No. 15-1081

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MICHAEL **TANKERSLEY**,
Plaintiff - Appellant,

v.

JAMES W. **ALMAND**, in his official capacity as Trustee of the Client Protection Fund; DOUGLAS M. BREGMAN, in his official capacity as Trustee of the Client Protection Fund; WALTER S.B. CHILDS, in his official capacity as Trustee of the Client Protection Fund; JOSEPH B. CHAZEN, in his official capacity as Trustee of the Client Protection Fund; CECELIA ANN KELLER, in her official capacity as Trustee of the Client Protection Fund; PATRICK A. ROBERSON, in his official capacity as Trustee of the Client Protection Fund; LEONARD H. SHAPIRO, in his official capacity as Trustee of the Client Protection Fund; DONNA HILL STATEON, in her official capacity as Trustee of the Client Protection Fund; DAVID WEISS, in his official capacity as Trustee of the Client Protection Fund; CHIEF JUDGE MARY ELLEN BARBERA, in her official capacity; JUDGE SALLY D. ADKINS, in her official capacity; JUDGE LYNNE A. BATTAGLIA, in her official capacity; JUDGE CLAYTON GREENE JR., in his official capacity; JUDGE GLENN T. HARRELL JR., in his official capacity; JUDGE ROBERT N. MCDONALD, in his official capacity; JUDGE SHIRLEY M. WATTS, in her official capacity; BESSIE M. DECKER, in her official capacity as Clerk of the Court of Appeals,
Defendants - Appellees.

On appeal from the U.S. District Court for the District of Maryland
(Hon. Richard D. Bennett, U.S. District Judge)

APPELLANT'S REPLY BRIEF

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June 16, 2015

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SUMMARY OF ARGUMENT

In his opening brief, plaintiff-appellant Michael Tankersley demonstrated that the district court's analysis of 42 U.S.C. §§ 666 and 405 was unmoored from the statutory language and that no interpretative canon justified the court's departure from the plain text. Defendants' response is to double down on the district court's atextual approach, in derogation of basic rules of statutory construction.

Regarding § 666, defendants' request that this Court elevate purpose and legislative history over text cannot be squared with the primacy of text in statutory interpretation. "Applicant" means "someone who applies," and neither defendants nor the district court has offered an alternative definition that would cover someone who is already licensed. Defendants' one textual argument — that whenever a person must pay a yearly fee he has become an "applicant" — warps the statutory term beyond recognition. Defendants' resort to the absurdity canon fails because the small difference of degree between a system in which some but not all Marylanders' social security numbers (SSNs) are collected and a system in which slightly more but still not all Marylanders' SSNs are collected is not the difference between an absurd law and a rational one but is instead a matter of a run-of-the-mill legislative policy judgment.

Regarding § 405, defendants again attempt to stretch a statute to cover what its words plainly do not. Defendants urge the Court to read § 405 as authorizing any SSN collection that the Court of Appeals authorizes. This interpretation is unsupported by the language of the statute, and adopting such a reading would nullify § 405's limitation on the types of entities that may collect SSNs by permitting certain core components of the state to authorize collection by (or delegate it to) any entity. Defendants' argument that Tankersley's licensure to practice law provides a sufficient nexus to justify the collection of his SSN runs afoul of the statutory requirement that only an individual who "is or appears to be" affected by a tax law may be required to furnish his or her SSN. Data in defendants' own possession made clear that Tankersley did not owe Maryland taxes.

Turning to enforceability, Tankersley's opening brief explained that Section 7 is enforceable under § 1983 because, first, Congress intended to create an enforceable right and, second, Congress did not intend to foreclose the § 1983 remedy. Defendants make no argument regarding the second point, thereby conceding it. On the first, defendants propose a novel and unreasonably stringent standard for § 1983 enforceability that runs counter to the Supreme Court's and this Court's decisions, and defendants invite this Court to split with the only two courts of appeals that have decided whether Section 7 creates an enforceable right.

