No. _____

In The
Supreme Court of the United States

ANTHONY ROBINSON,

Petitioner,

v.

UNITED STATES DEPARTMENT OF EDUCATION,

Respondent,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED:

1. The Fair Credit Reporting Act provides that any "person" who willfully or negligently violates its duties to consumers under the statute is liable to those consumers for actual damages, statutory damages, punitive damages, costs and attorney fees. 15 U.S.C. § 1681n and § 1681o. The definition of "person" under FCRA includes "any … government or governmental subdivision or agency." § 1681a(b). Respondent USDE seeks to avoid liability under FCRA on the basis of sovereign immunity. The question presented, upon which circuits are divided, is:

   Whether the Fair Credit Reporting Act authorizes consumers to file civil suits against federal governmental agencies under 15 U.S.C. § 1681n and §1681o.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Robinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals order denying Petitioner's petitioner for a rehearing en banc is attached in Pet. App. 1a-2a. The opinion of the court of appeals (Pet. App. 3a-22a) is published at 917 F.3d 799. The district court opinion denying Petitioner's motion for reconsideration (Pet. App 23a-30a) is unpublished. The opinion of the district court (Pet. App. 31a-44a) granting Respondent's motion to dismiss is unpublished but available at 2017 WL 1277429.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2019. Pet. App. 3a. The court of appeals denied petitioner's timely petition for rehearing en banc on May 7, 2019. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1681a(b) of Title 15 provides:

> The term "person" means any individual, partnership, corporation, trust, estate,

cooperative, association, government or governmental subdivision or agency, or other entity.

Section 1681n of Title 15 provides in relevant part:

(a) In general. Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance. Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible

purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater…… Section 1681o of Title 15 provides in relevant part:

a. In general. Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of— (1) any actual damages sustained by the consumer as a result of the failure; and

1. in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court…

Section 1681s-2(b)(1)(A) of Title 15 provides:

(b) Duties of furnishers of information upon notice of dispute (1) In general. After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall—

(A) conduct an investigation with respect to the disputed information;

Section 1681s of Title 15 is too long to include with the above; it may be found, in relevant part,

in **Appendix E,** APP.45a. Other relevant statutes are also included in Appendix E, including Sections 1681p, 1681q and 1681u(j) of Title 15.

STATEMENT OF THE CASE

This Court recognized the substantial importance of the question presented here when it decided *United States v. Bormes*, 568 U.S. 6 (2012). But in Bormes, this Court only answered the question of whether the Little Tucker Act could be construed as a waiver of federal sovereign immunity under the FCRA, and left the question of whether the FCRA itself contained a waiver to be decided by the Seventh Circuit. On remand, the Seventh Circuit found the language of the FCRA clearly and unambiguously waived the sovereign immunity of the federal government. *Bormes v. United States*, 759 F.3d 793 (2014). In Contrast, the Fourth and Ninth Circuits found no waiver of federal sovereign immunity under § 1681n and § 1681o of the FCRA*. Robinson v. United States Dep't. of Educ.*, 917 F.ed 799 (4th Cir. 2019).

The Circuits deviate on one point of interpretation of the FCRA liability provisions in § 1681n and § 1681o: in determining what "person" Congress intended to hold liable, the Seventh Circuit applied the definition of "person" in § 1681a(b—a definition which includes "any … governmental … agency." The Fourth and Ninth

Circuits, however, applied the ordinary meaning of "person" with the express purpose of excluding the sovereign. In order to justify applying the ordinary meaning of person in a statute that contains a definition of person, the Court merely listed a variety of principles of statutory construction, and added them up to equal the power to re-write the statute.

A. Statutory Scheme

The Fair Credit Reporting Act is designed to ensure accuracy and fairness in the credit reporting system. *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 52 (2007). Congress recognized that "[i]naccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1).

FCRA is one of six subchapters under the Consumer Credit Protection Act of 1968, which also includes the Equal Credit Opportunity Act (ECOA) and the Truth in Lending Act (TILA). FCRA imposes regulations on three groups: credit reporting agencies (CRAs), those who furnish information to CRAs ("furnishers"), and those who procure consumer reports for authorized purposes ("users"). The liability at issue in this case involves the USDE's activities

as a furnisher, and the relevant furnisher provisions are discussed in the first section below. However, if this Court agrees with Petitioner that "any governmental agency" includes Respondent, there are other requirements imposed on "any person" which could also give rise to liability under § 1681n and § 1681o. These requirements are discussed in the second section below.

(1)Duties & Liability of Furnishers

When FCRA was originally enacted in 1970, it only regulated the conduct of credit reporting agencies (CRAs) and users of consumer reports. See generally Pub. L. No. 91-508, 84 Stat. 1127 (1970). Thus, liability for violations of FCRA extended only to "[a]ny consumer reporting agency or user of information," and did not include those who furnish information to CRAs. Id., 84 Stat. at 1134, §§ 616; see also §617 (civil liability for negligent noncompliance).

In 1996, Congress expanded the scope of the FCRA to impose requirements on those who furnish information to the credit reporting agencies ("furnishers"). See 15 U.S.C. § 1681s-2. Under FCRA, furnishers' primary duty is to provide accurate information, § 1681s-2(a), but Congress exempted furnishers from liability to consumers for a violation of that duty. § 1681s-2(c)(1). Thus, FCRA does not impose any strict

liability for mistakes, and consumers cannot sue furnishers under FCRA simply for furnishing inaccurate information. As an alternative, consumers may attempt to bring suit against furnishers under the common law claims of defamation, invasion of privacy or negligence, and Congress accounted for that. In § 1681h(e)(e), Congress required that any such claims be limited to "false information furnished with malice or willful intent to injure such consumer."

Although Congress prohibited consumers from suing furnishers for violations of § 1681s-2(a), it empowered the Federal Trade Commission (FTC), states, and the Consumer Financial Protection Bureau (CFPB) to bring claims against furnishers for such violations. See § 1681s-2(d) (violations of § 1681s-2(a) "shall be enforced exclusively as provided under section 1681s of this title by the Federal agencies and officials and the State officials identified in section 1681s…"). First, the administrative enforcement regime established under § 1681s allows the FTC to issue a civil penalty for a violation that "constitutes a pattern or practice of violations of this subchapter." § 1681s(a)(2)(A). However, before the FTC can bring a claim for any penalty, Congress first requires that the FTC successfully obtain an injunction ordering the person not to commit the violation. §

1681s(a)(2)(C). Again, Congress limited furnishers' liability to ensure they are not penalized for mere mistakes. In addition to the FTC, Congress also empowered the CFPB to enforce "compliance with the requirements imposed under this subchapter with respect to … persons who furnish information to such agencies." § 1681s(b)(1)(H). Similarly, states may bring an action to enjoin violations and to recover damages on behalf of its residents. § 1681s(c)(1)(A)-(B).

Consumers can only bring claims against furnishers under FCRA for violations of the duties imposed under § 1681s-2(b). That section requires that furnishers "conduct an investigation" of consumers' disputes submitted to CRAs, to "review all relevant information provided by" the CRA, to "report the results of the investigation" to the CRA, and to appropriately modify or block inaccurate information. § 1681s-2(b)(1)(A)-(E). If a consumer submits a dispute to a CRA, both the CRA and the furnisher of information have an independent duty to investigate. 15 U.S.C. §§ 1681i(a), 1681s-2(b). Consumers also have the option to dispute information directly with furnishers, but those direct disputes cannot be the basis of a suit by a consumer because they fall under § 1681s-2(a). See § 1681s-2(c)(1). Given the narrow scope of duties under § 1681s-

2(b)(1), liability only arises after a consumer submits a dispute and the furnisher has an opportunity to investigate the dispute, then the furnisher fails to appropriately correct inaccurate information.

FCRA imposes civil liability for willful noncompliance with its requirements in § 1681n: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for actual damages or damages "of not less than $100 and not more than $1,000," as well as punitive damages, attorney fees, and costs. See also §1681o (civil liability for negligent noncompliance). So, FCRA's 1996 amendment changed liability from applying only to CRAs and users of credit reports, to liability for any "person," which "means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." § 1681a(b). This broad definition of "person" expands the "ordinary" definition of person by including the government, which is otherwise presumed to be excluded in statutes without such definition. See *Return Mail, Inc. v. U.S. Postal Service, et al.*, No. 17-1594 (June 10, 2019). Congress instructed that the statutory definition of "person" be "applicable for the purposes of this subchapter." § 1681a(a).

Courts have also created limitations on liability in their interpretation of § 1681n and § 1681o, which allow suits only for "willful" or negligent violations. In order to establish an FCRA claim, plaintiffs must prove that a reasonable investigation would have yielded different results (a causation requirement), and that the dispute was based on an actual inaccuracy. In practice, this requires that FCRA plaintiffs introduce expert testimony on what constitutes a "reasonable" investigation, and the cost of expert testimony is a deterrent to frivolous litigation. Plaintiffs also have to uncover the evidence to prove the inaccuracy. These burdens on plaintiffs provide furnishers affirmative defense whereby they can avoid liability by establishing that either they conducted a reasonable investigation, or that the disputed information was accurate.

(2)Other Requirements Imposed On Any "Person"

The majority of FCRA's requirements pertain only to CRAs, which would not expose the federal government to any liability because it is not a credit reporting agency. So, while many Courts have expressed fear that FCRA potentially exposes the government to extensive liability, further exploration of the statute shows that there are limited requirements imposed upon

"any person," and many affirmative defenses available to prevent liability. Aside from duties that apply exclusively to furnishers, the FCRA imposes the following ten requirements, subject to certain limitations, on any "person."

Limitations on Permissible Uses of Consumer Reports:

1. § 1681b(f) - "Person" cannot use or obtain report for impermissible purposes and a certification of the permissible purpose is required.
2. § 1681d(a) "Person" cannot procure "investigative consumer report" (defined in § 1681a(e) as a report which includes information about the consumer's character obtained through personal interviews) unless certain requirements are met.

Protection of Identity:

3. § 1681c(g) "Person" accepting credit cards cannot print more than the last 5 digits of the card number or expiration date on point-of-sale receipts.
4. § 1681m(f)(1) "Person" cannot transfer a debt after being notified it is the result of identity theft.

Disclosure Requirements:

5. §1681d(b) - "Person" must provide information on scope of investigation used

to create an investigative consumer report upon the request of the consumer.

6. § 1681e(e)(1) -"Person" must disclose certain information to CRA before it can "procure a consumer report for purposes of reselling the report."
7. § 1681m(a) & § 1681m(b) - "Person" taking adverse actions based on information in a consumer report obtained from either a CRA or from a third party must provide disclosures to consumers. Maintenance of reasonable procedures is an affirmative defense to any alleged violation of these sections. § 1681m(c).
8. § 1681m(h)(1) - "Person" who uses consumer report in connection with application for credit and gives less than ideal terms must provide disclosures to consumers. Maintenance of reasonable procedures is an affirmative defense to any alleged violation of this section. § 1681m(h)(7).

Establishment of Reasonable Procedures For Resellers:

9. § 1681e(e)(2)(A) "Person" who resells consumer reports must "establish and comply with reasonable procedures designed to ensure" it does not sell the report to users for impermissible purposes.

The above list demonstrates the limited scope of the duties imposed upon any "person," and undermines the notion that the FCRA creates vast liability. An analysis of the duties shows that half of them only require the person to make disclosures, and three of those provisions provide that there is no liability for a violation as long as reason-able procedures are in place to provide such disclosures. See § 1681m(c), § 1681m(h)(7). These requirements are simple, and merely require that any "person" establish appropriate procedures for making the required disclosures to avoid liability.

