans that the court file for the *Fitzpatrick* case is missing and cannot be located. A copy of the letter from NARA is attached as an appendix to this brief.

<sup>10</sup> Even Defendants concede that the Veterans’ sleeplessness is properly characterized as a physical condition. Appellees’ Brief at 15-16. The Veterans argued, and Defendants do not directly dispute, that this sleeplessness is properly

evidence to survive a motion for summary judgment on the issue of “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 “Plaintiff’s 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 Defendants made no attempt whatsoever to dispute the Veterans’ injuries before the district court. Nevertheless, they now mischaracterize and belittle those injuries in an apparent attempt to convince this Court to affirm on a factual basis not considered by the district court or supported by the record. Defendants’ efforts in this regard fail completely.

For example, Defendants speculate that “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.” Appellees’ Brief at 16 n.6 (emphasis omitted). This assertion is premature, uninformed, and just plain wrong. First of all, at the District Court, Defendants offered no evidence to dispute the Veterans’ injuries, nor have they conducted any discovery into the

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viewed as a “secondary consequence” that would fall within the language of *Fitzpatrick*. Appellants’ Principal Brief at 30.

severity, persistence, or frequency of the injuries.<sup>11</sup> Defendants had ample opportunity to seek and offer evidence regarding the Veterans’ injuries, but chose not to do so. Defendants could have sought additional details regarding the Veterans’ injuries through discovery, but they sought and obtained a stay of discovery in order to pursue their summary judgment motion. (R.35.) Further, Defendants diagnosed and treat the Veterans for their Post Traumatic Stress Disorder and so have direct access to the Veterans’ medical records. Presumably, if those records contradicted the Veterans’ testimony, Defendants would have said so during summary judgment proceedings.

In any case, this argument is a red herring—even if the Veterans only prove “some” actual injury, they are entitled to the statutory guarantee of \$1,000, costs, and attorney fees. 5 U.S.C. § 552a(g)(4); *Doe IV*, 540 U.S. at 627 (holding only that plaintiff must have “suffered *some* actual damages” to recover statutory minimum) (emphasis added); *Kehoe*, 421 F.3d at 1214 (explaining that “the

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<sup>11</sup> Defendants rely on *Dong v. Smithsonian Inst.*, 943 F. Supp. 69 (D.D.C. 1996), to argue that the Veterans’ sleeplessness would not warrant any damages award even if mental injuries were cognizable. Appellees’ Brief at 16 n.6. That distorts the holding in *Dong*. In that case, the district court found that “[the plaintiff’s] condition has not been severe enough to require either medical or psychiatric care” and held that “[a]lthough the necessity of medical treatment is certainly not a requirement of establishing emotional distress, it is an indication of the existence and severity of the distress.” *Dong*, 943 F. Supp. at 74. In the present case, it is undisputed that the Veterans’ injuries have required medical treatment, including additional prescribed medications. (R.40, Ex.1 at ¶13, Ex. 2 at ¶11.) *Dong* provides no support for the Defendants’ arguments in this case.

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”) (emphasis added). *See also Papse*, 2007 WL 1189369, at \*3 (“[E]ven a slight amount of [emotional] distress—worth, say, only a few dollars—would entitle the victim to the \$1,000 minimum award under the Privacy Act.”). Moreover, in other contexts, this Court has affirmed and found reasonable monetary awards well in excess of \$1,000 for instances of emotional injury similar in nature and arguably less severe than those already proven by the Veterans.<sup>12</sup> *See, e.g., Bogle v. McClure*, 332 F.3d 1347, 1359 (11th Cir. 2003) (upholding compensatory damages award of \$500,000 per plaintiff for “emotional harm” where the evidence of injury was the plaintiffs’ testimony that they felt “upset,” “embarrassed,” humiliated,” and “ashamed,” but where there was “no independent medical evidence of mental or physical harm”). In any case, it is premature for this Court to expound on *the amount* of recovery the

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<sup>12</sup> Defendants say that the Veterans do not claim any “quantifiable loss.” Appellees’ Brief at 15 n.5. That is not true. The monetary value of the Veterans’ mental and physical injuries, while perhaps “difficult to calculate,” is nonetheless quantifiable by a court or other fact-finder. *See Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000). *See also Bogle v. McClure*, 332 F.3d 1347, 1359 (11th Cir. 2003). Further, while the Veterans have not submitted evidence spelling out the exact dollars and cents of any out-of-pocket losses, as Defendants would require, the Veterans’ injuries do have pecuniary aspects. (R.40 Ex.1 at ¶12) (Mr. Perkins’ declaration noting “expenses” he incurs in monitoring his credit and financial accounts); (Ex.2 at ¶11) (Mr. Qualls’ declaration stating that “having to monitor my credit and financial accounts for an indefinite period of time because VA cannot account for my information” is one of the stressors aggravating his PTSD symptoms).