Although it is not necessary to go further because Tankersley's § 1983 remedy is sufficient to justify summary judgment in his favor, Tankersley may also enforce the Privacy Act by invoking this Court's inherent equitable power. Defendants correctly note that Tankersley's "Supremacy Clause" claim, which was the proper nomenclature in this Circuit until the Supreme Court's recent decision in *Armstrong v. Exceptional Child Center, Inc.*, is misidentified. But defendants give no reason that Tankersley's essential theory that federal courts have inherent and historically-based equitable power to halt violations of federal law — a theory that the Supreme Court recognized in *Armstrong* and whose validity defendants themselves acknowledge — is not sufficient to allow his case to proceed. To dismiss an otherwise-valid claim because the litigant has attached to his theory a name later held to be erroneous would substitute a formalistic "magic words" test for common sense.

At the heart of this appeal is the question whether the district court may substitute its policy views for the text of the statutes Congress wrote. Under the well-settled interpretive rules of the Supreme Court and this Court, the answer is no. The decision below should be reversed.

ARGUMENT

I. THE DISTRICT COURT'S ATEXTUAL INTERPRETATIONS OF 42 U.S.C. § 666 AND § 405 ARE INCORRECT.

A. This Court Should Not Deviate From The Ordinary Meaning Of "Applicant" Based On Policy, Legislative History, Or The Absurdity Canon.

The district court's chief reason for refusing to apply the Privacy Act here was the view that § 666 authorized the collection of Tankersley's SSN because he was an "applicant for a professional license." 42 U.S.C. § 666(a)(13). Defendants have not rebutted Tankersley's arguments in his opening brief that the ordinary meaning of "applicant" is "someone who applies" and not "someone already licensed"; that additional statutory clues buttress the conclusion that Congress used that word in its ordinary sense; and that troubling interpretive consequences would flow from interpreting "applicant" to incorporate "licensee." Opening Br. 17-20. Instead, defendants offer four categories of argument, none of them persuasive.

First, defendants reprise many of the district court's reasons for deviating from the text. Br. of Defendants-Appellees ("Defs. Br.") 17-19 (discussing statutory purpose and legislative history). Tankersley stands by his rebuttal of these arguments, which are all premised on the notion that a court may ignore clear statutory text. Opening Br. 21-24; *see generally Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("It is well established that when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is

not absurd — is to enforce it according to its terms." (citation and internal quotation marks omitted)). Defendants wisely choose not to defend the district court's theory that a plain-language reading of "applicant" renders 42 U.S.C. § 666(a)(16) superfluous, *see Greidinger v. Almand*, 30 F. Supp. 3d 413, 422 (D. Md. 2014) — an argument that Tankersley has rebutted, *see* Opening Br. 18-19.

Second, defendants recite in their statement of the facts the political history of various Maryland branches' and departments' views and actions regarding the implementation of the state legislature's SSN-collection requirement. Defs. Br. 7-10. This discussion is a red herring: intramural struggles within the state government over implementation of the state legislature's interpretation of § 666 do not shed light on whether the legislature's interpretation of the federal Privacy Act was correct in the first place.

Third, in an argument not made below, defendants posit that Tankersley was an "applicant" each time he paid his yearly dues to the Client Protection Fund ("CPF"). *Id.* at 22-23. This imaginative theory is contrary to any reasonable understanding of the word "applicant." As explained in Tankersley's opening brief, an "applicant" is "someone who applies," Merriam-Webster Online Dictionary, *at* http://www.merriam-webster.com/dictionary/applicant — not someone who pays a fee, even an annual fee. The standard definition is well-supported (and defendants' contrary argument undermined) by common usage. Is a rising college sophomore

an "applicant" for admission to the college when the college sends her the bill for her second year? Does the school "re-admit" her when she pays? Of course not. Even defendants must admit that the annual fee Maryland lawyers must pay to the CPF is "not captured as 'a renewal application' *per se*." Defs. Br. 22. Paying a fee and applying for a license are not synonymous. Indeed, the fact that defendants are forced here to propose yet another atextual interpretation, distinct from the one applied by the district court, shows the difficulty of avoiding the ordinary meaning of the word "applicant" in § 666.

