No. 22-846

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF AGRICULTURE
RURAL DEVELOPMENT RURAL HOUSING SERVICE,

Petitioner,

v.

REGINALD KIRTZ,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Fair Credit Reporting Act (FCRA) provides that "[a]ny person" may be held civilly liable for negligently or willfully failing "to comply with any requirement imposed" under the FCRA. 15 U.S.C. §§ 1681n, 1681o. The FCRA defines "person" to include "any … government or governmental subdivision or agency." *Id.* § 1681a(b). The question presented is:

Whether sections 1681n and 1681o waive federal agencies' sovereign immunity from civil liability under the FCRA.

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INTRODUCTION

The Fair Credit Reporting Act (FCRA) waives the sovereign immunity of the federal government by authorizing consumers to sue federal agencies for FCRA violations. That holding is compelled by the FCRA's plain text: The statute authorizes suit against "[a]ny person" that fails to comply with the FCRA, and it defines "person" to include "any … governmental … agency." 15 U.S.C. §§ 1681a(b), 1681n, 1681o.

In opposing review in *Robinson v. Department of Education*, 140 S. Ct. 1440 (2020) (denying cert.), of the question whether the FCRA waives the government's sovereign immunity, the government argued that—notwithstanding a conflict among the circuits—this Court should allow the lower courts to consider the issue further. That point remains correct.

Like the Third Circuit below, the District of Columbia and Seventh Circuits have held that federal agencies are "person[s]" that may be sued for FCRA violations. Although the Fourth and Ninth Circuits have disagreed, the trend in the case law supports the decision below, and there is reason to believe that the Fourth and Ninth Circuits would reconsider their precedent if faced with the issue today. To begin with, as the Third Circuit noted, this Court's decision in *Return Mail, Inc. v. U.S. Postal Service*, 139 S. Ct. 1853 (2019), explains that, where a statute includes an express statutory definition of "person," that definition controls, not a presumption that "person" does not include the sovereign. That decision was not available to the Fourth and Ninth Circuits when they addressed the FCRA question, and their opinions make plain that they applied a contrary rule. Increasing the likelihood that the circuits may align

on their own are three cases before this Court this Term that concern whether Congress has abrogated or declined to recognize immunity in other contexts. The Court's decisions in those cases may prompt the courts of appeals to reach consensus on the proper interpretation of the FCRA's text.

In addition, the Third Circuit is the only appellate court to address several of the arguments on which the government relies in its petition. Allowing the lower courts a chance to consider *Return Mail*, the Third Circuit's opinion, and the arguments not addressed in previous cases will enhance this Court's eventual consideration, if review later becomes appropriate.

The absence of immediate need for review is underscored by the government's failure to identify a single instance where FCRA liability has been imposed on a federal agency. Indeed, the government may yet avoid damages in this case in light of a recent decision by the Third Circuit that could foreclose liability on the merits. In these circumstances, the Court should adhere to its usual reluctance to grant review in interlocutory appeals and deny the petition for certiorari.

Seemingly recognizing that in these circumstances, conflict resolution is not a compelling reason to grant certiorari, the petition's primary argument is that the decision below is incorrect. The argument that the Court should grant review for error-correction purposes, however, is particularly weak in this case because the Third Circuit's decision is the most thorough and carefully reasoned of the decisions to date on the question presented. It is also correct.

STATEMENT

Statutory background

Under the FCRA, a consumer reporting agency that receives a consumer's dispute must "conduct a reasonable investigation to determine whether the disputed information is inaccurate," 15 U.S.C. § 1681i(a)(1)(A), and, if so, take steps to correct the consumer's file, *id.* § 1681i(a)(5)(A). In 1996, Congress amended the FCRA to impose similar duties on "person[s]" who provide information about consumers to consumer reporting agencies. *See* Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, div. A, tit. II, subtit. D, ch. 1, §§ 2409, 2413, 110 Stat. 3009-426, 3009-439, 3009-447. Under the 1996 amendment, a consumer reporting agency that receives a consumer dispute must "provide notification of the dispute to *any person* who provided any item of information in dispute." 15 U.S.C. § 1681i(a)(2)(A) (emphasis added). After receiving such a notice, the "*person*" providing the information, also called the "furnisher" of information, must "conduct an investigation," "report the results" to the consumer reporting agency, and take other steps to ensure that inaccurate, incomplete, or unverifiable information about the consumer is no longer reported. *Id.* § 1681s-2(b)(1) (emphasis added). The FCRA defines "person" to "mean[] any individual, partnership, corporation, trust, estate, cooperative, association, *government or governmental subdivision or agency*, or other entity." *Id.* § 1681a(b) (emphasis added).

The 1996 amendment also amended the FCRA's civil-liability provisions, *id.* §§ 1681n & 1681o. As amended, those provisions impose liability on "[a]ny

person" that fails "to comply with any requirement imposed under [the FCRA] with respect to any consumer." Section 1681n applies to willful violations and authorizes recovery of actual or statutory damages, punitive damages, costs, and attorney's fees. Section 1681o applies to negligent violations and authorizes recovery of actual damages, costs, and attorney's fees.

