

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FEDERAL AVIATION ADMINISTRATION, :

4 ET AL., :

5 Petitioners : No. 10-1024

6 v. :

7 STANMORE CAWTHON COOPER. :

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9 Washington, D.C.

10 Wednesday, November 30, 2011

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:07 a.m.

15 APPEARANCES:

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18 Petitioners.

19 RAYMOND A. CARDOZO, ESQ., San Francisco, California; for

20 Respondent.

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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 10-1024, Federal Aviation Administration v.
5 Cooper.

6 Mr. Feigin.

7 ORAL ARGUMENT OF ERIC J. FEIGIN

8 ON BEHALF OF THE PETITIONERS

9 MR. FEIGIN: Mr. Chief Justice, and may it
10 please the Court:

11 If Congress had intended to waive the
12 sovereign immunity of the United States to allow
13 uncapped emotional distress claims under the Privacy
14 Act, it would have and was required to state that waiver
15 clearly and unambiguously in the statutory text.

16 The substantive requirements of the Act
17 sweep far beyond any pre-existing common law protection
18 of privacy to impose a detailed set of new and pervasive
19 requirements on the collection, maintenance, use, and
20 dissemination of millions of Federal agency records.
21 The Act, for example, forbids agencies from keeping too
22 much information about an individual; compels agencies
23 to collect information about an individual, when
24 practicable, from the individual himself and not from
25 other sources; and can require agencies to safeguard

1 information about an individual even when that
2 information is otherwise already publicly available.

3 Congress would not have taken lightly the
4 question of whether to expose the United States to
5 expansive damages for intentional or willful violations
6 of these novel recordkeeping requirements. Indeed, the
7 way in which the district court believed that the Social
8 Security Administration violated the Privacy Act in this
9 case is something that never would have been actionable
10 at common law and never would have resulted in emotional
11 distress recovery.

12 JUSTICE GINSBURG: Then maybe Congress
13 shouldn't have passed this statute. But the injury, the
14 invasion of privacy, that's not something where
15 pecuniary damages are -- are prime if they exist at all.
16 I mean, this is -- the -- the tort that this is
17 comparable to is intentional infliction of emotional
18 distress. The -- the person who is subject to this, to
19 this embarrassment, this humiliation, doesn't have
20 out-of-pocket costs but is terribly distressed, nervous,
21 anxious, and all the rest.

22 The -- the act that the Congress is
23 reaching, the impact of it is of that nature, not -- I
24 mean, pecuniary damages do not ordinarily attend conduct
25 that embarrasses, humiliates you, causes mental

1 distress.

2 MR. FEIGIN: Well, first of all, Justice
3 Ginsburg, I'd like to respectfully disagree with the
4 premise of the question that the Privacy Act is
5 comparable to common law invasion of privacy. All the
6 requirements I just described that are under the Privacy
7 Act would not have existed at common law invasion of
8 privacy even though common law invasion of privacy was,
9 as you say, compensable with emotional distress awards.
10 In fact, even if we focus just on the disclosure-related
11 provision of the Privacy Act, it itself is much broader
12 than common law invasion of privacy.

13 JUSTICE GINSBURG: Even if it is -- even if
14 it is, the damages are -- the damages are not of a
15 pecuniary kind. So, you could say that Congress was
16 much more generous than the common law was, but the
17 impact on the person who is suing is not going to be
18 out-of-pocket business loss, pecuniary loss; it's going
19 to be the embarrassment, the humiliation. So, it's --
20 it's -- if Congress wanted to do something about the
21 impact on the person it has given a right, it's not
22 going to do something that has to do with pecuniary
23 damages which it's not likely the person in -- in this
24 plaintiff's situation is not likely to suffer.

25 MR. FEIGIN: Well, first of all, Your Honor,

1 there sometimes are, as there were at common law,
2 pecuniary damages resulting from either violations of
3 the Privacy Act or invasions of privacy; and the
4 government sometimes pays out very large pecuniary
5 judgments.

6 But to get to the core of your question
7 about why Congress might not in the Privacy Act have
8 provided an emotional distress award, I think the text
9 of the Act demonstrates that Congress thought about the
10 possibility of providing an emotional distress award,
11 but decided not to do that in the initial version of the
12 Act that it passed in 1974. Instead, that version of
13 the Act in section 5(c)(2)(B)(iii) assigned to the
14 Privacy Protection Study Commission the task of making a
15 recommendation as to whether the Act should later be
16 expanded to provide for general damages.

17 The commission understood its mission to
18 determine -- was to determine whether the Act ought to
19 be expanded to provide for dignitary and reputational
20 harms, such as compensation for emotional distress. And
21 the Privacy Commission further understood that the Act
22 as it had been enacted provided only for actual damages,
23 which it interpreted as synonymous with special damages.

24 JUSTICE GINSBURG: But that's the -- why --
25 is -- is a harm to a dignitary interest, is that an

1 actual injury?

2 MR. FEIGIN: Well, Your Honor, I --

3 JUSTICE GINSBURG: You describe that
4 injury -- I mean, it is an injury, the emotional
5 distress, the humiliation. Is that an actual injury?

6 MR. FEIGIN: Your Honor, the term "actual
7 injury" and the term "actual damages" -- those are
8 ambiguous terms. Sometimes they might include emotional
9 distress, and sometimes they might not. And --

10 JUSTICE GINSBURG: Well, let's take this
11 case. Did the plaintiff suffer an actual injury?

12 MR. FEIGIN: He did not --

13 JUSTICE GINSBURG: At least, did he allege
14 that he had suffered an actual injury?

15 MR. FEIGIN: He did not suffer actual
16 damages within the meaning of the Privacy Act.

17 JUSTICE GINSBURG: I didn't -- I didn't ask
18 you that. I asked you, did he suffer an actual injury,
19 as opposed to someone who is complaining about
20 something -- an abstract right or an abstract theory?
21 Is there an actual injury here?

22 MR. FEIGIN: Well, Your Honor, I think my
23 difficulty with the question is that I don't think the
24 term "actual injury" has some plain meaning out of
25 context. And the term that the Privacy Act uses is

1 "actual damages." I think in the context of the Privacy
2 Act, as well as in other contexts --

3 JUSTICE GINSBURG: Well, you have to have an
4 injury first before you can get damages. So, my
5 question is, was there an injury?

6 MR. FEIGIN: Well, if Your Honor's question
7 is whether he suffered an adverse effect within the
8 meaning of --

9 JUSTICE GINSBURG: Yes.

10 MR. FEIGIN: -- section (g)(1)(D) of the
11 Act, yes, we believe he did suffer an adverse effect
12 sufficient to confer standing. But this Court in Doe
13 described the adverse effect requirement as simply
14 codifying the Article III standing requirements and made
15 very clear that simply because a plaintiff may have
16 suffered an adverse effect, that doesn't mean that the
17 plaintiff suffered actual damages. But,
18 Justice Ginsburg --

19 JUSTICE SOTOMAYOR: I'm a little bit
20 confused by that because in your brief, the Solicitor
21 General's brief in Doe, it described the earlier version
22 of general damages in the following way -- and I'm
23 quoting from your brief there: "The general damages
24 provision in the Senate bill likely derived from the
25 common law of tort of invasion of privacy where general

1 damages may be awarded as" -- quote -- "'presumed
2 damages,' without proof of harm."