Finally, defendants invoke the absurdity canon, which courts "rarely invoke[] . . . to override unambiguous legislation." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459 (2002). Defendants reason as follows: Congress's purpose in enacting § 666 was to facilitate enforcement of child support; limiting the definition of "applicant" to its literal meaning does not maximally achieve that purpose; therefore, using the literal meaning of "applicant" is absurd. Defs. Br. 23-25. This argument has two flaws. First, the fact that Congress intended to facilitate collection of child support does not show that Congress sought to achieve that goal using all conceiveable means. Indeed, the statute suggests otherwise, as Congress could have required states to collect *all* their residents' SSNs, not only applicants' SSNs, had it wanted to maximize the use of this tool. The Supreme Court has held that it is not irrational for Congress to pursue a goal in a piecemeal manner that

stops short of using every tool at its disposal, *see, e.g., Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955), and this point is particularly salient where, as here, Congress is balancing one objective (the facilitation of child-support enforcement) with another (the protection of privacy). The sweeping language of the Privacy Act itself attests to the strength of the congressional interest in protecting privacy: "It shall be unlawful for *any* Federal, State or local government agency to deny to *any* individual *any* right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." Pub. L. No. 93-579, § 7(a)(1), *at* 5 U.S.C. § 552a note.

Indeed, in *United States v. Crabtree*, 565 F.3d 887 (4th Cir. 2009), this Court rejected another invitation to ignore a statute's plain language and alter the scope of a statutory provision — there, the exclusionary rule of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2515. The Court's reasoning in refusing to add an atextual exception to that statute is as applicable here as it was in *Crabtree*: "protect[ing] privacy at the expense of law enforcement is not absurd, but is a necessary consequence of the balance struck by Congress." 565 F.3d at 890.

The second problem with defendants' absurdity argument is that plaintiffs' plain-text reading of "applicant" does not meet this Court's criteria for absurdity, "*i.e.*, that is so gross as to shock the general moral or common sense." *Id.* at 889

(citation and internal quotation marks omitted); *accord Mylan Pharmaceuticals, Inc. v. FDA*, 454 F.3d 270, 275 (4th Cir. 2006). The difference between collecting the SSNs of *applicants* for Maryland professional licenses, *see* Defs. Br. 21-22 (listing occupations), and collecting the SSNs of those people *plus* the SSNs of *already-licensed* attorneys is not a difference that produces a result shocking either to moral or common sense. It is not even the difference between a system that fails to serve Congress's purpose and a system that succeeds: under Tankersley's plain-language reading, many SSNs will be still available to the State for use in child support enforcement, and for other individuals, the State can match names, addresses and other information to determine whether a person owes child support. The difference between Tankersley's plain-language reading and defendants' policy-based reading is just a matter of degree, and policy choices of this kind are quintessentially legislative judgments.

By contrast, the district court's (and defendants') leading authority for disregarding the text of § 666 is a case in which the plain-language reading of the statute utterly *defeated* the aim of the law. *See Abramski v. United States*, 134 S. Ct. 2259 (2014); Opening Br. 22-23 (distinguishing *Abramski*). Tellingly, defendants offer no example in which a marginal increase in the amount of activity Congress has authorized — whether that activity is the expenditure of funds, the enforcement of the law, or the collection of information — differentiated an absurd

reading of a statute from a rational one. Indeed, the Supreme Court has admonished that such statutory fine-tuning is decidedly *not* a court's job. *Lamie*, 540 U.S. at 542 ("It is beyond [the judicial] province . . . to provide for what we might think . . . is the preferred result." (citation and internal quotation marks omitted)). This Court should not adopt defendants' expansive reading of the absurdity canon.

* * *

In accordance with the Supreme Court's and this Court's canons of interpretation, the Court should apply § 666 as Congress wrote it and in accordance with its ordinary meaning. Tankersley was not an "applicant" when the defendants sought to collect his SSN. Therefore § 666 does not create an exception to the Privacy Act that applies here.