Factual Background and Proceedings Below

Respondent Reginald Kirtz had loan accounts with student-loan servicer Pennsylvania Higher Education Assistance Agency, also known as American Education Services (AES), and petitioner United States Department of Agriculture Rural Development Rural Housing Service (USDA). The Rural Development Rural Housing Service is a federal agency that "issues loans to promote the development of safe and affordable housing in rural communities." Pet. App. 4a. AES and USDA each furnished information about the status of the accounts to TransUnion, LLC, a credit reporting agency. *Id*.

Explaining that the account information furnished by AES and USDA, and reported on his TransUnion credit report, contained errors that lowered his credit score, Mr. Kirtz disputed the accuracy of TransUnion's reporting of his AES and USDA account status under section 1681i(a)(1)(A). Specifically, he asserted that AES and USDA continued to report the status of his accounts as "120 Days Past Due Date" after the accounts were closed with a balance of zero. *Id*. TransUnion notified AES and USDA of the dispute pursuant to section 1681i(a)(2)(A). Thereafter, alleging that TransUnion, AES, and USDA did not take the actions required by sections 1681i and

1681s-2 to investigate his dispute and correct his account information, Mr. Kirtz filed suit against the three entities under sections 1681n and 1681o. *Id.*

USDA moved to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). It argued that federal agencies are not "person[s]" that may be named defendants under sections 1681n and 1681o and, therefore, that the FCRA does not waive federal sovereign immunity. The district court granted USDA's motion and issued a judgment as to Mr. Kirtz's claim against USDA under Federal Rule of Civil Procedure 54(b). Mr. Kirtz appealed, and the Third Circuit reversed.

The court of appeals, recognizing that Congress may "waive [sovereign] immunity by enacting a statute that authorizes suit against the government for damages or other relief," explained that whether Congress has done so "is a question of statutory interpretation." Pet. App. 6a. Quoting this Court's decision in *Sossamon v. Texas*, 563 U.S. 277, 284 (2011), the court stated that a waiver "must be 'unequivocally expressed' in the statutory text." Pet. App. 6a–7a. It also recognized that ambiguities in the text must be construed "in favor of immunity." *Id.* at 7a (quoting *FAA v. Cooper*, 566 U.S. 284, 290 (2012)). But if "there is 'no ambiguity'" in the statute "after applying the 'traditional tools of statutory construction,'" the court continued, "courts must apply a waiver as written." *Id.* (quoting *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008)).

Applying these principles, the Third Circuit held that sections 1681n and 1681o of the FCRA waive federal agencies' immunity. *Id.* The court first considered the FCRA's definition of "person." Quoting

Return Mail, the court explained that the presumption that "person" does not include the sovereign "only applies 'in the absence of an express statutory definition.'" *Id.* at 8a (brackets removed) (quoting 139 S. Ct. at 1861–62). Because "the FCRA contains such an express definition," the court concluded that the presumption does not apply. *Id.*

Turning to the definition, the court held that the FCRA's definition of "person"—which includes "'any … governmental … agency'"—unambiguously "encompasses the United States and its agencies." *Id.* at 9a (quoting 15 U.S.C. § 1681a(b)). As the court explained, "Congress uses the expansive modifier 'any' to bring within a statute's reach all types of an item." *Id.* The court also observed that certain FCRA provisions that refer to "person[s]" make no sense unless "person" includes federal agencies. For instance, the definition of "consumer report" excludes communications "described in" section 1681a(y). *See* 15 U.S.C. § 1681a(d)(2)(D).[1] A key feature of the communications described in section 1681a(y) is that they are "not provided to any person except" those listed in the subsection. One "person" so listed is "any Federal or State officer, agency, or department." Pet. App. 9a (quoting 15 U.S.C. § 1681a(y)(1)(D)(ii)). Similarly, section "1681b(b)(3)(A) imposes obligations on 'person[s]' who make adverse employment decisions based on credit reports but makes an exception '[i]n the case of an agency or department of the United States Government'" under certain conditions. *Id.* at 10a (quoting 15 U.S.C.

[1] "Due to a drafting error, § 1681a(d)(2)(D) actually refers to § 1681a(x), but the accompanying notes make clear that the reference should be to subsection (y)." Pet. App. 9a n.3.

§§ 1681b(b)(3)(A) & (4)(A)). As the court reasoned, these exceptions rest on the understanding that a federal agency is a "person" under the FCRA. *Id.*; *see also id.* at 10a & n.4 (citing 15 U.S.C. §§ 1681b(a)(1)–(6) & 1681i(a)(2)).

