No. 21-2149

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REGINALD KIRTZ,

Plaintiff-Appellant,

v.

TRANS UNION LLC, PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY D/B/A AMERICAN EDUCATION SERVICES, AND U.S. DEPARTMENT OF AGRICULTURE RURAL DEVELOPMENT RURAL HOUSING SERVICE,

Defendants-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:20-cv-05231
Hon. Mitchell S. Goldberg

CORRECTED OPENING BRIEF OF PLAINTIFF-APPELLANT

Matthew B. Weisberg
Weisberg Law PC
7 South Morton Ave.
Morton, PA 19070
(610) 690-0801
mweisberg@weisberglawoffices.com

Nandan M. Joshi
Allison M. Zieve
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
njoshi@citizen.org

Attorneys for Plaintiff-Appellant

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INTRODUCTION

Although the United States enjoys sovereign immunity, Congress can waive that immunity through statutory text. In the Fair Credit Reporting Act (FCRA), Congress provided that "[a]ny person" may be held liable for negligent or willful violations of FCRA, 15 U.S.C. §§ 1681n & 1681o, and it defined "person" to include "any … government or governmental subdivision or agency," *id.* § 1681a(b). As the Seventh Circuit has held, this unambiguous language "waive[s] [the government's] sovereign immunity." *Bormes v. United States*, 759 F.3d 793, 795 (7th Cir. 2014). The D.C. Circuit recently joined the Seventh Circuit in concluding that "these provisions speak clearly enough to waive federal sovereign immunity." *Mowrer v. U.S. Dep't of Transp.*, 2021 WL 4343305, at *4 (D.C. Cir. Sept. 24, 2021).

In this case, however, the district court followed decisions of the Fourth and Ninth Circuits, which reject application of FCRA's definition of "person" to the statute's enforcement and remedial provisions, including §§ 1681n and 1681o. *See Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799, 806 (4th Cir. 2019); *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 769 (9th Cir. 2018). These courts did not dispute that the phrase

"government or governmental subdivision or agency" in the definition of "person" includes federal agencies. Rather, they refused to apply the definition on the ground that doing so would produce what they considered to be anomalous results with respect to FCRA provisions *other than* §§ 1681n and 1681o, and because those provisions do not refer to the "United States" by name.

As explained below, the Seventh and D.C. Circuit decisions are more faithful to the statutory language, which unambiguously subjects federal agencies to civil liability under FCRA. The rationales of the Fourth and Ninth Circuits, by contrast, do not hold up to scrutiny. The district court's decision, accordingly, should be reversed.

JURISDICTION

The district court had subject-matter jurisdiction over plaintiff-appellant Reginald Kirtz's FCRA claims under 15 U.S.C. § 1681p and 28 U.S.C. § 1331. On May 4, 2021, the district court dismissed Mr. Kirtz's claim against the U.S. Department of Agriculture Rural Housing Service (USDA) under Federal Rule of Civil Procedure 12(b)(1) on the ground of sovereign immunity, JA 4, and, on June 9, 2021, issued a final order and judgment in favor of USDA under Federal Rule of Civil Procedure 54(b)

on the ground that there was no just reason to delay, JA 3. Mr. Kirtz filed a timely notice of appeal on June 15, 2021. JA 2. This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTION PRESENTED

FCRA provides that "[a]ny person" may be held civilly liable for negligent or willful violations of its FCRA duties. 15 U.S.C. §§ 1681n & 1681o. FCRA defines a "person" to include "any … government or governmental subdivision or agency." *Id.* § 1681a(b). The question presented is whether FCRA waives a federal agency's sovereign immunity from civil liability.

The question presented was raised in USDA's motion to dismiss (Dist. Ct. ECF 21), objected to by Mr. Kirtz's opposition to USDA's motion (Dist. Ct. ECF 26), and ruled upon by the district court (JA 5–15).

STATEMENT OF RELATED CASES

On June 4, 2021, Mr. Kirtz petitioned this Court for interlocutory review of the district court's dismissal order under 28 U.S.C. § 1292(b), which was docketed as No. 21-8034. On June 9, 2021, the district court granted Mr. Kirtz's unopposed motion to vacate its certification for interlocutory review under § 1292(b) and to issue a final judgment under

Federal Rule of Civil Procedure 54(b). JA 3. On June 10, 2021, Mr. Kirtz withdrew his § 1292(b) petition.