3 So, I think there in Doe you argued that
4 general damages presumed injury. But that's very
5 different than, I think, the question Justice Ginsburg
6 was asking you. It's -- and I read your brief and your
7 arguments as sort of an -- an assumption that if you
8 suffer nonpecuniary harm, you haven't been injured.

9 MR. FEIGIN: Well, Your Honor --

10 JUSTICE SOTOMAYOR: There's a big difference
11 between presumed damages and proven injury. In Gertz,
12 we reference the common law tort as requiring actual
13 proof of injury for emotional distress. Most State laws
14 say you have to prove the emotional distress. We're not
15 presuming the injury. So, I guess what I'm saying to
16 you, aren't you the one confusing what injury is from
17 presumed damage?

18 MR. FEIGIN: I hope not, Your Honor. But
19 the -- the -- I think to get at your question, what we
20 said in the Doe brief is that general damages are a type
21 of presumed damages, and that's correct under the common
22 law, but that isn't all that general damages
23 encompasses. General damages, as the Court recognized
24 in Doe, are always presumed in the sense that they're
25 always assumed -- this is the common law definition of

1 general damages -- are always presumed in the sense
 2 they're always assumed to have taken place and an award
 3 of general damages can be made even without specific
 4 proof of harm. But in cases where a -- at common law,
 5 in cases where a plaintiff did introduce evidence of the
 6 extent of, for example, the emotional distress that he
 7 had suffered -- so, if he wanted to say I'm not happy
 8 with the presumed damages that you would give to just
 9 anybody who had suffered this invasion of privacy, I
 10 have a particularly sterling reputation or I am
 11 particularly sensitive to this sort of thing, I suffered
 12 a -- an increased amount of harm from what you might
 13 presume the average person would suffer, the award that
 14 that person would receive is --

15 JUSTICE SOTOMAYOR: So, why is that
 16 different from actual injury? I have -- I'm not
 17 sleeping. I have a nervous stomach. I'm not eating.
 18 The typical things that juries look at to determine
 19 whether you've proven emotional distress --

20 MR. FEIGIN: Well, Your Honor --

21 JUSTICE SOTOMAYOR: Why is that not actual
 22 injury?

23 MR. FEIGIN: So, the award that person would
 24 receive for the additional proof of emotional distress
 25 would be classified as general damages. Now, to get to

1 your question of why that's not actual damages.
2 Sometimes the terms "actual damages" or "actual injury"
3 can be used to include proven emotional distress, but
4 the term was ambiguous. We cite cases in footnotes 1
5 and 2 of our reply brief in which the term "actual
6 damages" or "actual damage" is used to mean exclusively
7 pecuniary harm.

8 JUSTICE SOTOMAYOR: I've looked at those
9 cases, and in all of them except for two, where the
10 reference wasn't really precise, it was because the use
11 of "actual damages" in the particular statute were
12 limited to pecuniary harms or the nature of the harms at
13 issue were pecuniary by nature.

14 MR. FEIGIN: Well, Your Honor, most of those
15 cases are cases out of the common law, and sometimes
16 they use "actual damages" in the same sentence with a
17 reference to emotional harm, making clear that they
18 think that the two types of harms are separate.

19 But, Your Honor, maybe I can try to explain
20 it this way: I think actually Respondent implicitly
21 agrees with our definition of general damages as
22 including proven harm. If you look at footnote 2 on
23 page 20 of the red brief and then again at page 22 of
24 the red brief, the definition of "actual damages" that
25 Respondent is offering he divides into two

1 subcategories: special damages and general damages.
2 Everybody agrees that special damages are limited to
3 pecuniary harm.

4 And Respondent makes no claim, nor could he,
5 that the type of damages he's seeking are special
6 damages. So, to the extent he thinks that he's entitled
7 to recovery under the Act, it's because he thinks that
8 the emotional distress harm that he wants to prove are
9 general damages. And if there's one thing we know about
10 the definition of "actual damages" in the Act, it's that
11 it doesn't include general damages, because, again,
12 Congress separately in the text of the Privacy Act
13 assigned the Privacy Protection Study Commission to make
14 a recommendation about whether the Act should later be
15 expanded to include general damages.

16 JUSTICE GINSBURG: What does "actual
17 damages" mean under the Fair Credit Reporting Act?

18 MR. FEIGIN: Your Honor, we don't have a
19 position on that at this point. I can describe to you
20 how we think that the inquiry would work. We think that
21 in some statutes actual damages might in context include
22 emotional distress awards. But the term "actual
23 damages" by itself in a waiver of sovereign immunity is
24 not a clear and unambiguous waiver of the United States'
25 sovereign immunity for claims of emotional distress.

1 And as to statutes which do not allow claims
2 against the United States, it would be a question of
3 context and legislative history. And we'd have to do
4 the same kind of workup of the Fair Credit Reporting Act
5 that we've done of the Privacy Act in this case. One --

6 JUSTICE GINSBURG: But it can mean, and I
7 think it has been held to mean, damages to a dignitary
8 interest. Mental distress has been held to -- the term
9 has been held to mean that under the Fair Credit
10 Reporting Act.

11 MR. FEIGIN: Yes, Your Honor. Multiple
12 courts of appeals have held that, and we're not
13 questioning that conclusion for purposes of this case
14 with the caveat that we don't think the United States is
15 subject to suit under the Fair Credit Reporting Act.

16 If the United States were subject to suit
17 under the Fair Credit Reporting Act, then because
18 there's ambiguity about the meaning of "actual damages,"
19 we think that the narrower interpretation as limited to
20 pecuniary harm would control.

21 One other distinction between the Fair
22 Credit Reporting Act and the Privacy Act is, again, as
23 I've said, the Privacy Act specifically carves out
24 general damages as a type of damages that aren't going
25 to be awarded, and the Fair Credit Reporting Act does

1 not.

2 The Fair Credit Reporting Act also has a
3 much more permissive remedial scheme, allowing in
4 certain cases for statutory damages and also allowing
5 for punitive damages. I don't think the Fair Credit
6 Reporting Act, for the various reasons I've just
7 mentioned, is a particularly good analogue for the
8 Privacy Act.

9 JUSTICE KENNEDY: Under --

10 JUSTICE GINSBURG: Just to question what the
11 term means, what the term "actual damages" means.

12 MR. FEIGIN: Well, Your Honor, again, as
13 we've demonstrated in our briefs, I think -- again, I'd
14 refer the Court to footnotes 1 and 2 for how this term
15 was used at the common law -- the term "actual damages"
16 can mean both things.