The Third Circuit also noted that, under section 1681a(a), the definition of "person" "explicitly applies 'for purposes of this subchapter,'"—that is, 15 U.S.C. ch. 41, subch. III, which "contain[s] the entirety of the FCRA." *Id.* at 8a (quoting 15 U.S.C. § 1681a(a)). At the same time, "where Congress wanted to use a different or narrower definition of 'person' within the FCRA, it knew how to do so." *Id.* For instance, section 1681g(g)(1)(G) excludes "an enterprise" defined in 12 U.S.C. § 4502(6) from the definition of "person" for purposes of section 1681g(g). *Id.* Similarly, section 1681n(a)(1)(B) uses the term "natural person" where Congress did not want to extend liability to all "person[s]." *Id.* at 9a. Because sections 1681n and 1681o refer to "[a]ny person," without qualification, the court concluded that "Congress intended for the term 'person' in the civil-liability provisions to carry its expressly defined meaning." *Id.*

The court found support in the Equal Credit Opportunity Act (ECOA) and the Truth in Lending Act (TILA), "both of which are codified alongside the FCRA in Chapter 41 of Title 15," *id.* at 11a, under the umbrella of the Consumer Credit Protection Act. "Like the FCRA, the TILA and ECOA define 'person' to include any 'government or governmental subdivision or agency,' and each includes 'person' in its definition of the term 'creditor.'" *Id.* at 11a–12a (citing 15 U.S.C. §§ 1602(d)–(g) (TILA), and 15 U.S.C. §§ 1691a(e)–(f) (ECOA)). The TILA and ECOA "authorize suits for civil damages against any 'creditor' who violates their

substantive requirements, using nearly identical language to the FCRA's civil liability provisions." *Id.* at 12a. The court observed that the TILA and ECOA "expressly" exempt the government from certain types of liability under each statute. *Id.* (citing 15 U.S.C. § 1612(b) (TILA); 15 U.S.C. § 1691e(b) (ECOA)). Thus, the court reasoned, "Congress understood in the contexts of the TILA and ECOA that authorizing suits against 'any creditor'—*i.e.*, any 'person'—would otherwise suffice to waive sovereign immunity," *id.* at 12a–13a, which made it necessary for Congress to enact express exemptions to liability where it wanted to limit the government's exposure to damages. And Congress "legislated against that statutory background" when it enacted the 1996 FCRA amendment to extend civil liability to "[a]ny person" that fails to comply with the FCRA's requirements. *Id.* at 13a.

The court found no support for USDA's premise that the original FCRA enacted in 1970 had not waived immunity, observing that it "appear[ed] to authorize suit" against the United States. *Id.* at 14a. In any event, the court explained, it was "focused today on interpreting the 1996 Amendments, and those Amendments, in clear and unambiguous terms, authorize suits against all 'persons,' including the United States." *Id.* at 14a–15a.

The court also rejected USDA's request to disregard the "FCRA's clear text" based on silence in the legislative history. *Id.* at 16a. The court recognized that this Court had at one time "been willing to disregard a clear and unambiguous waiver of immunity based solely on silence in the Congressional record." *Id.* at 17a n.11 (citing *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health &*

Welfare, 411 U.S. 279, 282–87 (1973) (*Employees*)). The court explained that "[t]hat era … has long since passed, and today's precedent makes clear that our analysis must begin and end with the text." *Id.* (citing *Cooper*, 566 U.S. at 291; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55–56 (1996); and *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989)).

In addition, the Third Circuit rejected USDA's theory that a "second, more specific waiver of sovereign immunity within the FCRA itself," 15 U.S.C. § 1681u(j), calls into question the waiver accomplished by the use of the defined term "person" in the general civil-liability provisions. Pet. App. 18a. Section 1681u(j) makes "[a]ny agency or department of the United States … liable to the consumer" for violation of section 1681u's restrictions on obtaining or disclosing consumer report information. The court explained that, whereas section 1681u targets only government agencies, sections 1681n and 1681o "concern requirements that apply not merely to the government but to 'persons' generally, so it makes sense to employ the broader term rather than enumerate specific entities already encompassed by the statutory definition." *Id.* at 18a–19a.

Similarly, the Third Circuit rejected the comparison of the FCRA's waiver of sovereign immunity to waivers contained in statutes addressing different subjects. The court explained that comparing the text of different waivers to inform its reading of the FCRA "would impose the exact sort of 'magic words' requirement that [this] Court has long rejected." *Id.* at 20a (quoting *Cooper*, 566 U.S. at 291).

The court also rejected USDA's argument that it should not apply the FCRA's unambiguous definition

of "person" to sections 1681n and 1681o because applying the definition to certain *other* provisions of the FCRA would supposedly produce "a parade of implausible and untenable results." *Id.* at 21a. That argument, the court explained, was a "legal bogeyman," because "[c]ourts have never been required to choose between mechanically applying a statutory definition everywhere in a statute or applying it nowhere." *Id.* Instead, the court stated, courts may decline to give force to a definition where doing so would be "unconstitutional," where it would "be absurd," or where it "would be 'incompatible' with Congress's regulatory scheme." *Id.* at 21a–22a (quoting *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 320 (2014)). "For all other provisions of a statute, courts must continue to apply statutory terms as defined." *Id.* at 22a.

