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

BRIEF FOR RESPONDENT

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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 FCRA. 15 U.S.C. §§ 1681n, 1681o. 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 FCRA.

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INTRODUCTION

The Fair Credit Reporting Act (FCRA) requires a "person" who furnishes information to consumer reporting agencies to investigate consumer complaints and correct inaccurate information. 15 U.S.C. § 1681s-2(b). FCRA also creates a right of action and liability for damages against "[a]ny person" who negligently or willfully fails to comply with those requirements. *Id.* §§ 1681n & 1681o. And FCRA defines "person" to include "[a]ny … government or governmental subdivision or agency," *id.* § 1681a(b)—a phrase that indisputably encompasses federal agencies such as petitioner United States Department of Agriculture Rural Development Rural Housing Service (USDA).

By imposing duties and corresponding liability on "person[s]," Congress made unmistakably clear that federal agencies, like other furnishers of information to consumer reporting agencies, could be sued for failing to comply with section 1681s-2(b). This case, therefore, should be an easy one. This Court does not disregard clear statutory text to achieve a particular outcome, even in the sovereign-immunity context. And USDA provides no basis for concluding that the statutory text is not clear: Its arguments about ambiguity do not even look to FCRA's definition of "person" and the language of its civil-liability provisions, but to other FCRA provisions and other statutes.

USDA advances a new approach to statutory waivers of sovereign immunity: It argues that the Court should ignore a statute's express definitions when interpreting whether a statutory cause of action extends to the sovereign. Blue-penciling a statute to

achieve a particular outcome, however, runs counter to the last four decades of this Court's jurisprudence on statutory interpretation, which emphasizes the importance of remaining faithful to unambiguous statutory language. Where a statute is unambiguous after applying traditional canons of statutory construction, the requirement that Congress clearly state its intent to waive immunity is satisfied, and the government is not entitled to an additional thumb on the scale.

Here, applying FCRA's definition of "person" to its civil-liability provisions makes plain that Congress authorized suit against USDA and, thereby, waived federal sovereign immunity. The judgment of the court of appeals should therefore be affirmed.

STATEMENT

Statutory background

1. "Congress enacted FCRA in 1970 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); *see* Pub. L. No. 91-508, tit. VI, 84 Stat. 1127 (1970) (1970 Act). FCRA primarily regulates consumer reporting agencies, defined as "person[s]" that prepare and disseminate consumer reports. 15 U.S.C. § 1681a(f). For instance, FCRA provides that consumer reporting agencies can disseminate consumer reports only for specified purposes, *see*, *e.g.*, *id.* §§ 1681b(a)(3), 1681f, and must investigate disputes concerning the accuracy of information in the consumer's file, *id.* § 1681i(a)(1).

Since its enactment, though, FCRA has regulated other "persons" as well. The 1970 Act included provisions that required a "person" procuring an invest-

igative consumer report or a "user" taking "adverse action[s]" against consumers to disclose certain information to consumers. *See* 1970 Act, §§ 606, 615, 84 Stat. at 1130, 1133, *codified at* 15 U.S.C. §§ 1681d(a), 1681m. The 1970 Act also made it a crime for a "person" to obtain consumer information using "false pretenses." 15 U.S.C. § 1681q.

The 1970 Act defined the term "person" "for the purposes of" FCRA, *id.* § 1681a(a), 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 definition has not changed and remains FCRA's definition of "person" today.

The 1970 Act authorized the Federal Trade Commission (FTC) to enforce FCRA's requirements against "consumer reporting agencies and all other persons subject" to FCRA. *Id.* § 1681s(a). It also authorized consumers to bring a private right of action against "consumer reporting agenc[ies] or user[s] of information" for failing to comply with FCRA's requirements. 1970 Act, §§ 616, 617, 84 Stat. at 1134.

2. In 1996, Congress sought to improve the accuracy of consumer reports by amending FCRA to impose duties on "[a]ny person" that furnishes 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, § 2413, 110 Stat. 3009-426, 3009-447 (1996) (1996 Amendment) (enacting 15 U.S.C. § 1681s-2). Section 1681s-2(b) requires furnishers to investigate consumer complaints filed with consumer reporting agencies and to make any necessary corrections. Section 1681s-2(b) may be enforced by consumers through

FCRA's private rights of action. To that end, the 1996 Amendment amended FCRA's civil-liability provisions—sections 1681n and 1681o—to extend liability to "[a]ny person" that fails to comply with FCRA requirements, including those applicable to furnishers. *See* 1996 Amendment, § 2412, 110 Stat. at 3009-446.

Several other "furnisher" duties—those set out in section 1681s-2(a)—can be enforced only by federal or state authorities. *See* 15 U.S.C. §§ 1681s-2(c), (d). To enhance the FTC's traditional enforcement authority, the 1996 Amendment authorized the FTC to obtain a civil penalty of up to $2500 "against any person" "[i]n the event of a knowing violation, which constitutes a pattern or practice of violations." *Id.* § 1681s(a)(2). The 1996 Amendment also authorized states to seek injunctive relief against "person[s]" violating FCRA and to bring a civil action for damages under sections 1681n and 1681o. *Id.* § 1681s(c).[1]

Factual Background and Proceedings Below

1. USDA is a federal agency that "issues loans to promote the development of safe and affordable housing in rural communities." Pet. App. 4a. Respondent Reginald Kirtz had loan accounts with student-loan servicer Pennsylvania Higher Education Assistance Agency, also known as American Education Services (AES), and USDA. *Id.* AES and USDA each furnished information about the status of the

[1] As discussed further below, both the FTC and the states may obtain monetary recoveries for certain violations by furnishers only if they first have obtained an injunction. *See infra* p.24.

accounts to the credit reporting agency TransUnion, LLC. *Id.*

After discovering 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 15 U.S.C. § 1681i(a)(1)(A). *Id.* TransUnion notified AES and USDA of the dispute, as required by section 1681i(a)(2)(A). *Id.*

2. 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), invoking federal sovereign immunity. *Id.* at 5a. The district court granted USDA's motion and entered judgment on Mr. Kirtz's claim against USDA under Federal Rule of Civil Procedure 54(b). *Id.* at 35a.

The Third Circuit reversed. The unanimous panel held that sections 1681n and 1681o of FCRA waive federal agencies' immunity by authorizing suit against "[a]ny person" and defining "person" to include government agencies. *Id.* at 7a–8a. As the court explained, "FCRA contains … an express definition: it defines 'person' to include any 'government or governmental subdivision or agency,'" and "[t]hat definition … explicitly applies" throughout FCRA. *Id.* at 8a (quoting 15 U.S.C. § 1681a(b)). The court also concluded that FCRA's definition of "person"

unambiguously "encompasses the United States and its agencies." *Id.* at 9a. The court observed that certain FCRA provisions that refer to "person[s]" make no sense unless "person" includes federal agencies. *Id.* at 9a–10a.

The court also found support in the Equal Credit Opportunity Act (ECOA) and the Truth in Lending Act (TILA), "both of which are codified alongside 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), (e), (g) (TILA) and 15 U.S.C. §§ 1691a(e)–(f) (ECOA)). 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 TILA and ECOA "expressly" exempt the government from certain types of liability under each statute. *Id.* (citing 15 U.S.C. § 1612(b) (TILA) and 15 U.S.C. § 1691e(b) (ECOA)). Thus, the court concluded, "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.

The court rejected USDA's request that it disregard the "FCRA's clear text" based on silence in the legislative history. *Id.* at 16a. The court recognized that *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411

U.S. 279 (1973), had once given weight to "silence in the Congressional record." Pet. App. 17a n.11. The court explained, however, "today's precedent makes clear that our analysis must begin and end with the text." *Id.*

The court rejected USDA's theory that a "second, more specific waiver of sovereign immunity within 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 improperly obtaining or disclosing information in violation of section 1681u, which addresses the authority of the Federal Bureau of Investigation (FBI) to obtain information from consumer reporting agencies for counterterrorism purposes. The court explained that, unlike section 1681u, 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.

