No. 19-512

In the Supreme Court of the United States

ANTHONY ROBINSON, PETITIONER

v.

DEPARTMENT OF EDUCATION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the civil-liability provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, unequivocally and unambiguously waive the sovereign immunity of the United States.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Md.):

Robinson v. *Pennsylvania Higher Education Assistance Agency*, No. 15-cv-79 (Apr. 3, 2017)

United States Court of Appeals (4th Cir.):

Robinson v. *United States Department of Education*, No. 18-1822 (Mar. 6, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-22) is reported at 917 F.3d 799. The opinion of the district court (Pet. App. 23-30) is not published in the Federal Supplement but is available at 2017 WL 5466673. A prior opinion of the district court (Pet. App. 31-44) also is not published in the Federal Supplement but is available at 2017 WL 1277429.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2019. A petition for rehearing was denied on May 7, 2019 (Pet. App. 1-2). The petition for a writ of certiorari was filed on August 5, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sued the Department of Education and other parties for alleged violations of the Fair Credit

Reporting Act (FCRA or 1970 Act), Pub. L. No. 91-508, Tit. VI, 84 Stat. 1127 (15 U.S.C. 1681 *et seq.*), and sought actual, statutory, and punitive damages, plus attorney's fees and costs. See Complaint ¶ 1. The district court dismissed the complaint for lack of subject-matter jurisdiction. Pet. App. 23-30. The court of appeals affirmed. *Id.* at 3-22.

1. The Department of Education administers the William D. Ford Federal Direct Loan Program, under which it makes loans to enable students and parents to pay the costs of attendance at postsecondary schools. See 20 U.S.C. 1087a; 34 C.F.R. 685.100 *et seq.* Petitioner alleges that he "'discovered that there were Direct Loan student loan accounts being reported to his Experian, Equifax, and Trans Union credit reports,' even though he did not 'authorize a student loan account to be opened in his name.'" Pet. App. 5 (citations omitted). Petitioner sued the Department of Education; the Pennsylvania Higher Education Assistance Agency, which services student loans for the Department; and three consumer reporting agencies. See *ibid.* As relevant here, petitioner alleged that the Department violated FCRA by "'failing to fully and properly investigate [petitioner's] disputes'" and "'failing to review all relevant information' related to his claim." *Id.* at 6 (citations omitted).

As originally enacted in 1970, FCRA principally imposed duties only on "consumer reporting agencies." *E.g.*, 1970 Act, § 602, 84 Stat. 1128. Those are entities engaging in "assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." § 603(f), 84 Stat. 1129; see §§ 604-605, 607-614, 84 Stat. 1129-1133. Congress's express goal in imposing

those duties was "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit * * * in a manner which is fair and equitable to the consumer" and with "respect for the consumer's right to privacy." § 602(a)(4) and (b), 84 Stat. 1128; see *TRW Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001). In its remedial provisions, the 1970 Act imposed civil liability on "[a]ny consumer reporting agency or user of information" that violated FCRA's provisions, including punitive damages and costs for willful violations. §§ 616-617, 84 Stat. 1134. It also imposed criminal liability on officers and employees of consumer reporting agencies who disclosed consumer information without authorization. § 620, 84 Stat. 1134.

The 1970 Act contained one provision imposing duties on a "person" and one provision imposing liability on a "person." Section 606 imposed certain conditions on when a "person" could "procure or cause to be prepared an investigative consumer report on any consumer." § 606(a), 84 Stat. 1130; see § 606(b), 84 Stat. 1130. And Section 619 imposed criminal liability on "[a]ny person" obtaining consumer information "under false pretenses." § 619, 84 Stat. 1134. The 1970 Act defined "person" to include "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." § 603(b), 84 Stat. 1128. The 1970 Act did not otherwise contain any substantive or remedial provisions applying to "persons," as opposed to "consumer reporting agencies" or "users of information." Instead, the statute used "person" or "persons" only in provisions imposing duties on consumer reporting agencies. *E.g.*, § 604(3), 84 Stat. 1129 (identifying circumstances in which a consumer reporting agency may furnish a

consumer report to a "person"); § 613(1), 84 Stat. 1133 (requiring consumer reporting agencies to make disclosures to consumers about "the name and address of the person to whom [certain] information is being reported"); see, *e.g.*, §§ 607, 610-612, 615, 620, 84 Stat. 1130-1134.

