No. 22-846

In the Supreme Court of the United States

DEPARTMENT OF AGRICULTURE RURAL DEVELOPMENT
RURAL HOUSING SERVICE, PETITIONER

v.

REGINALD KIRTZ

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

REPLY BRIEF FOR THE PETITIONER

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Respondent's principal argument against certiorari (Br. in Opp. 1-2, 11-16) is that even though the decision below deepens a square conflict with decisions of the Fourth and Ninth Circuits, it would be "premature" for this Court to review whether the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, unequivocally and unambiguously waives federal sovereign immunity from private damages suits. But five courts of appeals have divided 3-2 on that question, and their respective decisions have thoroughly aired the arguments on both sides. This Court routinely grants review of shallower conflicts. See, *e.g.*, Pet. at 13-22, *Bittner* v. *United States*, 598 U.S. 85 (2023) (No. 21-1195) (alleging a 1-1 split); Pet. at 18-20, *Reed* v. *Goertz*, 598 U.S. 230 (2023) (No. 21-442) (alleging a 2-1 split).

Moreover, the question presented "concerns a matter of great importance." *Robinson* v. *Department of Education*, 140 S. Ct. 1440, 1442 (2020) (Thomas, J., dissenting from the denial of certiorari). Although respondent observes (Br. in Opp. 2, 17-18) that the government may ultimately prevail on the merits in many FCRA suits (perhaps including this one), sovereign immunity "is an *immunity from suit* rather than a mere defense to liability," *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (citation omitted). An ultimate victory on the merits after protracted litigation thus would not vindicate the interests protected by sovereign immunity. This Court should grant review to resolve the conflict and reverse the erroneous decision below.

A. The Lower Court's Decision Is Incorrect

The government has observed (Pet. 10-12) that waivers of sovereign immunity must be unequivocally and unambiguously expressed. Respondent asserts that "USDA incorrectly suggests that Congress must enact an 'explicit statutory waiver of sovereign immunity' for such a waiver to be effective." Br. in Opp. 20 (citation omitted). But that is not merely the government's "suggest[ion]," *ibid.*—it is what this Court has held. See, *e.g.*, *Lane* v. *Peña*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied.") (citations omitted); see also, *e.g.*, *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (similar). Respondent's assertion is thus a tacit admission that FCRA does not contain the sort of unambiguous and unequivocal waiver of sovereign immunity that this Court requires.

Instead, respondent simply relies on the statutory definition of "person" in FCRA, see Br. in Opp. 19-21, and cites this Court's statement in *Richlin Security Service Co.* v. *Chertoff*, 553 U.S. 571 (2008), that "'[t]here is no need to resort to the sovereign immunity canon' if 'there is no ambiguity to construe,'" Br. in Opp. 21 (citation and ellipses omitted). But *Richlin* involved what all agreed was an unambiguous and unequivocal waiver of sovereign immunity: the question there was whether paralegal fees were included in the "fees" that Congress had clearly said plaintiffs could recover from the government under the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412. This case, by contrast, involves the question whether there exists a waiver of sovereign immunity in the first place. The sovereign-immunity canon is obviously relevant to that latter question. See *FAA* v. *Cooper*, 566 U.S. 284, 291 (2012).

Because neither the original 1970 statute, see Fair Credit Reporting Act (1970 Act), Pub. L. No. 91-508, Tit. VI, 84 Stat. 1127, nor the 1996 statute amending FCRA, see Consumer Credit Reporting Reform Act of 1996 (1996 Act), Pub. L. No. 104-208, Div. A, Tit. II, Subtit. D, ch. 1, 110 Stat. 3009-426, contains any language indicating a waiver of sovereign immunity from private damages suits, the combination of the two statutes cannot be read to implicitly effect such a waiver. See Pet. 12-17. This Court recognized and applied that principle in *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973) (*Employees*). Respondent appears to recognize that *Employees* squarely contradicts his position and so he urges (Br. in Opp. 21-23) this Court to simply ignore *Employees* on the ground that it relied on legislative history. But as the government has

explained, "the Court in *Employees* relied not only on legislative history but also on the absence of 'clear language' in the statute demonstrating that 'immunity was swept away.'" Pet. 17 (citation omitted). Respondent's suggestion (Br. in Opp. 22) that the Court's analysis of the statutory text "cannot be divorced from its examination of the legislative history" is unsound. The Court often employs many "traditional interpretive tools" in evaluating purported waivers of sovereign immunity, *Cooper*, 566 U.S. at 291, and respondent cites no authority for the proposition that partial reliance on legislative history somehow contaminates and thereby justifies discarding the Court's entire analysis and holding.