The court also rejected USDA's argument that it should not apply FCRA's unambiguous definition of "person" to sections 1681n and 1681o because applying the definition to certain *other* provisions of FCRA would supposedly produce "a parade of implausible and untenable results." *Id.* at 21a. Because no such result would arise by applying the definition to sections 1681n and 1681o, the court held that "courts must continue to apply statutory terms as defined." *Id.* at 22a.

In addition, the court found "unpersuasive" USDA's argument that FCRA's remedies upset the "balance" set by the remedial system of the Privacy Act, 5 U.S.C. § 552a. 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.* The court explained that, despite "some overlap," USDA failed to identify "any actual inconsistency between" the two statutes. *Id.*

SUMMARY OF ARGUMENT

By unambiguously authorizing suit against federal agencies, FCRA provides the clear statement required to waive the government's sovereign immunity.

I. This Court has held that Congress waives sovereign immunity when it creates a cause of action that authorizes suit against a federal agency. Congress is not required to use magic words to make its intent to waive immunity clear or to express its intent in any particular way. All that is required is that the statutory text be unambiguous after applying traditional tools of statutory construction.

Sections 1681n and 1681o satisfy that requirement. They provide that "[a]ny person" may be civilly liable for violating FCRA's requirements. The term "person" is a defined term that expressly includes "any … governmental … agency," which USDA agrees unambiguously includes federal agencies. When the definition is applied to sections 1681n and 1681o, the meaning of those provisions is straightforward and clear: Federal agencies may be civilly liable for violating FCRA's requirements.

Notably, elsewhere in FCRA Congress used express language where it did not want FCRA's

definition of "person" to apply to particular provisions. Congress did not do so in FCRA's civil-liability provisions.

Similarly, FCRA lacks the express exemption to governmental liability found in two of its sister statutes, ECOA and TILA. Although ECOA and TILA contain definitions and civil-liability provisions that parallel FCRA's, Congress expressly limited the government's liability in those two statutes. The absence of a similar exemption in FCRA, despite FCRA's materially identical definition and civil-liability provisions, reflects Congress's decision not to exempt federal agencies from liability when they fail to comply with their FCRA responsibilities.

II. USDA's arguments for interpreting "person" in sections 1681n and 1681o as if the term were not defined in the statute do not withstand scrutiny.

First, FCRA's use of "person" is not context dependent. Statutory definitions control the interpretation of defined terms absent a severe conflict with statutory purpose or design, and USDA asserts no such conflict here.

USDA nonetheless contends that FCRA's definition of "person" cannot sensibly apply to *other* FCRA provisions. Even if that were true, the definition sensibly applies to sections 1681n and 1681o and, therefore, unambiguously applies to them. In any event, USDA is wrong to rely on section 1681q, under which a "person" can be subject to criminal liability for using false pretenses to obtain consumer information. Even assuming the federal government cannot be subject to prosecution, application of the definition authorizes criminal liability against those governmental bodies that can be prosecuted. In addition, USDA points to

sections 1681s(a) and (c), which authorize federal and state enforcement of FCRA. Yet USDA does not seriously contest that FCRA's definition of "person" sensibly applies to those provisions.

Second, Congress did not act inconsistently with *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), when it amended sections 1681n and 1681o to create a cause of action that includes states as well as other governments. *Seminole Tribe* does not restrict Congress's authority to create causes of action enforceable against the states in federal or state courts where a state has waived its immunity.

Third, contrary to USDA's assertion, 15 U.S.C. § 1681u(j) is irrelevant. Section 1681u regulates the FBI's ability to obtain consumer information for counterterrorism purposes, and section 1681u(j) authorizes a cause of action against federal agencies that improperly obtain or disseminate that information. Congress's decision to limit that cause of action to federal agencies says nothing about its decision to provide a general cause of action against "[a]ny person"—including any government—that violates other FCRA provisions.

Fourth, the Privacy Act also has no bearing here. The Privacy Act does not conflict with FCRA in any way, and Congress's decision to provide remedies under that statute for violations of federal record-keeping requirements does not imply an intent to immunize the government for failing to comply with its furnisher obligations under FCRA.

Fifth, silence in legislative history does not create ambiguity in FCRA's statutory text. And to the extent legislative history is relevant at all, it confirms that holding all furnishers accountable—private and

governmental—advances Congress's goal of improving the accuracy of consumer reports.

III. USDA advocates a rule under which a statute's generally applicable definitions would not apply to causes of actions that use defined words if ignoring the definition would preserve the government's immunity without creating surplusage. Courts, however, may not rewrite an unambiguous statute whenever the revision would not create surplusage. And even in the sovereign-immunity context, this Court has refused to ignore an applicable definition when discerning Congress's intent.

USDA responds that the Court's 1973 decision in *Employees* supports ignoring FCRA's definition of "person." *Employees*, however, rests on a method of statutory interpretation that the Court has since abandoned: Instead of treating the statutory language as dispositive, *Employees* looked to other considerations, including silence in the legislative history and legislative purposes, in deciding that a definition did not apply to the statute's cause of action. A number of key premises of the Court's analysis in *Employees* are absent here. But regardless, this Court now recognizes that unambiguous statutory text governs the interpretation of statutory provisions, especially in the sovereign-immunity context. It should do so again in this case.

ARGUMENT

"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). Whether the United States has given its consent to be sued is a question of statutory interpretation: Congress authorizes suit against a federal defendant when it

"unequivocally express[es]" its intent to waive immunity "in statutory text." *FAA v. Cooper*, 566 U.S. 284, 290 (2012) (internal quotation marks omitted). The standard for finding a waiver of federal immunity is "equivalent[ ]" to the "clear-statement rule" that requires Congress to be "unmistakably clear in the language of the statute" when it abrogates the immunity of other sovereign entities, such as states, tribes, and territories. *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 346 (2023) (internal quotation marks omitted); *see also Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388 (2023) (citing federal waiver precedent in addressing abrogation of tribal immunity); *Sossamon v. Texas*, 563 U.S. 277, 285 n.4 (2011) (same with regard to state immunity).

FCRA's text contains the clear statement needed to waive federal immunity. In plain terms, FCRA authorizes suit against "[a]ny person" and defines "person" to include "any … governmental … agency." 15 U.S.C. §§ 1681a(b), 1681n, 1681o. "[W]hen a statute creates a cause of action and authorizes suit against the government on that claim"—and where it "specifically includ[es] governments" among the class of potential defendants—this Court has recognized that Congress has waived immunity because maintaining "immunity would … negate[ ]" the "expressly authorized suit[ ] against [the] sovereign." *Centro de Periodismo Investigativo*, 598 U.S. at 347–48. That principle controls here: To conclude that FCRA's civil-liability provisions do *not* waive federal immunity would mean that the "very suits allowed against governments would automatically have [to be] dismissed." *Id.* That is an implausible outcome.

USDA's response boils down to two points. First, it argues that FCRA's definition of "person" does not unambiguously apply to its civil-liability provisions. That argument flies in the face of clear statutory text and applicable canons of statutory construction. Second, USDA argues that a statute's general definition section cannot be the basis for concluding that a cause of action waives immunity. Those arguments cannot be reconciled with this Court's precedents and with the overarching principle that, to waive "sovereign immunity unambiguously, 'Congress need not state its intent in any particular way.'" *Coughlin*, 599 U.S. at 388 (quoting *Cooper*, 566 U.S. at 291). FCRA is unambiguous, and this Court should "apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

I. Sections 1681n and 1681o unambiguously authorize civil actions against federal agencies for FCRA violations.

The clear-statement rule "is not a magic-words requirement." *Coughlin*, 599 U.S. at 388. It "simply" asks "whether, upon applying 'traditional' tools of statutory interpretation," Congress's waiver of "sovereign immunity is 'clearly discernable' from the statute itself." *Id.* (quoting *Cooper*, 566 U.S. at 291). Although the sovereign-immunity canon requires textual ambiguities to be resolved in favor of immunity, "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 *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). The Court does not "resort to the sovereign immunity canon" if "there is no ambiguity left for [it] to construe." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008).