RELEVANT STATUTORY PROVISIONS

15 U.S.C. § 1681a(b) provides:

> The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

15 U.S.C. § 1681n(a) provides:

> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or (B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater; (2) such amount of punitive damages as the court may allow; and (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681o(a) provides:

> Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—(1) any actual damages sustained by the consumer as a result of the failure; and (2) in the case of any successful action

> to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681s-2(b)(1) provides:

> After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall—(A) conduct an investigation with respect to the disputed information; (B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title; (C) report the results of the investigation to the consumer reporting agency; (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly—(i) modify that item of information; (ii) delete that item of information; or (iii) permanently block the reporting of that item of information.

STATEMENT OF THE CASE

A. Statutory framework

Congress enacted FCRA to address the significant harms to consumers caused by inaccurate and unfair credit reports: "Inaccurate credit reports directly impair the efficiency of the banking system, and

unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1). As initially enacted in 1970, FCRA improved the accuracy and fairness of credit reports by imposing various requirements on consumer reporting agencies and users of consumer reports. *See* Pub. L. No. 91-508, tit. VI, §§ 604–615, 84 Stat. 1114, 1129–33 (1970) (1970 Act). In 1996, to further improve the accuracy and fairness of credit reports, Congress amended FCRA to impose duties on "furnishers"—entities that furnish information to consumer reporting agencies. Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, div. A, tit. II, subtit. D, ch. 1, § 2413, 110 Stat. 3009, 3009-447 (1996 Amendment), *codified as amended at* 15 U.S.C. § 1681s-2.

FCRA also sets forth procedures through which consumers can dispute the accuracy of information in their credit reports. Under 15 U.S.C. § 1681i(a)(1)(A), "if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency … of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation" to determine the accuracy of the information

and take appropriate action. In addition, the consumer reporting agency "shall provide notification of the dispute to any person who provided any item of the information in dispute," *i.e.*, the furnisher of the information. *Id.* § 1681i(a)(2)(A). Upon receiving the consumer reporting agency's notice, the furnisher has a duty under FCRA to investigate the dispute, review all relevant information provided by the consumer reporting agency, report the results of the investigation to the consumer reporting agency, and take other actions to correct inaccurate, incomplete, or unverifiable information. *Id.* § 1681s-2(b)(1).

FCRA imposes civil liability on any "person" who negligently or willfully fails to comply with its requirements. Under 15 U.S.C. § 1681o, "[a]ny person who is negligent in failing to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to that consumer" for actual damages, costs, and attorney's fees. The statute authorizes the consumer to recover actual damages or statutory damages, punitive damages, costs, and attorney's fees from "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter." *Id.* § 1681n(a). As this Court has recognized, a furnisher's failure to satisfy its duties under § 1681s-2(b) upon receiving notice of a

consumer's dispute can give rise to civil liability under §§ 1681o and 1681n. *See Seamans v. Temple Univ.*, 744 F.3d 853, 864, 867–68 (3d Cir. 2014).

Since its enactment in 1970, FCRA has defined the term "person" to include governmental entities. Specifically, FCRA defines "person" to "mean[] any individual, partnership, corporation, trust, estate, cooperative, association, *government or governmental subdivision or agency*, or other entity." 15 U.S.C. § 1681a(b) (emphasis added). FCRA states that this definition and other defined terms "are applicable for purposes of this subchapter," which comprises the entirety of FCRA, including the statute's remedial provisions. *Id.* § 1681a(a). Originally, FCRA's civil liability provisions extended only to a "consumer reporting agency or user of information." 1970 Act §§ 616 & 617, 84 Stat. at 1134. In 1996, along with imposing duties on furnishers, Congress amended §§ 1681n and 1681o to extend FCRA's civil liability provisions to "any person" that fails to comply with its FCRA responsibilities. 1996 Amendment, § 2412, 110 Stat. at 3009-446.

