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 OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the text of the Constitution does not explicitly require federal sovereign immunity, this Court has consistently concluded that "the strongest reasons of public policy" counsel against allowing "any plaintiff who presents a disputed question of property or . . . right" to "stop[] in its tracks" the "Government as representative of the community as a whole." *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 704 (1949). The converse of this rule is that the "community as a whole," through its elected representatives in Congress, can determine that there are situations in which it is appropriate for the federal government to be held accountable in court. *See, e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491-92 (2006); *United States v.*

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[1] Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). Because these principles ensure that politically accountable leaders decide when public concerns should bow to private complaints, this Court's role is simple: heed the text of the laws Congress has passed and allow for waivers of sovereign immunity that are no broader or narrower than that text dictates.

This Court's precedents overwhelmingly support such an approach. Time and again, this Court has explained that "just as 'we should not take it upon ourselves to extend [a] waiver [of sovereign immunity] beyond that which Congress intended[,] . . . [n]either, however, should we assume the authority to narrow the waiver that Congress intended.'" *United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 7 (1993) (alterations in original) (quoting *Smith v. United States*, 507 U.S. 197, 203 (1993)). And because the decision to waive sovereign immunity involves policy considerations that "Congress is 'far more competent than the Judiciary' to weigh," *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)), this Court has made clear that judges should not impose their own, post-hoc requirements on *how* Congress may accomplish that waiver. Doing so—requiring the statute to use "magic words," *FAA v. Cooper*, 566 U.S. 284, 291 (2012), for example—would undermine the entire basis for vesting the authority to waive sovereign immunity in Congress in the first place.

Yet that is precisely what the United States Department of Agriculture (USDA) asks this Court to do. It concedes that the Fair Credit Reporting Act (FCRA) subjects to civil liability any "person" who negligently or willfully "fail[s] to comply with [the FCRA's] requirement[s]," 15 U.S.C. §§ 1681n(a), 1681o(a). It also concedes that the FCRA defines "person" to include

"any . . . government or governmental subdivision or agency," *id.* § 1681a(b). But in the face of that "unequivocal declaration" from Congress, *Dellmuth v. Muth*, 491 U.S. 223, 232 (1989), it appeals to legislative history to attempt to create ambiguity, and it asserts that "cross-referencing a broad general definition" is insufficient to waive sovereign immunity, Pet'r Br. 10, creating from whole cloth a rule that the cause-of-action provision of a statute on its own must subject the sovereign to suit.

Adopting such a rule would not only defy this Court's precedents, it would also displace Congress's judgment, as reflected in the FCRA's text, that a damages remedy is necessary against the federal government when it violates the FCRA's substantive provisions. Indeed, many of the USDA's arguments to this Court—for example, that construing the FCRA to authorize suit against it would "vastly expand liability for federal-agency activity already covered by the Privacy Act," Pet'r Br. 36—are precisely the sort of arguments that would be better presented to Congress, with its "greater capacity 'to weigh and accommodate the competing policy concerns and reliance interests' involved in the issue," *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 801 (2014) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998)). In recent years, this Court has been especially skeptical of such arguments, as they risk "arrogating legislative power" and undermining "the Constitution's separation of legislative and judicial power." *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020). Those principles apply equally in this case.

ARGUMENT

I. The Decision Whether to Waive the Federal Government's Sovereign Immunity Belongs to Congress.

Since the earliest invocations of the sovereign immunity doctrine, this Court has recognized that only Congress, as the people's representative, has the power to decide whether or not to waive the United States' sovereign immunity. In justifying this rule, this Court has often spoken of the gravity of the decision to allow a private individual to vindicate his or her own private interests against the entity entrusted with protection of the greater public, as well as the risk that allowing such private litigation could divert government resources away from pursuit of the public welfare. *See, e.g.*, *The Siren*, 74 U.S. 152, 154 (1868) (warning that "the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government"); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944) ("The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government."); *Larson*, 337 U.S. at 704 ("[T]he interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief." (quoting *Decatur v. Paulding*, 39 U.S. 497, 516 (1840))). Decisions involving such matters, according to this Court, are squarely within Congress's "bailiwick," and thus Congress is "[t]he right governmental actor" to determine whether "to waive immunity." *Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 1442 (2019).