Two of the requirements imposed on "any person" merely limit the purposes for which reports can be obtained. §§ 1681b(f), 1681d(a). Thus, liability would only arise in the event a "person" is abusing the credit reporting system by obtaining consumer reports for inappropriate purposes. Given the vast amounts of personal information contained on consumer reports (including information on employment history and income level), these limitations provide consumers with necessary protection of their privacy. In fact, Congress found the misuse of credit reports to be so egregious that it enacted criminal penalties and civil fines on any person participating in such abuse. See § 1681q, § 1681r.

B. Background Facts & District Court Opinions

Petitioner Anthony Robinson's troubles began when he discovered that his signature had been forged on student loan applications, and that Respondent USDE was reporting fraudulent student loan accounts to the credit bureaus. Petitioner disputed the loans based on identity theft. In support, Petitioner submitted many documents, including copies of a loan document showing the forged signatures, along with a copy of the police report which identified the student loans as fraudulent. Respondent nevertheless refused to remove the fraudulent accounts from Petitioner's credit reports.

In 2015, Petitioner filed an Amended Complaint against Respondent in the U.S. District Court for the District of Maryland alleging Respondent breached its statutory obligations to him under §§ 1681s-2(b)(1)(A)-(B) by failing to property investigate his dispute and failing to review the information that was submitted with his dispute. Respondent moved to dismiss Petitioner's claims based on want of subject matter jurisdiction, claiming sovereign immunity as a federal agency. The District Court agreed with Respondent and dismissed Petitioner's claims along with Petitioner's subsequent Motion for Reconsideration. App., infra, 23a, 31a. The Fourth Circuit denied the Petitioner's ensuing appeal. The opinions of the

District Court and Fourth Circuit are based on the same reasoning, which is discussed below.

C. The Court of Appeals' Decision

To determine whether consumers can bring civil suit against federal government agencies under § 1681n and § 1681o, the Fourth Circuit cited this Court's requirement that a "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text … and will not be implied." App., infra, 9a, citing *Lane v. Pena*, 518 U.S 187, 192 (1996). The court added that in order to meet this standard, waivers must be "unambiguous." Ibid. The court placed "the burden of showing that the government has waived sovereign immunity" on the Petitioner. App., infra, 9a, citing *Williams v. United States,* 50 F.3d 299, 304 (4th Cir. 1995).

The court began its analysis by identifying the key issue of interpretation: "the meaning of the word 'person' in § 1681n and § 1681o." App., infra, 7a. The court acknowledged that the statute defines "person" to include "any … government or governmental subdivision or agency" § 1681a(b). However, it declined to apply the statutory definition of "person" to § 1681n or § 1681o. App., infra, 11a. In doing so, it recognized that its decision was in direct conflict with the Seventh Circuit's holding in *Bormes.* App., infra, 12a.

Noticeably absent from the court's decision is any mention of § 1681a(a), which states that the definition of person is "applicable for the purposes of this subchapter." The Fourth Circuit made no attempt to reconcile the language of § 1681a(a) with its decision to not apply the definition of "person" for the purposes of § 1681n and § 1681o. The court provides no discussion of how it arrived at the decision that the presumption that the ordinary meaning should apply despite the mandate in § 1681a(a). There are at least three principles of statutory construction which the court did not consider in reaching this result. First, the court did not address the fundamental "Supremacy-of-Text Principle" that the "words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts Canon 2 (2012). If this Court reviews the Fourth Circuit's decision, it can properly consider this fundamental principle, which would examine the text of the statute to derive its purpose, and to allow the purpose of the statute (as stated in its text) to inform its interpretation of § 1681n and § 1681o. Id.

By disregarding the language in § 1681a(a) and not using the statutory definition of "person," the court also did not consider the "Interpretive-Direction Canon" that "[d]efinition

sections and interpretation clauses are to be carefully followed," or the "Surplusage Canon" that "[i]f possible, every word and every provision is to be given effect (verba cum effectu sunt accipienda). None should be ignored. None should needlessly be given an interpretation that causes it to … have no consequence." Id., Canons 36, 26. By using the ordinary meaning of "person" instead of the statutory meaning, the Fourth Circuit disregarded the interpretive clause in § 1681a(a), thereby giving it no consequence.

Instead of using the statutory definition, the Fourth Circuit applied the "longstanding interpretative presumption that 'person' does not include the sovereign," claiming that "it is not unusual to consider the ordinary meaning of a defined term." App., infra, 11a, citing *Bond v. United States*, 572 U.S. 844, 861 (2014). In making this comparison, the court does not discuss that in *Bond*, this Honorable Court examined the extent of a federal criminal statute defining the phrase "chemical weapons," which contains two words, not just "person." The court glosses over the critical fact that the decision turned on the implication that the ordinary meaning of "weapon" informed its use in conjunction with "chemical," such that when taken together, they excluded activity that may have otherwise been technically subject to the

language. *Bond* was summarized by Chief Justice Roberts as follows:

> The question presented by this case is whether the Implementation Act also reaches a purely local crime: an amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water. Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach. The Chemical Weapons Convention Implementation Act contains no such clear indication, and we accordingly conclude that it does not cover the unremarkable local offense at issue here.

Id., 572 U.S. at 848. The Fourth Circuit supplies no explanation why this Court's statutory interpretation of a criminal statute adopted under an international treaty in *Bond* should inform its statutory interpretation of a civil liabilities provision in a consumer protection statute here. Other than the *Bond* case, the court supplies no citations to support its statement that the ordinary meaning presumption "applies

even when 'person' is elsewhere defined by statute." App., infra, 11a.

The court claimed that "[i]f it is plausible that Congress used 'person' according to its ordinary meaning, then sovereign immunity has not been unambiguously waived." Ibid. In its discussion, however, it never provides any explanation how it is "plausible" that Congress defined "person," stated that the definition should apply to the subchapter, yet intended for the "ordinary" meaning of person to apply only to the § 1681n and § 1681o, but not to § 1681s-2(b) (or any other "substantive" provisions). In fact, the court never discusses § 1681s-2(b) at all, despite the fact that it is the section upon which Petitioner's claims are based. The only statement that sheds light on the "plausibility" of the court's interpretation is that: "the substantive and enforcement provisions in *FCRA* are not one and the same." App., infra, 19a.

It seems the court believed it should engage in two separate statutory analyses for FCRA. For provisions it classified as "substantive," it applied the statutory definition of person (without requiring any analysis or explanation). But for provisions it classified as "enforcement,"

it applied the ordinary definition (also without requiring any analysis or explanation, other than "genuflecting before the divine altar of sovereign immunity."[1]). It does not offer any precedent for engaging in the bifurcated statutory analysis/non-analysis, and does consider the "Presumption of Consistent Usage" that a "word or phrase is presumed to bear the same meaning throughout a text." Reading Law, supra, Canon 25.

In finding that the "ordinary" definition of person should apply, the Fourth Circuit does not articulate the "ordinary" definition. Instead, it simply states: "suffice to say that the United States is not ordinarily considered to be a person." App., infra, 11a. The justifications the Fourth Circuit provides for its decision to displace the statutory meaning of person with the ordinary meaning of person are:

> (1) Compared to waivers in other unrelated statutes, the language in § 1681n and § 1681o is not as "clear" because it does not specifically reference

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[1] George W. Pugh, Historical Approach to the Doctrine of Sovereign Immunity, 13 La. L. Rev. (1953) Available at: https://digitalcommons.law.lsu.edu/lalrev/vol13/iss3/5

the "United States", App., infra, 12a-13a;

(2) If the statutory definition of "person" is applied to a completely different section of the statute, § 1681q, it would expose the U.S. to criminal penalties and create "absurd" results, App., infra, 16a;

(3) The waiver of federal sovereign immunity in § 1681u(j), a section which relates only to the federal government, is more "clear" because it uses the words "United States", App., infra, 14a;

(4) The consequences of waiving federal sovereign immunity under § 1681s(a)(1) (FTC enforcement), § 1681s(b)(1)(H) (CFPB enforcement), and § 1681s(c) (state enforcement) are "odd", App., infra, 17a;

(5) The court doubts that FCRA can validly waive state, tribal and foreign sovereign immunity in reliance on the statutory definition of "person," a result that it fears would have "broad and staggering implications…" App., infra, 19a;

(6) The potential exposure of the federal government to monetary liability is a consequence that court should interpret statutes to avoid; and

(7) The fact that an older version of the statute used "person" to indicate that the federal government was a "user" of information in one particular section has some implication. App., infra, 20a.

(1)Comparison to Waivers of Federal Sovereign Immunity in Unrelated Statutes

The Fourth Circuit first compared the FCRA to other statutes waiving sovereign immunity that it deemed more "clear." App., infra, 12a. The court denied that the "existing waivers serve as a series of litmus tests," App. infra, 14a., yet it relied heavily on other statutes to create a novel type of ambiguity in the language of FCRA: ambiguity by comparison. It did not offer any precedent from this Court for a method of statutory construction that derives ambiguity in one statute from the clarity in another, though the District Court and several other courts have engaged in this same problematic analysis. The Fourth Circuit acknowledges that its opinion is subject to the criticism of being imposing a "magic words" requirement on waivers of sovereign immunity, but simply denies that is the case. App., infra, 14a. In finding that there was "hardly evidence of an unequivocal intent to waive federal sovereign immunity in the same way as statutes that specifically describe actions

against the 'United States,'" App., infra, 12a, the court compares the FCRA to:

1. the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674;

2. the Little Tucker Act (LTA), 28 U.S.C. § 1346(a)(2);

3. the Internal Revenue Code (IRC), 26 U.S.C. 7433(a) (liability stemming from the "collection of Federal tax");

4. the Right to Financial Privacy Act, 12 U.S.C. § 3417(a) ("Person" in this statute means "an individual or a partnership of five or fewer individuals," and the provision cited is titled "Liability of agencies or departments of United States or financial institutions");

5. the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9620(a)(1) ("Person" in this statute only includes the "United States Government," 42 U.S.C. § 9601(21), so the liability is expanded beyond the statutory person to include: "[e]ach department, agency and instrumentality of the United States (including the executive, legislative, and judicial branches of government)"; and

6. the Clean Water Act, 33 U.S.C. § 1365(a)(1) ("Person in this statute only

> included "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body," 33 U.S.C. § 1362(5), the liability provision added "against any person, (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution)."

The Court admits that "analogizing FCRA's statutory scheme to that of other federal statutes" is "of decidedly marginal relevance and secondary importance." App., infra, 31a. Nonetheless, it compares FCRA to six federal statutes which fall into two categories. The first set of liability provisions are found within statutes that apply exclusively to the federal government (numbers 1-3 listed above). Despite the fact that the United States is the only entity being subjected to these entire statutes, the Fourth Circuit gives importance to the fact that "United States" is specifically mentioned in the liability sections. The Fourth Circuit explains that the use of "United States" is more clear than using a statutorily defined term "person," which supports its application of the ordinary definition of person rather than the statutory definition.

The second set of provisions, numbers 4-6 listed above, have definitions of "person" that do

not include agencies of the federal government, so their liability sections contain language that expands the scope of liability beyond the statutorily defined "person." None of the statutes cited by the court have a definition of "person" as expansive as FCRA, yet the Fourth Circuit cites them as persuasive authority for finding that "person" should be given its ordinary and not statutory meaning. See App., infra, 12a.

After citing completely unanalogous statutes, the Fourth Circuit refused to discuss the statutes cited by Petitioner for comparison, dismissing them as unimportant. App., infra, 20-21. Petitioner's Brief discussed the Equal Credit Opportunity Act, 15 U.S.C. § et. seq., and the Consumer Credit Disclosure Act (CCDA), 15 § 1602 et. seq. (formerly named Truth in Lending Act). Both ECOA and CCDA include the same entities in their definition of "person" as FCRA, and both are subchapters of the Consumer Credit Protection Act. See15. U.S.C. § 1681a(b), § 1691a(f), §§ 1602(d)-(e). There are two differences between the definitions that may even suggest that FCRA has a more expansive reach: (1) rather than merely "a" government, it covers "any" government, and (2) it includes any "other entity." Ibid. So, while the Court claimed that its interpretation "reflects a holistic statutory view," it refused to discuss how FCRA's waivers compare to the statutes in the same

suite of laws which are all designed for the same overall purpose: consumer protection.