Veterans should receive; the only issue here is whether they have stated a claim for a Privacy Act violation based on a proper interpretation of the statutory phrase “actual damages.”

### **III. Congress Has Expressly Waived Sovereign Immunity for the Veterans’ Actual Damages**

Defendants’ only real substantive argument for a restrictive reading of the phrase “actual damages” is the general canon of statutory construction that “ambiguities” in the statutory text of a waiver of sovereign immunity should be construed “in favor of immunity,” *i.e.*, “narrowly.” Appellees’ Brief at 17-18. This argument, though an accurate statement of the law generally, has no application here.

This is because there is no ambiguity in the waiver of sovereign immunity for “actual damages” in the Privacy Act. The language on its face—based on the words’ ordinary and plain meaning—includes general compensatory damages like the physical and mental injuries suffered by the Veterans here. This Court has expressly so held subsequent to *Fitzpatrick*. *See Banai*, 102 F.3d at 1207 (holding that “anger, embarrassment, and emotional distress are clearly compensable injuries” under the plain meaning of the phrase “actual damages,” which is also used in the Fair Housing Act). Defendants do not discuss or distinguish this Court’s holding in *Banai* or its other holdings post-*Fitzgerald* that the Veterans cite

in support of an inclusive reading of “actual damages.”<sup>13</sup> Because the scope of the phrase “actual damages” is clear on its face, there is no need to resolve any ambiguities in favor of immunity. *See United States v. Puerto Rico*, 287 F.3d 212, 217 (1st Cir. 2002) (“[C]ongressional intent remains the key determinant of the scope of a waiver of federal sovereign immunity....Plain meaning controls *except* when the statutory text is ambiguous.”) (emphasis added). *See also 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; emphasis added).

The *correct* canon of statutory construction to apply in the present case is the complement to the canon that Defendants put forward—namely, that “courts cannot ‘assume the authority *to narrow* the waiver that Congress intended.’” *McMellon v. United States*, 387 F.3d 329, 340 (4th Cir. 2004) (quoting *Smith v. United States*, 507 U.S. 197, 203 (1993)) (emphasis added). *See also United States v. Kubrick*, 444 U.S. 111, 117-118 (1979) (“We should also have in mind that the Act waives the immunity of the United States and that...we should not take it upon

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<sup>13</sup> *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).

ourselves to extend the waiver beyond that which Congress intended. *Neither, however, should we assume the authority to narrow the waiver that Congress intended.*”) (emphasis added; citations omitted). Here, Congress placed no limitations on the types of “actual damages” that could be recovered under the Privacy Act—Congress did not say that only “out-of-pocket losses” or “pecuniary damages” could be recovered, nor did it use any other similar limiting language. Thus, this Court should apply the plain meaning of the phrase, which this Court has held includes emotional distress.<sup>14</sup> *See Banai*, 102 F.3d at 1207.<sup>15</sup>

Finally, a holding that Congress intended to waive sovereign immunity for the types of injuries resulting from the Birmingham data breach is consistent with subsequent congressional action appropriating \$15.1 million specifically for remediating the damage caused by the breach. Pub. L. No. 110-28, Title V, Chap. 7, 121 Stat. 112, 169 (May 25, 2007); S. Rep. 110-85, at 59 (2007) (explaining that the \$15.1 million appropriation in Pub. L. No. 110-28 is for “remediation / prevention actions related to the [VA’s] latest data breach”). According to

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<sup>14</sup> Even if the text of the statute were not clear, Defendants do not dispute the Veterans’ reading of the Privacy Act’s legislative history as indicating that the phrase “actual damages” was used by Congress to distinguish from “punitive damages,” not to limit recovery to only pecuniary losses. Appellants’ Principal Brief at 41-42 n.34. That reading is consistent with this Court’s use of the phrase “actual damages.” *See Sheely*, 505 F.3d at 1203.

<sup>15</sup> That is the threshold flaw in the logic of *Fitzpatrick*—that the phrase “‘actual damages’ has no ‘plain meaning.’” 665 F.2d at 329. Clearly, this Court now thinks otherwise. *See Banai*, 102 F.3d at 1207; *Sheely*, 505 F.3d at 1203 n.30.