A. Sections 1681n and 1681o are not ambiguous. They provide that "[a]ny person" that negligently or willfully fails to comply with FCRA "is liable" to the consumer harmed by that failure. FCRA defines the term "person" to include "any … government or governmental subdivision or agency." 15 U.S.C. § 1681a(b). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). The definition therefore does not "cherry-pick *certain* governments" for coverage, *Coughlin*, 599 U.S. at 390; it treats *any* governmental agency as a "person" for purposes of FCRA. A federal agency like USDA is thus unambiguously a "governmental … agency" within the meaning of the statutory definition, as USDA concedes. *See* USDA Br. 25 ("FCRA's statutory definition of 'person' covers the United States and federal agencies").

The definition unambiguously applies to the use of "person" in sections 1681n and 1681o because "[s]tatutory definitions control the meaning of statutory words in the usual case." *Burgess v. United States*, 553 U.S. 124, 129 (2008) (ellipsis removed) (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)). Further, FCRA expressly 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 FCRA's provisions are codified. 15 U.S.C. § 1681a(a). Thus, FCRA "leav[es] no doubt as to the definition's reach," and "[t]he definition section of the statute supplies an unequivocal answer" to the question whether the term "person" in sections 1681n and 1681o encompasses USDA. *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct.

767, 776–77 (2018) (addressing the meaning of "whistleblower" in the Dodd-Frank Act, 15 U.S.C. § 78u-6(a)(6)).

Consistent with this principle and FCRA's plain text, where Congress did *not* want FCRA's general definition of "person" to apply to a particular provision, it said so expressly. For instance, FCRA imposes disclosure requirements on "[a]ny person who makes or arranges loans and who uses a consumer credit score," 15 U.S.C. § 1681g(g)(1), but, for purposes of that provision, excludes from the definition of "person" an "enterprise" as elsewhere defined, *id.* § 1681g(g)(1)(G). In addition, several FCRA provisions refer to "natural person[s]" where Congress did not want the broader statutory definition of "person" to apply. Section 1681a(o)(2)(B), for example, defines one element of the term "excluded communications" as a communication made to "procur[e] an opportunity for a *natural person* to work for the employer," even though context alone would indicate that the provision could only apply to a natural person. 15 U.S.C. § 1681a(o)(2)(B) (emphasis added). And section 1681n addresses damages that are recoverable from a "natural person" who "obtain[s] a consumer report under false pretenses or knowingly without a permissible purpose," which differ from the damages recoverable from "[a]ny person" more generally. *Id.* § 1681n(a)(1)(B).

Congress has also enacted express exceptions for government agencies where the government's status as a "person" would otherwise trigger requirements that Congress did not want to impose. For instance, consumer reporting agencies may provide credit reports to government agencies under 15 U.S.C. § 1681b(a)(3) because government agencies are

"person[s]" under that provision, as USDA agrees. *See* USDA Br. 24–25. But section 1681b(a)(3) authorizes consumer reports to be disseminated "[t]o a person" only for specified purposes. *See also id.* 15 U.S.C. § 1681b(f) (limiting when a "person" may obtain or use a consumer report). Recognizing that the government is a "person," Congress enacted exceptions to the limitation set forth in section 1681b to enable the government to receive consumer information for other purposes. *See id.* § 1681f (authorizing disclosure of limited consumer information to the government); *id.* §§ 1681u(a)–(c) (authorizing disclosures to the FBI for counterterrorism purposes); *id.* § 1681v(a) (similar provision for government agencies generally); *see also* 31 U.S.C. § 3711(h)(2) (authorizing federal agencies to obtain consumer reports for debt collection purposes).

Similarly, FCRA imposes obligations on a "person" who makes an adverse employment decision based on a consumer report, but it exempts federal agencies from those obligations when engaged in national security investigations. *See* 15 U.S.C. §§ 1681b(b)(3)(A) & (4)(A). FCRA also allows federal agencies engaged in national security investigations to receive consumer reports without triggering the disclosure requirements otherwise applicable when such reports are provided to "person[s]." *Id.* §§ 1681g(a)(3)(C); 1681k; *see also id.* § 1681c-1(i)(4) (allowing certain government agencies to receive consumer reports despite a "security freeze" requested by the consumer).

These exceptions are necessary, and make sense, only because the term "person" includes government agencies. "Had Congress intended" to exclude governmental agencies from the general civil-liability provisions of sections 1681n and 1681o, "it pre-

sumably would have done so expressly as it did" in these other FCRA provisions. *Russello v. United States*, 464 U.S. 16, 23 (1983). Congress did not do so.

B. Two related statutes confirm that FCRA's text means what it says. FCRA is not a standalone statute. It is one of several subchapters of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693r, a "comprehensive consumer protection statute" whose subchapters "were enacted as complementary titles." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 590–91 n.11 (2010). Thus, in *Jerman*, this Court looked to courts' interpretation of the "bona fide error" defense in TILA to aid its interpretation of the same defense in the Fair Debt Collection Practices Act, given the "close textual correspondence" between the two provisions. *Id.* at 590.

TILA and ECOA, both subchapters of the Consumer Credit Protection Act, similarly have definitions and civil-liability provisions that are materially identical to FCRA's. Both statutes also contain exceptions to governmental liability that make sense only if their civil-liability provisions incorporate statutory definitions.

ECOA provides the clearest example. ECOA defines a "creditor" as a "person" who regularly extends credit, 15 U.S.C. § 1691a(e), and defines "person" to include a "government or governmental subdivision or agency," *id.* § 1691a(f). ECOA authorizes consumers harmed by a violation to recover actual and punitive damages from "[a]ny creditor." *Id.* §§ 1691e(a), (b). As originally enacted, ECOA did not limit the class of creditors that could be subject to punitive damages. *See* Pub. L. No. 93-495, tit. V, sec.

503, § 706(b), 88 Stat. 1521, 1524 (1974). In 1976, Congress amended ECOA to "change the existing law" to "specifically exclude[ ] any Government or governmental subdivision or agency from liability for punitive damages." H.R. Rep. No. 94-210, at 9 (1975); *see* 15 U.S.C. § 1691e(b). That exception makes sense only because the authorization of suits against "any creditor" waived sovereign immunity. As the Department of Justice's Office of Legal Counsel has long recognized, the exception "indirectly, but … unequivocally, indicates that the United States may be required to pay compensatory damages" under ECOA's general civil-liability provision. 18 Op. Off. Legal Counsel 52, 70 (1994); *see also Moore v. U.S. Dep't of Agric.*, 55 F.3d 991, 994 (5th Cir. 1995) ("The plain language of the ECOA unequivocally expresses Congress' intentions: governmental entities are liable under the Act.").

TILA has an analogous structure. It defines a "creditor" as a "person," defines "person" to include an "organization," and defines "organization" to include a "government or governmental subdivision or agency." 15 U.S.C. §§ 1602(d), (e), (g). TILA's civil-liability provision, in turn, provides for an award of damages against "any creditor who fails to comply with" TILA. *Id.* § 1640(a). These provisions would subject governmental creditors to liability under TILA, which Congress did not want to do. Therefore, TILA bars any "civil or criminal penalty provided under [TILA]" against "the United States or any department or agency thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision." *Id*. § 1612(b).

As FCRA's sister statutes show, "[i]f Congress had wanted to" immunize federal agencies from some or

all of the civil liability created by treating the government as a "person," "it knew exactly how to do so—it could have simply borrowed from the statute[s] next door." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). FCRA instead mimics ECOA's and TILA's structural elements *without* incorporating ECOA's or TILA's exceptions to governmental liability. Congress's "choice to depart from the model of a closely related statute" is entitled to respect. *Id.* at 1355.

II. USDA has not identified a plausible basis for interpreting "person" in sections 1681n and 1681o as if the term were undefined.

USDA agrees that it is a "person" under FCRA's definition. It does not dispute that, as a "person," it is subject to the obligations that section 1681s-2 imposes on furnishers. It argues, however, that, when Congress enacted section 1681s-2 and simultaneously amended sections 1681n and 1681o to extend liability to "[a]ny person," Congress did not unambiguously incorporate the statutory definition of "person" into the civil-liability provisions and, therefore, the term "person" in those provisions should be interpreted as if it were undefined. None of USDA's arguments stands up to scrutiny.

A. FCRA's definition of "person" is not "context dependent."

1. USDA argues that it is not a person for purposes of section 1681n and 1681o because "FCRA's use of the word 'person' is context-dependent." USDA Br. 28. That is incorrect.