B. Proceedings in the district court

1. In this action, Mr. Kirtz alleges that a credit report prepared by defendant Trans Union, LLC, contains inaccurate information about two of his accounts: one account with defendant Pennsylvania Higher Education Assistance Agency (PHEAA), and another with defendant USDA. Dist. Ct. Op. 1 (JA 5). With respect to each account, Mr. Kirtz alleges that, although the account is closed and has a zero balance, his credit report erroneously reports the "pay status" as "Account 120 Days Past Due Date." *Id.* at 1–2 (JA 5–6). Because an "account that is listed as closed with a balance of zero could not simultaneously be past due," Mr. Kirtz alleges that "the reported pay statuses were false on their face." *Id.* at 2 (JA 6). Mr. Kirtz "asserts that this status misled the algorithms used to determine [his] credit score by making it appear [he] was still late on accounts that were closed, lowering [his] credit score and damaging [his] creditworthiness." *Id.*

Mr. Kirtz disputed the accuracy of his credit report with Trans Union. *Id.* As alleged in his complaint, Trans Union notified PHEAA and USDA of his dispute, *id.*, as it was required to do under 15 U.S.C. § 1681i(a)(2)(A). For both PHEAA and USDA, Trans Union's notice

triggered a duty under § 1681s-2(b)(1) to investigate the dispute and take appropriate action. *See* Amended Complaint, Dist. Ct. ECF 20, at 5 ¶ 20 (JA 27). Mr. Kirtz alleges that PHEAA and USDA failed to comply with their § 1681s-2(b)(1) duties, did not correct the erroneous information, and continued to report his pay status as late. *Id*. at 5, ¶¶ 18–21 (JA 27); *see also id*. at 10–11, ¶¶ 46–53 (Count IV of the amended complaint) (JA 32–33).

2. On October 20, 2020, Mr. Kirtz filed this action in the United States District Court for the Eastern District of Pennsylvania against Trans Union, PHEAA, and USDA for negligently and willfully failing to comply with their FCRA responsibilities after receiving Mr. Kirtz's dispute letter. *See* JA 18. In January 2021, after Mr. Kirtz filed an amended complaint (JA 23–35), USDA filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. Dist. Ct. ECF 21. USDA argued that, as a government agency, it was immune from liability under principles of sovereign immunity and that Congress in FCRA had not waived the government's immunity. *Id*. at 4. Mr. Kirtz opposed the motion, relying on the plain

text of FCRA's statutory definition and the Seventh Circuit's decision in *Bormes*. Dist. Ct. ECF 26.

On May 4, 2021, the district court granted USDA's motion. Order, Dist. Ct. ECF 30 (JA 4). After noting that this Court has not decided whether FCRA waives the sovereign immunity of the United States, the district court surveyed the decisions of the three courts of appeals outside this Circuit that had at the time reached conflicting decisions on that question. Dist. Ct. Op. 5 (JA 9). As the district court observed, in *Bormes*, "the Seventh Circuit found that the FCRA permits suit against a federal government entity" because "the statute authorizes suit against 'any person,' which includes 'any … government,'" and "'[t]he United States is a government.'" Dist. Ct. Op. 5 (JA 9) (quoting *Bormes*, 759 F.3d at 795). The district court also discussed Fourth and Ninth Circuit opinions interpreting FCRA not to waive the government's sovereign immunity. *Id*. at 6 (JA 10). The court found the Fourth and Ninth Circuits' reasoning "convincing." *Id.* at 7 (JA 11). It thus granted USDA's motion to dismiss, JA 4, and entered a separate final judgment in USDA's favor, JA 3.

C. Subsequent developments

On September 24, 2021, the D.C. Circuit decided *Mowrer*. In *Mowrer*, the court held that the term "any … government" in FCRA's definition of "person" is one that, "as used in a federal statute, surely includes the federal government." 2021 WL 4343305, at *4. Because that definition is "generally applicable" to all of FCRA, "which includes its private causes of action," the D.C. Circuit agreed with the Seventh Circuit that "FCRA waives federal sovereign immunity." *Id.* It stated that the "opposite conclusion" reached by the Fourth and Ninth Circuits was "unpersuasive." *Id.*

SUMMARY OF ARGUMENT

I. As a sovereign entity, the federal government must give its consent before it can be sued. Congress has authority to provide such consent by statute and does so when it enacts legislation authorizing the government to be named a defendant in a lawsuit. Congress need not express its intent to waive immunity in any particular way; the only requirement is that the waiver be unambiguous after traditional interpretive tools have been applied.