(2)Comparison to Criminal Penalties Provision 15 U.S.C. § 1681q

Continuing its pattern of making comparisons to provisions not at issue, the Fourth Circuit turned its focus to FCRA § 1681q, which provides:

> Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under Title 18, imprisoned for not more than 2 years, or both.

As it expressed its "puzzlement upon [imagining] a criminal case captioned '*United States v. United States*,'" it did not explain why the interpretation of § 1681n and § 1681o must be identical to the interpretation of § 1681q. App., infra, 16a, citing *United States v. Cooper Corp.*, 312 U.S. 600, 609 (1941). Inherent in the Fourth Circuit's analysis is the presumption that all liability provisions in the FCRA must adopt the statutory definition of "person" in order for the statutory definition to apply in § 1681n and § 1681o. It is an "all or none" approach to statutory construction without any precedent in this Court, and it created an irreconcilable method of analysis with inherent contradictions.

The Fourth Circuit's own interpretation required the application of different meanings of "person" throughout the statute. It applied the statutory definition for § 1681s-2(b)(1), but the ordinary meaning for § 1681n and § 1681o. Yet, in its discussion of § 1681q, the court supposes that "person" must be applied to every liability section or to no liability section at all. This analysis did not allow for the possibility that Congress intended to waive the sovereign immunity of the United States for civil liability under § 1681n and § 1681o, while at the same time did not intend to subject the U.S. to criminal liability under § 1681q. The Fourth Circuit does not address this inherent contradiction in its statutory analysis.

The other glaring omission in the court's analysis of § 1681q is that the Fourth Circuit does not provide its own definition of "person" (other than to say the statutory definition should not apply). It does not give any reason to conclude that the "ordinary" definition should apply, and it does not consider a third possibility: that "person" in § 1681q could refer to its "natural" definition to mean "individual." It does not seem to consider that the context of § 1681q—being a criminal penalties provision—could provide the context for an interpretation of "person" other than both the statutory and the ordinary definition.

The Fourth Circuit described Petitioner's interpretation as one of "isolation." Yet, while considering other liability statutes in the FCRA, the Fourth Circuit decided not to consider that § 1681r is a second criminal penalties provision in the FCRA that states:

> Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under title 18, imprisoned for not more than 2 years, or both.

The court never analyzed the use of the word "person" in this criminal liability statute, which refers to a person who receives information from a CRA without authorization. § 1681r. If this Court were to agree that the interpretation of the use of "person" in FCRA provisions provide guidance in the interpretation of the use of "person" in § 1681n and § 1681o, it would present an opportunity to include an analysis of the use of person in § 1681r. None of the three circuits who have examined this issue have considered § 1681r in their statutory analyses.

Also lacking in the court's statutory analysis is any explanation why it is "befuddling" or "truly bizarre" to imagine that agencies of the United States government could be prosecuted for

criminal penalties, which include fines and not just imprisonment. App., infra, 16a. It cites no precedent from this Court that suggests any presumption against the imposition of criminal penalties against the United States or its agencies (other than the basic presumption against a waiver of sovereign immunity absent clear, unequivocal language). Given that it had no support for this presumption, it is no surprise that it refused to discuss TILA. Ibid. The Court failed to consider that TILA expressly preserves the sovereign immunity of the United States from its criminal penalties provision. 15 U.S.C. § 1612(b) provides: "No civil or criminal penalty provided under this subchapter for any violation thereof may be imposed upon the United States or any department or agency thereof, or on any State or political subdivision thereof, or any agency of any State or political subdivision." The existence of this language which expressly preserves sovereign immunity suggests that absent the preservation, the language of the statute would dictate that sovereign immunity would be waived. But, according to the Fourth Circuit, that comparison is "of decidedly marginal relevance and secondary importance." App., infra, 20-21a. According to the Fourth Circuit, when examining a consumer protection statute, it is primarily important to look at the tax code and environmental protection statutes,

not other consumer protections statutes with identical definitions for "person."

(3)Comparison to Governmental Liability Provision 15 U.S.C. § 1681u(j)

The Fourth Circuit's next compared § 1681n and § 1681o to § 1681u(j). The court admits the language in § 168u(j) unambiguously waives the sovereign immunity of the federal government and its agencies. However, rather than having one waiver of federal immunity support a finding of another waiver, the Fourth Circuit finds the opposite. Section 1681u(j) provides:

> Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of: (1) $100, without regard to the volume of consumer reports, records, or information involved; (2) any actual damages sustained by the consumer as a result of the disclosure; (3) if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and (4) in the case of any successful action to enforce liability under this subsection, the costs of the

> action, together with reasonable attorney fees, as determined by the court."

The only hint toward why the Fourth Circuit relies upon § 1681u(j) for support of its interpretation of § 1681n is that it uses the word "United States," making it more "clear" than § 1681n and § 1681o's use of the statutorily defined term "person," which includes "any government." App., infra, 14a.

(4)Concern Over Consequences of Federal Liability Under § 1681s(a)(1)

The Fourth Circuit analyzed the liability created under § 1681s(a)(1) (Federal Trade Commission (FTC) enforcement); § 1681s(b)(1)(H) (Consumer Financial Protection Bureau (CFPB) enforcement); and § 1681s(c) (state attorney general enforcement). The court's analysis simply consisted of announcing, without explanation, that it found imposing these liabilities on the federal government "odd" and "anomolous." App., infra, 17a. It did not offer any support for its presumption that it is unusual for Congress to delegate enforcement authority to one federal agency over another, or that Congress does not empower states to bring suits over federal agencies on their citizens behalf. For the Fourth Circuit, the mere expression of bewilderment suffices to explain its rationale

despite it having offered no precedent to support these presumptions.

(5)Doubt That FCRA Could Waive State, Tribal, or Foreign Sovereign Immunities

As further support for its interpretation that "person" in FCRA § 1681n and § 1681o should be defined according to the "ordinary" meaning, the Fourth Circuit pondered what the implications would be if the statutory definition of "person" in § 1681a(b) were found to be waivers of state sovereign immunity, Indian tribal immunity, and foreign sovereign immunity. App., infra, 17a-18a. In its analysis, the court does not explain why a waiver of federal sovereign immunity would be dependent upon a valid waiver of state, tribal, or foreign immunities. The court seems to be operating under some "all or none" presumption that it does not explain. Additionally, the court ignores the fact that this Court has interpreted a single provision to be a valid and clear waiver of federal sovereign immunity while also finding it did not waive the sovereign immunity of states. *See* Religious Freedom Restoration Act.

(6)Monetary Concerns Over Costs of Waiver

The Fourth Circuit acknowledges that "it remains the province of the political branches, not the courts, to weigh the costs and benefits of

exposing the federal government to civil litigation." Despite paying verbal homage to this principle, the court clearly considered the costs of imposing liability as the primary basis of its interpretation. An analysis of the opinion shows that when examining the FCRA, the Fourth Circuit consistently raised its concerns about the financial implications of finding a waiver. The court described sovereign immunity analysis as based in part, to prevent the inadvertent imposition of massive monetary loss." (App., 9a).

(7)Reliance on Text of Prior Statute

The Fourth Circuit's final argument is a comparison to "person" in original statute. It cites a provision in which "person" describes a "user" of credit information that would receive reports for "a determination of … eligibility for a license or other benefit granted by a governmental instrumentality…" App., infra, 20a. The Court cannot imagine "[w]ho, other than a government, would be required by law to use credit information to determine eligibility for government benefits." Ibid. The court could not imagine an attorney (or non-profit) that might read the relevant laws and regulations, review a consumer's report, then make a determination of eligibility for benefits (which is simply a legal question). The court relies on this previous version of the statute as evidence that "the

ordinary meaning of 'person' has always applied to FCRA's enforcement provisions." Ibid. It then applauds itself for engaging in "a holistic statutory view that undermines *Robinson*'s attempt to transport the meaning of 'person' from FCRA's substantive measures to its enforcement provisions." Ibid. So, by transporting meaning from a 1970 version of the statute that was amended in 1996, the Fourth Circuit believes it is considering the appropriate "context" of the FCRA.

REASONS FOR GRANTING THE WRIT

By joining the Ninth Circuit in dismissing a consumer's suit against a federal governmental agency under the FCRA on the basis of sovereign immunity, the Fourth Circuit deepened an existing circuit conflict with the Seventh Circuit. Moreover, given (1) the ever-increasing importance of credit information to areas beyond lending, such as housing, employment, and insurance, (2) the federal government's decision in 2010 to take over most of the student loan market, and (3) that market's substantial growth in recent years, the question presented here is one of significant public importance. And the Fourth Circuit's resolution of the statutory question is wrong and at odds with the text and consumer protection purposes of the statute. This case affords the Court the opportunity to

both resolve a circuit conflict and ensure consumers are adequately protected from government violations of the FCRA.

A. There Is a 2-1 Conflict Over Whether The Federal Government May Be Held Liable Under FCRA

As the Fourth Circuit opinion documents, its decision to dismiss Petitioner's suit against the federal government was in accord with the Ninth's Circuit's decision in *Daniel v. Nat'l Park Serv.*, 891 F.3d 762 (9th Cir. 2018). App. 13a. Those two Circuits are, however, in conflict with the Seventh Circuit's decision in *Bormes*. 759 F.3d 793. In *Bormes*, the 7thCircuit held that "if the United States is a "person" under § 1681a(b) for the purpose of duties, how can it not be one for the purpose of remedies? Nothing in the FCRA allows the slightest basis for a distinction." Id. at 795.

The Fourth Circuit agreed that its decision was in conflict with the Seventh Circuit. *Robinson,* 917 F.3d at 806. But it argued that the Seventh Circuit had somehow changed its mind in *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818 (7th Cir. 2016). However, *Meyers* was not a retreat from *Bormes*. Instead Meyers simply continues a long history of immunity jurisprudence applicable only to Native American tribes, sovereign nations that are

assumed to be immune from suit under U.S. law to a degree far greater than the federal government.

[U]nless and until Congress acts, the tribes retain their historic sovereign authority. This is true even for a tribe's commercial activities. The Supreme Court has instructed time and again that if it is Congress' intent to abrogate tribal immunity, it must clearly and unequivocally express that purpose. The list of cases could continue at length. Any ambiguity must be interpreted in favor of sovereign immunity. * * * Congress did not specifically list Indian tribes in FACTA's definition of "person."*Meyers*, 836 F.3d, at 823-824 (citations and punctuation omitted). The precedence for this tribal sovereign immunity is extensive. In fact, …there is not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity without expressly mentioning Indian tribes somewhere in the statute." Id. at 824 (*citing In re Greektown Holdings, LLC*, 532 B.R. 680, 693 (E.D. Mich. 2015)). This is a different analysis altogether.

There is no reason to think, whether through the language of *Meyers* or elsewhere, that the Seventh Circuit will reverse *Bormes* once a state or federal government tries to claim sovereign immunity under FCRA because *Bormes* was not undone by *Meyers*. In fact, *Meyers* supports

Bormes by distinguishing the two cases in light of *Meyers*' reliance on *Bormes*. "*Meyers* has lost sight of the real question in this sovereign immunity case—whether an Indian tribe can claim immunity from suit." *Meyers*, 836 F.3d at 826-827. Meyers was distinctly about Indian tribal immunity and so a specific analysis inured not applicable to the present case.

