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

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

REPLY BRIEF FOR THE PETITIONER

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Although respondent frames his position as compelled by "clear statutory text," Br. 1, and "the 'literal language' of the statute," Br. 47 (citation omitted), he can point to nothing in the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, that "says in so many words that it is stripping immunity from a sovereign entity." *Financial Oversight & Management Board for Puerto Rico* v. *Centro De Periodismo Investigativo, Inc.*, 598 U.S. 339, 347 (2023). Ultimately, therefore, respondent appears to acknowledge that FCRA does not actually "address immunity expressly." Br. 37.

What respondent is really arguing, instead, is that FCRA contains an unwritten waiver of sovereign immunity. And such implicit waivers can be found, if at all, only where they are compelled "by such overwhelming implications from the text as will leave no room for

any other reasonable construction." *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 678 (1999) (brackets and citation omitted).

Respondent cannot satisfy that standard here. An essential premise of his argument (Br. 38) is that every cause of action broad enough to cover a sovereign automatically "carries with it" an implicit waiver of sovereign immunity. But if that were true, there would be no need for the freestanding waivers of sovereign immunity, found elsewhere in the U.S. Code, that exist only to allow suits under separately codified causes of action that already textually cover government entities. This Court has accordingly refused to find that generally worded causes of action like the ones at issue here are sufficient, by themselves, to implicitly waive sovereign immunity—even when it was undisputed that their terms would cover sovereign agencies. Respondent's efforts to distinguish those decisions, or argue that the Court has effectively overruled them, lack merit.

Rejecting respondent's expansive view of implicit sovereign-immunity waivers would in itself be sufficient to decide this case. But even if respondent were correct that every federal entity covered by a broadly worded cause of action automatically loses its sovereign immunity, it is far from clear that federal agencies are covered by 15 U.S.C. 1681n and 1681*o*. Even the court of appeals declined to embrace respondent's view that the statutory definition of "person" must be mechanically applied everywhere the word "person" appears in the statute. And the requisite contextual inquiry into whether the causes of action in Sections 1681n and 1681*o* incorporate that definition strongly favors instead interpreting "person" there in its natural sense,

which excludes the sovereign. Respondent's position would also produce multiple anomalies—such as putative application to immune States and an implicit override of the Privacy Act, 5 U.S.C. 552a—that he cannot explain. His failure to show even a clear cause of action against the government, let alone an explicit waiver of its sovereign immunity, thus provides an additional basis for reversal.

A. Respondent Identifies No Textual Waiver Of Sovereign Immunity For Actions Under 15 U.S.C. 1681n And 1681*o*

Respondent's arguments cannot supply the unequivocal and unambiguous waiver of sovereign immunity that FCRA's own text lacks. The broad implicit-waiver rule he urges cannot be squared with either congressional practice or judicial precedent.

1. As the government's opening brief explains (Br. 16-18), the most straightforward way in which Congress indicates its intent to waive or abrogate sovereign immunity "is when a statute says in so many words that it is stripping immunity from a sovereign entity." *Financial Oversight & Management Board*, 598 U.S. at 347.

The Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, for example, not only provides for "judicial review" by a plaintiff adversely affected by agency action, but also specifies that such an action "seeking relief other than money damages * * * shall not be dismissed * * * on the ground that it is against the United States." 5 U.S.C. 702. That express waiver is of a piece with others that Congress has directed to particular federal statutes or particular federal entities. See, *e.g.*, 15 U.S.C. 1122(a) (providing a "[w]aiver of sovereign immunity by the United States" for suits involving trademark violations) (emphasis omitted); 39 U.S.C. 409(d)(1)(B) (providing that the Postal Service "shall

not be immune under any other doctrine of sovereign immunity from suit in Federal Court" for violation of certain specified laws); Gov't Br. 16-17 (collecting additional examples).

