No. 08-467

IN THE

Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS OF THE UNITED STATES OF AMERICA AND THE HONORABLE JAMES B. PEAKE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Privacy Act prohibits any agency official from disclosing to "any person," by "any means of communication," any "item ... of information" that is contained in an agency's system of records, unless the disclosure is made with the "prior written consent of[] the individual to whom the record pertains." 5 U.S.C. § 552a(a)(4), (b). The court of appeals nevertheless held, and the Government leads its opposition by arguing, that the Act should be interpreted to permit any agency official to disclose without authorization any information he or she learns in the process of creating an agency record, so long as the official avoids physically retrieving a copy of that record before disclosure. The Government can point to nothing in the Act's text, history, or purpose that countenances that jarring result.

The Government also fails to disprove that the decision of the court below conflicts with the decisions of the D.C. and Ninth Circuits in *Bartel v. FAA*, 725 F.2d 1403 (D.C. Cir. 1984), and *Wilborn v. HHS*, 49 F.3d 597 (9th Cir. 1995). The Government's effort to distinguish those decisions on their facts ignores the Department of Justice's own *Privacy Act Overview* and position in litigation following *Bartel*, as well as decisions of numerous courts that have given the cases a plain reading.

The Government is simply wrong in asserting this case is not "of sufficient practical importance to warrant" review. Opp. 14. The decision below permits widespread disclosure of any information any citizen has ever provided a record-making official—hardly a question of little "practical importance."

And that disclosure, immunized by the decision below, undermines not only the fundamental privacy interests the Act is designed to protect, but also governmental and doctor-patient interests as well—problems the Government wholly fails to address. This Court should grant the petition.

1. As the petition explains (11-17), the courts of appeals are divided on the question whether the Privacy Act allows an agency official to disclose a record the official may not have retrieved but had a primary role in creating. The Ninth and D.C. Circuits have both held, in conflict with the court below, that the Act prohibits such disclosures. *Compare Bartel*, 725 F.2d at 1410-11 (Act "restrict[s] an agency official's discretion to disclose information in a record that he may not have read but that he had a primary role in creating and using"), *and Wilborn*, 49 F.3d at 597 (knowledge "gained by the creation of records[] cannot be used to sidestep" the Act), *with* App. 9a-12a (rejecting "argument ... [that] retrieval rule should not apply when the contents of a record are disclosed by the person who prepared the record").

The Government attempts to distinguish *Bartel* and *Wilborn* by arguing that they turned on the use of "sophisticated information collecting methods." Opp. 13. But the Government fails to join issue with the petition (13-15), which explains in some detail why that distinction is factually and legally untenable. Limiting statutory coverage to instances in which "sophisticated information collecting methods" have been employed would leave unprotected myriad files that, although traditionally not computerized, contain highly private information, such as employee medical and personnel records, 5 U.S.C. § 552a(a)(4).

Neither the text nor the history of the Act provides for such a limitation. *See* Pet. 19 (discussing legislative history requiring protection of manual files).

Unsurprisingly, therefore, other courts and adjudicators have rejected the narrow, fact-bound readings of *Bartel* and *Wilborn* the Government advances here (Opp. 13-14). *See, e.g., Pilon v. U.S. Dep't of Justice*, 73 F.3d 1111, 1118 (D.C. Cir. 1996) (*Bartel* prohibits official from "circumvent[ing] [the Act] with respect to a record he himself initiated by simply not reviewing" it); *Manuel v. Veterans Admin. Hosp.*, 857 F.2d 1112, 1120 n.1 (6th Cir. 1988) (noting "new ground cut by *Bartel* ... when disclosure is made by a person who had a role in creating the record"); *General Servs. Admin. & Am. Fed. of Gov't Employees Council 236*, 53 F.L.R.A. 925, 934 (1997) (describing holdings of *Bartel* and *Wilborn* in broad terms); *see also infra* pp. 10-11 (cases applying scrivener's exception).