17 So, the fact that in the Privacy Act it
18 does include -- it may include emotional distress awards
19 doesn't mean that that's the sense in which Congress
20 used it in the Privacy Act -- I'm sorry; I may have said
21 that wrong. The fact that in the context of the Fair
22 Credit Reporting Act it may include emotional distress
23 doesn't mean that that's the way in which Congress used
24 it in the Privacy Act. And I think --

25 JUSTICE KENNEDY: Are there -- are there

1 instances where, if there's an invasion of privacy and
2 there's a documented trauma from psychosomatic illness
3 with medical expenses and lost wages, is that special --
4 is that actual damage?

5 MR. FEIGIN: Yes, Your Honor. If there are
6 documented medical expenses that were out-of-pocket
7 expenses, then we think, even if they arise from
8 emotional distress, then they would be pecuniary harm
9 and could be compensated under the Privacy Act.

10 JUSTICE SOTOMAYOR: I'm sorry. Are you
11 arguing that the emotional distress component can't be?

12 MR. FEIGIN: The emotional distress
13 component itself cannot be, but medical expenses to
14 treat symptoms of emotional distress --

15 JUSTICE SOTOMAYOR: So, you're -- under --
16 as I understand the definition of "special damages" in
17 common law, if you proved any pecuniary harm, you were
18 also entitled to the mental distress damages as well.
19 So, you want half of the common law award -- award?

20 MR. FEIGIN: I don't think that's quite
21 correct about the definition of "special damages," Your
22 Honor. And I don't think there is any dispute on this.
23 "Special damages," the term in this context, is always
24 limited to pecuniary harm. Once --

25 JUSTICE SOTOMAYOR: We may have a difference

1 of -- of history there because, yes, special damages
2 required pecuniary harm, but once you prove that, it
3 also permitted recovery of nonpecuniary losses as well.

4 MR. FEIGIN: Well, Your Honor, in a common
5 law suit for defamation per quod --

6 JUSTICE SOTOMAYOR: But that's what your
7 brief said, actually.

8 MR. FEIGIN: Well, no, Your Honor. What we
9 said in our brief is, in a common lawsuit for defamation
10 per quod, there are two types of damages that could be
11 recovered: special damages and general damages. Unless
12 a -- special damages were limited to pecuniary harm.
13 Unless a plaintiff could prove at least some special
14 damages, they wouldn't be entitled to any recovery at
15 all. If a plaintiff could prove some special damages,
16 they could recover not only special damages -- in other
17 words, pecuniary harm -- but could also recover general
18 damages; that is, damages for emotional distress or
19 other dignitary --

20 JUSTICE SOTOMAYOR: We're not talking any
21 differently. That's what I just said. If you --

22 MR. FEIGIN: Yes, Your Honor. I think to
23 the extent I was perhaps disagreeing with you is I was
24 understanding you to say that the definition of "special
25 damages," the term, sometimes includes emotional

1 distress awards. The term "special damages" is limited
2 to pecuniary harm.

3 JUSTICE SOTOMAYOR: Sort of odd for Congress
4 to borrow from the defamation context and with a defined
5 term of art, "special damages," and not use it in the
6 Privacy Act if that's what it intended.

7 MR. FEIGIN: Well, Your Honor --

8 JUSTICE SOTOMAYOR: And to use a term,
9 "actual damages," which has a much broader meaning than
10 "special damages."

11 MR. FEIGIN: Well, Your Honor, as the Court
12 recognized in Doe, there's a structural similarity
13 between the civil remedies provision of the Privacy Act
14 and the remedial scheme for defamation per quod at
15 common law. And I think one reason there might be that
16 structural similarity is that defamation per quod at
17 common law solves the problem that Congress faced when
18 it was crafting the Privacy Act, which is trying to
19 figure out when a plaintiff's injuries are sufficiently
20 serious and concrete as to justify an award of damages.

21 I think it makes sense if, as the Court
22 supposed in Doe, Congress were aware of how defamation
23 per quod had solved that problem, that Congress would
24 have adopted the same limitation -- in other words, a
25 requirement of showing of pecuniary harm -- as the

1 threshold requirement under the Privacy Act.

2 Now, Congress had very good reason to be
3 cautious about extending the scope of liability under
4 the Privacy Act. As I've said, the Privacy Act
5 regulates a great deal of conduct that wouldn't have
6 been compensable at all in common law, let alone
7 resulted in any sort of emotional distress award.

8 Now, Congress recognized, I think, some of
9 the concerns that Justice Ginsburg and Justice Sotomayor
10 have raised about why plaintiffs might in some instances
11 deserve recovery for emotional distress. But it
12 recognized that there are arguments on both sides -- on
13 both sides on that issue. And what it decided to do in
14 the Privacy Act was to defer that issue for later and
15 assign the Privacy Protection Study Commission to make a
16 recommendation about whether the scope of liability that
17 the Act --

18 JUSTICE GINSBURG: Well, the -- the Privacy
19 Study Commission coming after can't say what the statute
20 means. I mean, that would be post-legislative history.
21 I mean, the statute exists, and then we have a Study
22 Commission to see what amendments might be made. But
23 the Study Commission can't decide what the -- what the
24 Act means.

25 MR. FEIGIN: Well, two points on that, Your

1 Honor: First of all, the reference of the general
2 damages issue to the Privacy Protection Study Commission
3 is in the text of the Act that Congress enacted in 1974.
4 So, the exclusion of general damages doesn't depend at
5 all on anything the Privacy Protection Study Commission
6 said.

7 As to the weight we think the Privacy
8 Protection Study Commission report should receive, first
9 of all we think it's very telling evidence that there is
10 at the very least ambiguity about what the term "actual
11 damages" could mean. The Privacy Protection Study
12 Commission interpreted the term "actual damages" in
13 precisely the same way that we do in our brief; that is,
14 as special damages, as that term was understood in
15 defamation torts at common law, which the Privacy
16 Protection Commission Study report makes very clear at
17 page 530 is limited to pecuniary harm.

18 I think, if for no other reason than that
19 that's a reasonable reading, I think the sort of
20 judicial restraint that is embodied in the canon that
21 requires courts to construe waivers of sovereign
22 immunity narrowly requires this Court to adopt that
23 narrower reading, because it shows that the narrower
24 reading is at the very least a reasonable one or, as the
25 Court said in *Nordic Village*, is a plausible one.

1 I think it would have been very unusual for
2 Congress silently or ambiguously to have decided to open
3 the door to emotional distress awards under the Privacy
4 Act. As I've said, the Privacy Act is quite a broad,
5 substantive act that would have exposed the government
6 to damages in -- in very new ways. And I think this
7 case illustrates -- illustrates that.

8 The district court here concluded that the
9 law enforcement-related disclosure of Respondent's
10 medical information by the Social Security
11 Administration was, in fact, authorized under the
12 Privacy Act by routine use published in the Federal
13 Register. But it concluded that Respondent could
14 nevertheless bring suit against the Federal Government
15 under the Privacy Act because the forms he filled out in
16 seeking Social Security disability benefits didn't
17 adequately disclose to him that his information might be
18 released to other government agencies for law
19 enforcement purposes.