The court applied those principles to the criminal prohibition in 15 U.S.C. § 1681q on "any 'person' … knowingly obtain[ing] credit information under false pretenses." *Id.* The court indicated that the "canon against absurdity … leans against applying the FCRA's definition of 'person' to this provision," because the federal government cannot be subject to criminal prosecution or imprisonment. *Id.* at 23a. Nonetheless, the court reiterated that "the plain text of [sections] 1681n and 1681o clearly expresses Congress's intent to authorize suits against" the federal government. *Id.* at 24a. The court also disagreed with USDA that it would be "untenable" to apply the unambiguous definition of "person" to the FCRA provisions that authorize punitive damages against federal defendants and authorize federal agencies and states to enforce the statute; applying those provisions to the federal government, the court

explained, falls well within Congress's authority. *Id.* at 25a–26a. In short, the court stated, no provision of the FCRA provides an "exceptional reason that absolves us of our duty to apply the FCRA's definition to §§ 1681n and 1681o." *Id.* at 27a.

Finally, the court found USDA's reliance on the Privacy Act, 5 U.S.C. § 552a, "unpersuasive." Pet. App. 32a. The Privacy Act "regulates information about individuals contained within systems of records maintained by federal agencies including, in some cases, consumer credit information." *Id.* Rejecting USDA's argument that the FCRA's remedies upset the "balance" set by the Privacy Act's remedial system, the court noted that Congress could reasonably have concluded that the Privacy Act, "with its strict limit on money damages, was insufficient to ensure the accuracy of consumer credit information." *Id.* In addition, despite "some overlap," the court noted that USDA failed to identify "any actual inconsistency between" the two statutes. *Id.*

REASONS FOR DENYING THE WRIT

I. The Court should deny review to permit further consideration of the issue in the courts of appeals.

This is not the first time this Court has been asked to resolve a circuit split on whether the FCRA waives the federal government's sovereign immunity. Four years ago, the plaintiff in *Robinson* sought review in this Court. Despite disagreement among the three circuits to have addressed the question at that time, the government opposed the petition, arguing that review would be "premature." *See* Brief for the Respondent in Opposition at 24, *Robinson*, 140 S. Ct.

1440 (No. 19-512). The government's statement remains correct: Review would be premature.

After *Robinson*, two notable things happened: First, this Court decided *Return Mail*. Second, the weight of lower-court authority shifted against the government, with the Third Circuit in this case and the D.C. Circuit in *Mowrer v. U.S. Department of Transportation*, 14 F.4th 723 (D.C. Cir. 2021), joining the Seventh Circuit, *see Bormes v. United States*, 759 F.3d 793 (7th Cir. 2014), in holding that federal agencies can be held liable for violating the FCRA. In light of the subsequent case law and the trend in the courts of appeals, it is far from clear that the Fourth and Ninth Circuits will adhere to their minority position—particularly because the decision below is the first to address several of the government's merits arguments. In addition, three cases before this Court this Term may impact the analysis of the question presented here. The lower courts, not this Court, should be the first to consider the application of those decisions' reasoning to the FCRA.

A. In June 2019, this Court issued its decision in *Return Mail*, which addressed whether the U.S. Postal Service could challenge the validity of a patent under a statute that allowed a "person" to bring such challenges. 139 S. Ct. at 1858–59. The term "person" was not defined in the statute, and this Court explained that, "*[i]n the absence of an express statutory definition*," the Court applies a "'longstanding interpretive presumption that "person" does not include the sovereign,' and thus excludes a federal agency like the Postal Service." *Id.* at 1861–62 (emphasis added) (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780–81 (2000)).

Citing *Return Mail*, the Third Circuit began its analysis with the recognition that, when a statute includes an express definition, that definition drives the question whether a government agency is a "person" under that statute. Pet. App. 8a. By contrast, the two circuits that failed to apply the express definition, the Fourth and the Ninth, did not have the benefit of *Return Mail*'s instruction. *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799 (4th Cir. 2019); *Daniel v. Nat'l Park Serv.*, 891 F.3d 762 (9th Cir. 2018). Indeed, their analysis is incompatible with *Return Mail*. The Fourth Circuit's March 2019 decision in *Robinson* explicitly states that the presumption that "person" does not include the sovereign "applies even when 'person' is elsewhere defined by statute." 917 F.3d at 802. The Ninth Circuit in *Daniel* ignored the "express statutory definition," *Return Mail*, 139 S. Ct. at 1861, writing that the "real question" in determining "whether Congress explicitly waived sovereign immunity" is not "whether the United States is a government" under FCRA's definition of "person," but whether the United States is "explicitly referenced" in the cause of action. 891 F.3d at 774 & n.10 (internal quotation marks omitted).

If faced with the question presented today, the Fourth and Ninth Circuits might well reconsider those decisions in light of this Court's subsequent precedent and the trend in the courts of appeals.