B. Defendants' Interpretation Of 42 U.S.C. § 405 Would Nullify Many Of That Provision's Requirements.

Like their interpretation of § 666, defendants' analysis of § 405 is at war with that provision's text. Under § 405, a state may use SSNs in "the administration of [a] tax," and individuals may be required to furnish their SSNs "to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved" if the individual "is or appears to be . . . affected" by the tax law in question. 42 U.S.C. § 405(c)(2)(C)(i). Tankersley disputes the applicability of § 405 both because the CPF is not

authorized to collect SSNs and because the CPF is not engaged in the administration of a tax, as shown chiefly by the fact that it is requiring SSNs from people like Tankersley who are not and do not appear to be affected by a Maryland tax law.

Defendants do not defend the district court's position that the CPF is an authorized collector of SSNs because it is a "political subdivision" of the State. *Compare Greidinger*, 30 F. Supp. 3d at 425 (so reasoning), *with* Opening Br. 27-29 (refuting this argument). Rather, according to defendants, the collection by the CPF is valid because the disclosure requirement was promulgated by the Court of Appeals, which is the "State." Defs. Br. 31. Even assuming that the Court of Appeals qualifies as the "State," both defendants' State-promulgation theory and their similar proposal that the Court of Appeals may "delegate" collection to another agency, *see id.* at 34, are untethered to the statutory language and if accepted would defeat § 405's limitations on which agencies can collect SSNs.

The statute specifies who can *authorize* the collection of SSNs: "any State (or political subdivision thereof) . . . may require any individual who is or appears to be so affected [by the relevant law] to furnish" the SSN. 42 U.S.C. § 405(c)(2)(C)(i). But the statute also includes another limitation. It limits the *collection* of the SSNs to "such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved." *Id.* The

State could not authorize another agency to collect SSNs under § 405 any more than it could permit a private entity to do so. The statute's independent limitation on what entities may collect prevents widespread dissemination of sensitive personal information that can be, and frequently is, used to perpetrate the life-disrupting and even sometimes life-ruining crime of identity theft. *See* Opening Br. 3-5, 14-16, 27. This limitation on collecting entities does not contain an exception based on which entity has ordered the SSN collection. Therefore, the fact that the Court of Appeals authorized the collection does not enlarge the set of agencies permitted to collect SSNs.

Defendants' theory would nullify the statutory limitation on which entities may collect SSNs because every SSN collection, no matter where the information goes (or to which agency the collection was "delegated") is presumably authorized either by the Court of Appeals or by the State Legislature. Defendants' theory would thus read § 405's careful specification of entities — the "State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved" — out of the statute. Because of the imperative to give meaning to each word of the statute, *see, e.g., Discover Bank v. Vaden*, 396 F.3d 366, 369 (4th Cir. 2005), such a reading cannot prevail. Ultimately, defendants have no response to Tankersley's key point that neither the CPF nor the Court of Appeals is an "agency . . . having administrative responsibility for the [tax] law" so as to bring

the CPF's collection of SSNs within the bounds of § 405. Opening Br. 28. Because the CPF's SSN-collection program falls outside the scope of § 405, it cannot operate in violation of the Privacy Act.

In response to Tankersley's separate objection that the SSN-collection program does not constitute the administration of a tax at all, defendants declare that Tankersley's licensure to practice law in Maryland provides a sufficient "nexus" to permit the collection of his SSN based on the speculative possibility that he might be subject to a Maryland tax law. Defs. Br. 29. But the statute requires more: it permits the collection of SSNs only from "individual[s] who [are] or appear[] to be . . . affected [by the relevant tax law]." 42 U.S.C. § 405(c)(2)(C)(i). Moreover, the Court has a duty to harmonize the Privacy Act and § 405 where possible. *See In re Moore*, 907 F.2d 1476, 1479 (4th Cir. 1990). Defendants claim that this interpretive duty evaporates when one law is intended to override another in some circumstances, Defs. Br. 27, but defendants give no reason why this should be so, particularly where defendants do not dispute that valid applications of the Privacy Act remain.

