No. 16-1151

In the Supreme Court of the United States

THOMAS O. FLOCK, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 49 U.S.C. 31150, which requires that the Federal Motor Carrier Safety Administration "shall" provide employers electronic access to certain information relating to the driving records of professional commercial vehicle operators, precludes the release of other driver-related information with driver consent.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 840 F.3d 49. The opinion of the district court (Pet. App. 14-42) is reported at 136 F. Supp. 3d 138.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2016. A petition for rehearing was denied on December 16, 2016 (Pet. App. 43-44). The petition for a writ of certiorari was filed on March 16, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act, 5 U.S.C. 552a, governs federal agencies' collection, maintenance, and dissemination of information about individuals. See *FAA* v. *Cooper*, 566 U.S. 284, 287 (2012). It requires an agency to

"maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. 552a(e)(1). In addition, the agency must "publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records," often called a System of Records Notice. 5 U.S.C. 552a(e)(4). Although the Privacy Act generally prohibits the disclosure of an individual's records, there are a number of exceptions. 5 U.S.C. 552a(b). As relevant here, the agency may disclose information "pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." *Ibid.*

If an agency "fails to comply" with the Privacy Act "in such a way as to have an adverse effect on an individual," that individual may bring suit in federal court. 5 U.S.C. 552a(g)(1)(D). For violations that are "intentional or willful," the individual may recover actual damages or $1000, whichever is higher, and reasonable attorney's fees. 5 U.S.C. 552a(g)(4).

2. a. The Federal Motor Carrier Safety Administration (FMCSA) is an operating administration within the Department of Transportation (DOT). Pet. App. 3. It is charged with ensuring "the highest degree of safety in motor carrier transportation." 49 U.S.C. 113(b). Congress has instructed FMCSA "to improve motor carrier, commercial motor vehicle, and driver safety," including by "developing and enforcing effective, compatible, and cost-beneficial motor carrier, commercial motor vehicle, and driver safety regulations and practices." 49 U.S.C. 31100. To achieve that goal, FMCSA promulgated (and up-

dates) the Federal Motor Carrier Safety Regulations (Safety Regulations). See, *e.g.*, 49 U.S.C. 31136, 31142; 49 C.F.R. Pts. 350-399. The Safety Regulations seek to ensure that, among other things, commercial motor vehicles meet safety standards, see 49 C.F.R. Pts. 393, 396; individual drivers satisfy eligibility requirements, see 49 C.F.R. Pts. 380, 383, 391; and drivers follow safety regulations when operating commercial motor vehicles, see 49 C.F.R. Pts. 382, 392, 395. FMCSA considers violations of the Safety Regulations when it issues motor-carrier ratings and when it determines whether to pursue enforcement actions against motor carriers and individual drivers. See, *e.g.*, 49 C.F.R. 383.51, 383.52, 383.53, 386.1(b), 386.72(b); 49 C.F.R. Pt. 385, Subpt. A and App. B; see also 49 U.S.C. 521(b).

Individual States, however, bear the primary responsibility to enforce the Safety Regulations on their roads. Pet. App. 16. States adopt the Safety Regulations (or equivalent state standards) under state law, as a condition for receiving certain federal grants. *Ibid.*; see 49 U.S.C. 31102; 49 C.F.R. Pt. 350. States that accept those federal grants are also required to collect and report motor-carrier safety data to FMCSA, often in the form of roadside inspection reports. Pet. App. 16; see 49 U.S.C. 31102(b)(2)(Q); 49 C.F.R. 350.201. The reports list the driver's identity and all safety violations observed at the inspection. 49 U.S.C. 31102(b)(2)(H); 49 C.F.R. 350.201(h) and (i); 74 Fed. Reg. 66,392 (Dec. 15, 2009).