Respondent, however, identifies no such waiver for actions under Sections 1681n and 1681*o*. Indeed, he ultimately appears to acknowledge (Br. 37) that Sections 1681n and 1681*o* do not "address immunity expressly." Respondent thus cannot show that Congress has "'unequivocally express[ed]' its intent to waive immunity 'in statutory text.'" Br. 12 (quoting *FAA* v. *Cooper*, 566 U.S. 284, 290 (2012)). Instead, he effectively asks the Court to infer that Congress meant to waive sovereign immunity when it amended FCRA in 1996, even though Congress did not expressly say that it was doing so.

2. This Court has held that courts may infer a sovereign-immunity waiver that Congress did not spell out explicitly only when the waiver is compelled by "overwhelming implications from the text," *College Savings Bank*, 527 U.S. at 678 (citation omitted), such as when Congress has adopted a cause of action that "expressly authorize[s] suit[] against sovereigns" in a manner that would be "negated" if sovereign immunity could be asserted as a defense, *Financial Oversight & Management Board*, 598 U.S. at 348. That is not the case here; even without application to the federal government, Sections 1681n and 1681*o* have myriad applications. Gov't Br. 24-25.

Respondent therefore relies on a much more sweeping conception of sovereign-immunity waivers—namely, that every federal cause of action broad enough to cover a sovereign automatically "carries with it" an implicit congressional waiver of sovereign immunity. Br. 38. That conception is unsupportable.

As an initial matter, it cannot be squared with longstanding congressional practice. As just discussed, Congress has adopted multiple provisions that exist solely to waive federal agencies' sovereign immunity to causes of action found elsewhere in the U.S. Code. If respondent were correct that every federal cause of action that is broad enough to apply to a federal agency also carries with it an implicit waiver of sovereign immunity, none of those freestanding express waivers of sovereign immunity would be necessary. Cf. *Sossamon* v. *Texas*, 563 U.S. 277, 290 (2011) ("It would be bizarre to create an 'unequivocal statement' rule and then find that every Spending Clause enactment, no matter what its text, satisfies that rule because it includes unexpressed, implied remedies against the States.").

Respondent's view is also inconsistent with multiple decisions of this Court. In *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), for example, the Court explained that merely identifying a "general authorization for suit in federal court" that is broad enough to cover a governmental entity is not sufficient to strip that entity of sovereign immunity. *Id.* at 246. Respondent argues that the statute there, which authorized suit against "any recipient of Federal assistance," 29 U.S.C. 794a(2) (1982), did not "'specifically' define[] 'recipient' to include states." Br. 41 (quoting *Atascadero State Hospital*, 473 U.S. at 245-246). But the Court in that case emphasized that the cause of action's coverage was still clear, noting that there was no claim "that the State of California is not a recipient of federal aid under the statute." 473 U.S. at 245-246. The Court nevertheless found the broadly worded cause of action insufficient, because nothing in that cause of action "specifically * * * abrogate[d]" sovereign immunity. *Ibid.*

The Court's decision in *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), is even clearer in its rejection of respondent's approach. *Id.* at 283-285; see Gov't Br. 25-27. The statute at issue there authorized suit against "[a]ny employer" who violated its minimum-wage and overtime provisions, 29 U.S.C. 216(b) (1970), and expressly defined "employer" to include state-owned hospitals. See *Employees of the Department of Public Health & Welfare*, 411 U.S. at 282-283. But while the "literal language" of the cause of action therefore "covered" state entities, *id.* at 283, the Court found that insufficient to "infer that Congress deprived Missouri of her constitutional immunity," *id.* at 285. The Court thus confirmed that a cause of action textually applicable to a sovereign defendant through a definitional provision does not, by itself, provide the "clear language" necessary to "indicat[e] * * * that the constitutional immunity was swept away." *Ibid.*

Respondent offers (Br. 45) a handful of factual distinctions between *Employees of the Department of Public Health & Welfare* and this case, but makes no meaningful attempt to argue that he could prevail under the rule the Court applied there. As the Court itself later approvingly explained, the decision in *Employees of the Department of Public Health & Welfare* found that a statute that "specifically covered the [sovereign defendants] in question" nevertheless "did not * * * express[] with clarity Congress's intention to supersede the [sovereign's] immunity from suits brought by individuals." *College Savings Bank*, 527 U.S. at 677. Applying that rule here, respondent's claims plainly fail.