20 I don't think there's any reason why
21 Congress would necessarily think that an omission on a
22 government form should give rise to a claim for
23 emotional distress damages. There certainly wouldn't
24 have been any analogue for it at common law.

25 JUSTICE GINSBURG: But that's just saying

1 that he didn't have a good claim for relief. But let's
2 take the worst case, where -- where a government
3 official spreads all kinds of false information or even
4 true but terribly embarrassing information about a
5 person, does it deliberately. Let's take that case,
6 because your rule covers all of them.

7 MR. FEIGIN: Well, in that case, Your Honor,
8 the plaintiff might have a claim under the Federal Tort
9 Claims Act based on a violation of some State law
10 statutory or common law privacy protection. So, the
11 category of cases that would have constituted invasion
12 of privacy prior to the Privacy Act might still be
13 available to a plaintiff, who might then recover
14 emotional distress damages against the government.

15 JUSTICE GINSBURG: But wasn't that the very
16 thing that Congress -- why did they pass this in the
17 first place? I mean, Congress was thinking of emotional
18 distress injuries.

19 MR. FEIGIN: Well, they passed it, Your
20 Honor, because they wanted, in the wake of Watergate, to
21 impose a set of detailed substantive requirements about
22 Federal recordkeeping. I think the -- you know, looking
23 through the Act, which takes up maybe 30 pages of the
24 petition appendix, it clearly isn't simply a
25 codification of common law invasion of privacy against

1 the Federal Government.

2 JUSTICE GINSBURG: But it's --

3 MR. FEIGIN: It does much, much more than
4 that.

5 Your Honor, even if we look just at the
6 disclosure-related provision, it's broader than common
7 law invasion of privacy in two very important ways. So,
8 for common law invasion of privacy, a plaintiff would
9 have to prove disclosure of very personal and private
10 information to the public at large. Under the Privacy
11 Act, however, a disclosure even to a single person would
12 constitute a violation of the Act, and the information
13 doesn't even have to be private.

14 Let me give a concrete example. So, if the
15 government has a record that contains information that
16 someone has a criminal conviction, it might be a
17 violation of the Privacy Act for the contents of that
18 record to be disclosed, even though someone could obtain
19 the same information by going to the court records or
20 potentially looking them up on the Internet.

21 And particularly since violations of Federal
22 law are typically -- typically, the only type of relief
23 a plaintiff can seek for violation of Federal law is
24 equitable relief under the Administrative Procedure Act.
25 I don't think there's any reason to assume that Congress

1 ambiguously or, I think, really silently decided that it
2 was going to ratchet things up to a serious degree and
3 expose the United States to uncapped emotional distress
4 damages under the Privacy Act.

5 JUSTICE GINSBURG: It did set a pretty high
6 bar for the plaintiff to meet, because the plaintiff
7 would have to prove intentional or willful conduct, not
8 negligence, but --

9 MR. FEIGIN: Well, three points on that,
10 Your Honor.

11 First of all, I think if Congress had
12 thought that the limitation to intentional or willful
13 conduct was itself a sufficient limitation on the
14 liability of the United States, it wouldn't have been so
15 reluctant to provide for general damages or perhaps even
16 for punitive damages.

17 Second, the courts of appeals now generally
18 interpret the intentional or willful requirement to
19 require only something slightly less than recklessness
20 or slightly more than gross negligence, which in
21 practice provides district courts and courts of appeals
22 with a great deal of flexibility to find intentional or
23 willful violations in cases where the Federal Government
24 doesn't believe it should be liable.

25 Third, to the extent the intentional or

1 willful requirement does impose a limitation on a
2 plaintiff's recovery, what actually winds up happening
3 in practice is that plaintiffs or courts will look to
4 all the various technical provisions of the Privacy Act
5 to try to find some violation that can be classified as
6 intentional or willful. So, for example, if a plaintiff
7 about whom information has been disclosed can't show the
8 disclosure is intentional or willful, he may try to
9 prove that a violation of the -- of (e)(10), which
10 requires the government to safeguard information, was
11 intentional or willful.

12 With the Court's permission, I'd like to
13 reserve the balance of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Cardozo.

16 ORAL ARGUMENT OF RAYMOND A. CARDOZO

17 ON BEHALF OF THE RESPONDENT

18 MR. CARDOZO: Mr. Chief Justice, and may it
19 please the Court:

20 Embracing the Government's view of "actual
21 damages" would mean that the very individuals Congress
22 sought to protect in this Act would have no remedy at
23 all for the primary form of harm that was well
24 recognized at common law when this Act was passed.

25 To carry out the Act's protective purposes,

1 this Court need only give the words "actual damages"
2 their common and ordinary meaning that appears in
3 Black's Law Dictionary: proven, not presumed,
4 liquidated, punitive, or other forms of damages that are
5 not tied to proof of harm.

6 JUSTICE ALITO: Could I ask you this
7 question about the damages that your client is seeking
8 in this case? If -- if we affirm the Ninth Circuit,
9 would -- are you claiming all of the damages that -- all
10 of the emotional damages that resulted from his criminal
11 conviction, or are you claiming only the emotional
12 damages that would have been suffered by anybody else
13 whose records were turned over to the FAA under the
14 Operation Safe Pilot program?

15 MR. CARDOZO: If you affirm, there will be a
16 proximate causation question that arises on remand. The
17 Act requires the damages to be the result of the
18 violation. So, he cannot recover for the emotional
19 distress that followed from the prosecution.

20 But, as Justice Ginsburg pointed out, we're
21 talking today not just about Mr. Cooper; we're talking
22 about every single person to whom this Act applies: the
23 whistleblower who the government chooses to silence by
24 embarrassing and humiliating them --

25 JUSTICE ALITO: Well, you allege that Mr.

1 Cooper suffered a severe emotional distress when he was
2 confronted with the fact that his records had been
3 turned over. So, you're -- you're saying that the
4 court -- that on remand, there would have to be a
5 separation of the degree of distress that he suffered as
6 a result of simply knowing that somebody in the FAA had
7 access to his Social Security records, but disregard the
8 distress that somebody in that situation would naturally
9 feel when confronted with the fact that a criminal
10 violation that he had committed had been exposed?

11 MR. CARDOZO: Yes. And that's the kind of
12 thing judges routinely have to sort through. For
13 example, someone suffers emotional distress and then
14 they lose their job thereafter, and the injury that
15 produces the emotional distress, the job -- the job loss
16 wasn't the proximate cause.

17 Judges -- in fact, we ask juries to do that.
18 In this case, it would be a judge sifting through that
19 and making that determination. As happened in
20 Petitioner Doe's case, the judge could find that the
21 emotional distress claim wasn't sufficient and reject it
22 altogether, but that's the nature of an emotional
23 distress remedy.

24 One thing you didn't hear in that argument
25 almost at all was any discussion of the text of this

1 Act, which tells you in at least four separate ways that
2 "actual damages" simply means proven, not presumed,
3 damages.