Since 2000, FMCSA has maintained a Motor Carrier Management Information System (MCMIS) database that compiles those inspection reports. Pet. App. 17. The database contains information relating to the

safety records of commercial truck drivers and motor carriers, including crash, inspection, and other compliance information. *Ibid.*; see 49 U.S.C. 31106. For many years before FMCSA was established, the Federal Highway Administration employed a similar data system. Pet. App. 17; see 65 Fed. Reg. 83,125 (Dec. 29, 2000).

b. FMCSA's Safety Regulations have long required that employers of motor-carrier drivers check a new driver's record in every State "where the driver held or holds a motor vehicle operator's license or permit during the preceding 3 years" and investigate "the driver's safety performance history with Department of Transportation regulated employers during the preceding three years." 49 C.F.R. 391.23(a); see also 35 Fed. Reg. 6461 (Apr. 22, 1970) (adopting regulation). In the past, employers could perform the required investigation by checking the driver's safety record with States and with the DOT employers listed on the driver's application. See 49 C.F.R. 391.21(b), 391.23(a). Or, with the driver's written consent, an employer could submit a Freedom of Information Act (FOIA) request to FMCSA for the driver's complete safety file from the MCMIS database. See 5 U.S.C. 552a(b); 49 C.F.R. 10.35(a).

In 2005, in an effort to streamline this system, Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 4117(a), 119 Stat. 1728-1729 (49 U.S.C. 31150). Section 31150 requires that FMCSA "shall provide persons conducting pre-employment screening services for the motor carrier industry electronic access" to three types of reports in the MCMIS database: "(1) Commercial motor vehicle

accident reports[;] (2) Inspection reports that contain no driver-related safety violations[;] (3) Serious driver-related safety violation inspection reports." 49 U.S.C. 31150(a). It further defines a "serious driver-related violation" as "a violation by an operator of a commercial motor vehicle that the Secretary determines will result in the operator being prohibited from continuing to operate a commercial motor vehicle until the violation is corrected." 49 U.S.C. 31150(d). Consistent with the Privacy Act, Section 31150 provides that records may be disclosed only with the driver's written consent. 49 U.S.C. 31150(b)(2).

c. To implement Section 31150, FMCSA issued two System of Records Notices establishing a Pre-Employment Screening Program (PSP). Pet. App. 5; see 75 Fed. Reg. 10,554-10,557 (Mar. 8, 2010) (2010 Notice); 77 Fed. Reg. 42,548-42,552 (July 19, 2012) (2012 Notice). The 2010 Notice specified that PSP reports would include "the most recent five (5) years' crash data and the most recent three (3) years' inspection information." 75 Fed. Reg. at 10,555; see also *id.* at 10,557 (describing "Record Source Categories"). The 2012 Notice identified the same information. 77 Fed. Reg. at 42,549-42,550, 42,552.

FMCSA explained that it had designed the PSP system "to satisfy the requirements of 49 U.S.C. 31150 *and* to meet the following performance, privacy and security objectives," including to "[p]rovide driver-related MCMIS crash and inspection data electronically, via a secure Internet site, for a fee, and in a timely and professional manner." 75 Fed. Reg. at 10,555 (emphasis added); see also 77 Fed. Reg. at 42,549 ("FMCSA believes that making this driver data available to potential employers and operator-

applicants will improve the quality of safety data and help employers make more informed decisions when hiring commercial drivers."). By making "crash and inspection data" about drivers "rapidly available" to drivers and their potential employers, FMCSA could offer a more efficient "alternative to requiring [employers] to submit a [FOIA] request or Privacy Act request to FMCSA for the data." 75 Fed. Reg. at 10,554. And by requiring a driver's written consent to the release of a PSP report, FMCSA would maintain compliance with the Privacy Act and Section 31150. See *id.* at 10,556; 77 Fed. Reg. at 42,551.

3. Petitioners are six commercial motor vehicle operators who allege that the PSP system contains reports of their non-serious driving violations and that the "dissemination" of such reports "diminishe[s]" the "economic value of [petitioners'] services." Pet. App. 116. Petitioners filed suit on behalf of a putative class "consisting of all individuals in the United States for whom FMCSA has collected, maintained and transmitted for dissemination under the Pre-employment Screening Program inspection reports that contain references to alleged safety violations not determined by the Secretary of Transportation to be serious driver-related safety violations." *Id.* at 141-142. According to petitioners, the inclusion of non-serious violations in PSP reports violates the Privacy Act because it "is neither relevant nor necessary to accomplish the specifically defined purpose of the PSP program (set forth in 49 U.S.C. § 31150(c))." *Id.* at 119. Rather, petitioners contend, Section 31150's requirement that FMCSA "shall" provide access to certain information, including serious driver-related safety violations, prohibits FMCSA from disclosing other information, in-

cluding non-serious violations. *Id.* at 118-119. Petitioners requested statutory damages of $1000 per violation, plus attorney's fees. *Id.* at 141.