Respondent therefore contends (Br. 46) that the Court should simply disregard *Employees of the De-*

partment of Public Health & Welfare on the theory that it reflects the "obsole[te]" mode of interpretation exemplified by this Court's since-overruled decision in *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964). But the flaw that led this Court to overrule *Parden* was that the decision too readily *inferred* a waiver of sovereign immunity in the absence of any express language to that effect. See, *e.g.*, *College Savings Bank*, 527 U.S. at 676-677. Overruling *Parden* thus made the standard for inferring a waiver of sovereign immunity more stringent, not less. As this Court has explained, *Employees of the Department of Public Health & Welfare* began the "retreat from *Parden*." *Id.* at 677. The fact that the Court continued that retreat in subsequent decisions casts only further doubt on respondent's attempt to broaden the circumstances in which courts will infer an unwritten waiver of sovereign immunity.

For example, respondent claims that in *Pennsylvania* v. *Union Gas*, 491 U.S. 1 (1989), the Court "held that Congress had abrogated state immunity when it amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) to 'explicitly include' states 'within the statute's definition of "persons."'" Br. 47 (quoting *Union Gas*, 491 U.S. at 7) (citation and brackets omitted). But there, not a single Justice accepted that inclusion of the States within the definition of "person" was sufficient by itself to establish clear congressional intent to abrogate immunity.[1] Instead, the Court found Congress's intent to ab-

[1] See 491 U.S. at 8 n.1 ("We do not say that CERCLA's definition of 'persons' alone overrides the States' immunity"); *id.* at 45 (White, J., joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ., concurring in the judgment in part and dissenting in part) (rejecting

rogate clear only because Congress had subsequently amended CERCLA to provide, *inter alia*, that "any State or local government which has caused or contributed to the release or threatened release of a hazardous substance * * * shall be subject to the provisions of this chapter in the same manner, and to the same extent, * * * as any nongovernmental entity." *Id.* at 8 (majority opinion) (quoting 42 U.S.C. 9601(20)(D)). Respondent can point to nothing like that here.

3. Contrary to respondent's suggestion (Br. 39-40), no decision of this Court supports his premise that every federal cause of action broad enough to cover a sovereign entity necessarily carries with it an implicit waiver of sovereign immunity. Respondent points (*ibid.*) to the Court's decisions in *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003), and *Coleman* v. *Court of Appeals of Maryland*, 566 U.S. 30 (2012) (plurality opinion). But the statutes at issue in those cases "all expressly authorized suits against sovereigns" by specifically calling out governmental entities as permissible defendants in the causes of action themselves. *Financial Oversight & Management Board*, 598 U.S. at 348; see 29 U.S.C. 216(b) (authorizing suits against "any employer (including a public agency)"); 29 U.S.C. 2617(a)(2) (same). Allowing as-

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the view that "because CERCLA includes 'States' within its definition of 'persons,' and because the statute makes 'persons' who are 'owners or operators' liable * * * , Congress expressed in CERCLA an 'unmistakably' clear intent to make the States liable to suit by private parties") (citations omitted). The Court subsequently overruled the separate portion of *Union Gas* holding that Congress has authority to abrogate state sovereign immunity through Commerce Clause legislation. See *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 72 (1996).

sertion of sovereign immunity would have rendered that language in the causes of action surplusage, "negat[ing]" Congress's express authorization. *Financial Oversight & Management Board*, 598 U.S. at 348; see Gov't Br. 18-20.[2]