4 Beginning with the words themselves, that's,
5 of course, the most common meaning of "actual damages,"
6 the one that appears in Black's Law Dictionary. As
7 Justice Sotomayor pointed out, the term of art for
8 economic loss in this arena is "special damages." If
9 that's what Congress meant, presumably it would have
10 used that term. It's the more common way to express one
11 category of damages only. That's economic --

12 JUSTICE ALITO: But you agree that the Act
13 does not allow recovery for what would have been
14 regarded at common law as general damages?

15 MR. CARDOZO: What would have been regarded
16 at common law as presumed -- the presumed damages, this
17 Act doesn't allow. That was peeled off for further
18 study.

19 JUSTICE ALITO: "General damages" -- that's
20 the term that they peeled off, right?

21 MR. CARDOZO: Right. But by keeping
22 "actual," the juxtaposition between actual and
23 general --

24 JUSTICE ALITO: But general damages is a
25 term from -- from the remedies in defamation cases,

1 right?

2 MR. CARDOZO: Yes.

3 JUSTICE ALITO: And there are two types of
4 damages in defamation cases, special damages and general
5 damages? And if you -- is that correct?

6 MR. CARDOZO: Correct.

7 JUSTICE ALITO: So, you subtract general
8 damages, and what do you have left?

9 MR. CARDOZO: But the interesting thing in
10 this case is they didn't take what you have left,
11 special damages, and they used a different term,
12 Congress did, "actual," a term that suggests we're going
13 to require proof of the damages. We're not going to
14 presume them. We're not going to allow speculative
15 damages.

16 JUSTICE ALITO: But the problem is that --
17 that your definition of actual damages and the general
18 definition of actual damages includes some things that
19 fell within the rubric of general damages.

20 MR. CARDOZO: That's true. But several
21 other things in the text of the Act tell you, again,
22 that "actual" means simply proven, not presumed. If you
23 look at the section 2, where Congress recites findings
24 and the statement of purposes for the Act, the right
25 that's being described here is an individual and

1 personal right of privacy, well understood, well settled
2 at the time to be a right that was primarily
3 nonpecuniary in nature.

4 JUSTICE ALITO: Well, let me just try this
5 one more time. You -- you say that there's a right to
6 recover actual damages but no right to recover general
7 damages. So, what you think is recoverable is actual
8 damages minus general damages?

9 MR. CARDOZO: No.

10 JUSTICE ALITO: No?

11 MR. CARDOZO: Our position is what is
12 recoverable is actual damages, the damages you prove,
13 substantiate. A judge can reject it if they find it
14 unsubstantiated as happened in Petitioner Doe's case.

15 JUSTICE KENNEDY: But -- but we --

16 MR. CARDOZO: But you can't presume --

17 JUSTICE KENNEDY: Courts don't -- courts
18 don't allow recovery for conjectural or speculative
19 damages. That's just -- that's just -- or am I wrong?
20 Do Federal courts --

21 MR. CARDOZO: No, but in this --

22 JUSTICE KENNEDY: -- routinely tell juries,
23 now you can come in with conjectural or speculative
24 damages? That's not the way juries are instructed.

25 MR. CARDOZO: But you can in this arena at

1 common law presume damages from the nature of the
2 violation. That is what was carved out, the ability to
3 presume it, rather than present evidence and subject it
4 to proof.

5 JUSTICE BREYER: Can you tell me what your
6 response is to the Government's argument that the
7 Privacy Commission which was set up understood the word
8 "actual damages" at the time the way they understand it?
9 What's your response to that? I -- are they right about
10 that in your opinion?

11 MR. CARDOZO: Apart from the obvious that
12 the post-enactment report was --

13 JUSTICE BREYER: No, I'm asking you what --

14 MR. CARDOZO: But -- but -- yes, on the
15 underlying point, several things. The commission --
16 this is a -- two paragraphs in a 620-page report that
17 doesn't run through the text of the Act, it's purpose,
18 all of the things one normally does in statutory
19 construction. So, where they draw this conclusion is
20 entirely --

21 JUSTICE BREYER: Okay.

22 MR. CARDOZO: -- opaque.

23 JUSTICE BREYER: So, am I right in saying
24 your -- you would agree with them that that is how the
25 Privacy Commission understood the Act, but in your

1 opinion, the Privacy Commission was wrong?

2 MR. CARDOZO: Yes, with one other -- with
3 one other proviso I would add. There's a little bit of
4 ambiguity. You see the Privacy Commission in this two
5 pages was trying to sell Congress on the notion of
6 expanding the remedy. So, it wrote on pages 530 of its
7 reports: "If the rights and interests established in
8 the Privacy Act are worthy of protection, then recovery
9 for intangible injuries such as pain and suffering, loss
10 of reputation, or the chilling effect on constitutional
11 rights is a part of that protection. There is evidence
12 for this proposition in common law privacy cases."

13 Surely, Congress knew that very thing.

14 JUSTICE BREYER: And by "pain and
15 suffering," they mean mental pain and suffering?

16 MR. CARDOZO: Right. Surely, Congress knew
17 that same thing. So, when it enacted this Act, it did
18 not mean to cut out the primary form of harm.

19 JUSTICE BREYER: Thank you.

20 MR. CARDOZO: Another --

21 JUSTICE SCALIA: What -- what the Government
22 would say is -- is that -- and they have their own
23 dictionary definitions. I don't -- I don't think it's
24 accurate to say that Black's Law Dictionary defines
25 "actual damages" the way you would have it defined. As

1 I recall, their briefing gives some other definitions
2 from an earlier version of Black's or whatever.

3 But what they say about the commission
4 understanding, which you acknowledge to be contrary to
5 your understanding of actual damages, what they say is
6 that at least shows that it isn't clear what "actual
7 damages" means. And -- and in their estimation, once
8 you -- once you establish that it isn't clear, then you
9 trigger the -- the rule that waivers of sovereign
10 immunity will not be considered to have any scope except
11 that scope which is clear.

12 MR. CARDOZO: Well, that's why it's critical
13 to understand the analysis, because you can't say
14 there's a genuine ambiguity unless you understand how
15 they arrived at that conclusion. The meaning of "actual
16 damages" can vary with the context, but it's usually
17 crystal clear in each context what you're talking about.

18 In this privacy context, it's fairly clear.
19 We have a provision at page 66a of the appendix, section
20 2(b), where Congress recites of purpose of this remedies
21 provision, and it states the purpose is to hold the
22 United States liable "for any damages which occur as a
23 result of."

24 The notable thing about that statement of
25 purpose, "which occur as a result of," lines up

1 precisely with proven, not presumed, damages. But "any
2 damages which occur as a result of" conflicts directly
3 with the notion of only one category of damages as being
4 authorized. That's Congress's statement of purpose for
5 this very provision. That aligns. Mr. Cooper's
6 construction aligns. The Government creates disharmony
7 in the statute.

8 JUSTICE BREYER: This would save me some
9 time possibly, but my guess is, and you may know, that
10 every State or many States have statutes or tort laws or
11 something against invasion of privacy. Now, you may
12 know how many. And -- and if you know how many, that's
13 helpful. And of those, if you know how many, how many
14 of them, and perhaps all, provide damages for mental
15 suffering caused by a violation of that particular
16 tort-like provision?