The government moved to dismiss for failure to state a claim, and the district court granted the motion. Pet. App. 15. The court explained that, prior to the passage of Section 31150, FMCSA "had the authority under the Privacy Act to release safety-related information from the MCMIS system to any prospective employer with the consent of the prospective driver-employee." *Id.* at 35. Now, "[Section] 31150 likewise requires consent." *Id.* at 36. The court noted that its analysis "could simply stop there" because, "[i]f the Privacy Act permits disclosure of information with the driver's consent, and if the program challenged here does not permit disclosure without the driver's consent, it is by no means clear how the challenged program could violate the Privacy Act." *Id.* at 36 n.7.

The district court further held that Section 31150 does not bar the release of records of non-serious violations. Pet. App. 42. The court concluded that the government's interpretation of Section 31150—that "[FMCSA] *must* release the three identified categories of reports, but *may* release additional information," *id.* at 35—merits deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It determined that the statute is ambiguous as to "whether the three identified categories of reports that 'shall' be subject to electronic access are intended to be a floor * * * or a ceiling." Pet. App. 38. In light of that ambiguity, the court deferred to the agency's interpretation, which it found to be "rational and coherent, and in keeping

with [FMCSA's] statutory authority to promote highway safety." *Id.* at 41.

4. The court of appeals unanimously affirmed. Pet. App. 1-13. At the outset, the court "assume[ed] without deciding that [petitioners] ha[d] adequately pled standing under both Article III and the Privacy Act" because the court "believe[d] this case [could] be decided easily on the merits." *Id.* at 8.

The court of appeals then analyzed FMCSA's interpretation of Section 31150 under *Chevron*. At the first step of *Chevron*, the court agreed with the district court that Section "31150's command that the agency 'shall provide' certain reports can just as easily be read as a floor, an articulation of the agency's minimum disclosure obligations, rather than a ceiling." Pet. App. 9-10 (citing *Massachusetts Trs. of E. Gas & Fuel Assocs.* v. *United States*, 377 U.S. 235, 244 (1964)). In addition, the court explained, "[t]here is no specific language in the statute which precludes the agency from making other driver-related information available to prospective employers, provided they have driver consent." *Id.* at 10. It thus concluded that "Congress has not spoken to the precise question of non-serious violations." *Ibid.*

At the second step of *Chevron*, the court of appeals determined that FMCSA's interpretation of Section 31150 was reasonable. The court explained that "reading the statute as a floor comports with the broader statutory purpose of § 31150 and the agency's mandate to promote highway safety" by providing "*more* information" to employers. Pet. App. 10. The court emphasized that FMCSA's interpretation also served the objective, apparent in both Section 31150 and the Privacy Act, of protecting employees by "requir[ing]

driver consent before the relevant MCMIS records can be disclosed." *Id.* at 11. On that point, the court concluded that FMCSA's standard consent form adequately notifies drivers that they are authorizing the disclosure of all driver-related safety violations, not just serious ones. *Id.* at 12.

ARGUMENT

Petitioners renew their contention (Pet. 14-39) that Section 31150 bars the disclosure of non-serious driver-related safety violations. The court of appeals correctly rejected that reading of the statute. Section 31150 requires FMCSA to provide electronic access to certain records, but it does not prohibit the disclosure of other records with a driver's consent. The court's decision to defer to FMCSA's reasonable statutory construction under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), does not conflict with any decision of this Court or of any other court of appeals.

Moreover, this case is not a suitable vehicle for addressing the question presented, for at least two reasons. First, petitioners may not have pleaded an injury sufficient to establish Article III standing because they did not allege that their information had been disclosed to a prospective employer or would be disclosed in the imminent future. Second, even putting Section 31150 to the side, petitioners cannot prevail under the Privacy Act because FMCSA makes the challenged disclosures only with driver consent. Further review is not warranted.

