No. 19-512

IN THE
Supreme Court of the United States

ANTHONY ROBINSON,
Petitioner,

v.

DEPARTMENT OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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As the Government concedes, there exists "a division of authority among the circuits on the question presented here." BIO at 21. That is—again in the Government's own words—"[t]he Fourth Circuit in this case joined the Ninth Circuit in concluding that [the Fair Credit Reporting Act's, 15 U.S.C. §§ 1681n-1681*o*] civil damages provisions do not unequivocally waive federal sovereign immunity." BIO at 21 (citing Pet. App. 21; *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 762 (9th Cir. 2018)). "The Seventh Circuit reached a contrary conclusion in *Bormes v. United States*, 759 F.3d 793 ([7th Cir.] 2014)." BIO at 22. The Government does not even suggest any vehicle issue that would prevent the Court from answering the question presented in this case, nor does it claim the question presented is unimportant.

Rather, recognizing the existence of a square and entrenched conflict on the important question presented, the Government presents two arguments in opposition to certiorari. Neither is persuasive. *First*, the Government argues that although the Seventh Circuit explicitly held in *Bormes* that FRCA's civil damages provisions waive federal sovereign immunity, the reasoning in *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (7th Cir. 2016), is "in serious tension" with *Bormes*, suggesting the Seventh Circuit "has since retreated" from *Bormes*. BIO at 22-23. Not so. As the Government itself recognizes, "*Meyers* did not purport to overrule *Bormes*." BIO at 23. Indeed, *Meyers* affirmed *Bormes*, recognizing there was "no debate that the United States is a government," thus

deeming *Bormes*'s conclusion "plain." *Meyers*, 836 F.3d at 826. Unlike *Bormes*, *Meyers* concerned *tribal* sovereign immunity, a doctrine entirely distinct from federal government immunity. How the Government claims that *Meyers*, which affirmed *Bormes* and ruled on a different topic, suggests a "retreat" from *Bormes* is inexplicable.

Second, the Government spends the vast majority of its brief arguing that the decision below was correct. BIO at 9-21. Whether the decision below was correct on the merits, of course, has no bearing on whether the petition for certiorari should be granted—all the less so when the government has conceded that a conflict of authority exists on the question presented. But in any event, the Government's arguments on the merits are wrong, and its attempts to explain away the unambiguous statutory text are unavailing.

The petition for certiorari should be granted.

I. AS THE GOVERNMENT CONCEDES, THERE IS A CLEAR CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

In the petition for certiorari, Petitioner explained that there exists a clear, and entrenched, conflict amongst the circuits on the question presented. *See* Pet. 35-48. In *Bormes v. United States*, the Seventh Circuit held "§ 1681a(b) waives the United States' immunity from damages for violations of the FCRA." 759 F.3d 793, 797 (7th Cir. 2014). Four years after *Bormes*, the Ninth Circuit ruled directly to the contrary, holding that

"FCRA does not waive the federal government's immunity from [plaintiff's] suit." *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 765 (3d Cir. 2018). In so holding, the Ninth Circuit recognized its decision was in conflict with *Bormes*, but stated it was "not convinced by the Seventh Circuit's reasoning." *Id.* at 773. And in the decision below, the Fourth Circuit held that FCRA did not waive the United States' immunity, recognizing that its ruling exacerbated an existing circuit split with *Bormes*'s holding that "FCRA … set forth a waiver of federal sovereign immunity." Pet. App. 21.

As noted above, the Government agrees that the Fourth Circuit's decision adds to what is now a 2-1 conflict on the question presented. BIO at 9, 21-22. The Government identifies no vehicle issue with this case, nor does it suggest that the question presented is of limited importance. Indeed, it claims the Seventh Circuit's approach could "impos[e] vast new liabilities on the United States and other governments." BIO at 17. Regardless of whether the Government's hypothesis is correct (the evidence is to the contrary)—and whether such a hypothesis can overrule unambiguous statutory text (it cannot)—the Government's own brief suggests the importance of the question presented. *See also* Pet. 37-40.