Respondent asserts (Br. 40) that concerns about negating statutory language cannot explain the Court's decisions. Noting that the statute in *Kimel* defined "public agency" to include "public agency employers that lack immunity (such as political subdivisions)," respondent posits that inclusion of "public agency" directly in the cause of action itself would still have performed the role of enabling suits against political subdivisions even if state agencies were able to assert their immunity. *Ibid.* But the key point in *Kimel* was that the cause of action doubled down on the inclusion of "public agenc[ies]": Even though the statutory definition of "employer" already covered them, see 29 U.S.C. 203(d), the cause of action specifically emphasized that Congress was authorizing suits "against any employer (*including a public agency*)." 29 U.S.C. 216(b) (emphasis added). The only conceivable reason for Congress to expressly refer to "public agenc[ies]" once again in the statutory cause of action, alongside "employer[s]" more generally, was to make clear that sovereign defendants should be treated no differently than private employers. The "plain language" therefore "clearly demonstrate[d] Congress's intent to subject the States to suit for money damages," *Kimel*, 528 U.S. at 74, in a way that a cross-

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[2] In *Kimel* and *Coleman*, the Court held that Congress intended to abrogate the States' sovereign immunity but that it lacked constitutional authority to accomplish that abrogation. See *Kimel*, 528 U.S. at 91; *Coleman*, 566 U.S. at 35 (plurality); *id.* at 44-45 (Scalia, J., concurring in the judgment).

reference to the general definition of "employer" alone would not.

Such a cross-reference, however, is the most that respondent would have here. Even assuming that Sections 1681n and 1681*o* incorporate FCRA's general definition of "person," but see pp. 14-17, *infra*, they do not themselves specifically reference government agencies, as the statute in *Kimel* did. Thus, allowing sovereign defendants to assert a valid defense would not "'negate[]'" any "statutory language" in Sections 1681n and 1681*o*. Resp. Br. 37 (quoting *Financial Oversight & Management Board*, 598 U.S. at 348). Indeed, permitting a subset of the covered "person[s]" to raise a sovereign-immunity defense no more negates the terms of the cause of action than does permitting a different subset of covered "person[s]" to raise a statute-of-limitations defense or any other defense that is not directed at the merits of a plaintiff's claim. Respondent's contrary position would depart from this Court's precedent by "conflat[ing] two 'analytically distinct' inquiries": (1) "whether the source of substantive law upon which the claimant relies provides an avenue for relief" against a non-immune defendant, and (2) "whether there has been a waiver of sovereign immunity." *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (citation omitted).

It is at the very least plausible that Congress would have anticipated that a sovereign-immunity defense, like a statute-of-limitations or other defense, would be available in the subset of cases covered by Section 1681n and 1681*o* where the defense's prerequisites are met. As the government explained in its opening brief (Gov't Br. 24) and respondent does not appear to dispute (*e.g.*, Br. 41), that understanding would still give effect to all of the statutory text in both the causes of action them-

selves and the definitional section. Thus, unlike in certain prior cases, there is no textual basis—let alone an "overwhelming" one, *College Savings Bank*, 527 U.S. at 678—for inferring that Congress must have intended to waive sovereign immunity.

Instead, this case fits the paradigm of decisions in which the Court has recognized that combining a nonspecific substantive provision with a statute's expansively written "general definition" of a term does not necessarily "constitute a clear statement that Congress meant the statute" to have improbable effects, such as overriding a default rule of interpretation favoring a less expansive approach. *Bond* v. *United States*, 572 U.S. 844, 860 (2014); see *Abitron Austria GmbH* v. *Hetronic International, Inc.*, 600 U.S. 412, 419-421 (2023) (requiring "clear indication" of statute's extraterritorial application). Respondent denies (Br. 27) the relevance of those decisions on the theory that they read the relevant statutes narrowly and that FCRA's definitional provision cannot be so read. See Br. 27-28. But there was no doubt that the statutory definition of "commerce" in *Abitron Austria GmbH* covered foreign commerce, yet the Court explained that combining it with substantive provisions that did not "on [their] own signal[] extraterritorial application" was not enough to overcome the presumption against extraterritoriality. See 600 U.S. at 420.

