No. 21-266

In the Supreme Court of the United States

ROBERT S. CARLBORG, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of the Navy properly redacted the personally identifying information of other individuals before producing records in response to petitioner's request under the Privacy Act, 5 U.S.C. 552a, where that Act generally forbids an agency from disclosing records about an individual unless the individual "to whom the record pertains" requests or consents to the disclosure in writing, 5 U.S.C. 552a(b).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 23a-25a) is not published in the Federal Reporter but is available at 2021 WL 1049467. The opinion of the district court (Pet. App. 1a-20a) is not published in the Federal Supplement but is available at 2020 WL 4583270.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2021. A petition for rehearing was denied on May 11, 2021 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on August 20, 2021. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Privacy Act, 5 U.S.C. 552a, to "protect the privacy of individuals identified in information systems maintained by Federal agencies." *Doe*

v. *Chao*, 540 U.S. 614, 618 (2005) (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896). To that end, the Act comprehensively regulates federal agencies' collection, maintenance, use, and dissemination of "records" containing personally identifying information when those records are maintained as part of a "system of records." 5 U.S.C. 552a(a)(4) and (5). The Act defines a "record" to include "any item * * * of information" maintained by an agency about a U.S. citizen or lawful permanent resident that contains the individual's name or other "identifying particular," such as a social security number. 5 U.S.C. 552a(a)(4). The Act prohibits agencies from disclosing such records to the public or to other agencies "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains," 5 U.S.C. 552a(b), unless the disclosure falls within one of the Act's enumerated exceptions, see 5 U.S.C. 552a(b)(1)-(12).

One of the purposes of the Privacy Act is to ensure that the information contained in an agency's system of records is "current and accurate for its intended use." Privacy Act of 1974, § 2(b)(4), 88 Stat. 1896. Thus, the Act requires agencies to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. 552a(e)(5). The Act also generally requires agencies to "make reasonable efforts" to assure that any records about an individual are "accurate" and "complete" before disseminating the records outside the federal government. 5 U.S.C. 552a(e)(6).

Any individual who wishes to confirm the accuracy of the information about him in an agency's system of rec-

ords may "request * * * to gain access to his record or to any information pertaining to him which is contained in the system." 5 U.S.C. 552a(d)(1). The Act requires agencies to provide such access upon request, *ibid.*, and the individual concerned may seek to correct any information the "individual believes is not accurate, relevant, timely, or complete," 5 U.S.C. 552a(d)(2)(B)(i); see also 5 U.S.C. 552a(f) (requiring agencies that maintain systems of records to promulgate rules governing requests to access, correct, or disclose the records). If an agency refuses to make the corrections sought by an individual or refuses to comply with the individual's request for access, the individual may bring a civil action in federal court. 5 U.S.C. 552a(g)(1) and (2).

2. Petitioner was involuntarily discharged from the U.S. Marine Corps in 2015. Pet. App. 1a-2a. He alleges that he was discharged shortly before he would have attained 20 years of continuous service and that the timing of his discharge significantly diminished his military retirement benefits. Compl. ¶ 3. In what he describes as an "effort to obtain documentary evidence as to how his case was handled," *ibid.*, petitioner submitted several requests for records under both the Privacy Act and the Freedom of Information Act (FOIA), 5 U.S.C. 552. Pet. App. 2a. The Marine Corps is a component of the Department of the Navy, and petitioner submitted his requests to the Navy. *Ibid.*; see 10 U.S.C. 8063(a).

The Navy searched the system of records identified by petitioner in his Privacy Act request and found no responsive documents. Pet. App. 2a. The Navy then searched a related system and located petitioner's 281-page "Official Military Personnel File," a copy of which the agency provided to petitioner in response to his request. *Ibid.* (citation omitted). Before doing so, the

Navy redacted from the document "personal identifying information pertaining to third parties," such as names, signatures, or social security numbers. *Ibid.* (citation omitted); see D. Ct. Doc. 28-4, at 3 (May 15, 2020) (Hughes Decl. ¶ 9).