II. Congress unambiguously waived the federal government's sovereign immunity in FCRA. FCRA requires a "person" that furnishes information to consumer reporting agencies to investigate disputes and take corrective action, and provides that a "person" that negligently or willfully fails to carry out its statutory responsibilities may be held liable to consumers. Although the term "person," when left undefined, presumptively excludes the sovereign, FCRA expressly defines "person" to include "any … government or governmental subdivision or agency." The plain meaning of the definition, bolstered by the prefatory term "any," leaves no doubt that a federal agency like USDA is a "person" that may be sued under FCRA for violating its statutory responsibilities. Indeed, provisions of FCRA that use the term "person" while creating exceptions for persons that are federal agencies make sense only because "person[s]" includes federal agencies to begin with.

FCRA is also explicit that the statutory definition of "person" applies to the whole statute and, thus, to the statutory provisions at issue in this case that impose duties on governmental "persons" and allow them to be sued. As the Supreme Court has consistently instructed, courts must apply statutorily defined terms as written, absent a showing that

doing so would undermine the regulatory scheme or the purpose of the statute. No such showing can be made here, where treating the government as a "person" would advance FCRA's goal of improving the fairness and accuracy of consumer credit reports.

The statutory history confirms the importance of recognizing that "person" includes federal agencies. The text at issue in this case stems from a 1996 amendment to FCRA in which Congress sought to improve the quality of consumer reports by imposing new responsibilities on persons that furnish information to consumer reporting agencies. Congress preserved consumers' ability to dispute any item of information on their consumer reports; required furnishers to investigate such disputes; and, to ensure that furnishers are held accountable if they fail to do so, extended FCRA's civil liability provisions to all "person[s]"—a term that had always been defined to encompass "any … governmental … agency." Excluding federal agencies from the definition of "person" would undermine the goals of the 1996 amendment by excluding a major furnisher of information from this process.

III. The district court's reasons for refusing to apply the statutory definition of "person" are unpersuasive.

The district court incorrectly surmised that the definition could not logically apply to FCRA's criminal provision because that would subject the United States to criminal liability. The Supreme Court has made clear that the impossibility of applying a criminal sanction to a "person" does not affect the meaning of that word for other purposes. In any event, questions about the imposition of criminal liability on sovereign entities do not detract from the application of the statutory definition to FCRA's civil liability provisions, which does not produce any illogical results.

The district court similarly erred in relying on FCRA provisions that authorize federal and state civil-enforcement actions against "person[s]." It is not unusual for a statute to authorize a federal agency to enforce the law against other federal agencies, or to authorize states to name the federal government as a defendant in a lawsuit. By contrast, reading "person" to exclude *any* sovereign entity would also preclude federal enforcers from holding *states* accountable for FCRA violations, even though the states are not entitled to immunity in actions brought by the federal government.

The district court's remaining arguments lack merit. The presumption against the imposition of punitive damages on the

government can be overcome by express statutory language, like that contained in FCRA's definition. Likewise, the presumption that "person" does not include the sovereign has been overcome here because Congress has unambiguously defined "person" to include the sovereign. Finally, the district court's requirement that to waive federal sovereign immunity Congress must mention the "United States" by name, or draft civil-liability provisions in a way that do not require resort to statutory definitions, flatly contradicts the Supreme Court's admonition that Congress does not need to use "magic words" or state its intent to waive immunity in any particular way.

STANDARD OF REVIEW

This Court reviews the district court's conclusion that the FCRA does not waive the government's sovereign immunity *de novo*. *Karns v. Shanahan*, 879 F.3d 504, 512 (3d Cir. 2018).