The existence of a conflict of authority on a question of federal law is, of course, one the principal reasons this Court grants certiorari. *See* Sup. Ct. R. 10(a); *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015). Here, there is an acknowledged conflict, on an important issue, in a case without any vehicle issues. A grant of certiorari is appropriate and necessary.

II. FAR FROM RETREATING FROM *BORMES*, THE SEVENTH CIRCUIT *REAFFIRMED* ITS RULE IN *MEYERS*.

Recognizing that governing Seventh Circuit law is directly in conflict with decisions of the Fourth and Ninth Circuits, the Government argues that a subsequent Seventh Circuit decision, *Meyers*, suggests the Seventh Circuit has "retreated from its decision in *Bormes* … and [may] resolve the conflict on its own." Pet. 22. Not so.

The Government acknowledges that "*Meyers* did not purport to overrule *Bormes*." BIO at 23. The Government's acknowledgment is, at best, a substantial understatement. Far from "overrul[ing]" *Bormes*, or engaging in analysis "in serious tension" with *Bormes*, BIO at 23, *Meyers reaffirmed* the rule in *Bormes* as regards the federal government while recognizing that a different rule applied to Indian tribes. In discussing *Bormes*, *Meyers* observed, "[b]ecause there is no debate that the United States is a government," it "was plain" that § 1681a(b) waived the federal government's immunity to suit. *Meyers*, 836 F.3d at 826. But, as *Meyers* recognized, the question before it did *not* concern federal government immunity, but rather tribunal immunity. As to that issue, *Meyers* observed:

> It is one thing to say 'any government' means 'the United States.' That is an entirely natural reading of 'any government.' But it's another thing to say 'any government' means 'Indian Tribes.' Against the long-held tradition of tribal immunity … 'any government' is equivocal in this regard. Moreover, it

> is one thing to read "the United States" when *Congress* says 'government.' But it would be quite another, given that ambiguities in statutes are to be resolved in favor of tribal immunity, to read 'Indian tribes' when Congress says 'government.'

Id. (quoting D. Ct. Order at 4).

In sum, eschewing any notion of "tension" with *Bormes*, the Seventh Circuit reaffirmed *Bormes*'s rule in *Meyers* while adopting a different rule under the legal standard applicable to tribal immunity. *See, e.g.*, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) ("To abrogate tribal immunity, Congress must 'unequivocally' express that purpose."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); *id.* at 55 ("Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832))). Whatever one thinks about *Meyers*'s distinction between federal and tribal sovereign immunity, the Seventh Circuit clearly does not think its ruling on the latter "retreated" from its established holding on the former.

Bormes has now been the law within the Seventh Circuit for almost six years, and the best evidence the Government can cite for the Seventh Circuit's alleged "retreat" from *Bormes* is a decision in which the Seventh Circuit deemed *Bormes*'s textual conclusion "plain" and "entirely natural." Reaffirming its prior decision, while

ruling on a separate question, is no evidence at all that the Seventh Circuit might take the question presented *en banc* and change course.[1]

III. THE FOURTH CIRCUIT'S DECISION WAS INCORRECT.

Tellingly, the Government spends nearly all of its brief arguing the merits of the case. BIO at 9-21. Even were the Government right, and the decision of the Fourth Circuit correct, that would still be no reason to deny the petition for certiorari here. *See* Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 617 (1974) (noting this Court's decision to grant cases "depends on numerous factors other than the perceived correctness of the