Defendant Howard, this special appropriation was provided by Congress several months after the Birmingham breach (and set aside along with approximately \$5 million in other VA funds for a total of \$20 million) “because the [Birmingham] breach potentially puts the identities of nearly a million physicians and VA patients at risk.” *VA sets aside \$20 million to handle latest data breach*, Daniel Pulliam, Government Executive.com, (June 14, 2007), available at [www.govexec.com/story\\_page.cfm?articleid=37191&dcn=todaysnews](http://www.govexec.com/story_page.cfm?articleid=37191&dcn=todaysnews). While the Veterans do not contend that this special appropriation amends the text of the Privacy Act (or that an amendment is necessary to their reading of the statute), Congress’ recent action comports with the plain language of the statute and indicates that the types of non-pecuniary injuries sustained as a result of the Birmingham incident are indeed the types of injuries for which sovereign immunity has been waived. *See Gulf Fishermen’s Assoc. v. Gutierrez*, No. 07-12903, 2008 WL 2388258, at \*2 (11th Cir. June 13, 2008) (“Although we need not rely on legislative history because we find the language of [the statute] to be plain and unambiguous[,] we note that the congressional committee reports demonstrate that ‘Congress said what it meant and meant what it said.’”) (quoting *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc)).

#### **IV. Defendants Abandon the District Court’s Rationale for Dismissing the Veterans’ APA Claims**

The District Court dismissed the Veterans’ claims for declaratory and injunctive relief under the APA because it found as a factual matter 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.) This was clear error, given that there is absolutely no evidence in the record to support such a finding, and neither are these facts germane to an APA claim. *See* Appellants’ Principal Brief at 52-56. Defendants obviously recognize this error and do not advance the District Court’s rationale.

Instead, Defendants seek affirmance on alternative grounds. They now argue that the Veterans have “failed to identify the precise nature of supposed violations or identify discrete actions that might fall within the scope of judicial review.” Appellees’ Brief at 28. This is plainly wrong. The Veterans have identified numerous identifiable affirmative final agency actions by Defendants that they seek to have held unlawful under 5 U.S.C. § 706(2) and additional agency actions that Defendants have unlawfully withheld and which the Veterans seek to compel under 5 U.S.C. § 706(1). *See* Appellants’ Principal Brief at 46-52.

A prime example from the first category (affirmative actions that should be declared unlawful) is Defendants’ purchase of fifteen external hard drives without

ensuring that the purchase was covered by a Privacy Impact Assessment (“PIA”). (R.21 at ¶87; Appellants’ Principal Brief at 50-51.)<sup>16</sup> Defendants admit that these external hard drives were purchased and that one of them was assigned to John Doe and contained the Veterans’ personal information. *See* Appellees’ Brief at 5-6. Further, Defendants do not dispute that they were required by section 208(b)(1) of the E-Government Act, 44 U.S.C. § 3501 note, to prepare a PIA prior to the purchase, nor do they dispute that they violated that requirement. Defendants’ only argument for avoiding review of this action is that “[t]he E-Government Act, § 208(b), contains a broad mandate to conduct Privacy Impact Assessments to ensure ‘sufficient’ protections for the privacy of personal information.” Appellees’ Brief at 25. But the Veterans do not now seek review of *the contents* of a PIA or *the sufficiency* of the protections that a proper PIA would require. Instead, the Veterans seek to have declared unlawful the purchase of the fifteen external hard drives that were procured without *any* PIA being developed at all—an affirmative and discrete agency action that was in clear violation of a non-discretionary

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<sup>16</sup> By highlighting this example and the one that follows, the Veterans do not suggest that they have not also properly challenged other actions and inactions by Defendants under the APA. The Veterans’ Principal Brief and their filings in the District Court clearly articulate other final agency actions that are properly reviewed under the APA, and the Veterans intend to pursue all of their claims under the APA upon remand.

statutory mandate.<sup>17</sup> See 44 U.S.C. § 3501 note, § 208(b) (“An agency shall take actions described under subparagraph (B) before . . . procuring information technology that collects, maintains, or disseminates information . . . (B) . . . each agency shall (i) conduct a privacy impact assessment. . . .”) (emphasis added).