In response to a separate request, the Navy also provided petitioner with a copy of an advisory opinion prepared by a Marine Corps official about petitioner's separation. Pet. App. 3a. The Navy redacted "a third party's signature at the end of the opinion" before producing it. *Ibid.*

3. In 2018, petitioner brought this action against the Navy under the Privacy Act and FOIA. Pet. App. 2a. As relevant here, petitioner contended that the Privacy Act did not permit the Navy to withhold any third-party personally identifying information when producing his 281-page personnel file or the advisory opinion about his separation. See *id.* at 16a.

The district court granted the Navy's motion for summary judgment on all claims. Pet. App. 1a-20a. The court observed that the Privacy Act prohibits agencies from disclosing any record contained in a system of records "except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains." *Id.* at 16a (quoting 5 U.S.C. 552a(b)). Petitioner had contended that the records he seeks are about him and therefore "cannot 'pertain' to someone else." *Ibid.* (citation omitted). The court explained, however, that "when materials pertain to both a Privacy Act requester and other individuals from whom the agency has received no written consent permitting disclosure, the Privacy Act's prohibition on disclosing information without written consent 'must take precedence,' and the portions of the record pertaining to

those third parties must be withheld." *Id.* at 17a (quoting, indirectly, *Sussman* v. *United States Marshals Serv.*, 494 F.3d 1106, 1121 n.9 (D.C. Cir. 2007)). The court "thus conclude[d] that the Navy properly withheld personal identifying information pertaining to third parties who had not provided their consent to disclose that information." *Ibid.*

4. The court of appeals affirmed in a per curiam order after finding that "[t]he merits of the parties' positions are so clear as to warrant summary action." Pet. App. 23a-24a. With respect to petitioner's Privacy Act claims, the court determined that "the district court correctly concluded that [the Navy] properly withheld information pertaining to third parties who had not provided their consent to disclosure of that information." *Id.* at 24a (citing 5 U.S.C. 552a(b) and *Sussman*, 494 F.3d at 1121 & n.9).

ARGUMENT

The court of appeals' unpublished order granting summary affirmance is correct and accords with the plain language of the Privacy Act, which generally prohibits an agency from disclosing agency records that pertain to an individual in the agency's system of records without the individual's written request or consent. 5 U.S.C. 552a(b). The decision below does not conflict with any decision of this Court. Although petitioner identifies (Pet. 8-9) some tension between the precedent on which the court of appeals relied here, *Sussman* v. *United States Marshals Service*, 494 F.3d 1106 (D.C. Cir. 2007), and a 1981 decision of the Eighth Circuit, the disagreement is shallow and does not warrant this Court's review. Accordingly, the petition for a writ of certiorari should be denied.

1. The Privacy Act generally prohibits an agency from disclosing "any record which is contained in a system of records * * * to any person * * * except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. 552a(b). That provision resolves this case. See Pet. App. 16a-17a, 24a. The information that the Navy withheld constitutes a "record" that is maintained by the Navy in a "system of records," as those terms are defined in the Privacy Act. See 5 U.S.C. 552a(b)(4) and (5). The Navy therefore cannot disclose that information "to any person," including petitioner, unless "the individual to whom the record pertains" requests or consents to the disclosure in writing, 5 U.S.C. 552a(b), or one of the various exceptions in Section 552a(b) applies, see 5 U.S.C. 552a(b)(1)-(12).

Petitioner contends (Pet. 4) that the Navy could not properly withhold any information in the documents it provided to him without invoking one of the "Privacy Act statutory exemption[s]." That contention is mistaken. The Act allows an agency to promulgate rules exempting specified systems of records from some of the mandatory-access provisions that would otherwise apply under the Act, see 5 U.S.C. 552a(j) and (k), and the Secretary of the Navy has promulgated such rules, see, *e.g.*, 32 C.F.R. 701.128. But the Act does not allow an agency to exempt records in a system of records from the non-disclosure provision in Section 552a(b)—which, as explained above, applies to the information at issue here and forbids the Navy from disclosing it without the written request or consent of the third parties to whom it pertains.