The Court should likewise find here that combining FCRA's statutory definition of "person" with civil-liability provisions that "on [their] own" give no hint of a sovereign-immunity waiver would not be enough to overcome the strong presumption against sovereign-immunity waivers. *Abitron Austria GmbH*, 600 U.S. at 420; see *Bond*, 572 U.S. at 861 ("In settling on a fair

reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition.").

4. Respondent's reliance (Br. 17-19) on provisions of the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, and Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, is misplaced. Those statutes contain causes of action against "[a]ny creditor," 15 U.S.C. 1691e(a) and (b) (ECOA); see 15 U.S.C. 1640(a) (TILA), and define "creditor" broadly to include "government[s] or governmental subdivision[s] or agenc[ies]," 15 U.S.C. 1691a(e) and (f) (ECOA); 15 U.S.C. 1602(d), (e), and (g) (TILA); see Resp. Br. 17-18. They also contain provisions expressly preserving federal and state immunity from certain forms of liability. See 15 U.S.C. 1612(b) (TILA); 15 U.S.C. 1691e(b) (ECOA). Contrary to respondent's contention (Br. 18-19), however, their inclusion of such disclaimers does not imply that FCRA needs one to avoid waiving sovereign immunity.

Because waivers of sovereign immunity must be "unequivocal[]," *Cooper*, 566 U.S. at 290, "[w]aiver cannot be found * * * merely because one provision of an act fails to contain an express exclusion of [sovereign] liability that other provisions of the act do contain," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 282 (2012). In any event, the differences between TILA, ECOA, and FCRA are readily explained by the timing of the relevant enactments. Congress adopted the relevant provisions in TILA and ECOA in 1968 and 1976, respectively. See Pub. L. No. 90-321, Tit. I, § 113, 82 Stat. 151 (1968); Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-

239, § 6, 90 Stat. 253-254.[3] As respondent himself emphasizes (Br. 43-46), the Court's approach to waivers of sovereign immunity at that time was in flux, with the Court sometimes showing a willingness to infer a waiver from the general "purpose" of a statute even where the text did not expressly supply one, Br. 44 (quoting *Parden*, 377 U.S. at 189). In that context, Congress may have chosen to preserve sovereign immunity explicitly, out of an understandable abundance of caution. By 1996, however, when Congress amended Sections 1681n and 1681*o*, this Court had made clear that it would not find a waiver of immunity absent an "unequivocal expression of congressional intent," *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 99 (1984), obviating any need for an express disclaimer.

Moreover, while pointing to TILA and ECOA to argue that Congress could have more clearly *preserved* sovereign immunity, respondent looks past the numerous examples, identified in the government's opening brief, demonstrating how Congress could have more clearly *waived* sovereign immunity. See Gov't Br. 14 (provision stating that the Postal Service "shall be considered to be a 'person'" for purposes of specified trademark and consumer protection laws, and separately stating that it "shall not be immune" from suits under those laws) (citations omitted); *id.* at 23-24 (statutes in which Congress authorized suit against "any person, including the United States") (citation omitted). At most, the availability of clear models that would either more expressly create, or more expressly disclaim, a sovereign-

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[3] The court of appeals stated that Congress adopted the relevant provisions of TILA and ECOA in 1980 and 1991, respectively. See Pet. App. 13a n.8. As the citations in the text demonstrate, that statement was incorrect.

immunity waiver simply situates Sections 1681n and 1681*o* in the wide category of ambiguous provisions—to which the Court applies a default rule that preserves sovereign immunity. See, *e.g.*, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

B. Respondent Fails Even To Establish That Sections 1681n And 1681*o* Unambiguously Create Causes Of Action That Encompass The United States

The absence of a textual waiver of sovereign immunity is in itself a sufficient basis for reversing the court of appeals' erroneous decision to allow respondent to sue a federal agency under Sections 1681n and 1681*o*. But respondent's position also fails for a second, independent reason—namely, that those causes of action do not even unambiguously encompass the United States. That defeats the very premise of his argument that the causes of action should be read as a waiver of the United States' sovereign immunity.