In 1996, Congress amended FCRA by expanding its regulatory focus from consumer reporting agencies to include persons who furnish information to those agencies and who use credit reports. See Consumer Credit Reporting Reform Act of 1996 (1996 Act), Pub. L. No. 104-208, Div. A, Tit. II, Subtit. D, Ch. 1, 110 Stat. 3009-426. As relevant here, a newly enacted provision obligated a "person" to conduct an investigation and take specific steps "[a]fter receiving notice * * * of a dispute with regard to the completeness or accuracy of any information provided by [the] person to a consumer reporting agency." Sec. 2413, § 623(b)(1), 110 Stat. 3009-448; see 15 U.S.C. 1681s-2(b)(1). The 1996 Act also amended FCRA's remedial provisions to apply to "[a]ny person," not just to "[a]ny consumer reporting agency or user of information." 1996 Act, Sec. 2412(a) and (d), 110 Stat. 3009-446; see 15 U.S.C. 1681n and 1681*o*. It also added provisions for statutory damages and attorney's fees. 1996 Act, Sec. 2412(b), (c), and (e), 110 Stat. 3009-446 to 3009-447; see 15 U.S.C. 1681n and 1681*o*. And it authorized both the Federal Trade Commission (FTC) and state governments to bring actions against "person[s]" who violate FCRA, including to obtain damages and injunctive relief. 1996 Act, Secs. 2416 and 2417, 110 Stat. 3009-450 to 3009-452; see 15 U.S.C. 1681s. (The Bureau of Consumer Financial Protection now shares that enforcement authority with the FTC. See Dodd-Frank Wall Street Reform and Consumer Protection

Act, Pub. L. No. 111-203, Tit. X, Subtit. H, § 1088(a)(10), 124 Stat. 2088-2090 (15 U.S.C. 1681s(b)(1)(H)).)

Alleging that the Department violated the FCRA provision requiring a "person" to conduct an investigation after receiving notice that it may have provided inaccurate information to a consumer reporting agency, 15 U.S.C. 1681s-2(b)(1), petitioner sought compensatory, statutory, and punitive damages under 15 U.S.C. 1681n and 1681*o*. See Pet. App. 6. As relevant here, the government moved to dismiss petitioner's claims against the Department on the ground that although FCRA's definition of "person" includes "government or governmental subdivision or agency," 15 U.S.C. 1681a(b), that does not clearly and unambiguously waive the sovereign immunity of the United States for purposes of imposing damages. See Pet. App. 6.

2. The district court dismissed petitioner's claims against the Department, Pet. App. 31-44, and denied reconsideration of that dismissal, *id.* at 23-30. Citing this Court's decision in *Lane* v. *Peña*, 518 U.S. 187 (1996), the district court recognized that "[a] waiver of sovereign immunity 'must be unequivocally expressed in statutory text and will not be implied.'" Pet. App. 41 (citation and ellipsis omitted). The court explained that FCRA did not contain any language analogous to the clear waivers of sovereign immunity contained in other statutes, like the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1), or the Tucker Act, 28 U.S.C. 1346(a)(1). Pet. App. 41. The court also observed that FCRA itself contains a provision stating that "any agency or department of the United States" may be held liable for damages for unlawfully disclosing consumer reports to the FBI. See *id.* at 42 (quoting 15 U.S.C. 1681u). The court

explained that "such language in § 1681u would be superfluous and unnecessary" if Sections 1681n and 1681*o* already imposed damages liability on the federal government. *Ibid.* The court also observed that reading "person" to include the United States would expose the federal government not just to actual and statutory damages, but also to punitive damages and criminal liability. *Id.* at 42-43. The court found it "inconceivable that Congress intended such a result absent a clear statement." *Id.* at 43.

3. The court of appeals affirmed. Pet. App. 3-22. The court recognized that whether FCRA waived the sovereign immunity of the United States was to be determined by "the text of the statute." *Id.* at 10. The court explained that such a waiver "'must be unequivocally expressed in statutory text,'" must be "unambiguous," and "'will not be implied.'" *Id.* at 9 (citation omitted). The court further explained that statutory text is ambiguous, and thus precludes a finding of a waiver of sovereign immunity, "if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Ibid.* (quoting *FAA* v. *Cooper*, 566 U.S. 284, 290-291 (2012)).

The court of appeals acknowledged that FCRA extends civil liability to a "person" in 15 U.S.C. 1681n and 1681*o*, see Pet. App. 10, and that Section 1681a(b) defines "person" to include a "government or governmental subdivision or agency," *id.* at 11 (citation omitted). But the court explained that the "'longstanding interpretive presumption that "person" does not include the sovereign' * * * applies even when 'person' is elsewhere defined by statute." *Ibid.* (citation omitted). The court observed (*ibid.*), for example, that in *Bond* v. *United States*, 572 U.S. 844 (2014), this Court recognized that

"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." *Id.* at 861.