Because *Meyers* and *Bormes* do not conflict, *Robinson* and *Daniel* stand in opposition to *Bormes* and so represent a Circuit split.

B. The Application of Sovereign Immunity to FCRA Presents an Important Question of Federal Law.

Given the importance of accurate credit reporting in so many aspects of life, a large portion of petitions for writs of certiorari involving the FCRA pertain to an important area of the law for the sake of Supreme Court Rule 10. But here, given the size of the student loan market and the Respondent's outsized role as the primary student lender, the Question Presented is especially important. By granting this writ, the Court will be able to determine whether consumer protections will remain available to millions of current and former students, their parents, and others who have been driven into a student loan market dominated by the federal government. And the Court will be able to

determine if victims of identity theft who have never even received a loan, like the Petitioner, can be compensated when their government makes their bad situation worse by perpetuating erroneous credit information.

Of course, credit scores and credit reports play a major role in determining whether, to what extent, and on what terms the nation's consumers can participate in the free market. In doing so, they affect entrepreneurs looking to open or expand a business, where prospective homeowners can live, and the ability of people to cover household and medical expenses in an emergency.

But credit reports do so much more than affect lending. As one of the defendants in this action explains (Experian, one of the "Big Three" credit reporting agencies), credit reports are used by landlords to make rental decisions, by insurance companies to determine rates, and by employers to make hiring decisions. See also *Safeco Ins. of America v. Burr*, 127 S.Ct. 2201 (2007) (discussing insurance companies' obligations under FCRA). Having erroneous information on your credit report, therefore, can do more than thwart your ability to obtain a loan on good terms. Erroneous information can prevent you from obtaining critical needs: a place to live, a job, and car insurance to cover you on the way from one to another.

The federal government may be the nation's largest furnisher of credit information. In 2010 the Respondent essentially federalized the student loan market as part of an effort to protect consumers. Glater, Jonathan, The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs (June 23, 2011). 14 N.Y.U. J. Legis. & Pub. Pol'y 11, *13-*15. The result was a revamped market where the Respondent is now responsible for ninety percent of all student loans. Mitchell, Josh et al., "Banks Want a Bigger Piece of Your Student Loan," Wall Street Journal, Mar. 7, 2018. And, from 2007 to 2018, according to the Respondent, that market tripled in size, from $500 billion to $1.5 trillion.

There is no evidence, and it is difficult to imagine that, as part of an effort to help consumers in the student loan market, the federal government intended to use sovereign immunity to stop those same consumers from bringing suit under against the new primary creditor in the market. Put differently, it would be grossly unfair were the government to both take over the student loan market and then benefit from an FCRA immunity not enjoyed by any other furnishers.

Because of all the ways erroneous credit information can be used against a consumer, and because the government is a major player in an

expansive lending market, this case represents an opportunity for the Court to clarify a dispute over sovereign immunity and consumer protection, a dispute with nationwide implications for tens of millions of Americans.

C. The Fourth Circuit's Decision Conflicts With This Court's Decisions by Misapplying the Doctrine of Federal Sovereign Immunity & By Ignoring FCRA's Plain Text

Certiorari is further warranted because the decision below is plainly wrong, and it presents this Court with an excellent opportunity to enhance the doctrine of sovereign immunity by eliminating the misinterpretations that have developed in the lower courts.

(1) Ambiguity is Not Created by Comparison to Other "More Clear" Waivers Because That Is A "Magic Words" Analysis

This Court has stated that the proper statutory analysis when analyzing whether a federal statute waives federal sovereign immunity is whether the language of the statute is "unambiguous." To create an ambiguity where the language is unequivocal, the Fourth Circuit cited six statutes other than the FCRA, along with one provision within the FCRA (§168u(j)) to

give examples of what it deems more "clear." What these provisions all have in common is that they contain the words "United States." The Fourth Circuit states:

Here again the waiver spells out that "the United States … is liable to the consumer. "There is no need to quibble over how Congress used a word. App., infra, 14a.

This is a perfect example of a "magic words" analysis, and this Court has the opportunity to remind lower courts that "ambiguity" only arises when there is a "plausible" alternative interpretation. The Fourth Circuit provided no plausible alternative explanation of why Congress defined person to include "any government," but intended for "person" to have its ordinary meaning only in liability sections. The application of this reasoning has serious implications because it seems to prevent Congress from relying upon the use of statutory definitions, and to demand redundancy. This Court could prevent any further proliferation of these problematic analyses, and reverse these decisions which contradict countless cases instructing that the plain language of the statute must control.

(2)Sovereign Immunity Is Only One of Many Principles of Statutory Construction—The

Key Consideration is the Consumer Protection Context

"No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions." Read Law, supra, Canon 3, citing *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (per Justice Breyer). "The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and [this Court] has never held that it displaces the other traditional tools of statutory construction." *Richlin Security Service Co. v. Chertoff,* 553 U.S. 571, 589 (2008). The opinions of the Fourth and Ninth Circuits clearly conflict with this Court's explanation of the role "sovereign" immunity is intended to play in statutory analysis. "Here, traditional tools of statutory construction—the statute's text, structure, drafting history, and purpose—provide a clear answer:" the term "person" in FCRA § 1681n and § 1681o includes the federal government of the United States and its agencies and subdivisions. See *FAA v. Cooper*, 566 U.S. 284, 305 (2012) (Kagan, J., dissenting).

The statutory analysis conducted by the Fourth and Ninth Circuits affords too much weight to its consideration of sovereign immunity, and it is improperly motivated by the potential monetary consequences of a waiver of federal sovereign immunity under FCRA. It fears

that "[e]ach report .. would give rise to potential liability under the FCRA," cautioning that "[t]here is no telling the true costs of a waiver…" App., infra, 15a. The theme of costs is the very "backdrop" of the Fourth Circuit's decision, App., infra, 12a.

The court was incorrect that the requirement of clarity "exists, in part, to prevent the inadvertent imposition of monetary loss." App., infra, 9a. This philosophy contradicts this Court's clear mandate that courts should not act "as a self-constituted guardian of the Treasury" by "import[ing] immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U. S. 61, 69 (1955). Ambiguity does not arise from the court's astonishment at Congress' budgetary decisions. The text of the FCRA was clear, and it waives the sovereign immunity of the U.S.

Blinded by its focus on money, the Court failed to consider the most important factor: context. It did not afford any weight to the fact that FCRA is a consumer statute designed to protect consumers and compensate them for actual damages they sustain when the commercial actors engaged in credit reporting do not comply with their statutory obligations.

(3)Federal Sovereign Immunity Has Different Historical and Legal Contexts That Are

Not Comparable to Those of State, Tribal or Foreign Sovereign Immunities

The Fourth and Ninth Circuits both relied heavily on precedent this Court has established in considering waivers of state, tribal and foreign immunity. This demonstrates that the courts have lost sight of the basic principle of statutory construction that context matters, and have inappropriately grouped all four types of distinct immunities into one group of "sovereign immunity." This error must be corrected.

In *Seminole Tribe of Florida v. Florida*, this Court set a high bar for the waiver of state sovereign immunity because such immunity is protected by the Eleventh Amendment of the Constitution. 517 U.S. 44 (1996). There are no constitutional concerns implicated with Congress consenting to suits against the federal government. That is within Congress' power. There is no "strong" presumption against the notion that Congress regularly subjects the federal government to the same exact penalties as it subjects all other commercial actors engaged in the same activities.

Lower courts have lost sight of the fact that sovereign immunity originated from an exercise in judicial restraint. It was based on the Court's refusal to apply the literal terms of the Constitution which could have been interpreted to grant courts the authority to hear claims

against the government, and to instead give Congress the power to determine when it "consents" to suit. The result is to respect the will of the people, expressed through the legislature, to determine in what circumstances we want to have the power to sue our federal government. The people spoke clearly in the FCRA: if the government is reporting inaccurate information on our credit reports and it refuses to investigate our disputes, we want access to the courts to seek compensation for the harm we suffer.

(4)A Comprehensive Analysis of FCRA Reveals a Remedial Scheme with Limited Liabilities and a Clear Intent to Waive Sovereign Immunity

The Fourth Circuit's analysis of selected provisions in *FCRA* was narrowly tailored to achieve the court's clearly stated goal: to prevent the imposition of liability on the government. This analysis conflicts with this Court's clear instruction that courts should not consider the consequences of a statute to determine its intent. It is a backwards analysis that starts with the implications of a waiver, then backtracks through unrelated provisions in *FCRA*, but it never goes back far enough to examine the actual statute at issue: § 1681s-2(b).

A proper analysis would look: (1) look at § 1681n and § 1681o, (2) ask who does "person" include, (3) assume the statutory definition applies (the proper presumption in all cases), (4) confirm the statutory definition applies because § 1681a(a) says it should, (5) refer back to § 1681n to see what conduct is covered, [a] (6) ask if USDE engages in that conduct, (7) perhaps ask if Congress knew USDE engaged in that conduct when it enacted the statute (entry of the federal government into a new commercial market after the adoption of a statute may change the analysis), and (8) since USDE admits that it engages in the conduct covered under § 1681s-2(b)(1) and that it is subject to the requirements, the analysis would end there. There is no ambiguity.

But, perhaps in the context of federal sovereign immunity, this Court does demand an analysis beyond that described above. When this Court remanded the *Bormes* case, did the Seventh Circuit meet its expectations for proper statutory analysis? This case grants this Court the opportunity to set clear standards of statutory analysis in the context of a waiver of federal sovereign immunity. The Circuits are clearly divided on what types of analysis are appropriate in this context, and this Court's guidance is needed.

If analysis properly includes monetary concerns, they have not been properly analyzed. While the Fourth and Ninth Circuits fear some massive explosion in lawsuits arising under the FCRA, a comprehensive analysis of the statute reveals that there are very limited liabilities under the FCRA upon which consumers may base a civil suit against the federal government and its agencies. A full analysis of FCRA also reveals that the structure of the statute provides affirmative defenses to nearly every potential violation. If the government establishes reasonable policies and procedures to comply with its obligations under FCRA, and it conducts reasonable investigations of consumers' disputes, it will have affirmative defenses to liability for any alleged violations of §§ 1681s-2(b)(1)(A)-(B).

The Fourth and Ninth Circuit's Analysis focused mostly on three provisions in the FCRA—§ 1681q, § 1681u(j), and § 1681s(a)(1)—none of which are at issue here. The Fourth Circuit did not even mention § 1681s-2(b)(1), the statute upon which Petitioner's claims are based. Not only was it inappropriate to base their decisions on political concerns over the "true costs" of a waiver, they did not even bother to actually examine those "costs." To the extent the scope of liability is relevant, which this Court could decide, it should be fully discussed. A proper statutory analysis conducted by this

learned Court would be of great benefit to the lower courts.

CONCLUSION

Respectfully submitted,

DATED: OCTOBER 14, 2019

s/

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APPENDICES

APPENDIX A

UNITED STATES COURT
OF APPEALS FOR THE
FOURTH CIRCUIT

No. 18-1822
(8:15-cv-00079-GJH)

ANTHONY ROBINSON
Plaintiff – Appellant

v.

UNITED STATES DEPARTMENT OF EDUCATION
Defendant - Appellee

And

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, d/b/a Fed Loan Servicing; EQUIFAX INFORMATION SERVICES, LLC; EXPERIAN INFORMATION SOLUTIONS, INC.; TRANS UNION, LLC

Defendants

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor,Clerk

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1822

ANTHONY ROBINSON,
Plaintiff – Appellant,

v.