Petitioner also contends (Pet. 5) that the Navy was required not to withhold the information at issue be-

cause he made a "first party request"—that is, he asked the Navy to search its system of records for records indexed by his name or other personal identifier, rather than by a third party's name or identifier. Section 552a(b) generally prohibits the disclosure of any record absent a "written request by" (or the consent of) "the individual to whom the record pertains." 5 U.S.C. 552a(b). Petitioner is correct that his own first-party request satisfied that language, in the sense that the Navy had the requisite "written request" from him to disclose any records or information "pertain[ing]" to him. *Ibid.*; see 5 U.S.C. 552a(d)(1) (general rule that agency must grant individual's request to access "his record" or "any information pertaining to him").

In this case, however, the Navy's search of its records in response to petitioner's request located documents pertaining to him that also constituted, in part, records "pertain[ing]" to third parties, and the agency lacked those parties' consent for disclosure. 5 U.S.C. 552a(b). The Act defines a "record" to include "any item * * * of information about an individual that is maintained by an agency * * * and that contains his name" or other "identifying particular." 5 U.S.C. 552a(a)(4). Under that definition, a single document that contains information about multiple individuals and those individuals' personally identifying information, such as social security numbers, could constitute an agency "record" that pertains to each of the individuals. And Section 552a(b) would forbid an agency from disclosing that record in full without the written consent of all the individuals to whom the record "pertains." 5 U.S.C. 552a(b). Absent the necessary consent, an agency can respond to an access request from one of the individuals about whom such a record is retrieved from a system of

records by redacting from the retrieved record the personal identifiers pertaining to the non-consenting third parties—as the Navy did here—so that the agency may provide a copy of the record to the requestor without violating Section 552a(b).

Of course, not every mention of a third party in a personnel file must be redacted absent the third party's consent. Consent is required only from the individual (or individuals) "to whom the record pertains." 5 U.S.C. 552a(b). For example, an employee's personnel file generally does not "pertain[]" to the employee's supervisor merely because the supervisor's name appears. Section 552a(b)'s consent-before-disclosure requirement is also subject to a number of exceptions, including where the disclosure "would be * * * required under" FOIA. 5 U.S.C. 552a(b)(2). FOIA, in turn, permits agencies to withhold from public release some documents whose disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6) ("personnel and medical files and similar files"); see 5 U.S.C. 552(b)(7)(C) (law enforcement records). If an agency could not withhold personal information in a record in response to a FOIA request—because, for example, the disclosure of the record would *not* constitute "a clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6)—then the agency also could not withhold that same information in response to a Privacy Act request (assuming that the Privacy Act's various other requirements were satisfied).

Petitioner's observation (Pet. 5) that the Privacy Act is "[u]nlike the FOIA" because the former "provides no statutory exemption for third party privacy protection" is therefore wide of the mark. The two statutes work in tandem. If FOIA would require an agency to disclose

personal information in an agency record—meaning that FOIA's statutory exemptions for protecting against an unwarranted invasion of personal privacy do not apply—then Section 552a(b) in the Privacy Act would not forbid the agency from disclosing the same record, even without the consent of all individuals to whom the record pertains. 5 U.S.C. 552a(b)(2). But petitioner has failed to demonstrate that FOIA would require the Navy to disclose the personally identifying information of third parties that he seeks here.

2. The court of appeals' summary affirmance in this case rested on the court's earlier published decision in *Sussman*, *supra*. See Pet. App. 24a; see also *id.* at 16a-17a (district court's reliance on *Sussman*). In *Sussman*, the D.C. Circuit recognized that an agency record may pertain to more than one individual for Privacy Act purposes, thus triggering Section 552a(b)'s consent-before-disclosure requirement with respect to each individual to whom the record "pertains." 5 U.S.C. 552a(b).

The plaintiff in that case sought to compel the U.S. Marshals Service to search for and disclose any information about him that appeared anywhere in the agency's records. See *Sussman*, 494 F.3d at 1120. The court of appeals rejected that request. In particular, after reviewing "the language of § 552a(d)(1)" and guidelines issued by the Office of Management and Budget (OMB), the court determined that the Privacy Act "give[s] parties access only to their own records, not to all information pertaining to them that happens to be contained in a system of records." *Id.* at 1120-1121. The court held that the Marshals Service was therefore required to disclose to the plaintiff, on remand, "those materials—and only those materials—contained in records *about him*." *Id.* at 1121 (emphasis added).