B. Review is also premature because three decisions from this Court this Term may help the courts of appeals to align without this Court's intervention. First, in *Türkiye Halk Bankasi A.S. v. United States*, 143 S. Ct. 940 (2023) (*Halkbank*), the Court held that "foreign states and their instrumentalities" are amenable to criminal

prosecution under 18 U.S.C. § 3231, which grants the district courts "jurisdiction … of all offenses against the laws of the United States." *Id.* at 944–45. The Court also held that the Foreign Sovereign Immunities Act "does not grant immunity to foreign states or their instrumentalities in criminal proceedings." *Id.* at 947. The Court noted, in particular, the "history" of attempts by "the Executive Branch … to subject foreign-government-owned entities to federal criminal prosecution." *Id.* at 948. *Robinson* and *Daniel* both rely on the impossibility of criminally prosecuting a government to justify their decisions not to apply the FCRA's unambiguous definition of "person" to the FCRA's *civil*-liability provisions. *Robinson*, 917 F.3d at 804; *Daniel*, 891 F.2d at 770. The decision in *Halkbank* thus may call into question the reasoning of those courts.

Second, in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, No. 22-227 (argued Apr. 24, 2023), this Court will decide whether the Bankruptcy Code abrogates tribal sovereign immunity, where a broadly worded definition does not include the word "tribes" but encompasses all "foreign or domestic government[s]." 11 U.S.C. § 101(27). The Court's decision in *Lac du Flambeau* may call into question the weight that the Fourth and Ninth Circuits gave to the absence of the phrase "United States" in the FCRA's definition and civil-liability provisions. *See Robinson*, 917 F.3d at 803–04; *Daniel*, 891 F.3d at 772–73. Notably, the United States argues that the Code's language "unambiguously abrogate[s] the sovereign immunity of all governments, foreign and domestic—a category that necessarily includes tribes," even though it does not "mention[] tribes specifically." Brief for the United States as Amicus

Curiae Supporting Respondents at 18, *Lac du Flambeau*, No. 22-227 (filed Mar. 31, 2023) (U.S. *Lac du Flambeau* Br.).[2]

Third, in *Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo*, No. 22-96 (argued Jan. 11, 2023), the Court is considering whether 48 U.S.C. § 2126(a) abrogates the sovereign immunity of the Financial Oversight and Management Board for Puerto Rico. One point of argument in the case is the relevance of legislative history in the abrogation analysis. *Compare* Brief for Petitioner at 40, *Centro de Periodismo*, No. 22-96 (filed Nov. 17, 2022) (citing *Employees*), *with* Brief of Respondent at 35, *Centro de Periodismo*, No. 22-96 (filed Dec. 19, 2022) (arguing against use of legislative history). The Ninth Circuit in *Daniel* relied on legislative history to support its conclusion that the FCRA's text does not waive sovereign immunity, *Daniel*, 891 F.3d at 775, and USDA argues that legislative history supports its view that Congress did not waive immunity when it enacted the 1996 amendment, Pet. 26–27. *Centro de Periodismo* may shed further light on whether legislative history can influence the interpretation of statutory language in the sovereign-immunity context.

C. Awaiting further consideration of the issue in the lower courts also makes sense because the decision below is the first to grapple with two arguments that the government makes in support of its claim for

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[2] At oral argument, counsel confirmed the United States' position that statutory language abrogating "the sovereign immunity of all governments, domestic and foreign" "would include the United States." Transcript of Oral Argument at 57–58, *Lac du Flambeau*, No. 22-227 (argued Apr. 24, 2023).

immunity. First, the court rejected the government's argument that it should engage in the mode of statutory analysis used in *Employees*, which considered legislative history and statutory purpose to decide whether Congress abrogated state sovereign immunity. Pet. App. 16a–17a. Second, the court rejected the government's argument that the Privacy Act was relevant to the question whether the FCRA waived immunity. *Id.* at 31a–34a. USDA's petition demonstrates that the government would lean heavily on both *Employees* and the Privacy Act in its merits briefing in this Court. Pet. 15–17, 21, 24–27. But none of the other courts of appeals that have considered whether the FCRA waives the government's sovereign immunity addressed these arguments. By denying the petition, the Court would give other courts of appeals an opportunity to weigh in on the government's arguments, thereby providing a better foundation for decisionmaking should this Court's review later be warranted.

II. This case is a poor vehicle for review of the question presented.

USDA argues that review is needed now because the government is a "ubiquitous FCRA defendant that could routinely be threatened with substantial monetary liability for its everyday employment and lending activities." Pet. 30. Given the government's opposition to review in *Robinson,* this concern should not be credited. Tellingly, the petition does not identify a single instance where a federal agency has paid damages for an alleged violation of the FCRA. Further, to the extent the government is a "ubiquitous FCRA defendant," it will have ample opportunities to seek review, if the courts of appeals do not reach

consensus, and if a judgment is awarded against it in an FCRA case—including in this one.