At the same time, this Court has been clear that the courts should not second-guess Congress's decision to waive immunity. After all, while private suits risk interfering with governmental functions, those risks must be weighed against the fundamental principle, dating at least to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 163. Our constitutional structure manifests a strong interest in permitting individuals to sue the government "where [their] federally protected rights have been invaded." *Bell v. Hood*, 327 U.S. 678, 684 (1946). Thus, "once Congress has acted to permit the claim of the aggrieved against the sovereign to be pursued in a judicial forum"—having determined that for a particular area of law, any threat of private litigation disrupting government is outweighed by the need for a remedy—"courts should not frustrate the legislative promise of relief by reconstructing a broader scope of immunity through a hostile and narrow construction of the statute." Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1252 (2014). As one preeminent treatise has put it, "[i]t is one thing to regard government liability as exceptional enough to require clarity of creation as a matter of presumed legislative intent," yet it "is quite something else to presume that a legislature that has clearly made the determination that government liability is in the interest of justice wants to accompany that determination with nit-picking technicalities that would not accompany other causes of action." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 285 (2012).

This makes sense not just as a principle of statutory interpretation, but also as a matter of separation of powers. If the primary constitutional "justification for sovereign immunity is to allow Congress to determine the appropriate balance between protecting government policymaking and providing remedies to those injured by government actions," then "the object of interpreting statutory waivers of sovereign immunity should be to ascertain and implement the deliberate balance achieved by Congress." John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 818 (1995). This approach is particularly important given the myriad policy considerations and conflicting interests that go into a congressional waiver of sovereign immunity—interests that Congress, certainly more so than this Court, is positioned to reconcile. *See* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1531 (1992) ("The dominant justification for sovereign immunity must be that we trust Congress, unlike any other entity, to set the rules of the game.").

This Court's sovereign immunity precedents reflect that understanding. As this Court recently explained, to determine whether a statute waives sovereign immunity, this Court "simply" applies "'traditional' tools of statutory interpretation" to decide whether "Congress's abrogation . . . is 'clearly discernable' from the statute itself." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin,* 143 S. Ct. 1689, 1696 (2023) (quoting *Cooper*, 566 U.S. at 291). And if the statute itself is unambiguous, that ends the matter: this Court has "never required that Congress use magic words" to effectuate a clear waiver of sovereign immunity. *Cooper*, 566 U.S. at 291.

Consistent with its insistence on fidelity to statutory text, this Court long ago discarded the rule that legislative history can create ambiguity in a statute that plainly waives sovereign immunity. *See, e.g.*, *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992) (noting that "legislative history has no bearing on the ambiguity point" in the sovereign immunity inquiry); *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it."). Focusing on text rather than legislative history allows people "to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). That principle is especially important in the context of sovereign immunity, a background rule designed to protect the interests of the people as a whole and to give way when Congress determines that allowing suit furthers the public interest.

Accordingly, although this Court typically resolves *unclear* statutes in favor of the sovereign, such "'rules of thumb' give way when 'the words of a statute are unambiguous.'" *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (quoting *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992)). This Court has only resorted to the so-called "sovereign immunity canon" when it has confronted ambiguity in the plain text of a statute. *See, e.g.*, *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589-90 (2008) (declining to apply "sovereign immunity canon" because "there is no ambiguity left for us to construe"); *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 626-27 (1992) (invoking sovereign immunity canon only after traditional tools of statutory interpretation left the Court "with an unanswered question"); *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (same).

Thus, even though "[t]he standard for finding a congressional abrogation is stringent," if the "language of the statute" amounts to an "unequivocal" abrogation, this Court must respect the statutory text. *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176, 1183 (2023) (quoting *Dellmuth*, 491 U.S. at 232).

In sum, this Court's consistent approach to questions of sovereign immunity has been to examine the text of the statute and then "implement Congress's choices rather than remake them." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1454 (2023). That approach reflects this Court's understanding that Congress, not the Judiciary, gets to decide when the interest in vindication of individual rights outweighs the government's interest in conducting its affairs free from the threat of litigation. As this Court has recognized, that nuanced decision should be left in the hands of the people's representatives.

II. This Court Should Decline the USDA's Invitation to Arrogate Legislative Authority by Imposing a Post-Hoc "Magic Words" Requirement on the Manner in Which Congress May Waive Sovereign Immunity.

Running headlong into these precedents, the USDA, in effect, asks this Court to create a new rule for how Congress may waive sovereign immunity. It argues that a waiver of sovereign immunity should only be considered unambiguous "in the context of a direct and explicit reference to [the sovereign] in the relevant cause of action itself." Pet'r Br. 20. Yet none of the cases cited by the USDA support that rule, and to tighten the requirements for waiving sovereign immunity *after* Congress has already legislated would subvert Congress's plan in passing the law and

amount to an inappropriate aggrandizement of judicial power.