Defendants posit that tailoring their collection of SSNs to the statutory requirement Tankersley invokes would necessitate a "wide-ranging administrative program." Defs. Br. 29. Tankersley asks for no such measure; defendants need only use the information they already have about Tankersley and other licensed

lawyers in discerning whose SSNs they may collect. As explained in the opening brief, the CPF knows where Tankersley lives and works because he reports that information to the CPF; the Maryland State Bar Association directory reflects that Tankersley lives and practices out of state. JA 114-15. Defendants offered no facts in the summary judgment record below, and they make no argument here, that Tankersley (or any other out-of-state lawyer) is nevertheless "affected" by Maryland taxes. Moreover, defendants have not provided any evidence that the Comptroller does, would, or could use the SSNs of out-of-state attorneys to determine whether such individuals are subject to Maryland taxes. The fact that the CPF does not exclude from its collection program individuals like Tankersley, who lacks any connection to Maryland except his bar license, shows that the purpose of the program is not the administration of a tax.

Finally, defendants have no answer for Tankersley's point that several additional characteristics of the statutory scheme — including that the hodgepodge of statutes through which SSNs wend their way from the CPF to state taxation authorities, the placement of the SSN-collection requirement in the portion of the state code governing the regulation of lawyers and not the collection of taxes, and the statutorily-specified enforcement mechanism of referral to bar counsel rather than state prosecutors — underscore that Maryland's SSN-collection system is not

"the administration of [a] tax" but, rather, part of the state's regulation of bar members. *See* Opening Br. 31-32.

The Court should reject defendants' invitation to rewrite § 405 to bring their SSN-collection program within it. Because no exception to the Privacy Act applies, its protections are available to Tankersley.

II. TANKERSLEY'S PRIVACY ACT RIGHTS ARE ENFORCEABLE BOTH UNDER 42 U.S.C. § 1983 AND UNDER THE COURT'S GENERAL EQUITABLE POWERS.

A. This Court Should Decline Defendants' Invitation To Ignore Its Own Precedent And Adopt A New Test For Rights-Creating Language Under 42 U.S.C. § 1983.

Tankersley's opening brief demonstrated that his Privacy Act rights are enforceable under § 1983. Opening Br. 36-42. Defendants' response to Tankersley's § 1983 argument begins with an irrelevant (and also erroneous) discussion of an argument Tankersley does not raise: that the Privacy Act *itself* creates a cause of action for the violation of Section 7. *See* Defs. Br. 38-39. Further, defendants' invocation of sovereign immunity is misplaced here because Tankersley is not seeking damages, but equitable relief. The ability to seek equitable relief against state officers for the violation of federal rights is over a century old. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908).

Regarding the argument that Tankersley *does* assert — that his rights under Section 7 of the Privacy Act are enforceable under § 1983 — defendants partly

concede the issue and, to the extent they do not, ask the court to disregard its own precedent and create a circuit split. The § 1983-enforceability inquiry has two parts: courts ask first whether Congress intended to create an enforceable right and second whether Congress intended to foreclose the use of § 1983 as a remedy. *Gonzaga University v. Doe*, 536 U.S. 273, 284-85 & n.4 (2002); *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997).

Defendants do not contest Tankersley's position on the second part of the § 1983 enforceability inquiry — foreclosure of the remedy — thus effectively conceding that if Section 7 of the Privacy Act creates an enforceable right, § 1983 is available to enforce it. Defendants' concession on this point is well-taken, as Tankersley has demonstrated, because the fact that Section 7 lacks a private enforcement mechanism shows that Congress has not foreclosed the use of § 1983 via a "'comprehensive'" remedial scheme that is "'incompatible'" with private enforcement. *See* Opening Br. 40 (quoting *Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007)); *accord Schwier v. Cox*, 340 F.3d 1284, 1292 (11th Cir. 2003).

Regarding the first part of the § 1983 enforceability inquiry — the question whether Congress has created an enforceable right to begin with — defendants' contention that Section 7 lacks rights-creating language ignores the text of Section 7 and proposes a new test that is contrary to this Court's case law. Section 7 provides: "It shall be unlawful for any Federal, State or local government agency