UNITED STATES DEPARTMENT OF EDUCATION,
Defendant – Appellee,

and

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, d/b/a Fed Loan Servicing; EQUIFAX INFORMATION SERVICES, LLC; EXPERIAN INFORMATION SOLUTIONS, INC.; TRANS UNION, LLC,
Defendants.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. George Jarrod Hazel, District Judge. (8:15-cv-00079-GJH)

Argued: January 29, 2019 Decided: March 6, 2019

Before WILKINSON, DIAZ, and FLOYD, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Diaz and Judge Floyd joined.

ARGUED: Quinn Breece Lobato, LOBATO LAW LLC, Lanham, Maryland, for Appellant. Sarah Wendy Carroll, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Joseph H. Hunt, Assistant Attorney General, Mark B. Stern, Civil Division, UNITED STATES DE-PARTMENT OF JUSTICE, Washington, D.C.; Robert K. Hur, United States Attorney, OFFICE OF THE UNITED STATES ATTOR-NEY, Baltimore, Maryland, for Appellee.

WILKINSON, Circuit Judge:

Appellant Anthony Robinson appeals the dismissal of his lawsuit against the U.S. Department of Education for violations of the Fair Credit Reporting Act (FCRA). The district court found that it lacked jurisdiction over the claim because Congress had not waived sovereign immunity for suits under FCRA. It is

settled law that a waiver of sovereign immunity must be unambiguous and unequivocal. Because the purported waiver here falls well short of that standard, we affirm.

I.

This appeal arises from Robinson's claims against the Big Three credit reporting agencies—Experian, Equifax, and Trans-Union—the Pennsylvania Higher Education Assistance Agency, and the U.S. Department of Education. The suit related to their treatment of an allegedly fraudulent student loan in Robinson's name. As all claims against the nonfederal defendants have now run their course, only Robinson's FCRA claims against the Department of Education remain on appeal.

The Department administers the William D. Ford Federal Direct Loan Program, through which it provides loans to students and parents for postsecondary education costs. Robinson's complaint detailed how the Department of Education "directly or indirectly causes credit information to be furnished to . .. consumer reporting agencies." J.A. 13, ¶ 7 (Amended Complaint). Robinson alleged that he "discovered that there were Direct Loan student loan accounts being reported to his Experian, Equifax, and Trans Union credit reports," J.A. 14, ¶ 8, even though he did not "authorize a student loan account to be opened in his name," id. ¶ 9.

Appellant asserted that he "has been disputing the Direct Loan accounts," "[s]ince November 2011 or earlier." Id. ¶ 10; see also J.A. 14-15, ¶¶ 11-14. In this action, he alleged that the Department violated FCRA, specifically 15 U.S.C. § 1681s-2(b), "by failing to fully and properly investigate [Appellant's] disputes," J.A. 17, ¶ 27, and "failing to review all relevant information" related to his claim, id. ¶ 28. The complaint brought claims under 15 U.S.C. §§ 1681n and 1681o, which provide civil causes of action for willful and negligent FCRA violations, respectively.

The Department filed a motion to dismiss for want of subject matter jurisdiction based on sovereign immunity. Fed. R. Civ. P. 12(b)(1). After comparing FCRA's language to several recognized waivers of sovereign immunity, the district court reasoned that FCRA's language did not unequivocally and unambiguously waive sovereign immunity. Robinson v. Pa. Higher Educ. Assistance Agency, No. GJH-15-0079, 2017 WL 1277429 (D. Md. Apr. 3, 2017). According to the district court, the plaintiff's reading of the waiver would, among other things, absurdly expose the federal government to criminal prosecutions. The court thus granted the government's motion and dismissed Robinson's claims against the Department. Id. Robinson asked the district court to reconsider its ruling, but that motion was denied. *Robinson v. Pa.*

Higher Educ. Assistance Agency, No. GJH-15-0079, 2017 WL 5466673 (D. Md. Nov. 13, 2017). He now appeals.

II.

The only question presented on appeal is whether the United States has waived sovereign immunity for suits alleging that the federal government willfully or negligently violated FCRA. See 15 U.S.C. §§ 1681n-1681o. We use "FCRA" to describe the statute as subsequently amended.

A.

The Supreme Court has recognized that sovereign powers have "traditionally enjoyed" a "common-law immunity from suit." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). As Alexander Hamilton noted while advocating the ratification of the Constitution in Federalist 81, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." The Federalist No. 81, at 511 (B. Wright ed., 1961) (emphasis omitted). That foundational immunity is a "necessary corollary" to "sovereignty and self-governance." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (internal quotation marks omitted). As such, the federal government has long enjoyed freedom from suit without consent in federal courts. See,

e.g., *United States v. Clarke,* 33 U.S. (8 Pet.) 436, 444 (1834) (Marshall, C.J.) ("As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of [C]ongress, or the court cannot exercise jurisdiction over it.").

The Department of Education thus enjoys as a federal agency a presumption of immunity from the present lawsuit. *FDIC v. Meyer,* 510 U.S. 471, 475 (1994). Indeed, "the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell,* 463 U.S. 206, 212 (1983). A strong doctrine of sovereign immunity is nowhere more important than for damages claims. Money judgments against a sovereign allow "the judgment creditor" to compete with "other important needs and worthwhile ends . . . for access to the public fisc." *Alden v. Maine*, 527 U.S. 706, 751 (1999); see *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428-32 (1990) (applying similar rationale to damages against the federal government). Instead, as the Framers recognized, the allocation of resources must be left to the will of the people. *Alden*, 527 U.S. at 751.

One way the people may exercise their will, however, is to consent to suit by waiving sovereign immunity. *Meyer*, 510 U.S. at 475. Damages suits against the United States, as with any litigant, may incentivize good behavior or appropriately compensate those who have been harmed. But it remains the province of the

political branches, not the courts, to weigh the costs and benefits of exposing the federal government to civil litigation. "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996). In other words, waivers cannot contain an ambiguity, which "exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *FAA v. Cooper*, 566 U.S. 284, 290-91 (2012). Sovereign immunity, in short, can only be waived by statutory text that is unambiguous and unequivocal. The requirement exists, in part, to prevent the inadvertent imposition of massive monetary loss.

B.

Against this backdrop, we shall examine the purported waiver itself. Robinson contends that his claims were wrongly dismissed because the United States has indeed waived sovereign immunity to civil actions under *FCRA's* general liability provisions. See 15 U.S.C. §§ 1681n-1681o. The plaintiff bears the burden of showing that the government has waived sovereign immunity at the motion to dismiss stage. *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995). We review the district court's ruling de novo. *Welch v. United States*, 409 F.3d 646, 650 (4th Cir. 2005).

FCRA provides a series of requirements for handling consumer credit information in order to "ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). *Robinson* claims the Department violated a provision that requires it, after being notified that a consumer disputes information relating to his credit, to "conduct an investigation with respect to the disputed information." 15 U.S.C. § 1681s-2(b)(1)(A). FCRA § 1681o provides that "[a]ny person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for actual damages, costs, and attorney's fees. For its part, § 1681n applies to willful FCRA violations, and adds punitive damages to the remedies for negligent violations under § 1681o. District courts have jurisdiction over any timely action properly brought under either provision. See 15 U.S.C. § 1681p.

This case centers on the meaning of the word "person" in § 1681n and § 1681o, specifically whether the federal government is a "person" for purposes of FCRA's general civil liability provisions. We begin our inquiry, as always, with the text of the statute. See *Clark v. Absolute Collection Serv., Inc.*, 741 F.3d 487, 489 (4th Cir. 2014). *Robinson* attempts to isolate FCRA's definitional and civil liability provisions from the rest of the

statute in arguing that FCRA's text is straightforward. FCRA's causes of action for willful and negligent violations apply to any "person." See 15 U.S.C. §§ 1681n-1681o. The statute itself defines "person" to include "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." 15 U.S.C. § 1681a(b). Since the federal government is a government, any government is a person, and as any person can be liable, so his argument goes, the federal government can be liable for FCRA violations.

But we do not interpret the word "person" on a blank slate. There is a "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780 (2000); *see United States v. Cooper Corp.*, 312 U.S. 600 (1941) ("person" does not include United States under the Sherman Act). This canon applies even when "person" is elsewhere defined by statute. "In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition." *Bond v. United States*, 572 U.S. 844, 861 (2014). While we need not determine the exact contours of the ordinary meaning of "person" for present purposes, see 1 U.S.C. § 1 (general definition of "person" throughout the United States Code), suffice it to

say that the United States is not ordinarily considered to be a person. On this ordinary understanding, FCRA's enforcement provisions thus would not apply to the federal government. If it is plausible that Congress used "person" according to its ordinary meaning, then sovereign immunity has not been unambiguously waived. *Cooper,* 566 U.S. at 290-91.

We observe, moreover, that statutes waiving sovereign immunity are normally quite clear. Take, for example, the Little Tucker Act, which "provides that '[t]he district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded . . .. upon . . . any Act of Congress.'" *United States v. Bormes*, 568 U.S. 6, 7 (2012) (quoting 28 U.S.C. § 1346(a)(2)). At its core, the Little Tucker Act specifically describes claims "against the United States." Id. The same is true of the Federal Tort Claims Act: "The United States [is] liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Indeed the words "United States" appear in a great many waivers. E.g., 12 U.S.C. § 3417(a) ("Any agency or department of the United States . . . is liable to the customer . . . ."); 42 U.S.C. § 9620(a)(1) ("Each department, agency, and instrumentality of the United States . . . shall be subject to . . . liability under section

9607."); see also 26 U.S.C. § 7433(a) (waiver describing "United States"); 46 U.S.C. § 30903(a) (same).

The alleged waivers in the present case, by contrast, describe only liability against a "person." See 15 U.S.C. §§ 1681n-1681o. Even the definition section on which Robinson relies does not specifically mention the United States or the federal government. See 15 U.S.C. § 1681a(b). And, as the Ninth Circuit recently noted, when Congress means to waive sovereign immunity in a provision otherwise applying to persons it says so explicitly. *Daniel v. Nat'l Park Serv.,* 891 F.3d 762, 772 (9th Cir. 2018); see 33 U.S.C. § 1365(a)(1) (Clean Water Act) ("[A]ny citizen may commence a civil action on his own behalf . . . against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency.)."); 42U.S.C.§ 6972(a)(1)(A) (Resource Conservation and Recovery Act) ("[A]ny person may commence a civil action on his own behalf . . . against any person (including (a) the United States, and (b) any other governmental instrumentality or agency . . .)."). Robinson's argument, at best, relies upon a far more abbreviated and less clear expression to establish a waiver in his case. This is hardly evidence of an unequivocal intent to waive federal sovereign immunity in the same way as statutes that specifically describe actions against the "United States."

There is, however, one explicit waiver of sovereign immunity elsewhere in *FCRA* that does not apply to Robinson's claims. Section 1681u empowers the Federal Bureau of Investigation to obtain information from consumer reporting agencies in connection with its counterterrorism efforts. This section includes a clear waiver: "Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of [§ 1681u] is liable to the consumer to whom such consumer reports, records, or information relate" for statutory, actual, and sometimes punitive damages. 15 U.S.C. § 1681u(j). Here again the waiver spells out that "the United States . . . is liable to the consumer." Id. There is no need to quibble over how Congress used a word. There is no need to hypothesize whether Congress considered the provision's effects on the federal government. Unlike the asserted waivers on which Robinson relies, the import of § 1681u(j) is plain as day.

This is not to say that waivers of sovereign immunity must "use magic words," Cooper, 566 U.S. at 291, that existing waivers serve as a series of litmus tests, or even that a statute must use the same waiver language throughout. There are no such requirements under law. But courts are to "presume congressional familiarity" with the need for waivers of sovereign immunity to be unambiguous and unequivocal. *U.S. Dep't of*

Energy v. Ohio, 503 U.S. 607, 615 (1992). The stark contrasts between FCRA's civil liability provisions and recognized waivers serve as strong evidence that Congress did not waive sovereign immunity under FCRA.