The DOJ has itself rejected the narrow readings the Government advances here, both in its *Privacy Act Overview*, *see* Pet. 15-16; U.S. Department of Justice, Office of Information and Privacy, *Freedom of Information Act Guide & Privacy Act Overview* 917 ("*Overview*"),[1] and in other litigation. In *Longtin v. U.S. Dep't of Justice*, the DOJ attempted to quash a third-party subpoena served upon an AUSA, arguing she could not testify to her memory of informa-

[1] The Government attempts to backtrack from the DOJ's *Overview* by asserting the *Overview* does not "endorse" the "holdings in [those cases]," Opp. 14 n.3, but the *Overview* does *describe* those holdings. And the *Overview* does not, as the Government now suggests, indicate those holdings are fact-bound or otherwise limited. *Id.*; *see Overview* 917-18.

tion learned on a phone call and later included in a system of records because the D.C. Circuit "has held that the release of the information is still subject to the Privacy Act, where she participated in gathering the information for the file in the first place." No. 06-1302, 2006 WL 2223999, at *3 (D.D.C. Aug. 3, 2006) (quoting Pls. Mot. Exh. 4 at 3). The Government thus recognizes and applies the same scrivener's exception Doe seeks here in contexts other than this case.

2.a. The Government also misreads the text of the Act, arguing that Congress (1) adopted an elaborate set of rules and exceptions to prohibit and govern disclosures made by officials *after* a record has already been created, but (2) freely permitted a record-maker to disclose any information he or she recalls from *creating* that same record. The Government points to nothing in the Act's text, history, or purpose that could possibly justify that absurd result.

On the contrary, the text prohibiting disclosure is straightforward and expansive. Barring exceptions not relevant here, the Act prohibits any unauthorized "disclos[ure] [of] any record which is contained in a system of records by any means of communication to any person, or to another agency." 5 U.S.C. § 552a(b). The Act defines "record" as "any item ... of information about an individual that is maintained by an agency, including ... [his] medical history," 5 U.S.C. § 552a(a)(4), and "system of records" as "a group of any records under the control of any agency from which information is retrieved by ... identifying particular assigned to the individual," 5 U.S.C. § 552a(a)(5). Although the Act does not define what

it means to "disclose," Black's Law Dictionary defines it as "to bring into view by uncovering; to expose, to make known." *Id.* at 464 (6th ed. 1991).

Applying those statutory terms, the question here is whether Dr. Hall "[made known] any ["item ... of information"] which is contained in a ["group of any records under the control of [the medical center] from which information is retrieved by the name of the individual"]." The answer to that question is emphatically "yes." Dr. Hall divulged to Doe's union representative Doe's medical history, which the Government does not dispute was contained in a record, Opp. 3, and maintained in a system of records. *See* App. 25a-26a.

The Government's argument that Dr. Hall did not violate the Act because he disclosed "information," and not a "record," Opp. 7-8 & 11 n.2, wildly misses the mark. The Act expressly states that any "item ... of information" contained in a system of records is *itself* a record. 5 U.S.C. § 552a(a)(4); *see, e.g.*, *Jacobs v. Nat'l Drug Intelligence Ctr.*, 423 F.3d 512, 522 (5th Cir. 2005) (agency violated Section 552a(b) when official used record to create document and disclosed information from document). If the Government's contrary interpretation were correct, any official could access a record, memorize it, and then disclose that memorized "information" without violating the Act. *See* Opp. 7 (arguing that because a "recollection" is not "under the control of [an] agency," it is not within "a system of records"). The term "record" offers no support for that breathtaking assertion. Indeed, the Government concedes Dr.

Hall created a record by "recording [Doe's medical] information in [Doe's] employee health file."[2] Opp. 3.

b. The Government next argues that the scrivener's exception (1) would impose liability beyond Congress's purpose; (2) has "no sound basis" in the statutory text; and (3) would overburden federal agencies. Opp. 8-10. None of these arguments is persuasive.

i. First, in asserting that application of the scrivener's exception would "go well beyond what is necessary to achieve th[e] congressional purpose" by imposing liability for disclosure of "information that agency officials acquire through *independent* means," Opp. 8 (emphasis added), the Government mistakes not only the legislative purpose behind the Act but also the limited nature of the exception. *Bartel* and *Wilborn* did not impose liability "simply because [the disclosed] information also appears in agency records." Opp. 8. Rather, both decisions recognize that, contrary to the Government's claims here, Opp. 8-10, knowledge of private information cannot properly be deemed "independent" of a record when, as here, the knowledge was obtained in the course of *creating* that record. *See Wilborn*, 49 F.3d at 601; *accord Bartel*, 725 F.2d at 1411. The rule Doe seeks thus does not hold liable the disclosure of

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[2] The Government wrongly asserts that the "court" reasoned that "[p]ersonal knowledge and memories are not included in the terminology or definitions of the Act." Opp. 9. Judge Murphy alone so reasoned; Judge Gruender refused to join that section of the opinion, and Judge Hansen rejected the strict application of the retrieval rule entirely. *See* Pet. 8-9; App. 14-15a, 19a.

any information that is also, coincidentally, contained in an agency's system of records.