1. Respondent asserts that "FCRA's definition of 'person' is not 'context dependent,'" Br. 19 (emphasis omitted), and should therefore be applied invariably in every place where the word "person" appears in the statute. But even where sovereign immunity is not at stake, this Court has rejected such a wooden approach. Instead, it has explained that "a statutory term—even one defined in the statute—'may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.'" *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 320 (2014) (quoting *Environmental Defense* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007)). Accordingly, even the court of appeals agreed that a court should not "apply[] the FCRA's definition of 'person' to" 15 U.S.C. 1681q, as "[i]t would be absurd" to read Section 1681q

as subjecting the United States to criminal liability. Pet. App. 22a-23a; see Gov't Br. 30-31.

Going further than even the court of appeals, respondent hypothesizes (Br. 22) that Congress may actually have intended to authorize criminal prosecutions of the United States under FCRA. But the sole support he offers for that suggestion (*ibid.*) is a statute concerning medical-waste management that not only expressly defines "person" to "includ[e] each department, agency, and instrumentality of the United States," but also expressly provides that "[e]ach department, agency, and instrumentality" of the United States "shall be subject to, and comply with," "all administrative orders, civil, criminal, and administrative penalties, and other sanctions" "in the same manner, and to the same extent, as any person" and "expressly waives any immunity otherwise applicable to the United States." 42 U.S.C. 6992e(a) and (b). The directness with which Congress spoke there to three different things—the definition of "person," the waiver of sovereign immunity, and the waiver's inclusion of provisions prescribing "criminal * * * penalties"—confirms that Congress would not have understood its mere use of the word "person" in Section 1681q to subject the United States to criminal punishment. See *United States* v. *Cooper Corp.*, 312 U.S. 600, 607 (1941) (explaining that where the statutory "phrase designating those liable criminally is 'every person who shall,'" it is "obvious that while the term 'person' may well include a corporation it cannot embrace the United States").[4]

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[4] Similarly, the statutes that respondent identifies (Br. 24-25) as explicitly authorizing enforcement suits against federal agencies by other federal agencies or the States serve only to confirm that Con-

As a fallback, respondent argues that even if background principles preclude "prosecuting a federal agency" under Section 1681q, courts can still "apply[] 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." Br. 22-23 (emphasis added). But that argument undermines, rather than supports, respondent's position. It reflects recognition that even if a FCRA liability provision is broad enough by its terms to cover both entities that possess immunity and entities that do not, the cause of action need not be read to take the "analytically distinct" step, *Meyer*, 510 U.S. at 484 (citation omitted), of waiving the former group's immunity.

2. Attempting, in the alternative, to distinguish Sections 1681n and 1681*o* from Section 1681q, respondent relies on *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343 (1997), for the proposition that "[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 sections and in all other contexts.'" Br. 21-22 (quoting *Robinson*, 519 U.S. at 343). But respondent never explains how that proposition is consistent with his overarching view that "FCRA's definition of 'person' is not 'context dependent.'" Br. 19 (emphasis omitted). And to the extent that he does, in fact, embrace *Robinson*, he is recognizing that "'each section must be analyzed to determine whether the context' resolves 'the issue in dispute,'" Br. 22 (quoting *Robinson*, 519 U.S. at 343-344)—an approach under which his attempt to unambiguously include the United States as a "person" in Sections 1681n and 1681*o* cannot succeed.

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gress speaks more directly when it intends to authorize such unusual proceedings.

As the Court explained in *Robinson*, "[o]nce it is established that [a] term [means one thing] in some sections, but not in others, the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." 519 U.S. at 343-344. Here, the recognition that Congress could not have used the term "person" in a sense that includes the United States in Section 1681q means that "the term standing alone is necessarily ambiguous" when it appears in nearby Sections 1681n and 1681*o*, and nothing about the "context" of those civil-liability provisions clarifies—let alone unambiguously—that Congress intended them to reach sovereign defendants. *Ibid.* To the contrary, it would have been natural for Congress to anticipate that the civil- and criminal-liability provisions, with their identical references to "[a]ny person," would be interpreted in the same way. 15 U.S.C. 1681n(a), 1681*o*(a), 1681q.