1. The court of appeals correctly determined that Section 31150 does not prohibit FMCSA from disclosing non-serious driver safety violations with driver consent. Pet. App. 9. In fact, Section 31150 says

nothing at all about such disclosures. *Id.* at 10. It specifies only that FMCSA "shall provide * * * electronic access" to three other categories of records. 49 U.S.C. 31150(a). At the very least, the statute is ambiguous and the court of appeals properly accorded *Chevron* deference to FMCSA's reasonable interpretation.

a. Petitioners' argument to the contrary misconstrues the role of Section 31150. Petitioners portray that provision (Pet. 18) as a limited grant of "specific statutory authorization to disseminate reports of 'serious driver-related violations.'" See Pet. 25 (contending that "Section 31150 represents the first time that Congress has authorized the dissemination of driver safety data"). But Section 31150 is not the source of FMCSA's "authorization" to disclose records. Agencies frequently communicate with the public or with industry participants in carrying out their functions. The Privacy Act governs those communications where they implicate individuals' records, and that Act authorizes the release of such records "with the prior written consent of [] the individual to whom the record pertains." 5 U.S.C. 552a(b). Thus, FMCSA may, consistent with the Privacy Act, disclose all driving records in its MCMIS database—so long as the covered individual consents to the release. Indeed, petitioners acknowledged below that FMCSA may disclose their entire safety records, including non-serious violations, pursuant to a FOIA request. See Pet. C.A. Br. 17-18.

The relevant question, then, is whether Section 31150 *withdraws* that authority for non-serious safety violations. It does not. Section 31150 states that FMCSA "shall" provide potential employers "electronic access" to, among other things, "[s]erious driver-

related safety violation inspection reports." 49 U.S.C. 31150(a). As this Court has explained, the term "'shall' plainly denotes a minimum" but "does not of linguistic necessity denote a maximum." *Massachusetts Trs. of E. Gas & Fuel Assocs.* v. *United States*, 377 U.S. 235, 244 (1964). Or, as the court of appeals concluded, Section "31150's command that the agency 'shall provide' certain reports can just as easily be read as a floor * * * rather than a ceiling." Pet. App. 9-10. In short, Section 31150 requires FMCSA to make available certain information in a convenient electronic format. Nothing in the statute precludes the agency from releasing additional information through that same format, if the disclosure otherwise complies with the agency's pre-existing Privacy Act obligations.

That interpretation of Section 31150(a) is consistent with other portions of the statute. For example, Section 31150(b) requires FMCSA to "ensure that any information that is released to [a prospective employer] *will not be released* to any person or entity, other than" the employer or the driver. 49 U.S.C. 31150(b)(3) (emphasis added). That express prohibition on further disclosures "demonstrates that Congress knew how to" bar the release of information "when it wanted to." *Jones* v. *Bock*, 549 U.S. 199, 222 (2007). Section 31150(c), meanwhile, adds that a prospective employer's use of the electronic MCMIS database "shall not be mandatory." 49 U.S.C. 31150(c). That provision underscores that Congress regarded Section 31150 as a non-exclusive mechanism for providing access to drivers' safety records. Because specific "investigations and inquiries" about new drivers are mandatory, 49 C.F.R. 391.23, Congress under-

stood that some disclosures would take place outside the system it had outlined.

The legislative history that petitioners cite (Pet. 25-26) is not to the contrary. As petitioners note, the relevant House Report explains that "[p]rohibiting the release of this driver safety information unless expressly authorized or required by law protects driver privacy." H.R. Conf. Rep. No. 203, 109th Cong., 1st Sess. 991 (2005). That statement, however, appears just two sentences after the same report emphasizes that "electronic access may be accomplished only after the prospective employer obtains written consent of the driver applicant." *Ibid.* Read together, those portions of the House Report merely confirm FMCSA's longstanding position that driver-related safety information can be released to the driver or another person only with the driver's written consent under the Privacy Act.