Moreover, this APA claim for failure to prepare a PIA for external hard drives is not just about holding Defendants accountable for past mistakes, but also about ensuring that future breaches involving the Veterans’ information do not

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<sup>17</sup> The purchase of the external hard drives is also a violation of section (e)(10) of the Privacy Act, 5 U.S.C. § 552a(e)(10) (another one of the Veterans’ APA claims) because the drives did not contain mandated encryption software. Defendants say that section (e)(10) gives them broad discretion to select among “appropriate safeguards” to protect Privacy Act information. Appellees’ Brief at 24. Regardless of whether that is true generally, in this case, Defendants had in place rules at the time of the Birmingham incident that required external hard drives to be encrypted with software that met federal encryption standards. One rule required encryption if the drive was used in a mobile environment. See VA Directive 6504 (June 7, 2006), (R.16, Ex.16.) It is undisputed here that John Doe’s external hard drive was used in a mobile environment and thus required encryption. See (R.16, Ex.12 at 12) (testimony by VA Deputy Secretary Mansfield, in response to questions from Representative Spencer Bachus, that John Doe downloaded information onto the external hard drive “and then took the hard drive off premises” in violation of VA Directive 6504), *available at* 2007 WLNR 4054292 (Feb. 28, 2007). See also (R.33-3 at 8) (documenting John Doe’s removal of the external hard drive from VA facilities in December 2006, just weeks before it was reported missing). Moreover, in addition to VA Directive 6504, other VA rules required encryption regardless of whether the drive was used offsite. See (R.33-3 at 16) (describing additional VA rule that “prohibits employees from storing sensitive data on portable devices without encrypting them” and stating that VA officials “did not request encryption software when the drives were purchased” because “VA had not approved any encryption software for external drives”). Defendants’ attempt to suggest that encryption was not required, *see* Appellees’ Brief at 6 n.2, contradicts the undisputed evidence in this case, including their own congressional testimony.

reoccur. Independent federal auditors have determined that the Veterans' personal information remains at risk.<sup>18</sup> Defendants have provided no evidence that hard drives like the ones at issue here have been banned from its Birmingham facility or that encryption software has been installed. If Defendants are compelled to prepare a PIA for these hard drives and other hard drives to be procured for the Birmingham facility, they would be required to address "how the information will be secured" and "with whom the information will be shared."<sup>19</sup> 44 U.S.C. § 3501, note § 208(b)(2)(B). The Veterans thus have a concrete interest in the preparation of a PIA, and their claim for failure to prepare one is cognizable under the APA. *See Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1171 (11th Cir. 2006) (holding that plaintiffs had a "cognizable procedural injury" in federal agency's failure to prepare Environmental Impact Statement such that their APA claim could proceed).

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<sup>18</sup> *See* GAO-07-1019, *Sustained Management Commitment and Oversight Are Vital to Resolving Long-standing Weaknesses at the Department of Veterans Affairs*, at 11 (Sept. 2007) (finding that VA has failed to implement long-standing information security recommendations and thus "VA has limited assurance that it has the proper safeguards in place to adequately protect its sensitive information from inadvertent or deliberate misuse, loss, or improper disclosure.").

<sup>19</sup> Thus, the Veterans do not concede that they are not also entitled to judicial review of the contents and sufficiency of a PIA. Section 208 contains mandatory requirements for the contents of a PIA. *See* 44 U.S.C. § 3501 note, § 208(b)(2). But that issue need not be addressed at this juncture, since Defendants have not even prepared one.

A prime example from the second category of the Veterans' APA claims (agency actions that Defendants have unlawfully withheld and which should be compelled) is Defendants' failure to conduct an independent risk analysis of the Birmingham data breach and thereafter to provide the Veterans with the credit protection services called for by the analysis. (R.21 at ¶¶F; R.14 at ¶3; Appellants' Principal Brief at 52.) Again, Defendants do not assert that they have conducted such an independent risk analysis, nor do they dispute that they were required by statute to do so. In fact, they do not address this claim by the Veterans at all. The plain truth is that Congress specifically enacted the Veterans Benefits, Health Care, and Information Technology Act ("VBHITA"), in 2006 for the benefit of individuals like the Veterans and specifically and unequivocally required Defendants to prepare an independent risk analysis in the event of a data breach like the one in Birmingham. *See* 38 U.S.C. § 5724(a)(1) ("In the event of a data breach with respect to sensitive personal information that is processed or maintained by the Secretary, the Secretary shall ensure that, as soon as possible after the data breach, a non-Department entity or the Office of Inspector General of the Department conducts an independent risk analysis of the data breach to determine the level of risk associated with the data breach for the potential misuse of any sensitive personal information involved in the data breach.") (emphasis added). The Veterans should thus be allowed to proceed with their APA claims.