"When a statute includes an explicit definition, [the courts] must follow that definition." *Digital Realty Tr.*, 138 S. Ct. at 776–77 (quoting *Burgess*, 553

U.S. at 130); *Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021) (same) (citing *Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020)). An "express definition" is "virtually conclusive," "[s]ave for some exceptional reason." *Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019) (internal quotation marks omitted).

Here, no "exceptional reason" prevents application of the statutory definition to sections 1681n and 1681o. As USDA points out, a court in some circumstances may refuse to apply a defined term that "seems not to fit" a particular statutory context. *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 (1993) (citing the Dictionary Act, 1 U.S.C. § 1). That exception, however, is confined to situations where applying the definition would be "incompatible with Congress' regulatory scheme" or would "destroy[ ] one of the statute's major purposes." *Digital Realty Tr.*, 138 S. Ct. at 778 (cleaned up). For instance, in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), this Court held that, although the definition of "air pollutant" in the Clean Air Act includes greenhouse gases, the Environmental Protection Agency erred in including greenhouse gases in certain air pollutant permitting requirements, where "their inclusion would radically transform those programs and render them unworkable as written." *Id.* at 320. Likewise, in *United States v. Public Utilities Commission of California*, 345 U.S. 295 (1953), the Court held that the Federal Power Act's definition of "person," which excluded municipalities, did not apply to statutory provisions that "contemplate[d] municipalities as users and distributors of power" and as parties who may file complaints and rehearing petitions. 345 U.S. at 312. The Court explained that applying the definition

would "thwart the premise of these provisions," *id.* at 313, and "bring about an end completely at variance with the purpose of the statute," *id.* at 315.

USDA does not argue that applying FCRA's definition of "person" to sections 1681n and 1681o would be incompatible with the statutory purpose and design. It leans on the "typical understanding" that "person" excludes the sovereign, USDA Br. 29, but a "typical understanding" applies only "[i]n the absence of an express statutory definition," *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1861 (2019), even where the definition "varies from a term's ordinary meaning," *Tanzin*, 141 S. Ct. at 490 (internal quotation marks omitted). Indeed, "[t]here would be little use" in Congress defining a statutory term "if [courts] were free in despite of it to choose a meaning for [themselves]." *Fox v. Standard Oil Co. of N.J.*, 294 U.S. 87, 96 (1935).

2. USDA also argues that FCRA's definition of "person" cannot sensibly be applied to certain other FCRA provisions—specifically, sections 1681q, 1681s(a)(2), and 1681s(c).[2] USDA Br. 29–31. The question presented here, however, is whether the definition unambiguously applies to sections 1681n and 1681o. A statutory term "may have a plain meaning in the context of a particular section" even if it does not have "the same meaning in all other

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[2] For good reason, USDA no longer argues that the possibility of punitive damages for a willful FCRA violation provides a basis for refusing to apply FCRA's definition of "person" to section 1681n. *See* Pet. 20. That argument would have no application to negligent violations under section 1681o and, in any event, would be wrong. *See Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 n.21 (1981) (recognizing that punitive damages against governmental bodies may be "expressly authorized by statute").

sections and in all other contexts." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997). Therefore, "each section must be analyzed to determine whether the context" resolves "the issue in dispute." *Id.* at 343–44. Contextual considerations relevant to other FCRA provisions do not speak to application of the definition to FCRA's civil-liability provisions. *See Mowrer v. U.S. Dep't of Transp.*, 14 F.4th 723, 730 (D.C. Cir. 2021).

In any event, USDA is wrong that FCRA's definition of "person" cannot apply to sections 1681q, 1681s(a)(2), and 1681s(c).

Section 1681q. Section 1681q 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." 15 U.S.C. § 1681q. USDA asserts that section 1681q "plainly uses 'person' in its natural sense" because it would be absurd to "'subject the federal government to criminal prosecution.'" USDA Br. 30 (quoting Pet. App. 22a). To begin with, Congress disagrees. *See* 42 U.S.C. § 6992e(a) ("For purposes of enforcing" medical-waste laws—"including, but not limited to, … civil, *criminal*, administrative penalty, or other sanction"—"against any [federal] department, agency, or instrumentality, the United States hereby expressly waives any immunity otherwise applicable to the United States." (emphasis added)). Moreover, this Court "rarely invokes" absurdity "to override unambiguous legislation." *Sigmon Coal*, 534 U.S. at 459.

In addition, even if prosecuting a federal agency (with Congress's consent) would be absurd, it would not preclude applying FCRA's definition of "person" to section 1681q, to ensure that the provision applies to

those governmental bodies that can be subject to criminal liability. *Cf. Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 128 (2003) (stating that, even if municipalities "may not be susceptible to every statutory penalty, … that is no reason to exempt them from remedies that sensibly apply"). For instance, last Term, this Court noted that foreign governments and their arms (such as state-owned banks) may not be protected from criminal prosecution. *See Türkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 269, 280 (2023) (holding that the Foreign Sovereign Immunities Act does not immunize foreign governments from criminal prosecution and that such immunity, if any, would derive from common law). Municipalities also may be subject to prosecution. *See* Stuart P. Green, *The Criminal Prosecution of Local Governments*, 72 N.C. L. Rev. 1197, 1201 (1994) (noting that local governments have historically been subject to prosecution under state law). Applying FCRA's definition of "person" removes any doubt that prosecutable governmental bodies (and their corporate arms) will be accountable if they violate section 1681q.

There is, moreover, good reason to believe that Congress intended FCRA's definition of "person" to apply to section 1681q. Like FCRA, TILA provides for criminal liability for statutory violations. *See* 15 U.S.C. § 1611. In TILA, however, Congress expressly immunized "the United States or any department or agency thereof, or … any State or political subdivision thereof, or any agency of any State or political subdivision" from criminal liability. *Id.* § 1612(b). Congress's decision *not* to enact a similar immunity provision in FCRA suggests that Congress intended section 1681q to apply to political subdivisions, as well as other prosecutable governmental entities.

In addition, the 1970 Act contained an apparent "loophole" affecting the ability of consumers to hold "users" of information liable for requesting records on false pretenses. "Courts avoided this loophole by reasoning that since section 1681q created criminal liability for requesting 'information on a consumer' using false pretenses, this prohibition was a 'requirement' of the Act, and therefore provided the substantive basis for civil liability." *See Phillips v. Grendahl*, 312 F.3d 357, 363–64 (8th Cir. 2002) (citing cases from five courts of appeals), *abrogated on other grounds*, *Safeco*, 551 U.S. at 56 & n.8. Under that reasoning, a federal agency could have been subject to civil remedies for violating section 1681q's requirements, even if it remained immune to criminal prosecution. *Cf. E. Transp. Co. v. United States*, 272 U.S. 675, 687–88 (1927) (concluding that Congress had waived immunity for certain admiralty suits without deciding whether the statute "subject[s] the United States itself for prosecution for a crime").

Sections 1681s(a)(2) and (c). Section 1681s(a) authorizes the FTC to enforce FCRA against "persons" and to seek civil penalties against "any person" "in the event of a knowing violation, which constitutes a pattern or practice of violations of" FCRA. 15 U.S.C. § 1681s(a). Section 1681s(c) authorizes states to seek injunctive relief and damages "under sections 1681n and 1681o." *Id.* § 1681s(c). The FTC may not recover civil penalties against furnishers for violations of section 1681s-2(a)(1), and states may not recover damages from furnishers for violations of section 1681s-2(a), unless the furnisher has violated a prior injunction. *Id.* §§ 1681s(a)(2)(C), (c)(5).

USDA identifies nothing problematic about applying FCRA's definition of "person" to these prov-

isions. *See* USDA Br. 31. Numerous federal statutes authorize federal- and state-initiated actions against federal agencies. *See*, *e.g.*, 15 U.S.C. § 1691c(a)(9), (c) (authorizing the Consumer Financial Protection Bureau and the FTC to enforce ECOA against "any person"); *id.* § 2688 (subjecting federal agencies to federal and state enforcement of lead-based paint regulations); *see also Dep't of Energy v. Ohio*, 503 U.S. 607, 616–19 (1992) (recognizing that Congress authorized states to bring citizen-suit actions against the United States under the Clean Water Act and Resource Conservation and Recovery Act). As the Third Circuit explained, "no principle of law … requires Congress to express its intent to authorize administrative or state enforcement in a particular way beyond [the] clear statement" required to authorize actions by private parties. Pet. App. 26a.