A. The USDA relies primarily on two cases for its novel rule, both of which it misconstrues. Fifty years ago, in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), the Court held that Congress did not abrogate state sovereign immunity by amending the definition of "employer" in the Fair Labor Standards Act (FLSA) to include certain state facilities while leaving in place a preexisting FLSA cause of action against an "employer." *Id.* at 282-83. Although the "literal language" of the FLSA covered the state defendants, *id.* at 283, the Court discounted the statute's plain text because it "found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts," *id.* at 285. In reaching this conclusion, the Court limited its engagement with a tricky constitutional question regarding congressional power to waive *states*' immunity and avoided overruling a then-relatively recent precedent, *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964).

Seemingly recognizing that *Employees*' reliance on legislative history to create ambiguity reflects an outmoded method of statutory interpretation, the USDA argues that the Court merely turned to legislative history in *Employees* for support for its independent conclusion that the FLSA's text was unclear. *See* Pet'r Br. 27. But that argument simply cannot be squared with this Court's statement in *Employees* that the "literal language" of the statute plainly covered the state entities. *Employees*, 411 U.S. at 283. It is hard to imagine a more explicit recognition of the clarity of statutory text.

Remarkably, then, the USDA argues in the alternative that legislative history *can* be used to "reinforce that Congress has *not* waived immunity" even if it cannot be used to find a waiver that does not exist in the statutory text. Pet'r Br. 27-28. Not only has this Court expressly held to the contrary, *see supra* Section I, but creating such a one-way street would undermine congressional authority and the careful balancing that goes into deciding whether to effectuate a waiver of sovereign immunity in the first place. In other words, if courts were permitted to go searching through legislative history for indications that contradict clear statutory text, it would wrest control of the sovereign immunity question away from Congress and put it in the hands of the Judiciary, undermining the chief justification for sovereign immunity as a default rule that Congress legislates against.

In any event, *Employees* does not stand for the broad proposition for which the USDA cites it. Never once in the decision did this Court suggest that statutory cross-references categorically cannot create waivers of sovereign immunity. Indeed, the Court's recognition that the two statutory sections of the FLSA read together created a "literal" waiver of sovereign immunity, 411 U.S. at 283, suggests quite the opposite.

B. The second case that the USDA relies on for its novel rule, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), also in no way "illustrate[s] that Congress does not waive sovereign immunity simply by cross-referencing a broad general definition." Pet'r Br. 10. For one thing, *Atascadero* could not have possibly addressed how "broad definitions" affect the sovereign immunity analysis because the case did not turn on an expressly defined term at all.

Instead, in *Atascadero*, this Court held that a provision that authorized suit for violations of Section 504

of the Rehabilitation Act by "any recipient of Federal assistance" was "not the kind of unequivocal statutory language sufficient to abrogate" a state's Eleventh Amendment immunity, even if the state received "Federal assistance." 473 U.S. at 245-46. Critically, however, states were not *defined* by Congress as "recipient[s] of Federal assistance" in the Rehabilitation Act; rather, they became "recipient[s]" through their own actions.

It is thus possible to imagine that when Congress subjected "any recipient of Federal assistance" to suit for violation of Section 504, it did not consider that such broad language might cover states and state agencies under certain circumstances. At least, Congress itself never expressly stated as much.

It is much more difficult to imagine that Congress did not think the federal government could be subject to suit when it wrote a law subjecting any "person" to suit and defining "person" to include "any . . . government or governmental subdivision or agency," 15 U.S.C. § 1681a(b). Congress itself wrote both the cause of action *and* the definitions provision, albeit at different times.[2]

And even if *Atascadero* created any doubt about Congress's ability to waive sovereign immunity through a statutory cross-reference, subsequent deci-

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[2] Notably, Congress wrote the cause of action subjecting any "person" to suit *after* writing the definitions provision, which defined "person" as including a "government or governmental subdivision or agency." *Compare* Fair Credit Reporting Act, Pub. L. No. 91-508, sec. 601, § 603(b), 84 Stat. 1127, 1128 (1970) (defining "person" to include the federal government), *with* Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, §§ 2412(a)-(e), 2415, 110 Stat. 3009-446 to 3009-447, 3009-450 (creating civil liability for "[a]ny person").

sions of this Court put it to rest. In both *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), this Court held that authorization of suit against a "public agency" permitted suit against a state agency, where the statute contained a separate provision defining "public agency" as including "the government of a State." *See Kimel*, 528 U.S. at 73-74; *Hibbs*, 538 U.S. at 726. In reaching that conclusion in *Kimel*, this Court explained that it has "never required that Congress make its clear statement [waiving sovereign immunity] in a single section or in statutory provisions enacted at the same time." 528 U.S. at 76.