ARGUMENT

I. Congress may waive federal agencies' sovereign immunity through unambiguous statutory text.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Congress may waive the federal government's sovereign immunity by

including an "unequivocal expression" of its consent to suit "in statutory text." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (internal quotation marks omitted). "Congress need not state its intent in any particular way" and is "never required" to use "magic words" to waive the government's immunity. *FAA v. Cooper*, 566 U.S. 284, 291 (2012). A waiver occurs when Congress enacts a statute that authorizes suit against the United States or its agencies for damages or other relief. *See id.*; *see also Lane v. Pena*, 518 U.S. 187, 193 (1996); *United States v. Williams,* 514 U.S. 527, 531–32 (1995).

As an expression of statutory text, a waiver of sovereign immunity is interpreted "in light of traditional interpretive rules." *Cooper*, 566 U.S. at 291. One such canon is the sovereign-immunity canon, which requires courts to "construe ambiguities in favor of immunity." *Williams*, 514 U.S. at 531. The sovereign-immunity canon, however, does not "displace[] the other traditional tools of statutory construction, *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008), and does not give courts "the authority to narrow [a] waiver that Congress intended," *United States v. Idaho ex rel. Dir., Idaho Dept. of Water Res.*, 508 U.S. 1, 7 (1993) (internal quotation marks omitted). Thus, if, applying "traditional tools of

statutory construction…, there is no ambiguity left for [courts] to construe," courts must apply a statute waiving immunity as written. *Richlin Sec. Serv. Co.*, 553 U.S. at 590; *see also Sebelius v. Cloer*, 569 U.S. 369, 380–81 (2013) (rejecting claim of immunity when "the words of the statute are unambiguous" (internal quotation marks omitted)); *Nordic Village*, 503 U.S. at 37 (holding that Congress did not waive sovereign immunity where the "a reading imposing monetary liability on the Government [was] not 'unambiguous'").

II. FCRA unambiguously waives USDA's sovereign immunity.

"As in all statutory construction cases, [a court must] begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). "[I]f the statutory language is unambiguous and the statutory scheme is coherent and consistent," the court's inquiry is at an end. *Cloer*, 569 U.S. at 380 (quoting *Sigmon Coal*, 534 U.S. at 450); *see also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (stating "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written"). Those principles apply in cases involving waivers of sovereign immunity, as in any other case of statutory construction. *See id.*; *see also Millbrook v. United States*, 569 U.S. 50, 57

(2013) ("declin[ing] to read … a limitation into unambiguous text" of the Federal Tort Claims Act's waiver of sovereign immunity).

A. The key language in the FCRA provisions at issue here is the term "person." Section 1681s-2(b)(1) provides that a "person" who provided "any information … to a consumer reporting agency" (*i.e.*, a furnisher) must, after receiving notice of a consumer dispute, "conduct an investigation" and take various other steps to ensure that the information it furnished is complete and accurate. Sections 1681n and 1681o, in turn, provide that "[a]ny person" who willfully or negligently fails "to comply with any requirement imposed" by the FCRA "with respect to any consumer is liable to that consumer" for damages. Mr. Kirtz alleges that USDA furnished incorrect information to Trans Union about the status of his debt and that, upon receiving notice of his dispute, USDA failed to take the steps required under § 1681s-2(b)(1). Accordingly, whether USDA can be held liable to Mr. Kirtz under FCRA turns on whether it is a "person" as that term is used in §§ 1681s-2(b)(1), 1681n, and 1681o.

If "person" were an undefined term, it would not encompass the USDA (and FCRA would not waive USDA's sovereign immunity)

because, "[i]n the absence of an express statutory definition, the [Supreme] Court applies a 'longstanding interpretive presumption that "person" does not include the sovereign,' and thus excludes a federal agency." *Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853, 1861–62 (2019) (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780–81 (2000)). That background principle, however, does not apply to FCRA because the statute provides an "express statutory definition" of the term "person." And "[w]hen a statute includes an explicit definition, [the courts] must follow that definition." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776–77 (2018) (quoting *Burgess v. United States*, 553 U.S. 124, 130 (2008)).

Since its enactment in 1970, FCRA has defined "person" expansively to encompass both individuals and entities of all types, including governmental entities. Specifically, § 1681a(b) provides that "the term 'person' means any individual, partnership, corporation, trust, estate, cooperative, association, *government or governmental subdivision or agency*, or other entity." *Id.* § 1681a(b) (emphasis added).