In that regard, a recent Third Circuit decision suggests a merits defense the government is likely to invoke to Mr. Kirtz's FCRA claim against USDA, which could moot any issue of immunity. Last fall, the Third Circuit in *Bibbs v. Trans Union LLC*, 43 F.4th 331 (3d Cir. 2022), considered whether statements in credit reports prepared by TransUnion were inaccurate or misleading under the FCRA where they included a "Pay Status" notation stating "Account 120 Days Past Due" but also stated that "the loans were closed, transferred, and had account balances of zero." *Id.* at 336. The court held that the company had not violated the FCRA because the credit reports were "accurate." *Id.* at 344.

The FCRA claims in *Bibbs* resemble Mr. Kirtz's FCRA claims here. *See* Am. Compl. ¶ 12, *Kirtz v. Trans Union, LLC*, No. 2:20-cv-5231 (E.D. Pa. Dec. 30, 2021), ECF 20 (alleging that Mr. Kirtz's TransUnion credit report stated that the relevant accounts were closed with a zero balance). The district court, however, has not yet considered whether Mr. Kirtz's FCRA claims are distinguishable from the claims in *Bibbs*. If the court were to rule that *Bibbs* controls, USDA would be entitled to judgment in its favor—the same outcome that it would receive if the Court granted review and reversed the decision below. On the other hand, if the district court concludes that *Bibbs* is distinguishable, and if it ultimately concludes that USDA negligently or willfully failed to comply with the FCRA, USDA can seek review of its immunity defense after the district court issues a final judgment.

This Court "generally await[s] final judgment in the lower courts before exercising … certiorari jurisdiction." *Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). There is good reason to adhere to that policy here.

III. The court of appeals' decision is correct.

USDA's primary argument for review is that the court of appeals erred in holding that the FCRA waives federal agencies' sovereign immunity. USDA is wrong. Accordingly, even if a request for error correction could otherwise justify review in the face of the strong reasons for not taking up the case discussed above, it does not do so here.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). "As in all statutory construction cases," the question whether Congress has granted such consent depends on "the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). "Congress need not state its intent in any particular way" and is "never required" to use "magic words" to waive the government's immunity. *Cooper*, 566 U.S. at 291. If the language Congress used is ambiguous, the sovereign-immunity canon requires ambiguities be resolved "in favor of immunity." *United States v. Williams*, 514 U.S. 527, 531 (1995). But "if the statutory language is unambiguous and the statutory scheme is coherent and consistent," the court's inquiry is at an end. *Sebelius v. Cloer,* 569 U.S. 369, 380 (2013) (quoting *Sigmon Coal*, 534 U.S. at 450).

The court of appeals faithfully applied these principles when it held that the "FCRA's plain text

clearly and unambiguously" waives the federal government's sovereign immunity by "authoriz[ing] suits for civil damages against the federal government." Pet. App. 2a.

A. Sections 1681n and 1681o provide that "[a]ny person" may be held liable for failing to comply with the requirements imposed by the FCRA. The term "person" "is usually presumed to not include the sovereign," but this presumption "only applies 'in the absence of an express statutory definition.'" Pet. App. 8a (brackets removed) (quoting *Return Mail*, 139 S. Ct. at 1861–62). "When a statute includes an explicit definition, [the courts] must follow that definition." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776–77 (2018) (quoting *Burgess v. United States*, 553 U.S. 124, 130 (2008)). Here, the FCRA defines the term "person" to include "any … government or governmental subdivision or agency," 15 U.S.C. § 1681a(b), a phrase that unambiguously "encompasses the United States and its agencies," Pet. App. 9a. Indeed, Congress used identical language in two of the FCRA's sister statutes—TILA and ECOA—to encompass agencies of the federal government. *See id*. at 11a–13a. In fact, USDA does not dispute that it is a "governmental … agency" and, therefore, falls within the FCRA's definition of "person."

That definition applies to the term "person" in sections 1681n and 1681o because "[s]tatutory definitions control the meaning of statutory words." *Burgess*, 553 U.S. at 129 (internal quotation marks omitted). Beyond that, section 1681a(a) explicitly directs that the "[d]efinitions and rules of construction set forth in [section 1681a] are applicable for the purposes of" the entire "subchapter" in which the FCRA's provisions are codified. Section 1681a(a) thus

"leav[es] no doubt as to the definition's reach." *Digital Realty Tr.*, 138 S. Ct. at 777.

B. Nonetheless, even while conceding that the definition establishes that it is a "person" for purposes of the FCRA's "substantive" provisions, *see* Pet. 18, USDA argues that Congress could not have intended to apply the FCRA's liability provisions to federal agencies when it amended sections 1681n and 1681o to extend civil liability to "[a]ny person." USDA's attempt to find ambiguity in the statutory text fails.