As the petition explains (and the Government fails to address), the Government's argument also disregards Congress's purpose in passing Section 552a(b). As the Joint House and Senate Report states, that section was, *inter alia*, "designed to prevent ... office gossip, interoffice and interbureau leaks of information about persons of interest in the agency or community, or such actions as the publicizing of information of a sensational or salacious nature or of that detrimental to character or reputation." S. Rep. No. 93-1183; H.R. Rep. No. 93-1416, at 51 (1974). As this case demonstrates, that cannot be accomplished by the strict retrieval rule applied below. The Government does not deny that its interpretation of the Act makes the most memorable (and likely the most sensitive) information also the most likely to be disclosed. *See* Pet. 23-24. Nor does the Government offer any explanation for how Congress could have believed it would protect privacy by requiring record-making officials to "collect information ... directly from the subject individual" "to the greatest extent practicable" and then permitting officials to disclose any information learned in that manner. 5 U.S.C. § 552a(e)(2). The rule the Government advocates is thus at cross-purposes with congressional intent.

ii. The Government is also wrong that the scrivener's exception "has no sound basis in the statutory text." Opp. 9. As explained, *supra* pp. 4-5, application of the scrivener's exception incorporates the statutory definitions of "record" and "system of records," and a straightforward definition of "disclose."

Moreover, any extent to which the scrivener's exception is divorced from the statutory text is a consequence of the exception's relation to a "judge-created" retrieval rule (App. 15a), invented by jurists concerned that the Act as written imposed too great a burden on federal agencies. *See, e.g., Olberding v. U.S. Dep't of Defense*, 709 F.2d 621, 622 (8th Cir. 1983); *Savarese v. U.S. Dep't of Health, Ed. & Welfare*, 479 F. Supp. 304, 308 (N.D. Ga. 1979). At most, the Government's objection to the textual basis of the scrivener's exception reflects the complications that inevitably accompany a judicial decision to "fix" a statute based on policy concerns. *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 358-59 (1991) (noting "complicated" task of settling upon a "statute" of limitations where the "claims are of judicial creation"); *see also Kimbrough v. United States*, 128 S. Ct. 558, 578 (2007) (Thomas, J., dissenting) ("By rejecting this statutory approach, the *Booker* remedial majority has left the Court with no law to apply and forced it to assume the legislative role of devising a new sentencing scheme."). It is one thing to defend a "judge-created" rule on administrative grounds; it is quite another to invoke that same judge-made rule to attack an "exception" that protects the heart of the Act. Even assuming the Government is correct that Section 552a(b) needs to be "fixed," the court of appeals' cure is worse than the disease, permitting core violations to go wholly unaddressed.

iii. The Government also urges that the court of appeals' interpretation of the statute is correct because Doe's "proposed construction of the Act would ... place unwarranted burdens on federal agencies."

Opp. 10. But as the Ninth and D.C. Circuits have explained, it "hardly places an intolerable burden on an agency to hold it liable" for disclosure of information an employee learned "from the act of creation itself." *Wilborn*, 49 F.3d at 602; *accord Bartel*, 725 F.2d at 1411. Furthermore, as the petition explains (22-23), the Act contains built-in safeguards against excessive liability. *See Jacobs*, 423 F.3d at 522 (rejecting argument of intolerable burden because, *inter alia*, (1) "the Act defines 'system of records' narrowly"; (2) the "prohibition against disclosure is not a strict-liability provision" but requires plaintiff to show "disclosure was willful and had an adverse effect on him"; and (3) "twelve statutory exceptions" guard "against unreasonable liability").