to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." Pub. L. No. 93-579, § 7(a)(1), *at* 5 U.S.C. § 552a note. The enforceable-rights question depends primarily on whether Congress has used "rights-creating" language that reflects "an unmistakeable focus on," or is "phrased in terms of," the beneficiaries. *Gonzaga*, 536 U.S. at 284 (citations, internal quotation marks, and emphasis omitted). Section 7 easily meets this test because it repeatedly uses language that focuses on and is intended to benefit individuals: it prohibits the "den[ial] to any *individual*" of a right, benefit, or privilege, "because of such *individual's* refusal" to provide his SSN. Pub. L. No. 93-579, § 7(a)(1), *at* 5 U.S.C. § 552a note (emphasis added); *see Schweier*, 340 F.3d at 1292 (explaining that this language "clearly confers a *legal right on individuals*: the right to refuse to disclose his or her SSN without suffering the loss of any right, benefit, or privilege provided by law" (citation and internal quotation marks omitted; emphasis in original)).

Defendants would read the text as focusing on the regulated entity and not the protected individuals, based on an unreasonably narrow view of what constitutes rights-creating language under *Gonzaga*. In defendants' view, a provision is focused on the regulated entity whenever "the provision itself is addressed to the conduct of the government," even where the conduct in question concerns the rights of individuals, Defs. Br. 42 — a standard that, judging by

defendants' examples, can be satisfied only when the individual beneficiaries are the grammatical subject of the statutory provision. Under defendants' view, apparently, a statute stating that "No recipient of federal funds shall subject any person to discrimination" would be insufficient to create an enforceable right, even though the Supreme Court has held that the same prohibition, differently stated — "No person . . . shall . . . be subjected to discrimination" — *does* create an enforceable right. *Gonzaga*, 536 U.S. at 284, 287 (discussing Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972). Defendants' formalistic "subject-only" requirement does not appear in the Supreme Court's or this Court's case law. And defendants cite no authority supporting this view; the cases that defendants do cite require only that there be a "focus" on the individual protected, not that a particular sentence structure be employed. *See* Defs. Br. 44-45.

Moreover, this Court has, on at least three occasions, found enforceable rights based on rights-creating language under *Gonzaga* where the beneficiaries were, as in the Privacy Act, the *focus* of a statutory provision without being the grammatical *subject* of the statutory sentence. *See Hensley v. Koller*, 722 F.3d 177, 181-83 (4th Cir. 2013) (holding enforceable under § 1983 a provision of the Adoption Assistance and Child Welfare Act, 42 U.S.C. § 673(a)(3), requiring that adoption assistance payments "shall be determined through agreement between the

adoptive parents and the State . . . , which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents"); *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 210-12 (4th Cir. 2007) (holding that a rural health clinic could invoke § 1983 to enforce a Medicaid Act provision, 42 U.S.C. § 1396a(bb), under which a "state plan shall provide for payment for services . . . furnished by a rural health clinic"); *Doe*, 501 F.3d at 355-57 (holding enforceable under § 1983 a provision of the Medicaid Act requiring that a "State plan for medical assistance must provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals," 42 U.S.C. § 1396a(a)(8)). In each of these cases, as here, the statutory text was phrased as a command to a government actor, yet the beneficiaries of these provisions were individuals. Accordingly, this Court rightly held that these laws created enforceable rights. Defendants' request that the Court engraft a stricter test onto the *Gonzaga* inquiry is at odds with the standard announced by the Supreme Court and three separate holdings of this Court.

Additionally, as defendants correctly concede, the only two courts of appeals to address the question, the Ninth and Eleventh Circuits, have both held that Section 7 of the Privacy Act does create enforceable rights. *Schweier*, 340 F.3d at

1292; *Dittman v. California*, 191 F.3d 1020, 1027-28 (9th Cir. 1999); *see* Defs. Br. 43-44. Thus, accepting defendants' argument would require the Court not only to abandon its own case law on § 1983 enforceability but also to create a circuit split with two other courts of appeals on the specific question at issue here: whether Section 7 of the Privacy Act creates an enforceable right.

For these reasons, in addition to those in the opening brief, this Court should hold that Tankersley may enforce his Privacy Act rights under § 1983.

B. Under The Federal Courts' Inherent Equitable Powers, Tankersley May Seek Injunctive Relief For The Violation Of His Federal Rights.