17 Do you know anything about those statistics?

18 MR. CARDOZO: Justice Breyer, you've given
19 me a little bit too much credit. I can't give you a
20 number of States, but I can tell you that I'm not aware
21 of any State that disallows. It is by far the general
22 rule, and I think it's universal, that recovery of
23 mental and emotional distress for invasion of the
24 privacy.

25 JUSTICE BREYER: Do you know enough to know

1 if they've done so through the use of a term like
 2 "actual damages," that one or analogous thereto, or
 3 whether they've had to have some special form of words?

4 MR. CARDOZO: I don't know that. So,
 5 I'll --

6 JUSTICE BREYER: Okay.

7 JUSTICE SCALIA: Of course, you're talking
 8 about statutes that require that the material have been
 9 made public, not that, say, establish a violation if one
 10 agency provides the information to another agency? I
 11 mean, as the Government points out, this -- this statute
 12 goes far beyond any -- any State statutory or common law
 13 protections of privacy. It's really very picky, picky.

14 And -- and to say that, you know, whatever
 15 emotional harm comes from that is -- is quite different
 16 from saying that under State privacy laws emotional
 17 distress is compensable.

18 MR. CARDOZO: Yes, but we're all here today
 19 only talking about the narrow category of cases in which
 20 there's an intentional and willful violation. So, they
 21 knew the law prevented them from doing what they did.

22 JUSTICE SCALIA: Well, that's right. But
 23 all you have to know is that you shouldn't give it to
 24 the other agency, because you're not making it public.
 25 You're not doing the kind of thing that constitutes an

1 invasion of privacy under State law. You've just
2 failed, intentionally failed, to follow the very
3 detailed and, as I say, picky, picky prescriptions
4 contained in the Privacy Act.

5 To say that you get emotional distress for
6 that as opposed to genuine -- what I would call genuine
7 privacy incursions, which State law covers, is a
8 different question.

9 MR. CARDOZO: But -- but this provision is
10 covering the range of intentional and willful violations
11 covered in the Act. The example of the whistleblower
12 who you want to silence, so you leak the most
13 embarrassing details to the press, shaming and
14 humiliating them in front of friends and family -- don't
15 leave the house for a month, but you haven't lost your
16 job, and you're not out of pocket -- zero remedy, zero.
17 That's the Government's construction.

18 And look at section 2, how Congress
19 described this Act. They didn't say we're imposing some
20 picayune technical requirements. They're saying we're
21 doing this to safeguard individual rights of privacy.
22 They use the very lingo; they analogized it unmistakably
23 and explicitly to the common law kind of invasion of
24 privacy for which emotional distress is routinely
25 recoverable.

1 JUSTICE SOTOMAYOR: Do you have any
2 statistics on the percentage of actions brought under
3 the Privacy Act in which the plaintiff was able to
4 establish pecuniary harm?

5 MR. CARDOZO: I don't have any statistics on
6 that. The one thing I can tell you is that this has
7 been the law in the Fifth Circuit for well over
8 30 years, and as the Government -- and prior to Doe v.
9 Chao, the rule was, in most circuits, you didn't have to
10 show any damages. And yet, at that point, a good
11 37 years after the Act had come into existence, the
12 Government stood up here and admitted that far broader
13 construction of the Act than we are talking about today
14 had no meaningful effect on the public --

15 JUSTICE SCALIA: You say that in the Fifth
16 Circuit or the Ninth Circuit for -- for many years?

17 MR. CARDOZO: This case is in -- coming out
18 of the Ninth Circuit, but the Fifth Circuit has the
19 rule.

20 JUSTICE SCALIA: Has had this for a long
21 time. Okay.

22 MR. CARDOZO: In the early '80s, it first
23 recognized emotional distress.

24 JUSTICE SOTOMAYOR: Are you aware of any
25 runaway verdicts based on awards of mental damage proof?

1 MR. CARDOZO: The only case that I'm aware
2 of --

3 JUSTICE SOTOMAYOR: I define "runaway
4 awards" as those in -- in six figures or above.

5 MR. CARDOZO: No.

6 JUSTICE SOTOMAYOR: Or even high five
7 figures.

8 MR. CARDOZO: The highest that I can think
9 of at the moment was a case out of the Fifth Circuit
10 called Jacobs in which a Federal agency revealed --
11 leaked to the press information falsely suggesting a
12 bank president was a money launderer. He got 100,000 in
13 emotional distress, but that's a pretty extreme
14 situation. The vast majority, it's going to be modest.
15 And I would say he should get \$100,000 in emotional
16 distress. He's an upstanding member of the community
17 and he's being called a common criminal; he might not
18 have suffered any pecuniary loss, but he has suffered
19 actual damages.

20 One other thing about the text that tells
21 you -- again, all of these points -- points align with
22 Mr. Cooper's construction and produce disharmony to the
23 other side. Look at the breadth of the language
24 Congress used to waive sovereign immunity in subsection
25 (g) of the Act. Recall that the Government's

1 construction is only one small category of plaintiffs,
2 who are the victims of intentional and willful
3 violations, can recover. Yet, the text says in any suit
4 in which a court determines that there's been
5 intentional and willful violation, the United States
6 shall be liable for actual damages.

7 If what we mean is only one small category,
8 economic damages, is serving as a substantial reduction
9 in the category of cases that can be brought, you'd
10 expect to see that limitation appear after the
11 "intentional and willful" in any suit in which a court
12 determines there has been willful, intentional violation
13 and the plaintiff has suffered economic loss, because it
14 is a substantially narrowing term.

15 However, if "actual damages" simply means
16 proven, not presumed, this wording is perfectly natural
17 and flows exactly. Again, every place you look in the
18 text of the Act, proven, not presumed, aligns.
19 "Economic only" is a square peg in a round hole in the
20 text of this Act.

21 JUSTICE KENNEDY: In -- in your argument, do
22 you have to avoid the concession that the term might be
23 ambiguous? I know your position is that liability for
24 damages is expressly waived, but then you stop there,
25 and you -- and you say that -- you resist the idea that

1 the definition of actual damages has to be unambiguous.
2 Is that a fair characterization of your argument?

3 MR. CARDOZO: I would modify it slightly.
4 What the Government is talking about is an ambiguity in
5 the abstract. They're lifting the two words out of the
6 context of the Act. Like any phrase, "actual damages"
7 can mean different things in different contexts. But in
8 this statute, when you run through the tools of
9 construction, it's not ambiguous. And that's --
10 that's --

11 JUSTICE SCALIA: That -- that's a different
12 point. And the question went to whether you acknowledge
13 the need to be unambiguous. Now, what the Government
14 says is, of course, the -- the waiver of sovereign
15 immunity, you would acknowledge, must be unambiguous,
16 but the Government says further, moreover, the scope of
17 the waiver of -- of sovereign immunity must be
18 unambiguous. Whether you have waived it only with
19 respect to pecuniary damages or also with respect to
20 emotional harm, that also must be unambiguous. And --
21 and you deny that second step, don't you? You think --

22 MR. CARDOZO: Actually we don't, Your Honor.

23 JUSTICE SCALIA: You don't?

24 MR. CARDOZO: And this is how I would
25 clarify it. What the doctrine of sovereign immunity

1 requires is that the waiver be expressed in text, and
2 the court can't read it in. It can't add words to the
3 text. If you -- if your intent is to separate out
4 presumed liquidated, punitive, other forms of damages
5 that do not -- are not tethered to proof of harm,
6 "actual damages" is a phrase that does that precisely
7 because that's what "actual" means; it means real.