Respondent also mistakenly suggests (Br. in Opp. 22) that the government "argues that the courts should continue to consider legislative history when interpreting waivers of [sovereign] immunity." The government's argument is that "the 1996 Act does not contain any unmistakably clear or unequivocal language waiving or abrogating sovereign immunity," which standing alone is sufficient to defeat the court of appeals' finding of a waiver, and that the statutory and legislative history simply underscore "the contemporaneous linguistic understanding that FCRA did not take the momentous step" of waiving sovereign immunity. Pet. 28 (emphasis omitted). Indeed, the snippets of legislative history that respondent cites (Br. in Opp. 23) do not mention the government or sovereign immunity at all, confirming that no contemporaneous law-trained reader would have understood the text of the 1996 Act to have waived sovereign immunity.

At a minimum, FCRA can plausibly be read not to have waived federal sovereign immunity—or abrogated state, tribal, or foreign sovereign immunity—from pri-

vate damages actions. See Pet. 17-22. Such a reading would not render the inclusion of governmental entities in the definition of "person" superfluous or a nullity, and indeed even the court of appeals recognized that not every FCRA provision applicable to a "person" can be read as applying to governmental entities. See *ibid.* Respondent argues that FCRA should be read to waive sovereign immunity wherever it would not be "absurd" to do so, Br. in Opp. 24; see *id.* at 24-26, but that interpretive principle is flatly inconsistent with this Court's precedents, see, *e.g.*, *Cooper*, 566 U.S. at 290-291 (requiring only "a plausible interpretation of the statute that would *not* authorize money damages against the Government") (emphasis added).

Finally, the government has explained (Pet. 22-26) how the statutory structure and history confirm that FCRA does not waive sovereign immunity (or abrogate the immunity of States, Indian tribes, and foreign governments). Respondent largely just repeats (Br. in Opp. 25-27) the court of appeals' flawed analysis, which the petition already addresses.

B. This Court's Review Is Warranted

1. Respondent acknowledges (Br. in Opp. 1, 11-13) that the decision below squarely conflicts with the Fourth Circuit's decision in *Robinson* v. *United States Department of Education*, 917 F.3d 799 (2019), cert. denied, 140 S. Ct. 1440 (2020), and the Ninth Circuit's decision in *Daniel* v. *National Park Service*, 891 F.3d 762 (2018). And respondent does not dispute that the D.C. and Seventh Circuits have held that FCRA waives the federal government's sovereign immunity. See *Mowrer* v. *United States Department of Transportation*, 14 F.4th 723 (D.C. Cir. 2021); *Bormes* v. *United States*, 759

F.3d 793 (7th Cir. 2014). The decision below thus deepens what is now a 3-2 circuit conflict.

Respondent nevertheless contends (Br. in Opp. 12) that further review is "premature" on the ground that the Fourth and Ninth Circuits might overrule their own decisions in light of this Court's 2019 decision in *Return Mail, Inc.* v. *United States Postal Service*, 139 S. Ct. 1853, and its decisions in three cases this Term: *Türkiye Halk Bankasi A.S.* v. *United States*, 143 S. Ct. 940 (2023) (*Halkbank*); *Lac du Flambeau Band* v. *Coughlin*, No. 22-227 (argued Apr. 24, 2023); and *Financial Oversight and Management Board* v. *Centro de Periodismo Investigativo, Inc.*, No. 22-96 (May 11, 2023), slip op. That contention is unsound because none of those cases is apposite to the question presented here.