Because § 1983 provides a viable means to enforce Section 7 of the Privacy Act, the Court need not reach Tankersley's alternative argument, styled as a claim under the Supremacy Clause. If it does, however, it should apply the rule recently reaffirmed by the Supreme Court that federal courts have the inherent equitable power to enjoin violations of federal law.

In accordance with Fourth Circuit precedent, Tankersley asserted a cause of action under the Supremacy Clause — specifically, the right "to seek equitable relief against the enforcement of a state law or regulation that the party claims interferes with its federal rights or from which the party claims immunity under federal law." Opening Br. 35 (relying on *United States v. South Carolina*, 720 F.3d 518, 526 (4th Cir. 2013), which held that such a cause of action existed under the

Supremacy Clause). After this case was filed, and after the opening brief on appeal was filed, the Supreme Court clarified that a cause of action under the Supremacy Clause does not exist. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015).

But the Court's analysis did not end there. Instead, the Court analyzed a claim styled as one under the Supremacy Clause as a claim seeking relief under the courts' inherent equitable power to "grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Id.* at 1384. As the Court explained, "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. It is a judge-made remedy[.]" *Id.* (citation omitted); *see also id.* ("What our cases demonstrate is that, 'in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer.'" (quoting *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845))). Defendants themselves acknowledge the continuing existence of this cause of action. *See* Defs. Br. 37 (recognizing that *Armstrong* "held that the 'ability to sue to enjoin unconstitutional actions by [both] state and federal officers' is a judicially-created remedy that is not premised upon an implied right of action contained within the Supremacy Clause" (quoting *Armstrong*, 135 S. Ct.

at 1384; alteration by defendants). Tankersley's claim for relief falls within the long history of judicial review in equity of state actions that violate federal law.

In *Armstrong*, the Supreme Court held that equitable relief against state officers who violate federal law was unavailable where Congress intended to foreclose it by providing a comprehensive remedial scheme and by using judicially unadministrable language. *See* 135 S. Ct. at 1385. By contrast, here, the Privacy Act does not include a comprehensive remedial scheme. The Act's remedial provisions apply only to Section 3, not to the Section 7 claim Tankersley advances here. *See* Opening Br. 39, 41-42. As noted, defendants do not argue the contrary. *See supra* Part II.A. Additionally, applying Section 7 requires a court to determine discrete questions of fact and law — whether Tankersley was suspended because of a refusal to disclose his SSN, and whether that denial was authorized by law — rather than to apply a "judgment-laden standard" more appropriately left to agency expertise. *Armstrong*, 135 S. Ct. at 1385.

The Court should not reject a valid legal theory because Tankersley pleaded it in words previously accepted by this Court but more recently rejected by the Supreme Court, where the substance of the claim has been approved by the Supreme Court. Indeed, this Court has explained that parties "[a]re not required to use any precise or magical words in their pleading." *Stevenson v. City of Seat Pleasant*, 743 F.3d 411, 418 (4th Cir. 2014); *see also Sansotta v. Town of Nags*

Head, 724 F.3d 533, 548 (4th Cir. 2013) ("We see no reason why the [plaintiffs] needed to use any special phrasing in their complaint, as this complaint gave the [defendants] 'fair notice' of the[ir] claims."); *cf. United States v. Goforth*, 465 F.3d 730, 737 (6th Cir. 2006) ("[W]here an argument advanced in an appellant's opening brief applies to and essentially subsumes an alternative basis for affirmance not separately argued therein, the appellant does not waive that alternative basis for affirmance."), *cited with approval in Brown v. Nucor Corp.*, No. 13-1779, 2015 WL 2167646, at *19 (4th Cir. May 11, 2015).

Because the gravamen of Tankersley's theory remains valid under *Armstrong*, it provides an alternative ground on which he may seek equitable relief for violation of his Privacy Act rights.

CONCLUSION

The district court's order granting defendants' motion to dismiss and denying Tankersley's motion for summary judgment should be reversed.

Dated: June 16, 2015

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of 32(a)(7)(B) because this brief contains 5,185 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type.

/s/ Scott Michelman

CERTIFICATION OF SERVICE

I certify that on June 16, 2015, I served this brief by ECF on all registered counsel for appellees.

/s/ Scott Michelman