No. 02-1377

In the
Supreme Court of the United States

BUCK DOE, ET AL.,
Petitioners,
v.
CHAO, SECRETARY OF LABOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee's interest in this case is in preserving the uninhibited exchange of information and access to federal government records. The Reporters Committee submits this brief in support of the government's argument that Section 552a(g)(4) of the Privacy Act of 1974, 5 U.S.C. § 552a ("Privacy Act" or "Act"), requires a plaintiff claiming violation of the Act to prove "actual damages" in order to collect the statutory minimum award of $1,000.

SUMMARY OF THE ARGUMENT

The Reporters Committee for Freedom of the Press supports the government's interpretation of the "actual damages" provision in the Privacy Act of 1974. *See* 5 U.S.C. § 552a(g)(4).

It is in the interest of the public to encourage, rather than restrict, the truthful exchange of information, especially when such information is not stigmatizing. Congress enacted the Privacy Act with the principle of open government in mind. It created the Privacy Act in tandem with amendments to the

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amicus curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), intended to make clear that the public is entitled to see government information except when narrowly drawn exemptions apply. In that context, Congress was careful to craft a privacy statute that deferred to openness. It included an exemption from Privacy Act closure for information required to be released under the FOIA, and it provided that, even when the government might mishandle information about individuals, they could recover damages only when the error was intentional and when the mishandling caused actual harm. The civil remedies provisions in the Act are therefore intentionally, and rightfully, stringent.

The government's position — that a person must prove actual damages in order to recover any damages under the Act — strikes the correct balance between the aims of the Act and the overarching goal of unrestricted flow of government information. The public will benefit from an interpretation of the civil remedies provision that penalizes disclosure of Privacy Act information only when actual harm occurs and that does not put a chill on the government's willingness to allow the exchange of such information.

ARGUMENT

I. The federal information laws encourage the free exchange of non-stigmatizing information.

The federal government's information policy is rooted in two statutes: the FOIA and the Privacy Act. The two acts complement each other and work together to form a comprehensive scheme of information disclosure. The overarching aim of the two statutes is simple: providing the public with information from government, while keeping private personal information the release of which could harm individuals. *See Cochran v. United States,* 770 F.2d 949, 954 (11th Cir. 1985)

(although they have seemingly contradictory purposes, the two acts work together to balance privacy interests against a strong public policy in favor of public access to government information); *Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 77 (D.C. Cir. 1982) ("Both FOIA and the Privacy Act evidence Congressional concern with open government, and especially, access to government records").

The Privacy Act was created in 1974 with the limited purpose of curtailing the government's ability to secretly amass and control information on individuals. In the wake of the Watergate hearings, Congress was concerned that the government could collect information about individuals and use it to their detriment without their knowledge. An impetus for the Act was the concern that encroaching computer technology would give rise to data systems capable of gathering vast amounts of information. Legislative history of the Act cites fears of secret government computer surveillance and "a dictatorship of data banks." S. Rep. No. 93-1183, 1974 U.S.C.C.A.N. 6916, 6922 (1974).[2]

Although the Act creates rules for the collection and nondisclosure of certain harmful information, transparency in government was important to the legislators who created the Act. The Senate Report on the bill that became the Privacy

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[2]"[The Act] is designed to prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of law-abiding citizens produced in recent years from actions of some overzealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases, of personal files held by Federal agencies. It is to prevent the secret gathering of information on people or the creation of secret information systems ..." S. Rep. No. 93-1183, 1974 U.S.C.C.A.N. at 6916-17. *See also Cochran*, 770 F.2d at 954 ("Congress was chiefly concerned with the potential for misuse of enormous amounts of personal information collected by government agencies ... and stored in computers").

Act cites as one main purpose of the Act the promotion of "accountability, responsibility, legislative oversight, *and open government* with respect to the use of computer technology in the personal information systems and data banks of the Federal Government and with respect to all of its other manual or mechanized files." S. Rep. No. 93-1183, 1974 U.S.C.C.A.N. at 6916 (emphasis added). The Report states: "[T]he Committee[3] does not wish to defeat the purposes of the Federal Reports Act to *promote the efficient, economical exchange and sharing of information*; nor does it wish to impose undue burdens on individuals from whom information is solicited." *Id.* at 6962 (emphasis added). The legislators who created the Act envisioned a "conscientious weighing of the interests by the administrators." *Id.*

To ensure that the goals of open government and free information exchange would not be lost when the Privacy Act took effect, Congress added Section 552a(b)(2) — the FOIA exception — to the Act. That section makes clear that the Privacy Act never prohibits public disclosure of information that is required to be released under FOIA. *See, e.g., Jafari v. Department of the Navy*, 728 F.2d 247 (4th Cir. 1984). According to the legislative history of the Act:

> This provision was included to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions [Privacy Act prohibitions on disclosure] were to be placed on the public and press. The Committee believed it would be unreasonable and contrary

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[3]References to the "Committee" are to Senate's Committee on Government Operations, which reported in September 1974 to the Senate on the Privacy Act bill. S. Rep. No. 93-1184, 1974 U.S.C.C.A.N. 6916.