Applying those principles, the court of appeals found that FCRA did not unambiguously or unequivocally waive sovereign immunity for purposes of liability under Sections 1681n and 1681*o*. The court observed that "statutes waiving sovereign immunity are normally quite clear," Pet. App. 12, such as the Little Tucker Act, 28 U.S.C. 1346(a)(2), the Federal Tort Claims Act, 28 U.S.C. 2674, and other federal statutes, see Pet. App. 12-13 (listing examples). The court explained that petitioner relied on "a far more abbreviated and less clear expression" to establish a waiver of sovereign immunity under FCRA. *Id.* at 13. The court also found FCRA's "explicit waiver of sovereign immunity" in Section 1681u "plain as day," and explained that "[t]he stark contrasts between FCRA's civil liability provisions" and those other examples "serve as strong evidence that Congress did not waive sovereign immunity" in the FCRA provisions at issue here. *Id.* at 14-15.

The court of appeals also explained that reading FCRA to waive sovereign immunity here would lead to absurd results. The court explained that one reason a waiver of sovereign immunity must be "unambiguous and unequivocal" is "to prevent the inadvertent imposition of massive monetary loss" on the government. Pet. App. 9. The court observed, however, that the purported waiver here "would be a very casual one" that could expose the government to massive liability, given its status as "the nation's largest employer and lender." *Id.* at 15. The court also observed that FCRA imposes criminal liability on a "person," and "the prospect of the

government bringing criminal charges against itself" would be "awkward." *Id.* at 16.

Similarly, the court of appeals explained that the FTC, the Bureau of Consumer Financial Protection, and States may civilly enforce FCRA, and "the prospect of the [Bureau's] pursuing a civil action against the United States" or the possibility that the federal government would "expose its fisc to the suits of state attorneys general in such an offhanded manner" would be "odd" and "anomalous," respectively. Pet. App. 17. And the court explained that because the phrase "'any government'" includes state, tribal, and foreign governments, reading FCRA to waive sovereign immunity would potentially "compromise treaties," "undermine principles of international comity," "cast aside a history of tribal immunity," and "ignore constitutional limits on federal abrogation of state sovereign immunity." *Id.* at 17-18.

The court of appeals observed that the Ninth Circuit also had held in *Daniel* v. *National Park Service*, 891 F.3d 762 (2018), that FCRA does not waive sovereign immunity. See Pet. App. 21. The court explained that *Daniel* "employed a holistic approach in interpreting FCRA to preserve federal sovereign immunity." *Ibid.* (emphasis omitted). The court acknowledged that the Seventh Circuit had reached the opposite conclusion in *Bormes* v. *United States*, 759 F.3d 793 (2014), but also observed that the Seventh Circuit had since "retreated from *Bormes* by upholding tribal sovereign immunity under FCRA, even though federal and tribal governments equally qualify as 'any government' under" the statute. Pet. App. 21 (quoting *Meyers* v. *Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 826 (7th Cir. 2016), cert. denied, 137 S. Ct. 1331 (2017)).

ARGUMENT

Petitioner renews his contention (Pet. 34-48) that FCRA's remedial provisions effect a waiver of the sovereign immunity of the United States. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court. Although petitioner correctly identifies (Pet. 35-37) a division of authority among the circuits on this question, the only circuit to find a waiver of sovereign immunity in FCRA has since retreated from that position in a subsequent published decision. Any residual tension in the case law thus does not warrant this Court's review.

1. a. The court of appeals correctly held that FCRA's civil damages provisions do not contain the "unequivocal" waiver of sovereign immunity that is necessary to subject the United States to damages actions. *United States Department of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992); see *Lane* v. *Peña*, 518 U.S. 187, 192 (1996). As this Court has explained in the analogous context of state sovereign immunity, "[t]he requirement of a clear statement in the text of [a] statute ensures that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter," rather than "'legislat[ing] on a sensitive topic inadvertently or without due deliberation.'" *Sossamon* v. *Texas*, 563 U.S. 277, 290-291 (2011) (citation omitted); see *id.* at 285 n.4 (observing that the requirement of an "unequivocally expressed" waiver applies equally to state and federal sovereign immunity). The requirement of a clear and unequivocal waiver also ensures that courts will not mistakenly impose burdens on the fisc that Congress did not authorize. See *Office of Personnel Management* v. *Richmond*, 496 U.S. 414, 428, 432 (1990).