b. Because nothing in Section 31150 forbids the disclosure of non-serious safety violations, the court of appeals correctly affirmed the dismissal of petitioners' suit. At the very least, though, Section 31150 is ambiguous as to whether additional disclosures are permissible. See Pet. App. 10. FMCSA's 2010 Notice indicates that the agency decided to make available "the most recent five (5) years' crash data and the most recent three (3) years' inspection information," without limitation to serious violations. 75 Fed. Reg. at 10,555. That decision—which was published in the Federal Register in accordance with the Privacy Act, see 5 U.S.C. 552a(e)(4), and with the agency's statutory mandate to achieve "the highest degree of safety in motor carrier transportation," 49 U.S.C. 113(b)—is

entitled to deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227-228 (2001).

As the court of appeals held, FMCSA's interpretation of Section 31150 "easily passes muster" under the second step of *Chevron*. Pet. App. 10. Increasing access to a driver's inspection history "comports with the broader statutory purpose of § 31150 and the agency's mandate to promote highway safety" by providing "*more* information" to employers. *Ibid.* Indeed, many of the violations identified in petitioners' complaint, though they may not qualify as "serious driver-related violation[s]" under Section 31150(d), raise significant safety concerns. See *id.* at 121-134. Drivers with violations for an incorrect "record of duty status," *id.* at 124, 127, 129, 131, for example, could be obscuring an hours-of-service violation, which is itself a "serious driver-related violation." See 49 C.F.R. 395.13. Similarly, drivers with repeated violations for speeding and employing a radar detector, Pet. App. 124-125, may pose an increased risk of traffic accidents. See 49 C.F.R. 392.6, 392.71.

At the same time, FMCSA's construction of the statute protects drivers by requiring consent before any MCMIS records are released. Pet. App. 11; see 75 Fed. Reg. at 10,556; 77 Fed. Reg. at 42,551 (ensuring that PSP records are provided with the "operator-applicant's signed, written consent"). Consistent with Section 31150(c), moreover, FMCSA has made clear that the use of the PSP system is not mandatory for either motor-carrier employers or drivers. 75 Fed. Reg. at 10,555. The same information instead remains available to an employer under FOIA and the Privacy Act, with the driver's consent. *Ibid.*

2. Petitioners contend (Pet. 18-39) that this case creates or deepens circuit splits on three questions: (1) whether statutory ambiguity may be established on the basis of congressional silence; (2) whether an agency receives deference for a statutory interpretation asserted for the first time in litigation; and (3) whether the Privacy Act permits disclosures not properly described in a System of Records Notice. Even assuming that some division exists, this case does not implicate any of those questions.

a. Petitioners first contend (Pet. 19-24) that the First Circuit created a conflict with four other courts of appeals by finding that "the failure of Congress to expressly withhold broader authority" amounts to "ambiguity under *Chevron* Step One." That contention is unfounded. As already explained, the question the court of appeals considered was whether a statutory provision that is silent on a subject "unambiguously restrict[s]" the agency's pre-existing authority on that subject. Pet. App. 9; see pp. 10-11, *supra*. The court, in other words, did not interpret silence as an ambiguous expansion of agency authority; it interpreted silence as, at most, ambiguous with respect to whether Section 31150 imposes a limitation on the agency's pre-existing authority.

There is no division among the courts of appeals on that question. In each of the decisions that petitioners cite (Pet. 19-20), the court engaged in a context-specific analysis of whether an agency could extend its authority beyond its congressionally delegated sphere. For example, the D.C. Circuit held that an agency could not unilaterally expand its "very limited authority to investigate representation disputes" at the behest of certain parties, in "the absence of any