Furthermore, applying FCRA's definition of "person" to sections 1691s(a) and (c) is necessary to avoid anomalous outcomes. Congress provided that a furnisher's duties under section 1681s-2(a) "*shall be enforced exclusively* as provided under section 1681s … by the Federal agencies and officials and the State officials identified in section 1681s." 15 U.S.C. § 1681s-2(d) (emphasis added). And Congress expressly authorized states to bring damages actions under sections 1681n and 1681o. *See id.* § 1681s(c)(1)(B). If governmental furnishers are not "persons" under section 1681s(a) and (c), there would be no enforcement mechanisms for the obligations concededly imposed on them by section 1681s-2. USDA provides no reason why Congress would have subjected governmental furnishers to the requirements of section 1681s-2, but then precluded federal and state enforcement of those obligations. Applying

FCRA's definition of "person" to sections 1681s(a) and (c) avoids this anomaly.

3. Although recognizing that the 1996 Amendment "broadened FCRA's remedial scope" to include "person[s]" within its civil-liability provisions, USDA argues that Congress did not authorize suit against federal agencies because the remedial provisions do not specify the United States. USDA Br. 31–32. But "the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole." *Markham v. Cabell*, 326 U.S. 404, 411 (1945). And when Congress amended sections 1681n and 1681o to apply to "[a]ny person," it left FCRA's longstanding definition of "person" untouched.

In addition, Congress amended sections 1681n and 1681o "to provide for suits against [persons] in precisely the same [1996 Amendment] in which it extended [FCRA's] substantive requirements" to "person[s]" that furnish information to consumer reporting agencies. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 76 (2000); *see* 1996 Amendment, §§ 2412–2413, 110 Stat. at 3009-446 to -447. USDA does not dispute that it is a "person" for purposes of those substantive requirements. USDA's interpretation, therefore, "requires the implausible assumption that Congress gave ["person"] different meanings in consecutive, related [sections] within a single statutory [amendment]." *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 889 (2019).

Quoting *United States v. California*, 297 U.S. 175 (1936), USDA asserts that "a sovereign is presumptively not intended to be bound by its own statute

unless named in it." USDA Br. 32 (quoting 297 U.S. at 186). But USDA concedes that "FCRA's statutory definition of 'person' covers the United States and federal agencies." USDA Br. 25. And this Court has noted that "a phrase like 'every government'" is sufficient "to express unambiguously the requisite intent" to waive immunity. *Coughlin*, 599 U.S. at 395; s*ee also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 150 (2010) (recognizing that the "express language" of a statute may waive sovereign immunity).

Contrary to USDA's suggestion, USDA Br. 32–33, neither *Bond v. United States*, 572 U.S. 844 (2014), nor *Abitron Austria GmbH v. Hetronic International, Inc.*, 600 U.S. 412 (2023), authorizes courts to disregard statutory definitions when interpreting defined terms. *Bond* concerned whether the prohibition on use of "any chemical weapon" in the Chemical Weapons Convention Implementation Act applied to local criminal conduct. 572 U.S. at 851, 860. The Court found "ambiguity deriv[ing] from the improbably broad reach" of the statutory definition of "chemical weapon," 18 U.S.C. § 229F(1)(A), and read the statute to exclude purely local crimes in light of "basic principles of federalism," 572 U.S. at 859–60. In *Abitron Austria*, the Court held that the Lanham Act's definition of "commerce," which refers to "all commerce" that Congress could regulate, 15 U.S.C. § 1127, is not specific enough to overcome the presumption against extraterritorial application of federal law. 600 U.S. at 420–21. *Bond* and *Abitron Austria* illustrate that the Court may read broadly worded statutory definitions narrowly in certain situations. They do not illustrate that the Court may *decline* to apply an unambiguous statutory definition

to provisions that use the defined term. *Bond* and *Abitron Austria*, therefore, offer no support for USDA, which *agrees* that it is encompassed by FCRA's definition of "person" but seeks to avoid application of that definition to sections 1681n and 1681o.

B. Applying FCRA's definition of "person" to sections 1681n and 1681o is consistent with *Seminole Tribe*.

As USDA observes, USDA Br. 34, Congress enacted the 1996 Amendment shortly after this Court held that Congress lacks authority under the Commerce Clause to abrogate state immunity. *See Seminole Tribe*, 517 U.S. at 47. Suggesting that it would have been "'insurrectionary'" and "quixotic[ ]" for Congress to "subject States to both compensatory and punitive damages" after *Seminole Tribe*, USDA Br. 34 (quoting *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799, 805 (4th Cir. 2019)), USDA argues that the "far more plausible understanding" is that sections 1681n and 1681o do not address sovereign immunity "at all." *Id.*

USDA's argument is not grounded in any canon of statutory construction, and it ignores the difference between Congress's authority to waive federal immunity and its authority to abrogate state immunity. To waive federal immunity, it is necessary and sufficient for Congress to enact unambiguous statutory text that authorizes suit against the federal government. *See*, *e.g.*, *United States v. Williams*, 514 U.S. 527, 531–32 (1995). To abrogate state immunity, unambiguous statutory text that permits suit against a state is *necessary* but *not sufficient*. Rather, for an action against a state to proceed, Congress must act pursuant to its authority under the Fourteenth

Amendment, the constitutional plan must waive state immunity, or the state must consent to suit. *See Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2462 (2022). But in all cases, unambiguous statutory text must authorize the action. *See*, *e.g.*, *id.* at 2466.

Sections 1681n and 1681o satisfy that requirement. By using the defined term "person" to designate the universe of potential FCRA defendants, the civil-liability provisions provide the necessary and sufficient textual basis to waive the immunity of the federal government and the necessary textual basis to authorize suit against state entities if the state does not assert constitutional immunity. In an analogous context, this Court has recognized that if a state "waive[s] its Eleventh Amendment immunity" to suits brought by tribes, 28 U.S.C. § 1362, which allows tribes to bring federal-question cases in federal court, "certainly would grant a district court jurisdiction to hear the claim." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786–87 n.4 (1991). Similarly, FCRA, which authorizes actions in both federal district court and "any other court of competent jurisdiction," 15 U.S.C. § 1681p, allows a plaintiff to proceed in a federal or state court if a state has consented to FCRA actions in that court. There is nothing insurrectionary or quixotic about this approach.

C. Section 1681u does not call into question the clarity of sections 1681n and 1681o.

FCRA section 1681u authorizes the FBI to obtain certain information from consumer reporting agencies "to protect against international terrorism or clandestine intelligence activities" and restricts the FBI's dissemination of that information. 15 U.S.C. §§ 1681u(a)–(c), (g). Section 1681u(j) creates a cause of

action against "[a]ny agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of [section 1681u]." *Id.* § 1681u(j).

According to USDA, "Congress's explicit naming of the United States in Section 1681u(j) underscores that even when Congress imposes particular substantive duties only on the federal government, it knows that it still must be unequivocal and unambiguous if it wishes to authorize private damages actions for breaching those duties." USDA Br. 35. USDA's theory is wrong. To begin with, this Court has cautioned against the practice of creating ambiguity in statutory language by comparing the wording of different waivers of sovereign immunity. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13 n.4 (1989) ("If no magic words are required for abrogation, then each statute must be evaluated on its own terms, not defeated by reference to another statute that uses more specific language."), *overruled on other grounds*, *Seminole Tribe*, 517 U.S. at 66. Accordingly, "the fact that Congress has referenced [the United States] specifically in some statutes [waiving federal] sovereign immunity does not foreclose it from using different language to accomplish that same goal in other statutory contexts." *Coughlin*, 599 U.S. at 395.