Nothing in the text or statutory history of Section 1681n, Section 1681*o,* or the other FCRA provisions at issue here contains an unambiguous and unequivocally expressed waiver of sovereign immunity. Petitioner's argument to the contrary is easily summarized: because Congress defined "person" in the original 1970 Act to include any "government or governmental subdivision or agency," 1970 Act § 603(b), 84 Stat. 1128 (15 U.S.C. 1681a(b)), the 1996 provisions of FCRA imposing liability on "person[s]" also impose liability on the United States. Petitioner's argument is unsound.

The 1970 Act plainly did not waive the sovereign immunity of the United States. As petitioner acknowledges (Pet. 6), FCRA as originally enacted principally regulated "consumer reporting agenc[ies]": entities that aggregate and disseminate personal information about consumers for use by third parties. 1970 Act § 603(f), 84 Stat. 1129; see §§ 604-605, 607-614, 84 Stat. 1129-1133. Consistent with that focus, the civil liability provisions applied only to "consumer reporting agenc[ies]" and "user[s] of information"—not to "person[s]." §§ 616-617, 84 Stat. 1134.

Moreover, Congress did not intend the United States to be deemed a "person" for every provision of the 1970 Act. For example, Section 619 imposed criminal liability, including imprisonment for up to one year, on any "person who knowingly and willingly obtains information on a consumer from a consumer reporting agency under false pretenses." 84 Stat. 1134 (15 U.S.C. 1681q). As the Ninth Circuit has recognized, Congress "never would have thought [that provision] applied to the United States." *Daniel* v. *National Park Service*, 891 F.3d 762, 775 n.12 (2018); see *United States* v. *Cooper Corp.*, 312 U.S. 600, 609 (1941) (explaining that "person" in the

antitrust laws must exclude the United States because otherwise it would subject the federal government to criminal liability); cf. *Return Mail, Inc.* v. *United States Postal Service*, 139 S. Ct. 1853, 1863 & n.4 (2019) (observing that a provision relieving the Patent Office of certain confidentiality obligations when "'a person'" is charged "with a criminal offense" is an example of a use of "person" that "plainly excludes the Government") (citation omitted). It is thus clear that notwithstanding the definition of "person" in the 1970 Act, Congress did not intend to waive the sovereign immunity of the United States for purposes of imposing liability.

The 1996 Act cannot properly be construed to change that conclusion. Although that statute expanded FCRA's scope from consumer reporting agencies to include "persons" who provide information to reporting agencies and who make use of credit reports, *e.g.*, Secs. 2403 and 2411, 110 Stat. 3009-430 to 3009-431, 3009-443 to 3009-446 (15 U.S.C. §§ 1681b(b)(2)-(3) and 1681m(a)), its expanded remedial provisions do not contain any language expressing an "unequivocal" waiver of federal sovereign immunity, *Ohio*, 503 U.S. at 615. For example, the 1996 Act increased the criminal penalties applicable to "person[s]," Sec. 2415, 110 Stat. 3009-450 (15 U.S.C. 1681q); added provisions permitting the FTC and state governments to sue "person[s]" in federal court for FCRA violations, including for civil penalties, Secs. 2416 and 2417, 110 Stat. 3009-450 to 3009-452 (codified as amended at 15 U.S.C. 1681s); and made the statute privately enforceable against "person[s]" for actual, statutory, and punitive damages, plus costs and attorney's fees, Sec. 2412, 110 Stat. 3009-446 to 3009-447 (15 U.S.C. 1681*o*).

Yet nothing in the 1996 Act suggests that any of those expanded provisions was intended to apply to the

United States (or state, tribal, or foreign governments). And because the 1970 Act also did not waive sovereign immunity, the combination of the two statutes cannot be read to have impliedly created such a waiver. As this Court has explained, "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." *Lane*, 518 U.S. at 192 (citation omitted).

Employees of the Department of Public Health & Welfare v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973) (*Employees*), illustrates the Court's general refusal to interpret amendments to an existing scheme as allowing new damages actions against the sovereign when neither the text nor history of the amendments affirmatively demonstrates that Congress intended that result. *Employees* concerned an amendment to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, that expanded the statutory definition of "employer" to include state hospitals. See 411 U.S. at 282-283. The FLSA already provided for civil remedies, including back pay and liquidated damages, against "[a]ny employer who violates the" FLSA's minimum-wage and overtime provisions. *Id.* at 283 (citation omitted). Yet the Court held that the amendment's expansion of the term "employer" to include state hospitals did *not* expose the States who ran those hospitals to damages liability otherwise applicable to an "employer." See *id.* at 284-286. The Court stated that Congress *could* "place new or even enormous fiscal burdens on the States." *Id.* at 284. But under the unequivocal-waiver rule described above, the Court found the FLSA amendments wanting: "[W]e have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible * * * to sue the

State," and therefore "[i]t is not easy to infer that Congress * * * desired silently to deprive the States of an immunity they have long enjoyed under * * * the Constitution." *Id.* at 285.