In a footnote, the court of appeals then addressed the situation present in this case, where a record about the requestor "pertain[s]" both to the requestor and to "other individuals, from whom the [agency] has received no written consent permitting disclosure." *Sussman*, 494 F.3d at 1121 n.9. The court observed that the literal language of the statute could be read to both "require * * * and forbid" disclosure in those circumstances, *ibid.*, since Section 552a(d)(1) states that an agency "shall" provide a requestor with "any information pertaining to him," 5 U.S.C. 552a(d)(1), while Section 552a(b) prohibits disclosing to any person a record that "pertains" to an individual without the individual's consent, 5 U.S.C. 552a(b). The court resolved any tension between those provisions by concluding that the prohibition against disclosure without consent "must take precedence," explaining that "the consent requirement in § 552a(b) is 'one of the most important, if not the most important, provisions' in the Privacy Act." *Sussman*, 494 F.3d at 1121 n.9 (quoting H.R. Rep. No. 1416, 93d Cong., 2d Sess. 12 (1974)).

Petitioner errs in suggesting (Pet. 6-7) that *Sussman* misread OMB guidelines. As noted above, the court of appeals in *Sussman* did invoke OMB's 1975 guidelines in the course of rejecting the plaintiff's theory that the Privacy Act entitled him to disclosure of any information about him in the agency's system of records, even if the records were not about him. See 494 F.3d at 1120 (citing 40 Fed. Reg. 28,949, 28,957 (July 9, 1975)). But the court did not invoke—let alone misread—those guidelines in its separate discussion of the situation here, where records about the requestor also pertain to third parties. See *id.* at 1121 n.9.

3. Finally, petitioner contends (Pet. 8-9) that the D.C. Circuit's decision in *Sussman* is inconsistent with the Eighth Circuit's decision in *Voelker* v. *IRS*, 646 F.2d 332 (1981). In *Voelker*, an IRS employee sought to compel the IRS to disclose records of its investigation of him. *Id.* at 333. The agency had withheld two pages of a report on the theory that the redacted material "consist[ed] of personal information pertaining to a third party." *Ibid.* The district court upheld those redactions, reasoning that the withheld pages did not "pertain to" the plaintiff. *Ibid.* The court of appeals reversed. *Ibid.* It understood the district court to have held that an individual requesting his own records under the Privacy Act must establish that the records also "pertain" to him, and it found any such requirement inconsistent with "the plain language of the statute." *Ibid.* Section 552a(d)(1) refers to an individual "gain[ing] access to his record *or* to any information pertaining to him which is contained in" an agency's system of records. 5 U.S.C. 552a(d)(1) (emphasis added). Given that disjunctive phrasing, the court of appeals explained that "no justification" exists "for requiring that information in a requesting individual's record meet some separate 'pertaining to' standard before disclosure is authorized." *Voelker*, 646 F.2d at 334.

Petitioner is correct that portions of the Eighth Circuit's reasoning in *Voelker* are difficult to square with *Sussman*. In particular, although the Eighth Circuit acknowledged in *Voelker* that a record about the requesting individual "may also pertain to another individual," 646 F.2d at 334, the court appeared to conclude that Section 552a(b) would not permit withholding the record from the requesting individual in those circumstances. See *id.* at 335 (stating that the Privacy Act

does not contain any provision "to shield from disclosure information in one person's record that pertains to another person," and that Section 552a(b) does not "create[] such an exemption").

Nonetheless, petitioner has not identified any division of authority warranting certiorari at this time. Since the enactment of the Privacy Act in 1974, the question presented appears to have arisen only twice in published decisions in the courts of appeals. The Eighth Circuit has not had any occasion to reconsider *Voelker* in light of the D.C. Circuit's later views, which are likely to carry significant weight given the latter's prominent role in Privacy Act and FOIA disputes. Cf. 5 U.S.C. 552a(g)(5) (special venue provision for Privacy Act suits to be brought in the District of Columbia). And the issue of disclosure of third-party information under the Privacy Act does not appear to be of any great practical significance—in general or in this dispute. Petitioner does not explain, for example, why he has any legitimate need for access to third parties' social security numbers that happen to appear in his personnel file, or to the form of a third party's signature at the end of the advisory opinion about his separation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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