In *Return Mail*, the Court held that the undefined term "person" in a patent statute did not include the federal government, explaining 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 that the presumption had not been overcome in that case. 139 S. Ct. at 1861-1862 (citation omitted). That presumption, however, plays no role here, where all agree that FCRA's definition of the general term "person" includes governmental entities. See 15 U.S.C. 1681a(b). Instead, the question here is whether Congress's use of the term "person" should be read to have waived the sovereign immunity of the federal government (and concomitantly abrogated the sovereign immunity of States, Indian tribes, and foreign governments) from private damages actions, notwithstanding the lack of any express statutory language in the 1970 Act or the 1996 Act demonstrating a congressional intent to waive or abrogate sov-

ereign immunity. The *Return Mail* presumption thus has no bearing on the question presented in this case, see *Robinson*, 917 F.3d at 802 (acknowledging the existence of the presumption), and would not plausibly cause the Fourth and Ninth Circuits to overrule *Robinson* and *Daniel*, respectively.

Halkbank held that the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, "does not grant immunity to foreign states or their instrumentalities in criminal proceedings" because the FSIA implements "a comprehensive scheme governing claims of immunity in civil actions" but "does not cover criminal cases." 143 S. Ct. at 947. That holding, based exclusively on the FSIA's text and context, see *id.* at 947-948, has no applicability to this case, which involves a different statute entirely. Respondent contends (Br. in Opp. 14) that *Halkbank* is inconsistent with the reliance in *Robinson* and *Daniel* on "the impossibility of criminally prosecuting a government to justify their decisions." But whether the FSIA precludes the United States from prosecuting an instrumentality of a foreign government has no bearing on whether FCRA authorizes the United States to criminally prosecute *itself*. Even the court of appeals in this case agreed that the latter result would be "absurd." Pet. App. 22a-23a.

Lac du Flambeau is likewise inapposite. The question there is whether Indian tribes are included in the phrase "other foreign or domestic government" in the Bankruptcy Code, 11 U.S.C. 101(27), for purposes of a provision that all agree unambiguously and unequivocally abrogates sovereign immunity, see 11 U.S.C. 106(a). As respondent observes (see Br. in Opp. 15 n.2), the government at oral argument agreed that a statute *expressly* "abrogat[ing] the sovereign immunity of all

governments, domestic and foreign," would "include the United States," Tr. of Oral Arg. at 57-58, *Lac du Flambeau*, *supra* (No. 22-227). But as the government also explained, that case (and hypothetical) involved "a clear abrogation" of sovereign immunity and thus "isn't a situation like where Congress has said, you can sue a person, and 'person' happens to be defined to include governments," with "no indication that Congress has thought about immunity specifically." *Id.* at 65.

Finally, *Financial Oversight Board* held that a statute providing that "any action against the Oversight Board * * * shall be brought in a United States district court," 48 U.S.C. 2126(a), does *not* abrogate the Board's sovereign immunity. Slip op. 8. The Court reiterated that Congress "must make its intent to abrogate [or waive] sovereign immunity 'unmistakably clear in the language of the statute.'" *Id.* at 6 (citation omitted). And the Court concluded that even though the statute "establish[ed] a judicial review scheme" and expressly "allu[ded] to 'declaratory or injunctive relief against the Oversight Board,'" *id.* at 8, those provisions "do[] not make the requisite clear statement," *id.* at 9, because they "do[] not explicitly strip the Board of immunity," "do[] not expressly authorize the bringing of claims against the Board," and "are compatible with the Board's generally retaining sovereign immunity," *id.* at 10-11. Those conclusions support, not undermine, the holdings in *Robinson* and *Daniel*, as well as the government's position in this case. Respondent suggests (Br. in Opp. 15) that *Financial Oversight Board* is relevant because "[o]ne point of argument in the case is the relevance of legislative history in the abrogation analysis," and the Ninth Circuit in *Daniel* supposedly "relied on legislative history." But the Court did not address any

argument based on legislative history in *Financial Oversight Board*. And in any event *Daniel* was clear that its holding rested on the text and structure of FCRA, see 891 F.3d at 769-774, and that the court invoked legislative history only to "confirm[] what [it] ha[d] concluded *from the text alone*," *id.* at 775 (emphasis added; citation omitted).