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[1] Equally unpersuasive is the Government's citation of an out-of-circuit, unpublished district court opinion siding with the Fourth and Ninth Circuits. *See* BIO at 23 (citing *Johnson v. Trans Union, LLC*, No. 16-cv-1240, 2019 WL 3202212, at *4 (W.D. La. July 15, 2019)). The Government never explains how that decision has any bearing on the question whether the Seventh Circuit will *sua sponte* change course. Moreover, to the extent that out-of-circuit district court cases have any bearing on this question, a split remains: many district courts have followed *Bormes*, *see, e.g.*, *Hoffmeister v. Sec'y of U.S. Treasury*, No. 17-CV-00889-LTB-MEH, 2018 WL 6429925, at *7 (D. Colo. Mar. 27, 2018), *report and recommendation adopted*, 2018 WL 6428266 (D. Colo. Apr. 11, 2018); *Ingram v. Experian Info. Sols., Inc.*, No. 3:16-CV-00210-NBB-RP, 2017 WL 2507694, at *2-3 (N.D. Miss. June 9, 2017); *Mooneyham v. Equifax Info. Servs., LLC*, 99 F. Supp. 3d 720, 725-26 (W.D. Ky. 2015)—even after *Daniel*, *see Bowers v. Navient Sols., LLC*, No. 2:18-CV-166-MHT-DAB, 2018 WL 7568368, at *5 (M.D. Ala. Dec. 27, 2018), *report and recommendation adopted*, 2019 WL 2754482 (M.D. Ala. July 1, 2019).

judgment we are asked to review"). But, the government is wrong.

The basic standard is undisputed: "Congress must unequivocally express any waiver of sovereign immunity for that waiver to be effective." *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1862 (2019). But in arguing against an unequivocal waiver of sovereign immunity, the Government asks this Court to entirely ignore the text of FCRA. That is the opposite of this Court's normal practice. Statutory interpretation begins with the text—"[a]nd where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). FCRA's text provides exactly such a "clear answer": by creating liability for "any … government or governmental subdivision or agency," Congress waived federal sovereign immunity for claims of liability under FCRA. The government simply has no answer to this basic point.

Since 1996, FCRA's damages provision has provided that "[a]ny *person* who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer." 15 U.S.C. § 1681n(a) (emphasis added); *see* 15 U.S.C. § 1681*o* (same for negligent failure). The statute defines "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, *government or governmental subdivision or agency*, or other entity." *Id.* § 1681a(b) (emphasis added). Correctly reading these two provisions in concert, "any . . . government or governmental subdivision or agency" that willfully fails to comply with FCRA is liable for damages. In other

words, the clear text of FCRA subjects the United States to liability for damages.

The plain meaning of "any . . . government" supports this reading. "[T]he word 'any' naturally carries 'an expansive meaning.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (citation omitted). And "[w]hen used (as here) with a 'singular noun in affirmative contexts,'" it "ordinarily 'refer[s] to a member of a particular group or class without distinction or limitation' and in this way 'impl[ies] *every* member of the class or group.'" *Id.* (citation omitted) (emphasis in original). A "government," meanwhile, is "[t]he sovereign power in a country or state." *Black's Law Dictionary* (11th ed. 2019). As *the* sovereign power in this country, the United States is a government, and thus is covered by a definition extending to "*every*" government.

Throughout its brief in opposition, the Government calls this straightforward reading of FCRA's text "simplistic," "mechanical," "unthinking," and "unsound." BIO at 10, 14, 15, 20, 22. Yet, the Government fails to provide *any* other plausible meaning of the phrase "any … government" in FCRA's definition of "person." *See FAA v. Cooper*, 566 U.S. 284, 290-91 (2012) (requiring a "plausible interpretation" to create ambiguity for immunity purposes). Nor can the Government explain why this definition suffices to waive sovereign immunity for FCRA's *substantive* provisions (which it concedes it does) but nonetheless fails to waive immunity when applied to FCRA's *damages* provisions. Courts need not, and should not, engage in such interpretative gymnastics, "[p]articularly when there's a much simpler and sounder explanation for the statute's wording."

SAS Inst., 138 S. Ct. at 1357. "Any government," under any logical reading of that phrase, includes the government of the United States.