C. Respondent's Position Creates Inexplicable Incongruities

Respondent also cannot explain the incongruities produced by reading Sections 1681n and 1681*o* to authorize private damages actions against the United States.

1. As the court of appeals recognized (Pet. App. 24a), there is no way to read Sections 1681n and 1681*o* as expressing Congress's intent to set aside the sovereign immunity of the federal government but not the sovereign immunity of individual States. The path through which the language might encompass federal and state entities is identical; Congress either intended to eliminate the defense for both, or neither.

It is thus highly relevant that Congress adopted the FCRA amendments at issue here just months after this Court held that Congress had exceeded its constitutional authority by purporting to abrogate the States' sovereign immunity through Commerce Clause legislation. See *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 47, 72 (1996). Against that backdrop, for Congress to attempt a new Commerce Clause-based abrogation of the States' sovereign immunity in FCRA would have been "insurrectionary." *Robinson* v. *United States Department of Education*, 917 F.3d 799, 805 (4th Cir. 2019), cert. denied, 140 S. Ct. 1440 (2020); see Gov't Br. 33-34.

Congress does not lightly flout this Court's decisions. And respondent cannot explain why it would have tried to do so here. Instead, he urges (Br. 28) the Court to simply disregard the implausibility of such congressional action, asserting that the point "is not grounded in any canon of statutory construction." But for more than two centuries, courts have given effect to "the legislature's desire that its laws be constitutional" by applying the constitutional-avoidance canon. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 142-143 (2010); see, *e.g.*, *United States* v. *Coombs*, 37 U.S. (3 Pet.) 72, 76 (1838) (Story, J.) ("[A] presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous."). That canon applies here, supporting an interpretation of Sections 1681n and 1681*o* that would avoid rendering them unconstitutional in their application to unconsenting States. See *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005) (explaining the Court's practice of "giv[ing] a statute's

ambiguous language a limiting construction called for by one of the statute's applications, even [if] other of the statute's applications, standing alone, would not support the same limitation").

Respondent also suggests (Br. 29) that Congress may have intended simply to provide "the necessary textual basis to authorize suit against state entities if the state does not assert constitutional immunity." But as with respondent's similar argument regarding Section 1681q, see p. 16, *supra*, that suggestion undermines rather than supports his position that Sections 1681n and 1681*o* inherently eliminate sovereign immunity. It instead recognizes that Congress could have understood those provisions to establish causes of action without also (unconstitutionally, in the case of States) implying the elimination of the sovereign-immunity defense.

2. Respondent likewise lacks a sound reason why Congress, if it intended to waive sovereign immunity for suits against federal agencies under Sections 1681n and 1681*o*, would not have specifically named federal agencies as potential defendants, as it had done just months earlier in Section 1681u(j). See 15 U.S.C. 1681u(j) (providing that "[a]ny agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer" for damages); Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, Tit. VI, sec. 601(a), § 624(i), 109 Stat. 976-977 (15 U.S.C. 1681u); see also Gov't Br. 34-35. Section 1681u(j) is consistent with the model in decisions like *Kimel* and *Hibbs* for waiving sovereign immunity through a sovereign-specific reference in the cause of action; Sections 1681n and 1681*o* are not.

Respondent suggests (Br. 30) that the specific reference to federal agencies in Section 1681u(j) was necessary because "[i]f Congress had instead used the word 'person' * * * the cause of action would also apply to consumer reporting agencies." But the substantive restrictions on "obtaining or disclosing" consumer reports found in Section 1681u apply only to federal agencies, see Pet. App. 18a, so consumer reporting agencies could not have been liable under Section 1681u(j) even if Congress had used the term "person." 15 U.S.C. 1681u(j). Instead, Congress's specific focus on the activities of federal agencies, and specific authorization of suit against those agencies, shows the normal deliberateness and clarity of a sovereign-immunity waiver—deliberateness and clarity that are entirely missing from Sections 1681n and 1681*o*.

