# SUPREME COURT OF THE UNITED STATES

No. 02–1377

BUCK DOE, PETITIONER *v.* ELAINE L. CHAO, SECRETARY OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February 24, 2004]

JUSTICE BREYER, dissenting.

I agree with JUSTICE GINSBURG and join her opinion. I emphasize JUSTICE GINSBURG's view that the statute (as we interpret it) is not likely to produce "massive recoveries" against the Government—recoveries that "Congress did not endorse." *Ante*, at 10 (dissenting opinion). I concede that the statute would lead to monetary recoveries whenever the Government's violation of the Privacy Act of 1974 is "intentional or willful." 5 U. S. C. §552a(g)(4). But the Government at oral argument pointed out that the phrase

> "'intentional or willful' has been construed by the lower courts as essentially a term of art, and the prevailing test . . . is . . . akin to the standard that would prevail in a *Bivens* action[:] . . . '[C]ould a reasonable officer in this person's position have believed what he was doing was legal?'" Tr. of Oral Arg. 33–34 (internal quotation marks added).

That is to say, the lower courts have interpreted the phrase restrictively, essentially applying it where the Government's violation of the Act is in bad faith. See, *e.g.*, *Albright* v. *United States*, 732 F. 2d 181, 189 (CADC 1984) (the term means "without grounds for believing [an action] to be lawful, or by flagrantly disregarding others' rights

under the Act"); see also, *e.g.*, *Scrimgeour* v. *IRS*, 149 F. 3d 318, 326 (CA4 1998) (same); *Wisdom* v. *Department of Housing and Urban Development*, 713 F. 2d 422, 424–435 (CA8 1983) (same); *Pippinger* v. *Rubin*, 129 F. 3d 519, 530 (CA10 1997) (same); *Hudson* v. *Reno*, 130 F. 3d 1193, 1205 (CA6 1997) (similar), overruled in part on other grounds, *Pollard* v. *E. I. du Pont de Nemours & Co.*, 532 U. S. 843, 848 (2001); *Moskiewicz* v. *Department of Agriculture*, 791 F. 2d 561, 564 (CA7 1986) (similar); *Wilborn* v. *Department of Health and Human Servs.*, 49 F. 3d 597, 602 (CA9 1995) (similar). But cf. *Covert* v. *Harrington*, 876 F. 2d 751, 757 (CA9 1989) (apparently applying a broader standard).

Given this prevailing interpretation, the Government need not fear liability based upon a technical, accidental, or good faith violation of the statute's detailed provisions. Hence JUSTICE GINSBURG's interpretation would not risk injury to the public fisc. And I consequently find no support in any of the statute's basic purposes for the majority's restrictive reading of the damages provision.