In *Employees*, Congress expanded a statutory definition of "employer" without amending the substantive liability provisions applicable to "any employer." Here, Congress expanded FCRA's liability provisions to reach "any person" without amending the statutory definition of "person." In neither case, however, did Congress include affirmative language unequivocally waiving sovereign immunity. As with the FLSA amendment in *Employees*, therefore, the 1996 Act should not be read to have exposed the United States to damages liability under FCRA, even on the assumption that the "literal language" of the definitional provision might plausibly be read to impose such liability. *Employees*, 411 U.S. at 283. Indeed, this Court has long refused to read statutes to have waived the sovereign immunity of the United States absent a clear and unambiguous statement, even when the statute could reasonably be read to the contrary. *E.g.*, *United States* v. *Idaho ex rel. Director, Idaho Department of Water Resources*, 508 U.S. 1, 7 (1993); *Library of Congress* v. *Shaw*, 478 U.S. 310, 323 (1986); *Employees*, *supra*; *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 20-21 (1926). Petitioner provides no sound basis to depart from those precedents here.

Reading FCRA as having preserved the sovereign immunity of the United States (as well as state, tribal, and foreign governments) does not render the inclusion of "government or governmental subdivision or agency" in the definition of "person" in 15 U.S.C. 1681a(b) su-

perfluous. That inclusion renders the substantive duties of a consumer reporting agency with respect to a "person" equally applicable with respect to a government or governmental subdivision or agency. See, *e.g.*, 15 U.S.C. 1681b (describing various circumstances under which a consumer reporting agency may furnish a consumer report to a "person"); 15 U.S.C. 1681c-1(i)(4) (describing exceptions to the requirement to place a security freeze on the making of a consumer report if the request is by a "person" for certain enumerated uses). And as the court of appeals stated (Pet. App. 19), FCRA's substantive requirements that apply to "persons" also could be read as applying to governmental bodies. At all events, as the court recognized, "the substantive and enforcement provisions in FCRA are not one and the same." *Ibid.* This Court has made clear that sovereign immunity must be evaluated on a provision-by-provision basis. *E.g.*, *Idaho Department of Water Resources*, 508 U.S. at 8. At a minimum, reading FCRA to exclude the United States (and other governments) from the civil-liability provisions "is a plausible interpretation of the statute" and therefore must be adopted in this context. *FAA* v. *Cooper*, 566 U.S. 284, 290 (2012).

b. Petitioner's mechanical reading of the statute to require every instance of "person" in FCRA to refer to the United States contravenes the fundamental principle that "[s]tatutory construction is a 'holistic endeavor,'" *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004) (citation omitted), and thus "look[s] to the provisions of the whole law," and not merely "a single sentence" of the statute, *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (citations omitted). Various textual and structural features of

FCRA expose the flaws in petitioner's simplistic reading of the statute.

Most obviously, FCRA subjects "person[s]" to criminal prosecution. See 15 U.S.C. 1681q. Indeed, the 1996 Act increased those criminal penalties. Sec. 2415, 110 Stat. 3009-450. As the Ninth Circuit recognized, it would be "patently absurd" to read FCRA as imposing federal criminal liability on the United States. *Daniel*, 891 F.3d at 770 (citation omitted); see Pet. App. 16. That petitioner seemingly embraces (Pet. 28-29) the possibility that FCRA authorizes federal prosecutors to indict and try federal agencies for criminally violating the statute underscores the incorrectness of his position.

The 1996 Act also authorized the FTC to seek civil penalties against "person[s]" who violate the statute. Sec. 2416, 110 Stat. 3009-450 to 3009-451 (15 U.S.C. 1681s). It is hard to imagine that Congress intended to enable one federal agency (the FTC) to sue another federal agency—or the United States itself—in federal court to recover civil penalties under FCRA. Cf. Joseph W. Mead, *Interagency Litigation and Article III*, 47 Ga. L. Rev. 1217, 1245 (2013). And the 1996 Act authorized States to enforce FCRA's provisions against "any person," including for monetary damages, in any court of competent jurisdiction. Sec. 2417, 110 Stat. 3009-451 to 3009-452 (15 U.S.C. 1681s). It would be both remarkable and constitutionally troublesome to assume that Congress intended to allow States to seek damages under FCRA against the United States and its agencies, cf. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), or against another State and its agencies, cf. *Franchise Tax Board* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019).