> to the spirit of the Freedom of Information Act to attempt to keep an accounting of the nature and purpose of access and disclosures involving the press and public or to impose guarantees of security and confidentiality on the data they acquire.

S. Rep. No. 93-1183, 1974 U.S.C.C.A.N. at 6985. The FOIA exception was "designed to preserve the status quo" regarding disclosure of information under FOIA. *Cochran,* 770 F.2d at 955 n.7. Its inclusion in the Privacy Act is clear evidence of Congress's intent to create a statutory scheme in which open government remains a top priority. *See id.* at 955 ("If the balance is equal the court should tilt the balance in favor of disclosure"); *Greentree*, 674 F.2d at 79 ("[S]ection (b)(2) of the Privacy Act represents a Congressional mandate that the Privacy Act not be used as a barrier to FOIA access").

II. Privacy Act enforcement actions were intended to be — and should be — limited in scope, so that government employees are not chilled from making appropriate decisions to release harmless information not protected by the Act

Because the Privacy Act has a limited purpose and is meant to accommodate the goal of open government, its civil remedies provisions are, and should be, stringent.

The Act's drafters intentionally limited the availability of civil relief by requiring Privacy Act claimants to submit a high level of proof that they had suffered harm. Congress's decision to condition damages on proof of "actual damages" is similar to its requirement that plaintiffs claiming improper release of information demonstrate that the government acted "intentionally" or "willfully." 5 U.S.C. § 552a(g)(1), -(4). Courts across the country have recognized that the "intentional or willful" standard of culpability is high. *See*, *e.g.,*

Scrimgeour v. Internal Revenue, 149 F.3d 318, 326 (4th Cir. 1998); *Andrews v. Veterans Admin.*, 838 F.2d 418,424-25 (10th Cir. 1988); *Laningham v. U.S. Navy*, 813 F.2d 1236, 1242-43 (D.C. Cir. 1987). Congress made sure that agencies whose employees acted without a high level of intent would not be hindered by lawsuits imposing civil penalties. *See, e.g., Pippinger v. Rubin*, 129 F.3d 519, 530 (10th Cir. 1997); *Sullivan v. Veterans Admin.*, 617 F. Supp. 258, 261-62 (D.D.C. 1985).

Appellant Buck Doe's interpretation of the damages provision in the Act — that anyone who has suffered "adverse harm" is entitled to the minimum award of $1,000, without proof of "actual damages" — goes against Congress's intent to limit the government's liability. Requiring a minimum damages award for each and every violation of the Act, regardless of proof of harm, would impose the threat of a large, unintended burden on government agencies. The constant threat of damages would chill government actors from releasing information that can and should be released under the FOIA and the Privacy Act. Faced with practically automatic penalties, government employees would likely withhold more information than is required under the law. Fear of damages would put the government on the defensive and make nondisclosure of information its default — a position that is clearly at odds with this country's information policy.[4]

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[4]The FOIA, the Privacy Act's sister statute, similarly levies only very limited penalties for failure to abide by its disclosure rules and provides no compensation at all for damages a requester may suffer because of unlawful denials. *See, e.g., Stabasefski v. United States*, 919 F. Supp. 1570, 1573 (M.D. Ga. 1996) (remedial measures under the FOIA are limited to injunctive relief, costs and attorneys fees, presumably because Congress did not want agencies to be inundated

(continued...)

The news media recognize that civil remedies against the government for disclosure of harmful information in certain instances are proper. Nevertheless, it is vital to the press in its role as public watchdog that government actors be encouraged to release as much information as possible under the federal information laws.[5] *See N.L.R.B. v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978); *Department of the Air Force v. Rose,* 425 U.S. 352, 360 (1976). The Reporters Committee for Freedom of the Press believes that the interpretation that the government advocates in this litigation — that an agency need not pay damages where actual harm has not been proven — is in line with goals of the Privacy Act and the FOIA to allow for uninhibited exchange of harmless information and to prevent a chill on legal disclosures made by government officials.

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[4](...continued)
with costs); *see also* 5 U.S.C. § 552(a)(4)(F) (under certain narrowly prescribed circumstances, an agency employee who arbitrarily or capriciously withholds information may be subject to disciplinary action).

[5]Of particular importance to the press is the ability of whistleblowers from government to inform the press and public about governmental operations. The drafters of Privacy Act intended that the law be interpreted in a way that does not chill whistleblowers from speaking out about issues of public importance. *See* S. Rep. No. 93-1183, 1974 U.S.C.C.A.N. at 6942 (explaining that stronger criminal penalty provisions were eliminated from a draft of the Act because of "the possibility that the threat of prosecution may preclude that 'Whistleblowing' and disclosure of wrongdoing to Congress and the press which helps to promote 'open government'"); *see also id.* at 6954 (it was important to Congress that whistleblowers receive immunity under the criminal code).

CONCLUSION

The Reporters Committee for Freedom of the Press respectfully asks the Court to take into consideration this country's information policy as a whole, with its goals of open government and free exchange of information, in its interpretation of the "actual damages" provision of the Privacy Act. In doing so, the Court should find in favor of the Respondent and hold that an individual who has proven a violation under the Act may not recover the statutory minimum of $1,000 without additional proof of "actual damages."

Respectfully submitted,

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