The Government argues that other provisions of FCRA indicate that Congress did not actually mean what it said when defining "person." BIO at 14-16. *But see Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776 (2018) ("When a statute includes an explicit definition, we must follow that definition …." (citation omitted)). For example, the Government notes that FCRA creates the potential for criminal liability which, it argues, could not apply to the federal government itself. BIO at 15. Yet even the Ninth Circuit admits that it is not "'outlandish' for Congress to subject *federal employees* to criminal prosecution." *Daniel*, 891 F.3d at 770 (citation omitted). Congress could rationally have decided that agencies, too, could face criminal fines for willfully violating consumers' rights, 15 U.S.C. § 1681q—or that the likelihood of such charges against agencies was too small to be of concern. When Congress wishes to explicitly exempt the federal government from liability it knows how to do so. *See* Pet. at 29 (citing the Truth in Lending Act). It did not do so here.

The Government also "presum[es]" that Congress enacted the 1996 amendments "mindful of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)." BIO 16. But even if Congress were mindful of *Seminole Tribe*, that proves nothing: the Government never explains how a ruling on Congress's *constitutional* power to abrogate *state* sovereign immunity controls its *statutory* decision of whether to abrogate *federal* sovereign immunity. Moreover, as the

Seventh Circuit observed, "[t]he premise of this argument is not entirely correct." *Bormes*, 759 F.3d at 796. As Congress would also have known, the federal government can sue states for damages even if private parties cannot. *Id.*

Next, the Government claims to divine Congressional intent from the 1996 Congress's *silence* on the immunity issue. BIO at 17-18. For one thing, legislative history (or lack thereof) cannot "be used to 'muddy' the meaning of 'clear statutory language.'" *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citation omitted). Congress enacts *text*, not individual legislators' or committees' views. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017). In a case like this, "where the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992). The Government's resort to legislative history is misplaced.

But even considering legislative history, the Government's argument is a strange one. In 1996, Congress made *no change* to the definition of "person" as that term had been defined since 1970. The fact that Congress did not add in 1996 "we really mean what we said in 1970" cannot be interpreted to mean that Congress was *sub silentio* changing the meaning of an unambiguous statutory term. As this Court has noted, "[i]f the text is clear, it needs no repetition in the legislative history …." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018). Again, the Government has no answer.

The textual implications of the Government's arguments further illustrate why it is wrong. The Government insists that under its reading of FCRA, state and tribal governments must also be exempted from the damages provisions. BIO at 11-12, 13. Of course, no inherent quality of sovereign immunity requires these varied governments' liability to stand or fall together. As this Court has noted, for instance, "immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018). But the Government flatly claims that neither federal, nor state, nor Indian governments fall under FCRA's damages provision, despite a clear statutory definition to the contrary.[2] This despite acknowledging that FCRA's definition waives sovereign immunity as to the statute's substantive provisions. BIO at 13-14. In essence, the Government asks the Court to interpret the phrase "any … government" in § 15 U.S.C. § 1681a(b) to mean *both* "any government" and "no government"—"a reading most unnatural." *Levin v. United States*, 568 U.S. 503, 514 (2013).

Finally, the Government presents a lengthy parade of horribles that will allegedly result from a plain reading of the statutory text. BIO at 18-20. For one,

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[2] The Government also cannot draw a principled line in the statutory text between federal, state, and tribal governments and foreign governments. *See Bormes*, 759 F.3d at 796-97 ("Foreign governments that engage in commerce in the United States cannot invoke immunity under the Foreign Sovereign Immunities Act. If the definition in § 1681a(b) exposes foreign nations to damages for commercial activity, why not the United States?" (citation omitted)).

available evidence suggests the Government's concerns are illusory. The Seventh Circuit has followed FCRA's plain text since 2014 and yet the Government cannot cite a *single* instance of one of its dire predictions coming to pass. And with good reason. *See* Pet. at 45-48 (noting defenses and limitations on liability). Moreover, even were the Government correct about the policy consequences arising from Congress's choices, "then Congress, not this Court, is [its] proper audience." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2414 (2015). Courts "must enforce the statute that Congress enacted," not the one the Government would prefer. *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1040 (2019).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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