statutory authority." *Railway Labor Execs.' Ass'n* v. *National Mediation Bd.*, 29 F.3d 655, 658 (1994) (en banc), cert. denied, 514 U.S. 1032 (1995). It explained that courts do not "*presume* a delegation of power absent an express *withholding* of such power." *Id.* at 671. The Third, Fifth, and Eleventh Circuits have similarly rejected the proposition that an agency is entitled to *Chevron* deference so long as its organic statute does not "specifically foreclose" the claimed authority. *Prestol Espinal* v. *Attorney General*, 653 F.3d 213, 220 (3d Cir. 2011); see *Contender Farms, L.L.P.* v. *United States Dep't of Agric.*, 779 F.3d 258, 271-274 (5th Cir. 2015) (holding that "an administrative agency does not receive deference under *Chevron* merely by demonstrating that a statute does not expressly negate the existence of a claimed administrative power") (emphasis, citation, and internal quotation marks omitted); *Bayou Lawn & Landscape Servs.* v. *Secretary of Labor*, 713 F.3d 1080, 1084 (11th Cir. 2013) (explaining that "an agency's power to promulgate legislative regulations is limited to the authority delegate[d] to it by Congress"). Unlike those decisions, the decision here rests on FMCSA's pre-existing authority to disclose information under the Privacy Act, which Section 31150 did not unambiguously rescind. Pet. App. 9; see *id.* at 35-36.

b. Petitioners next contend (Pet. 28-35) that the First Circuit deepened a circuit split by deferring to a statutory interpretation proposed for the first time as a defense in litigation. Petitioner's premise is mistaken. FMCSA's interpretation of Section 31150 was not "proposed by FMCSA counsel for the first time as a defense in this case," as petitioners assert (Pet. 28), but was articulated in both the 2010 and 2012 Notices.

As the court of appeals recognized, Pet. App. 5, the initial 2010 Notice identified the "Categories of Records" to be disclosed in PSP reports, including "the most recent five (5) years' crash data and the most recent three (3) years' inspection information." 75 Fed. Reg. at 10,555; see also *id.* at 10,557 (describing "Record Source Categories"). The 2012 Notice confirmed that "[a] record purchased through PSP contains the most recent five years of crash data and the most recent three years of roadside inspection data, *including* serious safety violations for an individual driver." 77 Fed. Reg. at 42,549 (emphasis added); see also *id.* at 42,550, 42,552.

Petitioners fail to identify anything in the court of appeals' decision suggesting that the court deferred to an agency litigating position. They assert (Pet. 33) that "there is no dispute" that the agency's position here "was adopted for the first time as a defense in litigation." But FMCSA made clear throughout this litigation that its 2010 and 2012 Notices extended the PSP system beyond the minimum disclosure requirements found in Section 31150. See, *e.g.*, Gov't C.A. Br. 9-10, 30-32. The court adopted the same reading of the two Notices. See Pet. App. 5-6 ("Neither of these [System of Records Notices] purported to exclude non-serious driver-related safety violations from the database."). Because the court did not defer to an agency litigating position, its decision does not implicate the circuit split that petitioners allege.

c. Finally, petitioners contend (Pet. 35-39) that the First Circuit permitted FMCSA to disclose documents that were not described in a System of Records Notice. According to petitioners, that decision conflicts with decisions of the Fifth and Sixth Circuits that

have enforced the Privacy Act's notice requirements. Pet. 37-38 (citing *Risch* v. *United States Postal Serv.*, 244 F.3d 510, 511 (6th Cir. 2001); *Chapman* v. *NASA*, 682 F.2d 526, 528 (5th Cir. 1982)).

Again, however, petitioners' argument relies on a mistaken premise. FMCSA has never disputed its obligation under the Privacy Act to "publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records." 5 U.S.C. 552a(e)(4). Nor did the court of appeals hold that FMCSA has no such obligation. See Pet. App. 5-6. As already explained, the 2010 and 2012 Notices provided the requisite notice. *Ibid.*; see pp. 15-16, *supra*.

Petitioners respond (Pet. 36) that the court of appeals erroneously held "that any records can be distributed unless a [System of Records Notice] specifically excludes those records." That is incorrect. Although the court observed that the 2010 and 2012 Notices did not "exclude non-serious driver-related safety violations," it did so after explaining that the same Notices expressly covered "the most recent five years' crash data and the most recent three years' inspection information." Pet. App. 5-6. The court's point was clear: The Notices covered all recent safety information, including non-serious violations.