Moreover, Congress did not refer explicitly to federal agencies rather than "persons" in section 1681u(j) because doing so is necessary to waive sovereign immunity; it did so because it was creating a cause of action applicable *only* to federal defendants who obtain or disclose consumer reports under section 1681u. If Congress had instead used the word "person" in section 1681u, the cause of action would also apply to consumer reporting agencies, which play a role in

the operation of the provision: They must furnish the information properly demanded by the FBI or by court order, and they are generally prohibited from disclosing the FBI's demand "in any consumer report." 15 U.S.C. §§ 1681u(a)–(d). Section 1681u indicates, however, that Congress intended to *shield* consumer reporting agencies from liability under section 1681u. That section provides that consumer reporting agencies "shall not be liable" under FCRA (or state law) for disclosing consumer information in "good-faith reliance upon a certification of the [FBI] pursuant to provisions of [section 1681u]," *id.* § 1681u(*l*), and that the judicial "remedies and sanctions" set forth section 1681u are exclusive, "[n]otwithstanding any other provision" of FCRA, *id.* § 1681u(m).

Thus, the principle that "'differences in language' in the same statute generally 'convey differences in meaning,'" USDA Br. 35 (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017)), does not support USDA. The difference in meaning between section 1681u(j)'s liability provision and FCRA's general civil-liability provision is readily apparent: Section 1681u(j) provides an exclusive cause of action against federal agencies that violate 1681u, while sections 1681n and 1681o provide general causes of action against "person[s]," including governmental agencies and consumer reporting agencies, that violate other FCRA provisions.

D. The Privacy Act does not limit FCRA's remedies.

USDA argues that holding federal agencies liable under sections 1681n and 1681o would be "inconsistent" with the remedies set forth in the Privacy Act of 1974, 5 U.S.C. § 552a. USDA Br. 35. USDA does not

suggest that federal furnishers are not subject to FCRA's *substantive* requirements because the Privacy Act is exclusive. Rather, it argues that the Privacy Act's *remedies* are the exclusive remedies available to consumers harmed by inaccurate consumer report information furnished by federal agencies. Courts, however, are "not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (internal quotation marks omitted). Thus, a "party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Id.* (internal quotation marks omitted); *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)).

That principle applies here. FCRA's primary focus is consumer reports prepared by consumer reporting agencies. The Privacy Act serves a different purpose. It "provide[s] certain safeguards for an individual against an invasion of personal privacy" arising out of federal-agency recordkeeping. Pub. L. No. 93-579, § 2(b), 88 Stat. 1896, 1896 (1974), *codified at* 5 U.S.C. § 552a note. The original 1974 law did not even expressly authorize federal agencies to disclose their records on consumers to consumer reporting agencies. *See* Pub. L. No. 93-579, § 3, 88 Stat. at 1897, *codified at* 5 U.S.C. § 552a. Congress granted that authority in 1982 in connection with an agency's attempt to collect federal claims, *see* Debt Collection Act of 1982, Pub. L. No. 97-365, §§ 2, 3, 96 Stat. 1749, 1749, and made

disclosure mandatory in 1996, *see* Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, tit. III, ch. 10, § 31001(k)(1), 110 Stat. 1321-358, 1321-365. But FCRA and the Privacy Act continue to occupy distinct spheres.

Notably, the Privacy Act's remedial scheme hails from the original 1974 enactment and was not updated in connection with the 1982 or 1996 Privacy Act amendments, or the 1996 Amendment to FCRA. *See* 5 U.S.C. § 552a(g). Thus, far from being "carefully calibrated" to address the furnishing of inaccurate information to consumer reporting agencies, USDA Br. 35, the Privacy Act's remedies are a one-size-fits-all framework for addressing the universe of federal recordkeeping practices subject to that statute, much of which has nothing to do with information that federal agencies furnish to consumer reporting agencies.

The Privacy Act's principal remedy afforded to consumers harmed by inaccurate federally furnished information on their consumer reports is the opportunity to request correction of an agency record and to seek injunctive relief if the agency refuses. *See* 5 U.S.C. §§ 552a(d), (g)(1)(A), (g)(2)(A). If a section 552a(d) request is successful, an agency must inform consumer reporting agencies about the correction. *Id.* § 552a(c)(4). That remedy can live comfortably alongside FCRA's damages remedies for negligent or willful failures to investigate consumer complaints about the accuracy of government-furnished information that appears on consumer reports.

The Privacy Act also authorizes damages for certain "intentional or willful" violations, *id.* §§ 552a(g)(1)(C), (D); (g)(4), but those remedies will rarely overlap with FCRA's remedies. A claim under

Privacy Act section 552a(g)(1)(C) requires "an adverse agency determination resulting from inaccurate agency records." *Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1007 (D.C. Cir. 2009). It thus provides no protection against non-governmental harms caused by inaccurate consumer reports. Section 552a(g)(1)(D) requires a violation of "any other provision of" the Privacy Act. As relevant here, this provision could come into play only if a section 552a(d) request to correct the record is successful and the agency intentionally or willfully fails to inform consumer reporting agencies about the correction, as required by section 552a(c)(4). But unlike FCRA, no provision of the Privacy Act compensates consumers for harms caused by an agency's negligent or willful failure to investigate a consumer's dispute in the first place. Accordingly, as the court of appeals stated, "it would have been quite reasonable for Congress, in enacting the 1996 FCRA amendments, to find that the Privacy Act's remedial scheme, with its strict limit on money damages, was insufficient to ensure the accuracy of consumer credit information." Pet. App. 32a.

E. The legislative history is consistent with FCRA's clear text.

Seeking assistance from silence in the legislative history, USDA argues that "Congress did not understand itself" to be creating liability for the federal government. USDA Br. 38. This Court "presume[s] that Congress is aware of existing law when it passes legislation." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014) (internal quotation marks omitted). It should thus presume that Congress was aware of FCRA's express definition of "person" when it amended sections 1681n and 1681o to impose liability on "[a]ny person."

Legislative silence, in any event, cannot defeat clear statutory text. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018) ("If the text is clear, it needs no repetition in the legislative history."). USDA nonetheless makes a heads-I-win, tails-you-lose argument that, although the Court should not consider legislative history to supply a waiver of immunity, it should do so to inform its conclusion that immunity has not been waived. USDA Br. 28, 39. But as the Court explained in *Dellmuth v. Muth*, 491 U.S. 223 (1989), "[i]f Congress' intention" regarding immunity is "unmistakably clear in the language of the statute, recourse to legislative history will be unnecessary." *Id.* at 230 (internal quotation marks omitted). Here, FCRA is unmistakably clear, making recourse to legislative history unnecessary.

Furthermore, to the extent that legislative history is relevant, it confirms that applying FCRA's definition of "person" to sections 1681n and 1681o would not be "incompatible with Congress' regulatory scheme" or undermine "the statute's major purposes." *Digital Realty Tr.*, 138 S. Ct. at 778 (cleaned up). "FCRA seeks to ensure 'fair and accurate credit reporting.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334 (2016) (quoting 15 U.S.C. § 1681(a)(1)). Credit reports, however, cannot be accurate if furnishers provide inaccurate information about consumers to consumer reporting agencies. Congress recognized that the absence of furnisher duties in the 1970 Act "weaken[ed] the accuracy of the consumer reporting system." S. Rep. No. 103-209, at 6 (1993). Accordingly, "to make it more likely that information reported to consumer reporting agencies is accurate," Congress amended FCRA to require furnishers to investigate consumer disputes and amended sections 1681n and 1681o to

authorize liability against "[a]ny person." H.R. Rep. No. 102-692, at 69 (1992). Congress recognized that, with this change, "furnishers will be subject to civil liability for a failure to reinvestigate disputed information or a failure to update information that has been determined to be incorrect or inaccurate." S. Rep. No. 103-209, at 7; *see also* H.R. Rep. No. 103-486, at 49 (1994) (recognizing that the amendment makes civil-liability provisions applicable to "persons that furnish information to consumer reporting agencies").

As "one of the largest furnishers of credit information in the country," USDA Br. 38 (internal quotation marks omitted), the federal government furnishes information to consumer reporting agencies that has a significant impact on how creditors, employers, and others make decisions about whether to extend credit, hire applicants, or engage in other transactions with consumers. Applying sections 1681n and 1681o to federal agencies ensures that the procedures that Congress has imposed to promote fairness and accuracy in credit reporting apply to government-furnished information, just as they do to information furnished by private entities. The legislative history and the congressional purpose it describes thus fully support the result compelled by FCRA's unambiguous text: federal agencies are "persons" subject to furnisher liability under sections 1681n and 1681o.