3. The Government also errs—and errs badly—in asserting that this case is not of "sufficient practical importance" to warrant review. Opp. 14. The interpretation of the Privacy Act adopted by the court below and advanced by the Government here dramatically expands the disclosures permitted under what Congress deemed the "key provision" of the statute. *See* Pet. 11. The Government does not deny the significant policy concerns presented by agency disclosure of private information, which the Government is gathering at an ever-increasing rate. *See* Pet. 26.[3]

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[3] The Government's only response to the grave practical concerns presented by its interpretation of the Act, *see* Pet. 25-27, is to suggest those "concerns are addressed by applicable rules of medical ethics." Opp. 15 n.4. As the Government is well aware, however, the Privacy Act provides Doe's only private remedy for Dr. Hall's disclosure. When Doe asserted a cause of action against Dr. Hall under a state medical privacy statute, the Government argued the claim was barred by preemption and federal immunity. Answer of Dr. Hall (first de-

The Government likewise offers no reason to believe that individuals will continue to provide agencies with the information essential to so many federal functions when that information may be widely disclosed. *See* Pet. 26-27.

The Government also argues that the conflict presented by this case is "unlikely to affect the outcome of a significant number of cases." Opp. 14-15. Even considering only reported or published decisions, however, the issue has arisen with a frequency that warrants review. *See, e.g.*, *Krueger v. Mansfield*, No. 06 C 3322, 2008 WL 2271493, at *8 (N.D. Ill. May 30, 2008) (citing decision below and immunizing disclosure of medical records not retrieved); *Carlson v. General Servs. Admin.*, No. 04 C 7937, 2006 WL 3409150, at *4 (N.D. Ill. Nov. 21, 2006) (rejecting argument that Act "d[id] not apply" where official "compiled the [offending] e-mail from his own memory and did not 'retrieve' any of the information from a record"); *Stokes v. Commissioner, Social Security Admin.*, 292 F. Supp. 2d 178, 181 (D. Me. 2003) (citing *Bartel* and *Wilborn* and rejecting reliance on retrieval rule); *Krieger v. Fadely*, 199 F.R.D. 10, 13 (D.D.C. 2001) (relevant discovery would include whether "[defendant] authorized or conducted an investigation" and disclosed results without authorization, "even though she may not have actually retrieved the information about the investigation"); *Fisher v. National Insts. of Health*, 934 F. Supp. 464, 474 (D.D.C. 1996) (recognizing scrivener's exception

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fense); Answer of Department of Veterans Affairs (same). And it is unclear what solution the Government believes medical ethics will provide; they did not prevent disclosure here.

but concluding plaintiff failed to demonstrate officials learned disclosed information "through direct involvement in the investigation"); *Kassel v. U.S. Veterans' Admin.*, 709 F. Supp. 1194, 1201-02 (D.N.H. 1989) (rejecting reliance on retrieval rule when discloser played key role in relevant litigation and may have created record); *see also Longtin*, *supra* (scrivener's exception governs Government's third-party discovery).

As noted in the petition (25), the published cases are also just the tip of the iceberg, and difficulties in interpreting the Privacy Act have been exacerbated by "the fact that many Privacy Act cases are unpublished district court decisions." *Overview* 889. Many Privacy Act cases are brought by *pro se* litigants and present limited prospects of damages, making it unsurprising that the cases that survive to appellate review are somewhat limited. *See, e.g.*, *Krueger*, 2008 WL 2271493 (counsel denied; no appeal). Possible appeals are winnowed further by settlements occurring after courts have applied the scrivener's exception to deny motions for judgment premised on the retrieval rule. *See, e.g.*, Settlement & Dismissal Order, *Carlson v. Hood*, No. 1:04cv7937 (N.D. Ill. May 22, 2007).

4. As Judge Schiltz recognized, this case presents a highly suitable vehicle for resolving the proper application of the scrivener's exception. App. 27a. Given the steady stream of cases implicating the exception but both the limited number of suitable vehicles and the utmost importance of the question presented, this case presents an overdue opportunity to resolve a conflict over the proper interpretation of a statute that has long troubled the lower courts.

Unless and until this Court acts, the conflict will persist, vast amounts of personal information will be at risk for disclosure, and courts will continue to mangle the Act beyond recognition in the name of bureaucratic convenience. This Court should grant review, resolve the conflict, and restore the privacy abolished below.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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