Indeed, in the universe of possible waivers, this would be a very casual one. Yet the consequences of waiving immunity under FCRA's general liability provisions are anything but casual: the federal government is the nation's largest employer and lender. The Department represents that "[i]n fiscal year 2017, for example, the delinquent non-tax debt owed to the federal government totaled $185 billion." Brief for Appellee, at 23. It notes that federal agencies sometimes are required by law to report delinquent debts to the consumer reporting agencies. See, e.g., 20 U.S.C. § 1080a. Each report, of course, would give rise to potential liability under FCRA. There is no telling the true costs of a waiver, especially when considering the punitive damages generally allowed under § 1681n.

C.

The consequences of Robinson's proposed reading, moreover, extend further when we consider other applications of FCRA's enforcement provisions. See *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000) (recognizing the " fundamental canon of statutory

construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," id. at 133 (internal quotation marks omitted)). Robinson's reading of the statute would raise a host of new issues ranging from the merely befuddling to the truly bizarre. We thus follow the Supreme Court's lead in being "especially reluctant to read 'person' to mean the sovereign where, as here, such a reading is decidedly awkward." Int'l *Primate Prot. League v. Adm'rs of Tulane Educ. Fund,* 500 U.S. 72, 83 (1991) (internal quotation marks omitted).

And awkward it is. Take, for example, the prospect of the government bringing criminal charges against itself. The Act's enforcement provisions, after all, facially authorize criminal proceedings against "[a]ny person." 15 U.S.C. § 1681q. Imagine a court's puzzlement upon seeing a criminal case captioned "*United States v. United States*." See *Cooper Corp.*, 312 U.S. at 609 ("It must be obvious that the United States cannot be embraced by the phrase 'any person'" when a statute criminalizes conduct by "any person." Id.). Robinson points out that other courts, upon finding waiver under FCRA, have dismissed this problem because a prosecution could be brought against federal employees. See, e.g., *Bormes v. United States*, 759 F.3d 793, 796 (7th Cir. 2014). But, adopting Robinson's reading arguendo, the statute allows prosecution of "any

government," not the employees of any government. The pro-waiver camp cannot have it both ways—literal most often, just not when it suits to blur the lines.

FCRA also empowers several federal agencies to enforce its various provisions, including, most notably, the Federal Trade Commission and the Consumer Finance Protection Bureau. See 15 U.S.C. § 1681s(a)(1) (FTC enforcement), § 1681s(b)(1)(H) (CFPB enforcement). If the prospect of the CFPB pursuing a civil action against the United States is any less odd than a criminal prosecution of the United States, it is not by much. To make matters worse, states also play a role in enforcing FCRA's various provisions. See 15 U.S.C. § 1681s(c). It would be anomalous for the federal government to expose its fisc to the suits of state attorneys general in such an offhanded manner. And once again, FCRA litigants under plaintiff's reading could even pursue punitive damages against the federal government, see 15 U.S.C. § 1681n, which would trample yet another presumption, this time "against imposition of punitive damages on governmental entities." *Vt. Agency of Nat. Res.,* 529 U.S. at 785.

Regrettably the problems with Robinson's proposal do not end there. Robinson's arguments equally would expose "any government" to liability, including foreign, tribal, and state governments. The first implication would require courts

to compromise treaties and to undermine principles of international comity. See *Samantar v. Yousuf,* 560 U.S. 305, 311-25 (2010) (describing common-law and statutory immunities afforded to foreign governments). The second, to cast aside a history of tribal immunity. See *Bay Mills Indian Cmty.*, 572 U.S. at 788-91 (discussing tribal sovereign immunity). The third, to ignore constitutional limits on federal abrogation of state sovereign immunity. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47, 72 (1996) (holding that Congress lacks the power to abrogate state sovereign immunity under the Commerce Clause).

The *Seminole Tribe* decision, in fact, came down not long before Congress amended the Act that Robinson now contends waives governmental sovereign immunity. See *Consumer Credit Reporting Reform Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009-426. Robinson would therefore have us suppose that Congress, in an insurrectionary moment, set out to defy a prominent Supreme Court ruling that held Congress lacked the very authority Robinson now asserts it exercised. On a broader level, Robinson would have FCRA expose not only the United States but foreign, tribal, and state governments to punitive damages, criminal penalties, and an array of other monetary sanctions for activities "in which governments are uniquely involved on a massive scale." Brief for Appellee, at 30. To

read these broad and staggering implications into the statute on the slimmest of textual hints would be to abjure our duty to construe "the statutory language with that conservatism which is appropriate in the case of a waiver of sovereign immunity." *United States v. Sherwood*, 312 U.S. 584, 590 (1941).

We are not, of course, required to reach any of those confounding problems Robinson's reading presents in the instant case. But we should not interpret the statute today in a way that will create serious new difficulties tomorrow. The statute bears no indicia of congressional intent to bring about such a bevy of implausible results, let alone an unambiguous and unequivocal intent to do so.

Faced with abundant evidence from FCRA's text and structure, Robinson argues that FCRA's enforcement provisions must apply to the federal government because the federal government is a person under several of FCRA's substantive provisions. Cf. *Bormes*, 759 F.3d at 795 ("The United States concedes that it is a "person" for the purpose of [FCRA's] substantive requirements."). But the substantive and enforcement provisions in FCRA are not one and the same. All of the problems discussed above relate to the statute's enforcement provisions. And Robinson's argument does not even begin to account for the untoward consequences of, inter alia, reading the statute's enforcement provisions to set the

federal government in courts of law against itself.

Moreover, just as the ordinary meaning of "person" has always applied to FCRA's enforcement provisions, the statutory definition of "person" has always applied to FCRA's substantive provisions. To take but one example, FCRA § 604(3)(D) specifically provided that consumer reporting agencies could give information to a "person" for "a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status." *Fair Credit Reporting Act, Pub. L. No.* 91-508, 84 Stat. 1127, 1129 (1970). Who, other than a government, would be required by law to use credit information to determine eligibility for government benefits? Our reading of the word "person" thus does not create a textual anomaly, but rather reflects a holistic statutory view that undermines Robinson's attempt to transport the meaning of "person" from FCRA's substantive measures to its enforcement provisions.

Both parties also raise arguments by analogizing FCRA's statutory scheme to that of other federal statutes, drawing on its general purposes, and plucking out various tidbits from its legislative history. But we do not rest our opinion on those bases. We think that these arguments, at best, are of decidedly marginal

relevance and secondary importance. FCRA's text and structure make clear that no unambiguous and unequivocal waiver of sovereign immunity has taken place.

D.

The parties debate extensively several cases from other circuits addressing this issue. The Ninth Circuit, for example, adopted a reading of the statute similar to our own. The court employed a holistic approach in interpreting *FCRA to preserve federal sovereign immunity. Daniel v. Nat'l Park Serv.*, 891 F.3d 762 (9th Cir. 2018). It reasoned that "[d]istilling a clear waiver of sovereign immunity in the *FCRA* would require us to treat 'the United States' as a 'person' in each provision." Id. at 770. The Ninth Circuit rejected that interpretation after reviewing the myriad absurd results of reading "person" to include the United States throughout the enforcement provisions of the statute. Id. at 768-74.

It is true that the Seventh Circuit initially adopted the view that FCRA did set forth a waiver of federal sovereign immunity. *Bormes*, 759 F.3d at 796. But when faced with the actual consequences of that ruling, the Seventh Circuit retreated from *Bormes* by upholding tribal sovereign immunity under FCRA, even though federal and tribal governments equally qualify as "any government" under *Bormes*' reading of the

statute. *Meyers v. Oneida Tribe of Indians of Wis.,* 836 F.3d 818, 823-27 (7th Cir. 2016). Reading "any government" to allow suits against tribes, in the view of Meyers, would be "shoehorning" a tribal immunity waiver where it failed utterly to fit. Id. at 827. "But when it comes to sovereign immunity, shoehorning is precisely what we cannot do." Id. As the Ninth Circuit recognized in *Daniel*, the Seventh Circuit's logic regarding tribal sovereign immunity should apply equally to the United States. 891 F.3d at 774.

III.

For the foregoing reasons, the judgment of the district court dismissing this case for want of subject matter jurisdiction is

AFFIRMED

APPENDIX C

IN THE UNITED STATES DISTRICT
COURT FOR THE
DISTRICT OF MARYLAND

ANTHONY ROBINSON,
Plaintiff,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiff Anthony Robinson' s Motion for Reconsideration of this Court's April 3, 2017 Order, ECF No. 67, granting Defendant United States Department of Education ' s Motion to Dismiss, ECF No. 41, and Defendant Pennsylvania Higher Education Assistance Agency's ("PHEAA' s") Motion to Dismiss Robinson ' s defamation claim, ECF No. 68. No hearing is necessary. See Loe. R. 105.6 (D. Md. 2016).

In his Amended Complaint, Robinson alleges that the Defendants violated the Fair Credit Reporting Act ("FCRA"), ECF No. 38 ¶¶ 16-31, and are liable for defamation, id. ¶¶ 32-44. In

sum, Robinson alleges that he discovered that Direct Loan student loan accounts were being reported to his Experian, Equifax and Trans Union (the "Credit Reporting Agencies" or "CRAs") credit reports under his name, id. ¶ 8, although he had not authorized the accounts, id ¶ 11. Since 2011, Robinson has been disputing the accounts with the CRAs and PHEAA. Id. ¶ 10. Robinson asserts that the CRAs and PHEAA violated the FCRA by, among other things, "failing to conduct a reasonable investigation" regarding his dispute, id ¶17, failing to provide specific information to Robinson, id, ¶21, and failing to review specific information provided by Robinson, id, ¶ 28.

1. Motion for Reconsideration

On June 12, 2015, Defendant United States Department of Education filed a Motion to Dismiss the Amended Complaint for Lack of Jurisdiction, arguing that the FCRA did not expressly waive the United States' sovereign immunity. ECF No. 41-1 at 13. On April 3, 2017, the Court granted the Department of Education's Motion, finding that a careful reading of the FCRA established that the provisions "do not contain a clear and unequivocal waiver of sovereign immunity." ECF No. 66 at 9. The Court acknowledged that the Seventh Circuit had come to the opposite conclusion in *Bormes v. United States,* 759 F.3d 793, 795 (7th Cir. 2014);

however, the Court declined to follow the Seventh Circuit's reasoning, explaining that "[t]he Seventh Circuit's decision ... conflicted with a number of district court opinions," and that even after *Bormes,* additional district courts had declined to read a waiver of sovereign immunity into the *FCRA.* See *ECF* No. 66 at 5-6 (citing *Daniel v. Nat'! Park Serv.*. No. CV 16-18-BLG-SWP, 2016 WL 4401369, at *3 (D. Mont. Aug. 17, 2016) ("The FCRA is ambiguous as to whether plaintiffs can recover damages against government entities, as federal statutes typically waive sovereign immunity in clearer terms."). On April 17, 2017, Robinson filed a Motion for Reconsideration, asking the Court to reconsider its dismissal of the Department of Education from this case. ECF No. 69.

A motion for reconsideration filed within 28 days of the underlying order is governed by Federal Rule of Civil Procedure 59(e). Courts have recognized three limited grounds for granting a motion for reconsideration pursuant to Rule 59(e): (1) to accommodate an intervening change in controlling law; (2) to account for new evidence; or (3) to correct clear error of law or prevent manifest injustice. See United States ex rel. *Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284,290 (4th Cir. 2002) (citing *Pacific Ins. Co. v. Am. Nat'! Fire Ins. Co. ,* 148 F.3d 396,403 (4th Cir. 1998)), cert. denied, 538 U.S. 1012 (2003). A Rule 59(e) motion "may not be

used to re litigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Pacific Ins. Co.,* 148 F.3d at 403 (quoting 11 Wright, et al., Federal Practice and Procedure§ 2810.1, at 127-28 (2d ed. 1995)) . See also *Sanders v. Prince George's Public School System*, No. RWT 08-cv-501, 2011 WL 4443441, at* 1 (D. Md. Sept. 21, 2011) (a motion for reconsideration is "not the proper place to relitigate a case after the court has ruled against a party, as mere disagreement with a court's rulings will not support granting such a request"). "In general, 'reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.'" Id (quoting *Wright,* et al., supra, § 2810.1, at 124).