As the court of appeals recognized, all of those provisions thus make clear that Congress did not contemplate treating the United States or its agencies as "persons" for all provisions of FCRA. See Pet. App. 16-17; see also *Daniel*, 891 F.3d at 770. Likewise, Congress cannot be assumed to have subjected the United States and other governments to punitive damages, see 15 U.S.C. 1681n, especially given the "presumption against imposition of punitive damages on governmental entities." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 785 (2000); see Pet. App. 17.

Moreover, Congress presumably enacted the 1996 Act while mindful of this Court's decision in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), issued only months earlier, which held that Congress lacked authority under the Commerce Clause to abrogate state sovereign immunity to private damages actions. See *id.* at 47, 72. As the court of appeals here explained (Pet. App. 18), it is implausible that Congress, "in an insurrectionary moment," responded to *Seminole Tribe* with an attempt to subject States to both compensatory and punitive damages under FCRA. Petitioner's sole response is to suggest (Pet. 44) that courts assess state and federal sovereign immunity differently. But this Court has made clear that when determining whether Congress has unequivocally waived sovereign immunity in a statute, the same "strict construction principle" applies to state and federal sovereigns alike. *Sossamon*, 563 U.S. at 285 n.4.

Indeed, Congress has demonstrated that when it wants to permit damages actions against the United States under FCRA, it does so expressly. In a FCRA amendment enacted just a few months before the 1996 Act, Congress empowered the FBI to obtain and use

consumer information from consumer reporting agencies in limited circumstances for national security purposes, and simultaneously provided 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 statutory, actual, and (in certain circumstances) punitive damages. Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, Tit. VI, Sec. 601(a), § 624(i), 109 Stat. 976 (15 U.S.C. 1681u(j)). As the court of appeals observed, "[u]nlike the asserted waivers on which [petitioner] relies, the import of § 1681u(j) is plain as day." Pet. App. 14. This Court has repeatedly explained that "differences in language" in the same statute generally "convey differences in meaning." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017). Congress's unequivocal and unambiguous waiver of federal sovereign immunity in Section 1681u(j) is a strong indication that it intended no such waiver in Sections 1681n and 1681*o*. See *Daniel*, 891 F.3d at 771 ("Equating 'the United States' with a 'person' in multiple sections of the FCRA also conflicts with a very clear waiver of sovereign immunity elsewhere in the statute.").

Moreover, nothing in FCRA's legislative history suggests that Congress believed it was imposing vast new liabilities on the United States and other governments. See *Employees*, 411 U.S. at 285 (finding no waiver of state sovereign immunity because "we have found not a word in the history of the 1966 amendments to indicate" that Congress wished to waive such immunity). The House Report on an early version of the 1996 Act observed only that extension of the liability provisions to "'any person who'" fails to comply with FCRA

would bring within the scope of the provisions "persons who furnish information to consumer reporting agencies, such as banks and retailers." H.R. Rep. No. 486, 103d Cong., 2d Sess. 49 (1994); see S. Rep. No. 185, 104th Cong., 1st Sess. 48-49 (1995). Likewise, the sponsor of a Senate bill containing identical language described those provisions as extending liability to "banks, retailers, and other creditors." 140 Cong. Rec. 8941 (1994) (statement of Sen. Bryan). Petitioner has identified no authority indicating that the language was understood to extend liability to the United States or other governmental bodies.

As the Ninth Circuit observed, "[t]he lack of any reference to potential federal liability is particularly glaring given the federal government's role as the nation's largest employer, lender, and creditor, and its corresponding vulnerability to suit under the new FCRA provisions." *Daniel*, 891 F.3d at 776. The 1996 Act broadened FCRA to regulate the conduct of "persons" in various respects that, under petitioner's reading, would make the federal government a ubiquitous FCRA defendant. *Id.* at 775-776 (brackets omitted). Although petitioner asserts (Pet. 47) that the potential liability resulting from his reading of the statute would be "very limited," his interpretation would open the government to damages actions for a wide range of conduct ranging from the routine printing of credit card receipts, *e.g.*, *Daniel*, 891 F.3d at 765, to practices related to its extensive employment and lending activities. As the court of appeals here recognized, "[t]here is no telling the true costs of a waiver." Pet. App. 15. Congress cannot be deemed to have risked the government fisc in so "casual" a manner. *Ibid.*

c. Another reason to doubt petitioner's reading of FCRA is that Congress is unlikely to have intended the 1996 Act to disrupt the carefully calibrated remedies available against the federal government under the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (5 U.S.C. 552a). That statute comprehensively regulates Executive Branch agencies in their collection, maintenance, use, and dissemination of "records" containing information about an "individual," when those records are maintained as part of a "system of records." 5 U.S.C. 552a(a)(1)-(5) and (b). The Privacy Act authorizes a limited class of private civil actions to enforce its terms. 5 U.S.C. 552a(g); see *Cooper*, 566 U.S. at 303 (observing that Congress's intent in enacting the Privacy Act was "to cabin relief, not to maximize it").