Respondent also suggests (Br. in Opp. 15-16) that this Court's review is premature because the Third Circuit was "the first to grapple with two arguments that the government makes," involving *Employees* and the Privacy Act. See Pet. 15-17, 24-26. But the government has long raised those arguments in FCRA cases, including in this Court. See, *e.g.*, Br. in Opp. at 12-13, 19-20, *Robinson*, *supra* (No. 19-512). That the Fourth and Ninth Circuits agreed with the government's position without even needing to rely on those arguments underscores just how wrong the court below was. And that the D.C. Circuit erroneously found a waiver of sovereign immunity without addressing those arguments is a reason for, not against, this Court's review of the question presented.

2. Respondent argues (Br. in Opp. 16-18) that this case is a poor vehicle in which to address the question presented because the government ultimately might prevail on the merits. But sovereign immunity "is an *immunity from suit* rather than a mere defense to liability," *Puerto Rico Aqueduct & Sewer Authority*, 506 U.S. at 144 (citation omitted), so forcing the government to undergo litigation (including potentially invasive discovery) would undermine the interests protected by sovereign immunity even if the government may ultimately prevail on the merits.

Respondent suggests (Br. in Opp. 16) that the question presented is not important given that the petition did not identify a case in which "a federal agency has paid damages for an alleged violation of FCRA" following an adverse merits determination. But that is not surprising given that the burdens of litigation and discovery can induce federal agencies to settle FCRA claims in cases where district courts deny the government's claims of sovereign immunity or where circuit precedent already forecloses that defense. See, *e.g.*, Stipulation for Compromise Settlement, *Miles* v. *The Art Institute of Houston, Inc.*, No. 21-cv-106 (N.D. Ill. May 27, 2022); Stipulation to Dismiss Pursuant to Settlement, *Paetsch* v. *United States Department of Veterans Affairs*, No. 20-cv-1691 (N.D. Ill. Jan. 7, 2021); Order of Dismissal, *Jones* v. *United States Department of Agriculture*, No. 17-cv-11530 (E.D. Mich. July 11, 2018); Notice of Settlement, *Kent* v. *Trans Union, LLC*, No. 16-cv-322 (N.D. Tex. Sept. 11, 2017).

Indeed, those pressures—in addition to the conceded circuit conflict—are precisely why the denial of sovereign immunity is ripe for review now. Respondent asserts that the decision below is interlocutory (Br. in Opp. 17-18), but the lower courts' resolution of the sovereign immunity issue is final and conclusive. When district courts deny sovereign-immunity claims, such interlocutory orders generally are immediately appealable precisely because a reversal on immunity grounds after a final judgment would come too late to vindicate the purpose of the immunity. See *Puerto Rico Aqueduct & Sewer Authority*, 506 U.S. at 144-147. That principle applies with even greater force where, as here, the district court entered a final judgment in favor of USDA on sovereign immunity grounds under Rule 54(b) of the

Federal Rules of Civil Procedure, such that reversal of the court of appeals' ruling would terminate the litigation.

The foundational principle of sovereign immunity also is an important issue in its own right, irrespective of dollars and cents. Immunity from suit protects "the nation from unanticipated intervention in the processes of government." *Alden* v. *Maine*, 527 U.S. 706, 750 (1999) (citation omitted). Congress is the body charged by the Constitution with striking the balance between creating federal rights and duties, on the one hand, and creating private remedies to vindicate and enforce those rights and duties, on the other; such balancing "lies at the heart of the political process." *Id.* at 751. Judicial decisions allowing "private suits for money damages" against the sovereign absent its consent would upset that balance and "place unwarranted strain on the [government's] ability to govern in accordance with the will of [its] citizens." *Id.* at 750-751. And subjecting States, Indian tribes, and foreign governments to suit would further upset that balance and exacerbate that strain. Yet the court of appeals' erroneous finding of a waiver of sovereign immunity, contrary to decisions of the Fourth and Ninth Circuits, threatens to do just that. This Court should therefore grant the petition to reverse the decision below.

Respectfully submitted.

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