III. FCRA's cause of action is sufficient to waive federal sovereign immunity.

Last Term, this Court reiterated that sovereign immunity is not a defense to a claim "when a statute creates a cause of action and authorizes suit against a government on that claim." *Centro de Periodismo*

Investigativo, 598 U.S. at 347. Any other outcome would necessarily "negate[ ]" the statutory language conferring the unambiguous authorization. *Id.* at 348.

USDA sees things differently. Because sovereign-immunity waivers and causes of action are "analytically distinct," USDA Br. 13 (quoting *FDIC v. Meyer*, 510 U.S. 471, 484 (1994)), USDA argues that "a cause of action [that] merely cross-references a general definition that includes sovereigns and non-sovereigns" will not waive immunity. *Id.* at 22. That argument is inconsistent with precedent and conceptually unsound. The only case whose outcome would arguably be consistent with the rule that USDA now advances—*Employees*, 411 U.S. 279—does not rest on such a rule, and that decision's approach to statutory interpretation has not survived this Court's subsequent teachings.

A. Congress waives immunity when it creates a cause of action against a federal defendant.

1. USDA's observation that sovereign-immunity waivers and causes of action are "analytically distinct" is a red herring. Congress, of course, need not waive immunity through a cause of action, but may address immunity expressly. *See Centro de Periodismo Investigativo*, 598 U.S. at 347 (explaining that a statute may "in so many words … strip[ ] immunity from a sovereign entity"). For instance, Congress may eliminate all immunity that a federal entity would otherwise possess by providing that the entity may "sue and be sued" or by disclaiming the entity's governmental status. *See*, *e.g.*, *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744 (2004) (U.S. Postal Service); *Lebron v. Nat'l R.R. Passenger*

Corp., 513 U.S. 374, 392 (1995) (Amtrak); *Meyer*, 510 U.S. at 480–81 (Federal Deposit Insurance Corporation and now-abolished Federal Savings and Loan Insurance Corporation). Such a waiver of immunity does not imply the existence of a cause of action under which the government will be liable. *Flamingo Indus.*, 540 U.S. at 744 ("An absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity.").

Similarly, where Congress lacks the constitutional power to abrogate state immunity, it nonetheless has the power to create causes of action against state defendants enforceable in forums where the state has consented to suit. *Cf. Alden v. Maine*, 527 U.S. 706, 757–58 (1999) (holding that the state had not consented to suit under the Fair Labor Standards Act). In that context as well, a cause of action is distinct from the abrogation of immunity.

None of that matters here because the enactment of a cause of action against a sovereign entity carries with it a waiver of immunity (or abrogation where it is within Congress's constitutional power) with respect to the underlying claim. If it did not, Congress would be required to address immunity separately every time it created a cause of action against the government, lest it "authorize a suit against a sovereign with one hand, only to bar it with the other." *Centro de Periodismo Investigativo*, 598 U.S. at 348. This Court therefore has never held that a federal defendant is entitled to invoke sovereign immunity in the face of a cause of action that specifically authorizes actions against it. Rather, the Court has described that situation as an "'unequivocal declaration' from Congress" that immunity has been waived. *Id.* at 347

(quoting *Dellmuth*, 491 U.S. at 232); *see also*, *e.g.*, *id.* at 347–48 (citing cases); *Cooper*, 566 U.S. at 291; *Lane v. Peña*, 518 U.S. 187, 193 (1996); *Williams*, 514 U.S. at 531–32.

2. USDA attempts to sidestep this precedent by proposing a rule under which only *some* statutory causes of action authorized against sovereign entities would waive immunity. As USDA describes it, if a cause of action contains "specific remedial language" that would be surplusage if immunity were preserved, the cause of action waives immunity. USDA Br. 19. On the other hand, USDA posits, if "a cause of action merely cross-references a general definition that includes sovereigns along with non-sovereigns," the provision would not waive immunity where neither the definition nor the cause of action would be surplusage. *Id.* at 22.

USDA's proposed rule trips out of the starting gate because it cannot successfully distinguish precedent. In *Kimel*, 528 U.S. 62, the Court addressed the cause of action in the Age Discrimination in Employment Act of 1967 (ADEA), which authorizes "a civil action" without specifying the potential defendants. 29 U.S.C. § 626(c). A separate subsection, however, provides that the ADEA "shall be enforced" under both the ADEA's cause of action and under "the powers, remedies, and procedures" set out in the Fair Labor Standards Act (FLSA). *See id.* § 626(b). The FLSA, in turn, authorizes a civil action "against any employer (including a public agency)." *Id.* § 216(b). Section 216(b) does not identify the entities that "public agency" comprises, but the FLSA elsewhere defines "public agency" to include "the government of a State or political subdivision thereof," and "any agency of … a State, or a political subdivision of a State." *Kimel*,

528 U.S. at 74 (quoting 29 U.S.C. § 203(x)). Reading these provisions "as a whole," the Court held that "the plain language of these provisions clearly demonstrates Congress's intent to subject the States to suit for money damages." *Id.*; *see also Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 35 (2012) (plurality op.) (applying a similar analysis to find a waiver of immunity under a provision of the Family and Medical Leave Act); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (same, concerning another provision of the Family and Medical Leave Act).

Under the rule proposed by USDA, however, this Court should have interpreted the term "public agency" in *Kimel* without applying the statutory definitions. Doing so would not have resulted in surplusage: The statutory definitions of "employer" and "public agency" would still apply to substantive provisions of the FLSA, *see*, *e.g.*, 29 U.S.C. §§ 207(a), (k), (o); 213(b)(20), while liability under section 216 (and consequently the ADEA) would attach to private employers and public agency employers that lack immunity (such as political subdivisions). That approach would have been akin to the outcome that USDA seeks here—but this Court rejected it. Making clear that it has "never required that Congress make its clear statement in a single section" of a statute, *Kimel*, 528 U.S. at 76, the Court "dispelled" "[a]ny doubt concerning the identity of the 'public agency' defendant named in § 216(b) … by looking to" the definition of the term in section 203(x), *id.* at 74. Likewise here, the statutory definition of "person" avoids any doubt about the term's meaning in sections 1681n and 1681o.

Apart from being inconsistent with precedent, USDA's argument makes no conceptual sense. Under

the sovereign-immunity canon, a statute must be unambiguous—that is, subject to no other plausible interpretation—in creating a cause of action against the government. Accordingly, the government's corollary excluding definitional cross-references will come into play only where the Court has already concluded that under "'traditional' tools of statutory interpretation" a statute (like sections 1681n and 1681o) *unambiguously* creates a cause of action against federal agencies. *Coughlin*, 599 U.S. at 388 (quoting *Cooper*, 566 U.S. at 291). Having so concluded, it would be peculiar for the Court to then address the purportedly "distinct" question whether Congress has waived federal immunity by assuming that a definition including the government does *not* apply to a statute's civil-liability provisions.

USDA says that taking this approach would not create surplusage. USDA Br. 24. But USDA does not claim that the plain text itself has surplusage, and the canon against surplusage does not permit the Court to rewrite an unambiguous statute simply because the revision, too, would not create surplusage. If "the statutory text is plain and unambiguous," the Court "must apply the statute according to its terms." *Carcieri*, 555 U.S. at 387 (citation omitted).

Relying on *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), USDA states that Congress does not remove immunity through a "general authorization for suit in federal court." USDA Br. 21 (quoting 473 U.S. at 246). But *Atascadero* does not foreclose application of a statutory definition to identify a clear waiver. In *Atascadero*, Congress had authorized suit against "any recipient of Federal assistance" under the Rehabilitation Act, but no provision of the statute "specifically" defined "recipient" to include states. 473

U.S. at 245–46 (internal quotation marks omitted). Here, FCRA specifically defines "person" to include federal agencies.