Petitioner's understanding of FCRA would vastly expand the liability of the United States for federal-agency activity already covered by the Privacy Act. The Privacy Act, for example, addresses disclosures by a federal agency to a consumer reporting agency of an overdue debt that the federal agency is trying to collect—a type of disclosure that a federal agency is required by law to make under certain circumstances, see 31 U.S.C. 3711(e), including with respect to student loans, see 20 U.S.C. 1080a, 1087a(b)(2). If the disclosed record of the overdue debt contains an error, the Privacy Act offers procedures whereby the individual to whom the record pertains can correct the record, see 5 U.S.C. 552a(d), and requires the federal agency to inform the consumer reporting agency about any correction, see 5 U.S.C. 552a(c)(4). The FCRA provision petitioner invokes contains analogous (but not identical) correction procedures and a notice requirement when

there has been an error in a disclosure made by a "person" to a consumer reporting agency. See 15 U.S.C. 1681s-2(b).

Yet under the Privacy Act, an individual generally may seek only injunctive relief, not money damages, for failure to correct the record. 5 U.S.C. 552a(g)(1)(A) and (2)(A). Compensatory damages are available only if "actual damages" resulted from an "intentional or willful" failure to take specified actions. 5 U.S.C. 552a(g)(4)(A); see *Doe* v. *Chao*, 540 U.S. 614, 620-621 (2004). By contrast, on petitioner's reading, FCRA would permit a damages action for a failure to correct the record. 15 U.S.C. 1681n, 1681*o*, and 1681s-2(b). And it would permit either type of action to be premised merely on negligence, without any need to prove intentional or willful conduct. 15 U.S.C. 1681*o*. It also would permit, in the case of a willful violation, automatic statutory damages without any showing that the plaintiff sustained "actual damages." 15 U.S.C. 1681n(a)(1)(A). Congress cannot have intended the Privacy Act's reticulated remedial scheme to be so easily displaced or circumvented.

d. Petitioner's remaining arguments lack merit.

Petitioner faults (Pet. 16) the court of appeals for failing to cite 15 U.S.C. 1681a(a), which states that FCRA's definitional provisions "are applicable for purposes of this subchapter." But the court of appeals plainly understood that petitioner's argument was predicated on the language of the statute, see Pet. App. 11; the court simply recognized that unthinking reliance on Section 1681a (including subsection (a)) begs the question whether the combination of those definitional provisions and the extension of liability to "any person"

in the 1996 Act is sufficient to waive the sovereign immunity of the United States. The FLSA provision at issue in *Employees*, *supra*, likewise stated that its definition of "'[e]mployer'" applied to that term "[a]s used in this chapter." 29 U.S.C. 203 (1970). Yet this Court understood that such language did not answer the sovereign-immunity question. *Employees*, 411 U.S. at 283-285. Indeed, without such language, there would not even *be* a sovereign-immunity question. See *Vermont Agency*, 529 U.S. at 780-781.

Petitioner's reliance (Pet. 25) on the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, and the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, is misplaced. ECOA expressly exempts "a government or governmental subdivision or agency" from a punitive-damages provision that otherwise applies to "[a]ny creditor," 15 U.S.C. 1691e(b), and TILA expressly preserves state and federal sovereign immunity, 15 U.S.C. 1612(b). To the extent petitioner suggests that the lack of similar provisions in FCRA should be read to waive the sovereign immunity of the United States, the suggestion is mistaken. Waivers of sovereign immunity must be "unequivocally expressed," *Sossamon*, 563 U.S. at 285 n.4, not implicitly found by negative inference from provisions in other related statutes. See *id.* at 290-291; *Lane*, 518 U.S. at 192. Petitioner does not cite any authority for the contrary proposition.