1. USDA incorrectly suggests that Congress must enact an "explicit statutory waiver of sovereign immunity" for such a waiver to be effective. Pet. 9; *see also id.* at 15 (asserting that the court of appeals did not "identify any language elsewhere in the 1996 Act waiving or abrogating sovereign immunity"). This Court has recognized that Congress may waive sovereign immunity by authorizing suit against the United States or its agencies for damages or other relief. *See*, *e.g.*, *Cooper*, 566 U.S. at 291; *Lane v. Pena*, 518 U.S. 187, 193 (1996); *Williams*, 514 U.S. at 531–32. The FCRA does just that by authorizing civil actions against "[a]ny person," 15 U.S.C. §§ 1681n, 1681o, a term expressly defined to include federal agencies.

USDA argues that, because sections 1681n and 1681o originally extended civil liability only to "'consumer reporting agenc[ies]'" and "'user[s] of information,'" rather than "person[s]," the original statute "plainly did not waive the sovereign immunity of the United States," and that "[a]gainst that background, the 1996 Act cannot properly be construed to have silently subjected the United States to suits for money damages." Pet. 13–14 (quoting 15

U.S.C. §§ 1681n, 1681o (1970)). Even assuming, however, that the 1970 act preserved sovereign immunity, *but see* Pet. App. 14a, the 1996 amendments waived immunity "in clear and unambiguous terms" when they "authorize[d] suits against all 'persons,' including the United States," *id.* at 14a–15a.

USDA contends that reading the FCRA to preserve immunity is "plausible" and, therefore, such a reading must be adopted in accordance with the sovereign-immunity canon. Pet. 17–18. But USDA's reading is not plausible because it requires disregarding the statutory text and applicable canons of statutory construction. "There is no need … to resort to the sovereign immunity canon" if "there is no ambiguity … to construe." *Richlin Sec. Serv.*, 553 U.S. at 590.

2. The court of appeals correctly rejected USDA's call to jettison this Court's current teachings about statutory interpretation in favor of the approach employed in *Employees*. *See* Pet. App. 17a n.11. In *Employees*, this Court held that Congress did not abrogate state immunity when it amended the definition of "employer" in the Fair Labor Standards Act (FLSA) to include certain state-run facilities while leaving in place a preexisting FLSA cause of action applicable to an "employer." 411 U.S. at 282–83, 285. The Court recognized that states were "covered by" the FLSA under the "literal language" of the amended statute. *Id.* at 283. Nonetheless, the Court concluded that immunity had not been abrogated because the *legislative history* of the amendment did not reveal an intent to eliminate state immunity and because the purpose of the amendment was not to authorize private actions, but to give the Secretary of Labor

authority to enforce the FLSA against states. *Id*. at 285–86.

Despite *Employees*' reliance on legislative history, this Court's subsequent decisions "make[] clear that [the] analysis must begin and end with the text." Pet. App. 17a n.11; *see Cooper*, 566 U.S. at 291 ("What we thus require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools."). As the United States itself has recently stated, "legislative history 'generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate' … sovereign immunity, especially … where the statutory text is clear in categorically abrogating sovereign immunity." U.S. *Lac du Flambeau* Br. at 33 (citation omitted) (quoting *Dellmuth*, 491 U.S. at 230).

USDA responds that *Employees* "relied not only on the legislative history but also the absence of 'clear language' in the statute" abrogating state immunity. Pet. 17 (quoting 411 U.S. at 285). But *Employees*' suggestion that the statutory language was not clear—despite the Court's own acknowledgment of the plain language's literal meaning—cannot be divorced from its examination of the legislative history and intent. *See Employees*, 411 U.S. at 285 (stating "we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts").

USDA alternatively argues that the courts should continue to consider legislative history when interpreting waivers of immunity. Pet. 26–27. USDA suggests that legislative history cannot "*supply* a waiver," but may be relevant to a conclusion that

immunity has *not* been waived. *Id*. at 27 (quoting *Lane*, 518 U.S. at 192 (emphasis added)). But this Court has been clear that legislative history has no place in either direction: "If Congress' intention is unmistakably clear in the language of the statute, *recourse to legislative history will be unnecessary*; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile." *Dellmuth*, 491 U.S. at 230 (emphasis added, internal quotation marks removed).

Moreover, even if legislative history were relevant, the history here supports reading the FCRA's unambiguous text to waive the government's immunity. As originally enacted, the FCRA did not regulate furnishers of consumer-report information, a deficiency that "weaken[ed] the accuracy of the consumer reporting system." S. Rep. No. 103-209, at 6 (1993). "[T]o make it more likely that information reported to consumer reporting agencies is accurate," H.R. Rep. No. 102-692, at 69 (1992), Congress enacted the 1996 amendment to require furnishers to investigate consumer disputes and make necessary corrections. *See* 15 U.S.C. § 1681s-2(b)(1). Congress's expansion of the FCRA's civil-liability provisions to "person[s]" was part and parcel of its decision to regulate furnishers. S. Rep. No. 103-209, at 7. Unlike in *Employees*, where "private enforcement of the [FLSA] was not a paramount objective," 411 U.S. at 286, Congress understood that the FCRA "was designed to be largely self-enforcing" and that "the capacity of consumers to bring private actions to enforce their rights under the statute is at least equally important" as federal enforcement. S. Rep. No. 103-209, at 6 (quoting testimony by the Federal Trade Commission's Director of Credit Practices). Because

the federal government is the "nation's largest employer and creditor," Pet. App. 27a–28a, it furnishes much of the information that appears on consumers' credit reports. Thus, "authorizing enforcement against the federal government" for violating its furnisher responsibilities advances the FCRA's goal of promoting "fair and accurate credit reporting." *Id.* at 27a (quoting 15 U.S.C. § 1681(a)(1)).