USDA expresses concern that applying a definition applicable to the whole statute to a civil-liability provision that uses the defined term would risk Congress waiving liability "inadvertently or without due deliberation." USDA Br. 21 (quoting *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality op.)). This Court, however, "resist[s] speculating whether Congress acted inadvertently." *Hamer v. Neighborhood Housing Servs. of Chicago*, 583 U.S. 17, 25 (2017); *see also Magwood v. Patterson*, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent."). In lieu of speculation, the Court uses "clear statement rules." *Spector*, 545 U.S. at 139 (plurality op.); *see Sossamon*, 563 U.S. at 290 (focusing on the need for a "clear statement in the text"). And "Congress need not state its intent in any particular way" to waive immunity. *Coughlin*, 599 U.S. at 388 (quoting *Cooper*, 566 U.S. at 291). Thus, in *Coughlin*, this Court held that Congress clearly stated its intent to abrogate tribal sovereign immunity under the Bankruptcy Code through a definitional section that does not expressly mention tribes. *Id.* at 394–95. The Court did not speculate whether the statutory language was inadvertent or the result of due deliberation; it simply gave effect to the "strikingly broad scope" of the statutory definition. *Id.* at 389. Nothing about FCRA calls for a different approach.

B. *Employees* does not control here.

USDA's request that the Court interpret sections 1681n and 1681o without regard to FCRA's definition

of "person" seeks "to salvage the result, if not the reasoning, of" the Court's 1973 decision in *Employees*. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019) (addressing the Freedom of Information Act). In *Employees*, the Court did not apply the FLSA's definition of "employer" in deciding whether the statute's cause of action against "employer[s]" overcame state immunity. That result was not grounded in a blanket rule against interpreting causes of action in accordance with generally applicable statutory definitions. Rather, it arose from a "methodology" that "assumes that the task of a court of law is to plumb the intent of a particular Congress that enacted a particular provision," rather than "to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times." *Union Gas*, 491 U.S. at 29–30 (Scalia, J., concurring in part and dissenting in part). If *Employees*' methodology still held sway, its application to FCRA would not change the conclusion that FCRA waives immunity. The Court, however, rejected *Employees'* methodology long ago, leaving it "a relic from a bygone era of statutory construction." *Food Mktg. Inst.*, 139 S. Ct. at 2364 (internal quotation marks omitted). The Court should not resurrect it here.

1. In *Parden v. Terminal Railway Co. of Alaska Docks Department*, 377 U.S. 184 (1964), *overruled by Welch v. Tex. Dep't of Highways and Pub. Transp.*, 483 U.S. 468 (1987), and *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), the Court held that a cause of action in the Federal Employers' Liability Act (FELA) that extended to "every common carrier by railroad" applied to state-owned railroads and that a state construct-

ively waived its immunity by operating such a railroad. *Id.* at 185–92. Although FELA did not expressly define "common carrier by railroad" to include state railroads, the Court concluded that FELA's "purpose is no less applicable to state railroads and their employees" than to private railroad employees. *Id.* at 189.

Employees was decided against the backdrop of that since-overruled decision. The FLSA authorizes actions against "employer[s]" for unpaid wages, and until 1966, had expressly excluded states from the statute's definition of "employer." 411 U.S. at 282–83. In that year, Congress amended the definition to expressly include certain state hospitals and schools under the "literal language" of the FLSA. *Id.* *Employees* held that the amendment did not trigger *Parden*'s constructive-waiver principle to overcome state immunity. At the outset, the Court put *Parden* "to one side" on the ground that, while state railroads were an "isolated state activity" undertaken for profit, state hospitals and schools operated as non-profit entities and employed many workers who might be eligible to sue for unpaid wages under the FLSA. *Id.* at 284–85; *see also id.* at 287 (noting that the FLSA covered 2.7 million employees at 118,000 state and local establishments). Given how "pervasive" the FLSA was, the Court first considered the "history of the 1966 amendments," but "found not a word" that "indicate[d] a purpose of Congress to make it possible for [citizens] to sue the State in the federal courts." *Id.* at 285. The Court found it "surprising" that Congress would "deprive[ ] Missouri of her constitutional immunity without changing" the FLSA's civil-liability provision or indicating "by clear language that the constitutional immunity was swept away." *Id.* And the Court observed that the Secretary of Labor could

enforce the FLSA against states, which "may explain why Congress was silent as to waiver of sovereign immunity" since, in the Court's view, "private enforcement … was not a paramount objective." *Id.* at 286.

Taken on its own terms, *Employees* would not control here. Unlike the FLSA's definition of "employer," FCRA's definition of "person" has always encompassed federal agencies. Also, unlike the FLSA amendments, the 1996 Amendment "chang[ed] the old" civil-liability provisions in FCRA to specify that consumers could bring actions against "person[s]," *Employees*, 411 U.S. at 285. The 1996 Amendment *also* amended FCRA's definitions section in some respects, § 2402, 110 Stat. at 3009-426, but left the definition of "person" intact, suggesting that Congress intended the definition to apply to the amended civil liability provisions. And while "private enforcement" may not have been a "paramount objective" of the FLSA, Congress was aware that FCRA was "designed to be largely self-enforcing, the capacity of consumers to bring private actions to enforce their rights under the statute [being] at least equally important" as federal enforcement. S. Rep. No. 103-209, at 6 (quoting testimony by the FTC's Director of Credit Practices). USDA is therefore wrong to assert that the "circumstances here are identical in all relevant respects to" the circumstances of *Employees*. USDA Br. 26.

2. In any event, this Court rejected *Employees*' approach to statutory interpretation long ago. The outcome in *Employees*, while based on a *Parden*-style analysis, started a "retreat from *Parden*." *College Savings Bank*, 527 U.S. at 677. Although early decisions continued to cite *Parden* and *Employees* as

relevant precedent, the Court's immunity jurisprudence began to focus on statutory text rather than legislative purpose. In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court established that it would not hold that a state waived its immunity except where "express language" or "overwhelming implications from the text … leave no room for any other reasonable construction." *Id.* at 673 (internal quotation marks omitted). In *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), the Court stated that an "unequivocal expression of congressional intent" was needed to abrogate state immunity. *Id.* at 99. The following year, *Atascadero* joined these two strands by squarely holding that the expression of congressional "intent" needed to abrogate state immunity must consist of "unmistakable language in the statute itself." 473 U.S. at 243.

Atascadero signaled the death knell for *Parden* and the obsolescence of *Employees*. In *Welch*, a majority of Justices overruled *Parden*'s approach to congressional abrogation of state immunity. 483 U.S. at 478 (plurality op.); *id.* at 496 (Scalia, J., concurring).[3] Two years later, this Court decided *Dellmuth* and *Union Gas*, both on the same day. In *Dellmuth*, the Court declared legislative history to be generally "irrelevant to a judicial inquiry into whether Congress intended to abrogate" state immunity. 491 U.S. at 230. The Court did not cite *Employees*, even though Justice Brennan's dissent argued that *Employees* required consideration of legislative history to "identify

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[3] In 1999, the Court overruled *Parden*'s constructive-waiver principle as outside the reach of Congress's Commerce Clause power. *College Savings Bank*, 527 U.S. at 680.

Congress's purpose" and its "actual intent." *Id.* at 239, 241 (Brennan, J., dissenting).

In *Union Gas*, the Court, in an opinion authored by Justice Brennan, held that Congress had abrogated state immunity when it amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*, to "explicitly include[ ]" states "within the statute's definition of 'persons.'" 491 U.S. at 7. The Court distinguished *Employees* because the amended CERCLA scheme contained other elements that supported abrogation, *id.* at 8–9 n.2, while Justice Scalia, concurring in part, rejected the idea that a court should "plumb the intent of the particular Congress that enacted a particular provision" rather than "give fair and reasonable meaning to the text of the United States Code," *id.* at 29–30. Although the Court has not overruled *Employees*' *holding*, *see Kimel*, 528 U.S. at 77; *id.* at 99 (Thomas, J., dissenting), the Court has not relied on *Employees*' method of statutory analysis in any subsequent decision.

This Court has thus long abandoned *Employees*' approach to statutory interpretation—searching for congressional intent in places other than the "literal language" of the statute, 411 U.S. at 283—in favor of an approach in which "the text of a law controls over purported legislative intentions unmoored from any statutory text." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022). Having renounced the "*ancien regime*" of statutory interpretation that *Employees* represents, the Court should reject USDA's "invitation to have one last drink." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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