Several aspects of this statutory definition confirm that it includes federal agencies. To begin with, the term "government" denotes the

"sovereign power in a country or state" and "the machinery by which sovereign power is expressed." Black's Law Dictionary (11th ed. 2019) (Westlaw) (definition of "government"). The same was true at the time of FCRA's enactment. *See* Black's Law Dictionary 824 (rev. 4th ed. 1968) (1968 Black's) (similar definition of "government"). A "governmental agency," in turn, means a "subordinate creature of the sovereign created to carry out a governmental function…. [E]very agency which Congress can constitutionally create." 1968 Black's at 825 (quoting *Graves v. New York ex rel. O'Keefe,* 306 U.S. 466, 478 (1939)); *see also* Webster's Third New International Dictionary 40 (Philip Babcock Gove, et al., eds., G&C Merriam Co. 1965) (defining "agency" as "a department or other administrative unit of a government"). As an "Executive Department" of the U.S. government, *see* 5 U.S.C. § 101, USDA manifestly qualifies as a "governmental … agency." Indeed, USDA's sovereign immunity argument depends on that fact.

The expansiveness of the statutory definition of "person" emphasizes that Congress intended the term to cover sovereign governmental bodies. That the definition is prefaced by the word "any"—a word that, "read naturally, … has an expansive meaning, that is, one

or some indiscriminately of whatever kind," *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (cleaned up)—confirms that the federal government is among the sovereign entities that FCRA treats as a "person."

B. Other provisions of FCRA confirm that the reference to "government" and "governmental … agency" in the definition of "person" includes federal agencies. For instance, the definition of "consumer report" excludes from its scope communications "described in" § 1681a(y). *See* 15 U.S.C. § 1681a(d)(2)(D).[1] Section 1681a(y), in turn, provides that certain employment-related communications will not be treated as consumer reports if, among other things, "the communication is not provided to any person except" persons identified in the subsection. Such persons include "any Federal or State officer, agency, or department." 15 U.S.C. § 1681a(y)(1)(D)(ii). That provision explicitly treats a federal agency as a "person" that can receive the employment report described in subsection (y).

[1] Because of a drafting error, § 1681a(d)(2)(D) mistakenly refers to § 1681a(x) instead of § 1681a(y). *See* § 1681a note (References in Text).

Likewise, § 1681b uses "person" in a way that unambiguously applies to federal agencies. Section 1681b(b)(3)(A) provides that, "in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer" a copy of the report and a description of the consumer's rights under the FCRA. This obligation does not apply, however, "[i]n the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes," but only if the agency or department makes certain written findings. 15 U.S.C. § 1681b(b)(4)(A). The exception is necessary because the obligations imposed on "person[s]" under § 1681b(b)(3)(A) extend to federal agencies; if agencies were not "persons," the adverse-action requirements would not apply to them in the first place and the exception would be unnecessary and superfluous. *Cf. FCC v. NextWave Personal Comm'cns, Inc.*, 537 U.S. 293, 302 (2003) ("These latter exceptions would be entirely superfluous if we were to read [the Bankruptcy Code] as the Commission proposes—which means, of course, that such a reading must be rejected.").

C. FCRA's broad definition of "person" also unambiguously applies to each of the statutory provisions relevant to Mr. Kirtz's claim against USDA: §§ 1681s-2(b)(1), 1681n, and 1681o. FCRA directs in plain terms that the "[d]efinitions and rules of construction set forth in [§ 1681a] are applicable for purposes of" the entire "subchapter" in which FCRA's provisions are codified. 15 U.S.C. § 1681a(a). The statutory text thus "leav[es] no doubt as to the definition's reach." *Digital Realty Tr.*, 138 S. Ct. at 777.