In any event, petitioners have waived any argument about the clarity of the 2010 and 2012 Notices. Their complaint asserted claims under other provisions of the Privacy Act. See Pet. App. 145 (asserting violations of 5 U.S.C. 552a(e)(1) and (6)). Petitioners did not bring suit under the notice provisions of 5 U.S.C. 552a(e)(4), and they cannot invoke those provisions now. See *Cutter* v. *Wilkinson*, 544 U.S.

709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

3. Even if petitioners had raised a legal question on which there is a division of authority, this case would not be a good vehicle for answering it. There is a potential jurisdictional obstacle to this Court's review, and any decision on the proper interpretation of Section 31150 would not be outcome-determinative anyway.

a. The court of appeals determined that it could "assume without deciding that [petitioners] have adequately pled standing" under Article III because the case could "be decided easily on the merits." Pet. App. 8. That approach was incorrect; courts must resolve jurisdictional questions before proceeding to the merits. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (rejecting the doctrine of "hypothetical jurisdiction").

In order to satisfy Article III, plaintiffs must allege facts sufficient to establish that they have suffered a particularized injury. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992). Here, petitioners did not allege that FMCSA had disseminated their safety records to prospective employers and caused any existing harm. See Pet. App. 116-120. Rather, they alleged that FMCSA had "prepared and *made available for* dissemination to potential employers" their PSP reports. *Id.* at 121, 124, 126, 128, 130, 132 (emphasis added). Yet, according to their allegations, it is the "dissemination of PSP reports" that "diminishes the economic value of [petitioners'] services," *id.* at 120, and dissemination can occur only with their consent. Petitioners also alleged that, for some unnamed drivers, reports of non-serious safety

violations had a negative impact on the drivers' ability "to command better compensation and benefits when * * * hired"—though that did not necessarily include petitioners themselves. *Id.* at 140.

Petitioners, in effect, assert a future injury that would occur if their PSP reports were ultimately disclosed to a potential employer. But allegations of future injury must demonstrate that the injury is "certainly impending," not merely "possible," in order to satisfy Article III. *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (emphasis and citation omitted). Petitioners have not pleaded facts showing that their injury is "certainly impending." Not one of the petitioners alleges, for example, that he has applied for a job that would trigger a request for a PSP report, or even that he has contemplated applying for a job in the future but has been discouraged from doing so by the potential disclosure of his PSP report. See Pet. App. 141. Thus, whether their PSP reports might cause petitioners some future economic harm is, under the facts alleged in their complaint, "speculative." *Clapper*, 133 S. Ct. at 1148.[*]

b. In addition, a decision adopting petitioners' preferred interpretation of Section 31150 would not change the outcome of this case. Petitioners have not alleged any cognizable Privacy Act violation. FMCSA does not disseminate any information to potential employers without a driver's consent, 49 U.S.C.

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[*] Petitioners have abandoned the argument that they have standing based on the $10 fee to access their PSP reports. See Pet. App. 138. The district court correctly rejected the argument because "that injury is not caused by the alleged violation of the Privacy Act, and therefore would not be redressable by a ruling in [petitioners'] favor." *Id.* at 32 n.4.

31150(b), and the Privacy Act permits the disclosure of agency records with such consent, 5 U.S.C. 552a(b). As the district court pointed out, "[a]rguably, the [c]ourt could simply stop there." Pet. App. 36 n.7.

Petitioners seek to avoid this problem by alleging that FMCSA violated 5 U.S.C. 552a(e)(1). Pet. App. 145. That provision governs the proper maintenance of records, rather than the proper disclosure of records. Compare 5 U.S.C. 552a(e)(1), with 5 U.S.C. 552a(b). But the asserted harm in petitioners' complaint is the "dissemination" of information to potential future employers. See Pet. App. 116, 140-141. In fact, petitioners concede that FMCSA's maintenance of non-serious safety violations in the MCMIS database is unobjectionable, and even that the disclosure of such violations is permissible under FOIA. See Pet. 8; Pet. App. 35. Thus, whatever the validity of their contention that FMCSA lacked the authority to disclose non-serious safety violations under Section 31150, petitioners have not stated a claim under the Privacy Act. For that reason, too, review of the Section 31150 question is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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