Here, *Robinson* argues that the Court's Order " contains a clear error of law." *ECF* No. 69 at 1. Robinson argues first that the terms of the FCRA are "undisputedly open to only one interpretation-that the United States is [a] 'person' under the *FCRA*." Id at 3. Robinson then argues that it was an error of law for the Court to decline to imply a waiver of sovereign immunity, as other sections of the *FCRA* expressly imposed damages liability on the United States. Id at 5. Finally, Robinson argues that the Court erred by "attempt[ing] to rewrite the statute." Id at 11. These are the same arguments Robinson made in his Opposition to Defendant United States

Department of Education ' s Motion to Dismiss Amended Complaint for Lack of Jurisdiction. See, e.g., *ECF* No. 46 at 6 ("The *FCRA*'s Unambiguous Definition of' Person' As Including the 'Government' Shows that Congress Intended to Waive Sovereign Immunity"), 11 ("The Consequences of Waiving Sovereign Immunity Are Appropriate Because the United States Voluntarily Acts as a Substantial Furnisher"), 12 ("It is not the role of the judiciary to substitute its judgment for that of Congress when Congress has enacted statute with clear, unequivocal intentions by assuming that Congress must have failed to consider the consequences of the statute.").

It is certainly true that there is a "split of persuasive authority" on the question of whether the FCRA waived the United States' sovereign immunity. See *Tice v. United States Dep't of Treasury,* No. 2:16-CV-1813-CWH, 2017 WL 3017717, at *3 (D.S.C. Mar. 30, 2017) (collecting cases from various district courts split on this issue) . But while the Fourth Circuit has not opined on this issue, at least one other court in this Circuit has similarly found that "the *FCRA* does not unequivocally waive the United States' sovereign immunity for the violations of the *FCRA* that are at issue here." Id. at *5. Furthermore, since the April 3, 2017 Order, this Court has had another opportunity to consider whether the *FCRA* waived sovereign immunity,

and held that "the provisions of the FCRA imposing civil liability for noncompliance with its provisions do not contain an unequivocal waiver of sovereign immunity ror the federal government." *Johnson v. Devos*, No. GJH-15-1820, 2017 WL 3475668, at *5 (D. Md. Aug. 11, 2017). *Robinson* may disagree with the Court's April 3, 2017 decision, as may other courts; however, with no precedent in this Circuit or from the Supreme Court directing it otherwise, id. at *3 (noting that the Supreme Court and Fourth Circuit "have not addressed whether the *FCRA* contains a waiver of sovereign immunity"), and with a number of other district courts having arrived at the same conclusion, the Court cannot conclude that its decision contained a "clear error oflaw" as required to reconsider its decision. As such, Robinson's Motion for Reconsideration, ECF No. 67 is denied.

2. Motion to Dismiss Count III of the Amended Complaint

PHEAA's Motion to Dismiss Robinson's defamation claim, ECF No. 68-which Robinson did not oppose-is denied. PHEAA argues that Robinson's defamation claim is "preempted by the ... FCRA" and should be dismissed. ECF No. 68-1 at 1. 15 U.S.C. § 1681h(e) provides that "[e]xcept as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation ... with

respect to the reporting of information ... except as to false information furnished with malice or willful intent to injure such consumer." To plead malice , a plaintiff must plead that the defendant "acted with reckless disregard for the truth or falsity of the information it was reporting, which requires a showing that [the defendant] acted with a high degree of awareness of probable falsity or had serious doubts as to its veracity." *Alston v. United Collections Bureau. Inc.,* No. DKC-13-0913, 2014 WL 859013, at* 11 (D. Md. Mar. 4, 2014). To plead a willful intent to injure, a plaintiff must plead that the defendant " knowingly and intentionally committed an act in conscious disregard for [plaintiffs] rights." *Beachley v. PNC Bank, Nat. Ass'n,* No. CIV. JKB-10-1774, 2011 WL 3705239, at *5 (D. Md. Aug. 22, 2011). Plaintiffs cannot merely plead a "formulaic recitation of the elements" of a claim to survive a Motion to Dismiss. *Ashcrop v. Iqbal*, 556 U.S. 662, 681 (2009).

PHEAA argues that "Plaintiff's Amended Complaint does not make a single factual allegation that suggests PHEAA acted maliciously or with a willful intent to injure." ECF No. 68-1 at 1.1 The Court finds otherwise. Robinson alleges that he provided PHEAA with a copy of his signature, which showed that the signature on the documents opening the loan accounts was a forgery. ECF No. 38 ,r 34. Furthermore, Robinson alleges that he advised PHEAA on

numerous occasions that he did not open the accounts, and provided them with documentation that verified his claim. Id. ,i 35. Robinson claims that PHEAA, despite knowing that the accounts had not been opened by Robinson, falsely reported his delinquency to the CRAs "as a collection tactic to coerce Plaintiff into paying PHEAA," id. ,i 37, and with the intent to "harm the Plaintiffs chances of obtaining credit," id. ,i 40. Thus, at this stage, the Court finds that Robinson has sufficiently pleaded that PHEAA acted with " reckless disregard" that the information it was sending to the CRAs was false, as required to establish malice. As such, the Court finds that Robinson's defamation claim is not preempted by§ 168lh(e).

For the foregoing reasons, it is hereby ORDERED that:

PHEAA's Motion to Dismiss Count III of the Amended Complaint, ECF No. 68, is hereby DENIED; and,

Robinson's Motion for Reconsideration, ECF No. 69, is hereby DENIED.

GEORGE J. HAZEL
United States District Judge
Dated: November 13, 2017

APPENDIX D

THE UNITED STATES DISTRICT
COURT FOR THE
DISTRICT OF MARYLAND

Anthony ROBINSON,
Plaintiff,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, et al.,
Defendants.

Civil Action No.: GJH-15-0079

MEMORANDUM OPINION

.GEORGE J. HAZEL, United States District Judge

Plaintiff Anthony Robinson ("Plaintiff" or "Robinson") brings suit against Defend-ants Pennsylvania Higher Education Assistance Agency d/b/a FedLoan Servicing, the United States Department of Education ("USDE"), Equifax Information Services. LLC and Experian

Information Solutions. Inc., [1] alleging claims under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq., and common law defamation. Defendant USDE has filed a Motion to Dismiss for Lack of Jurisdiction under Fed. R. Civ. P. 12(b)(1). ECF No. 41. No hearing is necessary. See Loc. R. 105.6 (D. Md. 2016). For the following reasons. Defendant's Motion to Dismiss is granted and USDE is dismissed from this action.

I. BACKGROUND

At the motion to dismiss stage, the Court takes the allegations in Plaintiff's Amend-ed Com-plaint as true. Some time prior to November 2011, Robinson "discovered that there were Direct Loan student loan accounts being reported to his Experian. Equifax, and Trans Union credit reports." ECF No. 38 ¶ 8. Robinson had not authorized a student loan account to be opened in his name. Id. ¶ 9. In November 2011, Robinson began disputing the Direct Loan accounts with Experian, Equifax, and Trans Union (collectively, the "credit reporting agencies" or "CRAs"), as well as with FedLoan Servicing and Direct Loans

[1] Defendant Trans Union, LLC was terminated from suit on September 2, 2015. ECF No. 49; ECF No. 50.

directly.[2] Id. ¶ 10. In his disputes, Plaintiff stated that the Direct Loan accounts were "fraudulently opened in his name," and that he had only authorized Direct Loan to perform a credit check, not to open a loan account in his name. Id. ¶ 11. Plaintiff requested a description of the CRAs' investigations into these disputes. Id. ¶ 10. Plaintiff also states that upon information and belief, the CRAs forwarded his disputes to FLS for additional investigation. Id. ¶ 12. In April 2014, Plaintiff alleges that he provided a police report, a copy of his driver's license, a copy of his credit reports, and other documents in support of his disputes. Id. ¶ 14.

Plaintiff filed an Amended Complaint in this Court on June 3, 2015. ECF No. 38. USDE filed its Motion to Dismiss for Lack of Jurisdiction on June 12, 2015. ECF No. 41. Plaintiff filed an Opposition to the Motion to Dismiss, ECF No. 46, and USDE filed a Reply. ECF No. 48.[3]

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[2] According to Plaintiff's Amended Complaint, Defendant Pennsylvania Higher Education Assistance Agency ("PHEAA") is a student loan servicing company. ECF No. 38 ¶ 3. PHEAA conducts its student loan servicing operations commercially as American Education Services ("AES") and for federally-owned loans as FedLoan Servicing ("FLS"). Id. ¶ 3. FLS services loans for the U.S. Department of Education ("Direct Loans"). Id.

[3] Additionally, following a joint Motion to Stay, the proceedings in this case were stayed on June 19, 2015 pending appeals in

II. STANDARD OF REVIEW

"It is well established that before a federal court can decide the merits of a claim, the claim must invoke the jurisdiction of the court." *Miller v. Brown,* 462 F.3d 312, 316 (4th Cir. 2006). Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction. See *Khoury v. Meserve*, 268 F. Supp. 2d 600, 606 (D. Md. 2003), aff'd, 85 Fed.Appx. 960 (4th Cir. 2004). Once a challenge is made to subject matter jurisdiction, the Plaintiff bears the burden of proving that subject matter jurisdiction exists. See *Ferdinand–Davenport v. Children's Guild*, 742 F. Supp. 2d 772, 777 (D. Md. 2010) (citing *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., Md.*, 523 F.3d 453, 459 (4th Cir. 2008)). The Court should grant a Rule 12(b)(1) motion "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law."

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two controlling cases, unrelated to the legal issue discussed in this Opinion, before the Fourth Circuit. ECF No. 40; FCF No. 42. After the Fourth Circuit issued its decisions in those cases. Plaintiff filed a Motion to Lift Stay on December 23, 2015, but Defendant PHEAA opposed pending writ of certiorari petitions to the Supreme Court. ECF No. 51: ECF No. 52. The parties conferred about proceeding to discovery while the case was stayed as to Defendant PHEAA, but Defendant USDE objected because of the pending Motion to Dismiss. ECF No. 55.

Evans v. B.F. Perkins Co., a Div. of Standex In'l Corp., 166 F.3d 642, 647 (4th Cir. 1999).

III. ANALYSIS

A. The Fair Credit Reporting Act

"Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Saunders v. Branch Banking and Trust* Co. of Va., 526 F.3d 142, 147 (4th Cir. 2008) (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007)). The Act imposes civil liability on "any person" who "willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer." § 1681n, or who "is negligent in failing to comply with any requirement imposed under this subchapter," § 1681o. The Act defines "person" to mean "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." § 1681 a(b). The parties dispute whether "government or governmental subdivision or agency" in the definition of "person" includes the Department of Education, which is a federal agency.