3. Respondent also cannot meaningfully explain another anomaly—that applying FCRA's general civil-liability provisions to federal agencies would allow plaintiffs to circumvent the tailored, government-specific enforcement regime that Congress adopted in the Privacy Act. See Govt' Br. 35-38.

As respondent acknowledges (Br. 32-33), Congress amended the Privacy Act in 1996, shortly before adopting the amendments to Sections 1681n and 1681*o* at issue here, to make reporting to credit reporting agencies mandatory for federal agencies in certain circumstances. See Debt Collection Improvement Act of 1996, Pub. L. 104-134, Tit. III, ch. 10, § 31001(k)(1), 110 Stat. 1321-365 (31 U.S.C. 3711(e)). That mandatory reporting requirement differentiates federal agencies from private creditors, who "furnish [consumer reporting agencies] with consumer information only on a volun-

tary basis." *Hammer* v. *Equifax Information Services, L.L.C.*, 974 F.3d 564, 568 (5th Cir. 2020).

At the same time, Congress also preserved the Privacy Act's distinctive remedies, which—unlike those in FCRA—authorize injunctive relief to correct reporting errors, but permit money damages to be awarded only where an agency has "intentional[ly] or willful[ly]" refused to take certain specified actions and the plaintiff has suffered "actual damages." 5 U.S.C. 552a(g)(4)(A); see 5 U.S.C. 552a(g)(2)(A). Respondent asserts (Br. 33) that the Privacy Act's remedies "can live comfortably alongside FCRA's damages remedies for negligent or willful failures to investigate consumer complaints." But if individuals suing under FCRA can obtain up to $1000 in statutory damages from the government for willful violations without needing to show actual damages, see 15 U.S.C. 1681n(a)(1), and can obtain actual damages from the government without needing to show anything more than "negligen[ce]," 15 U.S.C. 1681*o*(a), they would never need to invoke the government-specific remedies that Congress adopted in the Privacy Act for credit-reporting errors by federal agencies.

Respondent offers no sound reason why the more general FCRA provisions would override the more specific one in the Privacy Act. Cf. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("It is a commonplace of statutory construction that the specific governs the general.") (brackets and citation omitted). This Court would not normally interpret a general remedial provision to allow circumvention of a more specific and limited one. See *Fitzgerald* v. *Barnstable School Committee*, 555 U.S. 246, 254-255 (2009) (explaining that the Court has declined to apply the private right of action under 42 U.S.C. 1983 in circum-

stances where it would "'[a]llow a plaintiff to circumvent' [more specific] statutes' [remedial] provisions" and obtain "tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under th[ose] statutes") (citation omitted). And such an interpretation is all the more unwarranted when it involves the effective expansion of the Privacy Act's limited waiver of sovereign immunity.

4. Finally, respondent cannot explain why, if Congress did intend to open up federal coffers to damages suits under Sections 1681n and 1681*o*, no Member of Congress said a word about it. See Gov't Br. 38-39. He instead acknowledges the "silence in the legislative history," Br. 34, and simply asserts that "[l]egislative silence * * * cannot defeat clear statutory text," Br. 35. But as discussed above, and in the government's opening brief, there is no "clear statutory text" in FCRA that waives the United States' sovereign immunity.

Respondent's argument is founded not on "clear statutory text," but instead on an inference that he would draw from a cross-reference in a cause of action. In evaluating that argument, it is worth noting that no Members of Congress indicated the intent respondent would ascribe to them. See *Quern* v. *Jordan*, 440 U.S. 332, 342-343 (1979) (refusing to infer "that Congress intended by the general language of" a statute "to overturn the constitutionally guaranteed immunity of the several States" where it was "passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment").

There was no discussion of waiving sovereign immunity in debates on the bill—let alone in the statute those debates produced. The absence of the requisite textual waiver thus means here precisely what the

canon against implicit sovereign-immunity waivers presumes: that Congress did not make a deliberate choice to waive the sovereign immunity of the United States. See Gov't Br. 15-16.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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