2. Petitioner correctly identifies (Pet. 35-37) a division of authority among the circuits on the question presented here. The Fourth Circuit in this case joined the Ninth Circuit in concluding that FCRA's civil damages provisions do not unequivocally waive federal sovereign immunity. See Pet. App. 21; *Daniel*, 891 F.3d 762. The Seventh Circuit reached a contrary conclusion in

Bormes v. *United States*, 759 F.3d 793 (2014). Nevertheless, this Court's review of that conflict is unwarranted because the Seventh Circuit has since retreated from its decision in *Bormes*, suggesting that it may reconsider its interpretation of FCRA and resolve the conflict on its own.

The decision in *Bormes* came following a remand from this Court, which had held that the Little Tucker Act, 28 U.S.C. 1346(a)(2), does not waive the sovereign immunity of the United States for FCRA violations. *United States* v. *Bormes*, 568 U.S. 6, 15-16 (2012). In determining that FCRA accomplishes what the Little Tucker Act does not, the Seventh Circuit adopted the view that the 1970 Act's definition of "'person'" as including a "government or governmental subdivision or agency," 15 U.S.C. 1681a(b), must apply across the board to every instance of "person" in FCRA, including the 1996 Act's expanded liability provisions. See *Bormes*, 759 F.3d at 795. As explained above, that simplistic reading of FCRA is incorrect because it overlooks the requirement that waivers of sovereign immunity be unequivocally expressed, and fails to engage in a holistic analysis of the statutory text and structure.

But two years after *Bormes*, in *Meyers* v. *Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (2016), cert. denied, 137 S. Ct. 1331 (2017), the Seventh Circuit engaged in the correct holistic analysis to conclude that FCRA did not waive *tribal* sovereign immunity. *Id.* at 827. The *Meyers* court recognized that "if it is Congress's intent to abrogate tribal immunity, it must clearly and unequivocally express that purpose." *Id.* at 824. And it explained that although the definition of "'person'" in 15 U.S.C. 1681a(b) "includes 'any government,'" which it acknowledged could in isolation be

"broad enough to include Indian tribes," 836 F.3d at 824 (ellipsis omitted), that definition was insufficiently clear and unequivocal to waive tribal sovereign immunity, see *id.* at 826-827. "[W]hen it comes to sovereign immunity," the court explained, "Congress' words must fit like a glove in their unequivocality." *Id.* at 827. *Meyers* distinguished the court's previous decision in *Bormes* in part based on its view that reading the phrase "'any government'" to include the United States could be thought "entirely natural," whereas the phrase is "equivocal" as to whether it includes tribal governments in light of "the long-held tradition of tribal immunity." *Id.* at 826 (citation omitted).

Although *Meyers* did not purport to overrule *Bormes*, the respective analyses in those two cases are in serious tension. The sovereign immunity of the United States, especially to suits for money damages, is fundamental under the constitutional structure, and that rule is at least as long-recognized as tribal sovereign immunity. And there is no textual basis in FCRA's definition of "person" to treat the word "government" as applying to the federal government (and possibly state governments) but not tribal governments. Accordingly, it is far from clear that, if squarely presented with the issue, the Seventh Circuit would adhere to its holding in *Bormes*, especially now that two other courts of appeals have expressly disagreed with *Bormes*—and none has agreed with it. Indeed, a district court that initially found *Bormes* persuasive changed course after the decisions in *Meyers*, *Daniel*, and this case, finding on reconsideration that "FCRA does not contain a clear, unequivocal, and unambiguous waiver of sovereign immunity." *Johnson* v. *Trans Union, LLC*, No. 16-cv-1240, 2019 WL 3202212, at *4 (W.D. La. July 15,

2019). And following the Ninth Circuit's decision in *Daniel*, it appears that every district court to address the issue has determined, contrary to *Bormes*, that FCRA does not waive federal sovereign immunity.[*] Given the tenuousness of *Bormes*, this Court's review now would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[*] *E.g.*, *Tillery* v. *United States Department of Education*, No. 18-cv-3256, 2019 WL 3413518, at *3 (D. Md. July 29, 2019); *Smith* v. *Pennsylvania Higher Education Assistance Agency*, No. 18-cv-10162, 2019 WL 3219896, at *4-*5 (E.D. Mich. July 17, 2019); *Marzouq* v. *United States Department of Education*, No. 18-cv-13616, 2019 WL 2996177, at *1 (E.D. Mich. July 9, 2019); *Dumas* v. *GC Services, L.P.*, No. 18-cv-12992, 2019 WL 529260, at *3-*4 (E.D. Mich. Feb. 11, 2019); *Russ* v. *United States Department of Education*, 364 F. Supp. 3d 1009, 1015-1016 (D. Neb. 2018).