B. Sovereign Immunity

The doctrine of "[s]overeign immunity shields the United States from suit absent a consent to

be sued that is 'unequivocally expressed.'" *United States v. Bormes,* 133 S.Ct. 12, 16 (2012) (quoting *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33 (1992)). "[T]he Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarged beyond what the statute requires." *Nordic Vill.,* 503 U.S at 34 (internal quotations omitted). A waiver of sovereign immunity cannot be implied, see *United States v. King,* 395 U.S. 1, 4 (1969), and "all ambiguities" are to be "resolved in favor of the Government." *DePhillips v. United States*, No. 8:09-CV-00905, 2009 WL 4505877, at *2 (D. Md. Nov. 24, 2009) (citing Nordic Vill., 503 U.S at 34)). If sovereign immunity has not been waived, federal courts lack subject matter jurisdiction over the claim. *DePhillips,* 2009 WL 4505877 at *2 (citing *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 485 n.5 (1983)); *McLean v. United States*, 566 F.3d 391, 401–02 (4th Cir. 2009)). In its Motion to Dismiss, Defendant USDE urges the Court to find that the FCRA does not waive sovereign immunity for the federal government and therefore that the Court does not have subject matter jurisdiction. ECF No. 41-1 at 4–14.[4]

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[4] Pin cites to documents filed on the Court's electronic filing system (CM/ECF) refer to the page numbers generated by that

Neither the Supreme Court nor the Fourth Circuit has squarely ruled upon whether the FCRA waives sovereign immunity. See United *States v. Bormes*, 133 S. Ct. 12, 20 (2012) ("We do not decide here whether FCRA itself waives the Federal Government's immunity to damages actions under § 1681n"); *Bormes v. United States*, 759 F.3d 793, 795 (7th Cir. 2014) ("As far as we can tell, this is the first appellate decision on the issue.'"). In *United States v. Bormes,* the Supreme Court held that the *Little Tucker Act,* 28 U.S.C. § 1346(a)(2), which provides that "[t]he district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of ... [a]ny ... civil action or claim against the United States, not exceeding $10,000 in amount, founded ... upon ... any Act of Congress," does not waive sovereign immunity of the United States with respect to violations of the FCRA. *Bormes,* 133 S. Ct. at 15. However, the Supreme Court did not decide whether the FCRA itself waives sovereign immunity, and instead remanded that question back to the Seventh Circuit. Id. at 20. The Supreme Court instructed that "[s]ince FCRA is a detailed remedial scheme, only its own text can determine whether the damages liability Congress crafted

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system.

extends to the Federal Government." Id. at 19 (emphasis in original).

On remand, the Seventh Circuit held that the FCRA waived sovereign immunity. *Bormes v. United States,* 759 F.3d 793. 795. In so holding, the Seventh Circuit relied on the plain language of the definition "person" which includes "government." Id. The court referenced the history of the FCRA noting that while Section 1681n, as originally enacted in 1970, applied only against consumer reporting agencies, Congress amended Section 1681n in 1996, expanding liability to all "persons." Id. However, the legislative history did not discuss how this expansion interacted with the existing definition of "person" in § 1681 a(b), which encompasses "any ... government." Id. at 795. The United States, as defendant in *Borme*s, argued that while it was a "person" for the purposes of the Act's substantive requirements, Congress did not intend for damages liability under § 1681n to also apply to the federal government. The Seventh Circuit responded, "[b]ut if the United States is a 'person' under § 1681 a(b) for the purpose of duties, how can it not be one for the purpose of remedies?" Id. at 795. It concluded accordingly, "Section 1681 a(b) does what it has done since 1970, no matter what happens to other sections.... [it] waive[s] sovereign immunity for all requirements and remedies that another section authorizes against any 'person.' Congress

need not add 'we really mean it!' to make statutes effectual.'" Id. at 796.

The Seventh Circuit's decision in *Bormes* conflicted with a number of district court opinions on the subject. For example in *Stellick v. U.S. Dep't of Educ.,* No. 11-CV-0730 PJS/JJG, 2013 WL 673856, at *1 (D. Minn. Feb. 25, 2013), the court held that although "person" in § 1681 a(b) includes "government," this does not constitute Congress's "unequivocal expression" of consent to be sued. See *Stellick*, 2013 WL 673856, at *3. The court reasoned that when the FCRA was enacted in 1970, its remedial provisions, §§ 1681n and 1681o, applied not to "persons" but to consumer-reporting agencies. Id. At that time, the federal government was not acting as a consumer reporting agency, so it was "understandable ... why Congress did not think to include within the FCRA a provision explicitly preserving sovereign immunity." Id. Thus, in contrast to the Seventh Circuit's reading of the legislative history, the *Stellick* court did not read the history to express an unequivocal waiver. The court further reasoned that reading a waiver of sovereign immunity into the statute would impose punitive damages and criminal liability on the United States under § 1681n(a)(2) and § 1681q. Id. at *4. This consequence, in the court's view, "would be immense." Id.; see also *Gillert v. U.S. Dep't of Educ.,* No.CIV. 08-6080, 2010 WL 3582945. at *3 (W.D. Ark. Sept. 7, 2010)

("Plaintiff's argument that the FCRA waives sovereign immunity by including in the definition of 'persons', the terms 'government or governmental subdivision' is unconvincing."); *Ralph v. U.S. Air Force MGIB,* No. 06-CV-02211-ZLW-KLM, 2007 WL 3232593. at *3 (D. Colo. Oct. 31, 2007) (holding that "the United States has not consented to suit under [the FCRA]").

Additionally, even after the Seventh Circuit's decision in *Bormes*, the district court in *Daniel v. Nat'l Park Serv., No.* CV 16-18-BLG-SPW, 2016 WL 4401369, at *3 (D. Mont. Aug. 17, 2016) declined to follow suit. The Daniel court held, after reviewing all relevant authorities, that:

> [T]he Court believes that the district court opinions from this circuit are more persuasive than *Bormes* and finds that the FCRA does not contain an unequivocal waiver of sovereign immunity. The FCRA is ambiguous as to whether plaintiffs can recover damages against government entities, as federal statutes typically waive sovereign immunity in clearer terms.

Daniel, 2016 WL 4401369. at *4. The court further found that "including the United States as a 'person' every time the term is used in the FCRA would lead to inconsistent usage and potentially absurd results." Id. at *5.

In this case, the Court also declines to follow the Seventh Circuit's decision in *Bormes*. The Court starts with the guiding principle that "[i]t

is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell,* 463 U.S. 206, 212 (1983). A waiver of sovereign immunity "must be unequivocally expressed in statutory text ... and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (internal citations omitted). Congress is well-equipped and able to construct statutory language waiving sovereign immunity, and it has done so in other instances. The Federal Tort Claims Act for example, specifically authorizes "claims against the United States for money damages" for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment." 28 U.S.C. § 1346(b)(1). The *Tucker Act* also authorizes "civil action[s] against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected ... under the internal-revenue laws" and "civil action[s] or claim[s] against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress ... or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort ..." 28 U.S.C. § 1346(a)(1)–(2). No such language is found reading 15 U.S.C. § 1681 a(b) and §§ 1681n–1681o of the FCRA together.

Additionally, a separate and unrelated section of the *FCRA*, 15 U.S.C. § 1681 u imposes damages liability on "any agency or department of the United States" which unlawfully discloses consumer reports to the FBI for counter-intelligence purposes. 15 U.S.C. § 1681u(j). Certainly if liability for the federal government were to be read wholesale into the FCRA such language in § 1681u would be superfluous and unnecessary. The Court finds that in light of clear expressions of waiver in other statutes and even other provisions within the *FCRA.* §§ 1681n–1681o cannot be construed to waive sovereign immunity for the United States.

Moreover, "correctly reading a statute 'demands awareness of certain presuppositions.'" *Bond v. U.S.,* 134 S.Ct. 2077, 2088 (2014) (noting that even though a criminal statute, read on its face, would cover a chemical weapons crime committed in Australia, the Supreme Court would not apply the statute to such conduct "absent a plain statement from Congress."). "In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition." Id. at 2091. Here, sweeping the federal government into every instance where the FCRA imposes liability on "persons" would expose the federal government not only to actual damages under § 1681o, but

punitive damages under § 1681q and even criminal liability under § 1681q ("any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be lined under Title 18 imprisoned for not more than 2 years, or both"). It is inconceivable that Congress intended such a result absent a clear statement. See *Stellick*, 2013 WL 673856, at *3; *Daniel,* 2016 WL 4401369, at *5.

Plaintiff's additional arguments for waiver are unavailing. Plaintiff asserts that "[i]f the Court were to accept the USDE's interpretation, then consumers and the Courts would have no power under the FCRA to correct inaccurate credit reporting of the USDE." *ECF* No. 46 at 1. However, Plaintiff maintains administrative remedies to seek discharge of his student loan debt. See 34 C.F.R. § 685.214 ("[i]n order to qualify for discharge of a loan under this section, a borrower must submit to the Secretary a written request and sworn statement, and the factual assertions in the statement must be true"); *Ogunmokun v. Am. Educ. Servs./PHEAA*, No. 12-CV-4403 RRM JO, 2014 WL 4724707, at *4 (E.D.N.Y. Sept. 23, 2014) (noting that "[u]nder the Higher Education Act ("HEA"), which governs student loans guaranteed federally by the Department of Education, a borrower seeking certain types of loan relief must normally avail himself of the administrative process" and

discussing discharge of student loan debt on grounds of "identity theft").

In sum the Court finds that the provisions of the FCRA cited by Plaintiff do not contain a clear and unequivocal waiver of sovereign immunity. Accordingly, the Court is without subject matter jurisdiction, and Defendant USDE shall be dismissed from suit.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss. ECF No. 41, is granted. A separate Order shall issue.

Dated: April 3, 2017

/s/
George J. Hazel
United States District Judge

APPENDIX E

Additional Relevant Statutory Provisions

Section 1681b(a)(1)(D) of Title 15 provides in relevant part:

(a) In general. Subject to subsection (c), any consumer reporting agency may furnish a consumer report under the following circumstances and no other…

(3) To a person which it has reason to believe…

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status;

Section 1681p of Title 15 provides:

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of—

(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or

(2) 5 years after the date on which the violation that is the basis for such liability occurs.

Section 1681q of Title 15 provides:

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, imprisoned for not more than 2 years, or both.

Section 1681r of Title 15 provides:

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under title 18, imprisoned for not more than 2 years, or both.

Section 1681s of Title 15 provides in relevant part:

(a) Enforcement by Federal Trade Commission

(1) In general. The Federal Trade Commission shall be authorized to enforce compliance with the requirements imposed by this subchapter under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), with respect to consumer reporting agencies and all other persons subject thereto, except to

the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other Government agency under any of subparagraphs (A) through (G) of subsection (b)(1), and subject to subtitle B of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5511 et seq.], subsection (b).[1] For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce, in violation of section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)), and shall be subject to enforcement by the Federal Trade Commission under section 5(b) of that Act [15 U.S.C. 45(b)] with respect to any consumer reporting agency or person that is subject to enforcement by the Federal Trade Commission pursuant to this subsection, irespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under

> this subchapter and to require the filing of reports, the production of documents, and the appearance of witnesses, as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter. Any person violating any of the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions of such Act are part of this subchapter.
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> * * *

(b) Enforcement by other agencies

(1) In general. Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to section 1681m(d) of this title shall be enforced under…

> (H) subtitle E of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5561 et seq.], by the Bureau, with respect to any person subject to this subchapter.

(c) State action for violations

(1) Authority of States. In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this subchapter, the State—

(A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;

(B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover—

(i) damages for which the person is liable to such residents under sections 1681n and 1681o of this title as a result of the violation;

(ii) in the case of a violation described in any of paragraphs (1) through (3) of section 1681s–2(c) of this title, damages for which the person would, but for section 1681s–2(c) of this title, be liable to such residents as a result of the violation; or

(iii) damages of not more than $1,000 for each willful or negligent violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be

awarded the costs of the action and reasonable attorney fees as determined by the court.

Section 1681u(j) of Title 15 provides:

Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of—

(1) $100, without regard to the volume of consumer reports, records, or information involved;

(2) any actual damages sustained by the consumer as a result of the disclosure;

(3) if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and

(4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.