Defendants, like the District Court, simply have failed to address the meat of the Veterans' APA claims. Instead, they paint with a broad brush and characterize the claims as seeking "wholesale programmatic relief" and "wholesale improvement of [the VA] by court decree, rather than in the office of the Department or the halls of Congress." Appellees' Brief at 26 n.16, 27.<sup>20</sup> As the two examples above illustrate, that characterization is way off the mark. The preparation of one PIA to cover the purchase of external hard drives at one VA facility does not implicate the VA's entire information technology program, and neither does the preparation of one risk analysis. Both (and other actions challenged by the Veterans) are exactly the types of discrete and mandatory agency actions that are properly reviewed under the APA. *See SUWA*, 542 U.S. at 64

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<sup>20</sup> On this point, Defendants rely heavily on *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) ("*SUWA*"). But that case is inapposite here. In *SUWA*, the plaintiff sought review under the APA of the Bureau of Land Management's ("BLM") alleged failure to "manage [certain] lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness" and to comply with other similarly broad directives. 542 U.S. at 59 (quoting 43 U.S.C. § 1782(c)). The Supreme Court held that these "broad statutory mandate[s]" could not be enforced under the APA because they necessarily involve the exercise of considerable agency "lawful discretion" and "abstract policy." *Id.* at 66. Not so in the present case. The Veterans seek to enforce discrete, mandatory requirements that Defendants have no lawful means of avoiding. In fact, in *SUWA*, the Supreme Court contrasted the situation in *Safeway Stores, Inc. v. Brown*, 138 F.2d 278 (Emerg. Ct. App. 1943), in which the court correctly held that the "failure to issue a ruling" on a matter was itself an agency action and that a court could issue an order "directing the [agency] to take action." *Id.* at 66; *Safeway Stores*, 138 F.2d at 280. The Veterans' APA claims, including their challenge to Defendants' failure to conduct an independent risk analysis, are in this same vein.

("[A] claim under § 706(1) can proceed [] where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." (emphasis in original). See also *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm.").

Moreover, these discrete requirements imposed on Defendants *have been* spelled out "in the halls of Congress," to use Defendants' words. Defendants have one of the worst records in meeting these types of information security requirements of any federal agency,<sup>21</sup> and they will not act voluntarily to meet them, as was clearly shown in the present case and revealed in audits conducted after the Birmingham incident. See GAO-07-1019, *Sustained Management Commitment and Oversight Are Vital to Resolving Long-standing Weaknesses at the Department of Veterans Affairs*, at 11 (Sept. 2007) (finding that VA has failed to implement long-standing information security recommendations and thus "VA has limited assurance that it has the proper safeguards in place to adequately protect its sensitive information from inadvertent or deliberate misuse, loss, or improper disclosure."). Congress has singled out Defendants for their recalcitrance

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<sup>21</sup> See, e.g., Office of Management and Budget, *Fiscal Year 2007 Report to Congress on Implementation of the Federal Information Security Management Act of 2002*, at 8-9 (documenting VA's "poor" performance on information security as compared to other agencies and departments), available at [www.whitehouse.gov/omb/inforeg/reports/2007\\_fisma\\_report.pdf](http://www.whitehouse.gov/omb/inforeg/reports/2007_fisma_report.pdf).

and mandated that VA provide specific remedies for victims of its security violations like the Veterans. *See, e.g.*, 38 U.S.C. § 5724(a)(1). The Veterans are not asking the courts to rewrite the rules or mandate sweeping reform—only to enforce the specific, mandatory requirements already imposed by Congress for their benefit and the benefit of the nearly 200,000 veterans impacted by this incident. *See Ouachita Watch League*, 463 F.3d at 1173 (“The court, if it concludes that the [agency] has failed to follow [statutory requirements], has the power to order the agency to comply.”). Without judicial enforcement, those statutory requirements are just words on paper and empty promises.

### **CONCLUSION**

For these reasons and those stated in the Veterans’ principal brief, the District Court’s judgment should be reversed and this case remanded for further proceedings.

**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 reply brief contains 6,282 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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Counsel for Plaintiffs-Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of June 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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# APPENDIX



# National Archives and Records Administration

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April 23, 2008

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Dear Ms. Borden:

After a thorough search, we were unable to locate the United States Court of Appeals case file that you recently requested.

According to our records, case number 80-9070, *Fitzpatrick versus I.R.S.*, is supposed to be located in box number 17 of accession number 276-83-0003.

The box is in our custody, but the folder is not in it. We will continue to search for it and will notify you if we find it.

Sincerely,

Guy Hall  
Archivist