8 There's no ordinary definition of "actual"
9 where it means pecuniary only, that is -- you get when
10 you use it in certain contexts. So, this Court doesn't
11 need to add, expand, or read anything into these words,
12 "actual damages." It simply needs to give them the
13 meaning that they have in ordinary English definitions,
14 in Black's Law definition. This definition this Court
15 gave to actual damages in the Birdsall case over a
16 hundred years ago is the same thing: presumed -- proven
17 damages, not presumed. So, the waiver of sovereign
18 immunity is here expressed; it doesn't arise by
19 implication.

20 But the one -- but there's another side to
21 the sovereign immunity point that the Government never
22 mentions. The court's obligation is dual here. When
23 there has been a waiver, the court can't expand that
24 waiver, but neither can it contract it. You have here
25 the Government spinning out theoretical -- theoretical

1 possibilities that actual damages was -- was used in
2 this more peculiar sense; what it really meant was
3 special damages -- to produce a deconstruction of the
4 statute that eviscerates it, leaves most of the people
5 who suffer intentional, willful violations without any
6 remedy at all. And those who happen to have an economic
7 loss do not get compensation for the primary form of
8 harm from a privacy violation.

9 CHIEF JUSTICE ROBERTS: The argument you've
10 made, and I certainly understand it, that this is the
11 Privacy Act, and so it's precisely these types of
12 damages that you'd be concerned about, really cuts both
13 ways. I mean, what you're saying is this is a really
14 big chunk of damages, because this is what the whole Act
15 was about. And it seems to me that that argument
16 suggests that there's some weight to the Government's
17 point that, well, if you're going to get into that, you
18 really do need a clear waiver of sovereign immunity.

19 MR. CARDOZO: Absolutely, but -- but that
20 circles back to my point that if you're going to -- if
21 your intent is to say presumed, not proven, "actual"
22 fits exactly. "Special" is the term that wasn't used
23 here. So, to fault Congress for picking a term that
24 means precisely "proven, not presumed," and say you
25 weren't clear enough, that's asking too much,

1 particularly when they also said -- in their statement
2 of purpose, they spoke to the remedies provision and
3 said "any damages which occur as a result of." They
4 used the sweepingly broad language. They did multiple
5 things to say -- reveal no doubt about its intent.

6 And recall the rule from the Morissette and
7 Molzof case when Congress is legislating against a
8 common law background. The rule is if Congress's
9 silence is taken as an indication that Congress intends
10 to follow established norms, not depart from them, when
11 Congress says "actual damages" in a privacy context,
12 it's fair to -- it's going to assume that people are
13 going to understand that at common law, actual damages
14 included emotional distress for privacy violations.

15 So, rather than assuming that it departed
16 from the common law, we typically require a contrary
17 direction, under Morissette and Molzof, and you don't
18 have that contrary direction here.

19 And you get the same answer as you roll
20 through -- you don't need to look -- go past the text,
21 but you get the same answer as you roll through all of
22 the tools of construction: The common law background
23 and the Morissette/Molzof rule points you to the same
24 place. The legislative history. This Act, the Act that
25 emerged, was a compromise between a far broader remedial

1 scheme that authorized punitive damages, did not have
2 the intentional and willful requirement, had a
3 negligence standard, and a more measured version.

4 The Government's construction of this Act
5 throws that compromise out the window and rewrites the
6 Act as a one-sided in the Government's favor when what
7 clearly happened in the legislature was a balance was
8 struck.

9 Another thing about the legislative history,
10 both the House and Senate bills originally had the term
11 "actual damages" in there from the start, and they both
12 had "actual damages" simply as a counterpart to punitive
13 damages. Again, another confirmation. Actual damages.

14 JUSTICE ALITO: Well, suppose this were a
15 common lawsuit for -- for slander per quod, and what was
16 said was that Mr. Cooper received Social Security
17 disability benefits. Now, he would -- and he claims
18 that causes him great distress because of the extrinsic
19 fact that he was known to be a pilot, and, therefore,
20 people who -- who knew that he was flying around an
21 airplane even though he was so severely disabled that he
22 was entitled to get Social Security disability
23 benefits -- that would damage his reputation.

24 Now, the damages that you're seeking, the
25 emotional distress that he allegedly incurred, what

1 would that be? Which -- under what category of damages
2 would that fall?

3 MR. CARDOZO: His -- his economic loss would
4 be special damages.

5 JUSTICE ALITO: And let's --

6 MR. CARDOZO: The damages he could prove --

7 JUSTICE ALITO: You don't claim any economic
8 loss here.

9 MR. CARDOZO: Right. The damages he could
10 prove would be actual damages.

11 JUSTICE ALITO: No. That -- under the --
12 would that be the term that a court -- a common law
13 court would use, actual damages? Wouldn't they ask
14 whether the damages to his reputation and the emotional
15 distress that he suffered therefrom were either --
16 wouldn't they ask whether that was special or general?

17 MR. CARDOZO: Well, they could also use
18 actual damages because, of course, in the Gertz case,
19 the Court --

20 JUSTICE ALITO: No. Gertz came after the
21 common law. Gertz was a modification of the common law.
22 What would it be at common law?

23 MR. CARDOZO: At common law, it would be
24 general damages, but --

25 JUSTICE ALITO: General damages here are

1 excluded by Congress, right?

2 MR. CARDOZO: They were referred for further
3 study, but what was authorized in the text, the
4 substantive provision, is actual damages, not special
5 damages.

6 If Congress had wanted to peel off the whole
7 piece and require only economic loss, the more common
8 and routine term of art that's used is "special
9 damages," which circles back to another important point.

10 JUSTICE SCALIA: But -- but -- but elsewhere
11 in the statute, it's made very clear that Congress did
12 not think it was authorizing general damages, right?
13 Because it set up this commission to recommend whether
14 general damages should be included. Now, what would be
15 -- what would be the purpose of that commission if
16 indeed actual damages already included general damages?

17 MR. CARDOZO: It doesn't include general
18 damages. Recall the presumed damages. The presumed
19 damages. A substantial portion of the compensation
20 ordinarily available would be peeled off under our
21 construction. And this was a distinction that actually
22 appeared in the Gertz case, where to place First
23 Amendment limitations on recovery. The Court
24 distinguished between actual damages and presumed
25 damages. So --

1 JUSTICE SCALIA: You would say that actual
2 emotional damages are not -- are not general damages?

3 MR. CARDOZO: I wouldn't say -- I would say
4 you could call them general damages. In the context of
5 this Act, what Congress does not choose special damages
6 as the term of what it's authorizing and, instead,
7 chooses the broader term, "actual damages."