The USDA makes much of the fact that in both *Kimel* and *Hibbs*, the defined term appearing in the cause of action, "public agency," inherently conveyed that state agencies were covered—or at least, "public agency," in the USDA's view, is a more natural fit with a definition including state agencies than "person" is with a definition including the federal government. Even if true, that is irrelevant: the whole purpose of including a "definitions" section in a statute is to clarify whether certain terms should take on special—even *atypical*—meanings in the context of the law. To require the defined term to bear some particular meaning independent of its statutory definition would render the definition provision itself unnecessary.

C. Once its arguments from precedent are discounted, what the USDA really wants becomes clear: for this Court to engage in the sort of weighing of policy interests that Congress already undertook when it enacted a waiver of sovereign immunity in the FCRA.

For instance, the USDA argues that authorizing suits against it through the FCRA is "inconsistent with the carefully calibrated remedies available against the federal government under the Privacy Act," which

"comprehensively regulates Executive Branch agencies in their collection, maintenance, use, and dissemination of 'records' containing information about an 'individual,'" Pet'r Br. 35-36 (quoting 5 U.S.C. § 552a(a)(1)-(5) and (b)), and "authorizes only a limited scope of private civil actions," *id.* at 36 (quoting 5 U.S.C. § 552a(g)).

Yet it is entirely possible—indeed, likely—that Congress was aware of the Privacy Act and its limited remedies when it enacted the FCRA, and it decided that those remedies were insufficient to ensure the accuracy of consumer credit information. Congress easily could have made the judgment that violation of such accuracy requirements justified greater or different punishment from that authorized by the Privacy Act. It is not the role of this Court to second-guess that judgment.

The USDA also asserts that a plain-text reading of the FCRA's sovereign immunity provisions would necessarily subject *states*, not just the federal government, to suit, in violation of this Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that Congress cannot abrogate state sovereign immunity under its Commerce Clause authority. Even if the USDA's interpretation were correct, *but see* Resp. Br. 28-29 (arguing the FCRA's cause of action extends to states but is not sufficient to waive their immunity), it would not give this Court license to rewrite the FCRA in a case that involves *federal* sovereign immunity and is thus one in which Congress plainly has the authority to waive immunity. The bottom line is that this Court should not depart from the plain meaning of the FCRA's text because of speculation about how that text might apply in a different context.

For this Court to accept the USDA's invitation to raise the already-high bar for waiving sovereign immunity *after* Congress has already legislated would be especially problematic. "It is a commonplace of statutory interpretation that 'Congress legislates against the backdrop of existing law.'" *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013)). The law that existed in 1996 when Congress revised the FCRA's civil liability provision was clear, and remains so today: Congress may abrogate sovereign immunity by "making its intention unmistakably clear in the language of the statute." *Dellmuth*, 491 U.S. at 228. Awareness of the rules for waiving sovereign immunity allows Congress to act deliberately when it wants to do so. If this Court were permitted to change the rules of the game after-the-fact, it would essentially be rewriting the statute that Congress enacted, notwithstanding the myriad policy considerations that go into any waiver of sovereign immunity. *See* Nagle, *supra*, at 773 ("[I]nterpretive rules that Congress cannot satisfy when drafting a statute conflict with legislative supremacy.").

This Court has always been wary of engaging with such weighty questions—ones that it is ill-suited to answer. For instance, in the context of *Bivens*, this Court has cautioned that "the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide," an assessment that is more appropriately vested in Congress than the courts. *Ziglar v. Abbasi*, 582 U.S. 120, 136 (2017). There, as here, "the most important question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" *Hernandez*, 140 S. Ct. at 750 (quoting *Abbasi*, 582 U.S. at 135). "The correct

'answer most often will be Congress.'" *Id.* at 750 (quoting *Abbasi*, 582 U.S. at 135).

Just as this Court has cautioned against inferring a remedy where the text is not clear, so too should this Court refrain from foreclosing a remedy that Congress has expressly authorized. "The exemption of the sovereign from suit involves hardship enough where consent has been withheld." *United States v. Williams*, 514 U.S. 527, 541 (1995) (Scalia, J., concurring) (quoting *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383 (1949)). This Court should not "add to its rigor by refinement of construction where consent has been announced." *Id.*

* * *

At bottom, this case involves a straightforward exercise of statutory interpretation. The text of the FCRA clearly and unambiguously waives the federal government's sovereign immunity from suit. The USDA may "wish[] [the FCRA] said something else. But that is 'an appeal better directed to Congress.'" *Talevski*, 143 S. Ct. at 1455 (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part)). This Court should not indulge it.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

Respectfully submitted,

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