3. USDA argues that sections 1681n and 1681o are ambiguous because applying the definition of "person" *elsewhere* in the FCRA would, in USDA's view, produce "unlikely" results. Pet. 19. But the possibility that a court may have a valid reason not to apply the definition to some other FCRA provision does not introduce ambiguity into the meaning of "person" in sections 1681n and 1681o, any more than it introduces ambiguity into other sections where USDA concedes that the plain terms of the statutory definition of "person" apply.

For instance, USDA highlights 15 U.S.C. § 1681q, Pet. 13, 14, 19, which currently provides that "[a]ny 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." Concluding that it would be "absurd" to prosecute the federal government, Pet. App. 22a, the court of appeals suggested that the "canon against absurdity … leans against applying the FCRA's definition of 'person' to this provision," *id.* at 23a. But as the court explained, this possibility does not make the plain text of sections 1681n and 1681o ambiguous, because applying the definition to those sections is not absurd. *Id.* at 27a.

The other FCRA provisions on which USDA relies do not create ambiguity either. Sections 1681s(a) and (c) authorize the Federal Trade Commission to enforce the statute against "person[s]," and create a cause of action under which states may sue "person[s]" that violate the statute. Pet. 14, 19. These outcomes are not absurd, however. Indeed, USDA acknowledges that Congress may authorize such actions by making its intent "clear." Pet. 19–20.

Similarly, in authorizing punitive damages for willful FCRA violations, Section 1681n overrides the "presumption against imposition of punitive damages on governmental entities," *Stevens*, 529 U.S. at 785, which Congress may do through a "clear expression" of its intent. Pet. App. 25a (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263–64 (1981)).

USDA further argues that interpreting sections 1681n and 1681o to authorize private suits against states would be unconstitutional under *Seminole Tribe*. Pet. 22. That argument "conflate[s] Congress's intent with its power." Pet. App. 24a. Under *Seminole Tribe*, Congress lacks the power under the Commerce Clause to abrogate state sovereign immunity. *See* 517 U.S. at 72–73. But by authorizing states as defendants in FCRA actions, Congress expressed its intent that states that violate the FCRA may be held liable by courts with jurisdiction over them, such as state courts (or federal courts if a state has waived its Eleventh Amendment immunity against suit in federal court).

The court of appeals was also correctly "not persuaded" by USDA's attempt to draw a negative inference from 15 U.S.C. § 1681u(j). Pet. App. 18a. Section 1681u authorizes the Federal Bureau of

Investigation (FBI) to obtain certain consumer information from consumer reporting agencies "to protect against international terrorism or clandestine intelligence activities," and restricts how the FBI may disseminate that information. 15 U.S.C. §§ 1681u(a)–(c), (g). Section 1681u(j) creates a cause of action against "any agency or department of the United States" that violates section 1681u. USDA attempts to draw significance from the fact that section 1681u(j) "explicitly name[s] the United States." Pet. 23. But that section obviously names the United States because it is *only* applicable to federal agencies. As the court of appeals explained, sections "1681n and 1681o concern requirements that apply not merely to the government but to 'persons' generally, so it makes sense to employ the broader term rather than enumerate specific entities already encompassed by the statutory definition." Pet. App. 18a–19a.

4. Searching further afield, USDA invokes the Privacy Act to argue that the FCRA does not waive sovereign immunity. The Privacy Act touches on conduct subject to the FCRA because it authorizes federal agencies to report information to consumer reporting agencies when the government has a claim against an individual. *See* 5 U.S.C. § 552a(b)(12).

USDA argues that Congress would not have made "the United States liable for money damages under FCRA" where the same conduct would not trigger money damages under the Privacy Act. Pet. 26. That logic does not follow. USDA does not deny that it is subject to the *substantive* obligations of both statutes and that no inconsistency exists between the Privacy Act and the FCRA. "[T]his Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v.*

Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 144 (2001); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." (citation omitted)). "[T]he Privacy Act provides no obstacle to reading 'person' in the FCRA to include the federal government." Pet. App. 34a.

In sum, the Third Circuit anticipated and convincingly answered all the arguments the government now makes to support its claim that the court of appeals erred. The government's continued disagreement does not establish either that the court of appeals was incorrect or that review of its ruling is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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