8 JUSTICE SCALIA: No, but it -- it does use
9 the term "general damages" and makes very clear that it
10 doesn't think this statute covers general damages. So,
11 I think -- I think you have to argue that the term
12 "general damages" includes only "presumed" emotional
13 harm and not "proven" emotional harm.

14 MR. CARDOZO: That -- that is exactly our
15 position.

16 JUSTICE SCALIA: Okay.

17 MR. CARDOZO: And the thing I would add to
18 that is general damages -- actual damages was in the
19 statute long before general damages surfaced. It
20 appeared at the eleventh hour, and Congress just said
21 let's send that off to the commission. That's important
22 to keep in mind, because it creates a huge question
23 about what Congress meant to peel off. There's no
24 explanation of general damages. It isn't defined. It
25 arose at the eleventh hour.

1 But the important thing is the term it kept
2 in the statute was not "special damages," the term of
3 art that has a pecuniary limitation. It kept the
4 broader term "actual damages," and the term it kept
5 aligns with its statement of purpose, the breadth of the
6 waiver of sovereign immunity, and the nonpecuniary
7 expression -- a desire to protect nonpecuniary interests
8 that's throughout the Act.

9 Let me wrap up with a couple of observations
10 here. Congress passed this Act to restore the citizens'
11 faith in their government, and it made a solemn promise
12 to the American citizens that in cases of intentional
13 and willful violation, the United States shall be liable
14 for actual damages.

15 Today, the Government is proposing that
16 "actual damages" be read in a way that renders this Act
17 virtually irrelevant. That makes a mockery of that
18 solemn promise. To preserve the vitality of this Act,
19 this Court need only give "actual damages" its most
20 common and ordinary meaning: proven, not presumed.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Feigin, you have 5 minutes remaining.

23 REBUTTAL ARGUMENT OF ERIC J. FEIGIN

24 ON BEHALF OF THE PETITIONERS

25 MR. FEIGIN: Thank you, Mr. Chief Justice.

1 I just have a few points. First of all,
2 Respondent would like the Court look -- would like the
3 Court to look to, quote, "the common and ordinary
4 meaning" of actual damages, and asserts that the term
5 "actual damages" fits exactly here. But no court to
6 consider this issue has ever thought that the meaning of
7 "actual damages" was plain. You have to look at the
8 context.

9 And the context here includes the exclusion
10 of general damages, which I think Respondent conceded,
11 when Justice Alito asked him this question, includes --

12 JUSTICE SOTOMAYOR: Counsel, you seem to be
13 arguing throughout that "general damages" meant actual
14 damages when "general damages," in my understanding,
15 meant two things: presumed and actual. So, why is it
16 illogical for Congress to look at what "general damages"
17 meant and pick the meaning that included proven damages,
18 actual?

19 MR. FEIGIN: Well, Your Honor, I think if
20 you look at the sources cited in our brief, as well as
21 the sources cited in his brief -- in particular, I'd
22 refer you to the block quote on page 22 -- "general
23 damages," that term, most typically refers to a class or
24 a type of damages that could be presumed but could also
25 be proven.

1 And when they are proven -- and I think
2 Respondent effectively conceded this -- they remain
3 general damages. And because Congress decided to think
4 about general damages later, because that would have
5 been such a great expansion of the waiver of sovereign
6 immunity, I don't think the Act should be construed to
7 allow those type of emotional distress damages.

8 Now, Respondent would like to --

9 JUSTICE SOTOMAYOR: I -- I'm still confused.
10 "General damages" meant presumed or actual? Congress
11 says we don't want general damages because it includes
12 presumed. So, we're going to use the word "actual."
13 How do you get from that, that Congress meant "only
14 pecuniary"? I mean, that has its -- why didn't they
15 just use that? Instead of "actual damages," why didn't
16 they just say "pecuniary damages," if that's what they
17 intended?

18 MR. FEIGIN: Well, Your Honor, I think
19 that's essentially Respondent's argument. He wants to
20 fault Congress for not using the specific term "special
21 damages." But I think that flips the canon of
22 interpreting waivers of sovereign immunity on its head
23 and requires Congress to unambiguously not waive its
24 sovereign immunity when, in fact, what I think the Court
25 does is precisely the opposite.

1 I also think, Justice Breyer, addressing the
2 Privacy Protection Study Commission, the commission
3 included two of the Congressmen who sponsored the
4 Privacy Act. It agreed with our reading, the reading
5 that we're offering here, of what both "actual damages"
6 mean and what "general damages" mean. And -- and not
7 only did they agree with that, but there's a statement
8 in the legislative history that adopts our definition,
9 too, that's discussed in our brief.

10 Now, I think what Respondent essentially
11 wants the Court to do here is to adopt the
12 recommendation of the Privacy Protection Study
13 Commission that the Act be expanded to allow both
14 special and general damages, in which case emotional
15 distress awards would be allowed. Now, there may be
16 some good policy arguments for that, as the Privacy
17 Protection Study Commission said, but the judicial
18 restraint that's embodied in the sovereign immunity
19 canon I think compels the Court not to get out ahead of
20 Congress on this issue.

21 Congress didn't provide emotional distress
22 awards when it passed the Act in 1974. It never amended
23 the Act to include them. And the Act does not provide
24 for them. Thank you.

25 JUSTICE BREYER: At -- wait -- at common

1 law, if you have a minute.

2 Suppose a plaintiff proved that this
3 particular violation of privacy was so terrible he was
4 in bed for a week, he couldn't go to his family's
5 wedding. I mean, the absolute -- the clearest possible
6 proof. Now, would that have been considered general
7 damages or not? So, it wasn't presumed. It wasn't
8 speculative. It wasn't anything. It's absolute -- tied
9 up. Definite.

10 Would that have been considered general
11 damages, or -- or would it have been considered special?

12 MR. FEIGIN: Emotional distress, even
13 physical symptoms of emotional distress, are general
14 damages.

15 JUSTICE BREYER: No matter how well proved.
16 No matter how clearly proved.

17 MR. FEIGIN: No matter how they're proved,
18 did you say?

19 JUSTICE BREYER: No matter how clearly they
20 are proved.

21 MR. FEIGIN: That's correct, Your Honor.
22 They're general damages.

23 JUSTICE BREYER: And -- and I can look -- to
24 verify that, I look at what definition where?

25 MR. FEIGIN: Well, first of all, Your Honor,

1 you can look at page 139 of the Dobbs treatise, which is
 2 cited in our brief, which very clearly defines general
 3 damages in that fashion. Also, if you look at the
 4 Second Restatement, section 621 and 623, they define
 5 general -- they define general damages and emotional
 6 distress damages in this context only by reference to
 7 proven damages.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
 10 Counsel.

11 The case is submitted.

12 (Whereupon, at 12:07 p.m., the case in the
 13 above-entitled matter was submitted.)

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