An "express definition" in a statute is "'virtually conclusive,'" and courts will not alter a defined meaning, "[s]ave for some exceptional reason." *Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 228 (2012), for the proposition that "'[i]t is very rare that a defined meaning can be replaced' or altered"). This is not one of those "very rare" cases. Congress did not displace the FCRA-wide definition of "person" with a more specific definition applicable to §§ 1681s-2(b)(1), 1681n, or 1681o. By contrast, in another section of FCRA, § 1681g(g)(1)(G), Congress supplied a special definition of "person" carving out certain entities from the general definition solely "[a]s used in this subsection." Congress's decision not to

include any such limitation on the term as used in the provisions at issue here confirms that it intended the generally applicable definition to apply.

Moreover, applying Congress's chosen definition is not "incompatible with Congress' regulatory scheme" and does not "destroy one of [FCRA's] major purposes." *Digital Realty Tr.*, 138 U.S. at 778 (cleaned up). "Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007); *see also Spokeo v. Robins*, 136 S. Ct. 1540, 1545 (2016) ("The FCRA seeks to ensure 'fair and accurate credit reporting.'" (quoting 15 U.S.C. § 1681(a)(1))). Credit reports, however, cannot be accurate if furnishers provide inaccurate information about consumers to credit reporting agencies. As "the nation's largest employer, lender, and creditor," *Daniel*, 891 F.3d at 776, the federal government is a significant furnisher of information that appears on credit reports. By applying §§ 1681s-2(b)(1), 1681n, and 1681o to federal agencies, FCRA ensures that the procedures that Congress has set forth to promote fairness and accuracy in credit reporting apply to government-furnished information,

just as they do to information furnished by private entities. Far from being incompatible with FCRA's regulatory scheme or undermining the statute's purpose, *Digital Realty Tr.*, 138 U.S. at 778, faithful application of the statutory definition to FCRA provisions at issue is necessary to realize fully the goals that Congress sought to achieve.

D. The statutory history further confirms Congress's intent that the FCRA's definition of "person" should apply as written. As originally enacted, FCRA did not regulate furnishers of consumer-report information. Thus, although the 1970 Act required that the consumer reporting agencies investigate "any item of information" that a consumer disputed, *id.* § 611, 84 Stat. at 1132, it imposed no corresponding duty on persons who furnished the information to the consumer reporting agency.

Congress later recognized that the absence of furnisher duties "weaken[ed] the accuracy of the consumer reporting system." S. Rep. No. 103-209, at 6 (1993). Unlike consumer reporting agencies, furnishers "have direct access to the facts of a given credit transaction," so if the furnisher "acts irresponsibly in verifying the information …, inaccurate information may remain on the report and the consumer is left with little or no recourse." *Id.* Accordingly, "to make it more likely that information

reported to consumer reporting agencies is accurate," H.R. Rep. No. 102-692, at 69 (1992), Congress amended FCRA to require furnishers to investigate consumer disputes. Under the 1996 amendments, when a consumer reporting agency receives a consumer dispute, it must "provide notification of the dispute to any person who provided any item of information in dispute." *See* 1996 Amendment, § 2409, 110 Stat. 3009-440 (15 U.S.C. § 1681i(a)(2)(A)). That "person" must then investigate the dispute and make any necessary corrections. *Id*. § 2413, 110 Stat. 3009-447 (15 U.S.C. § 1681s-2(b)(1)).

In connection with these new duties, Congress also amended §§ 1681n and 1681o, which had previously applied only to consumer reporting agencies and users of consumer reports, to authorize civil liability against "[a]ny person" who negligently or willfully violates its FCRA obligations. *Id*. § 2412, 110 Stat. at 3009-446. Congress recognized that, with this change, "furnishers will be subject to civil liability for a failure to reinvestigate disputed information or a failure to update information that has been determined to be incorrect or inaccurate." S. Rep. No. 103-209, at 7; *see also* H.R. Rep. No. 103-486, at 49 (1994) (recognizing that the amendment makes civil liability provisions

applicable to "persons that furnish information to consumer reporting agencies").

Notably, in reforming FCRA's dispute process, the 1996 amendment did not alter the consumer's longstanding right to dispute "*any item* of information" in the consumer's file. *See* § 2409(a), 110 Stat. at 3009-439 (emphasis added) (15 U.S.C. § 1681i(a)(1)(A)). Congress surely understood that consumer reporting agencies obtain information from federal agencies. *Cf.* H.R. Rep. No. 108-263, at 24 (2003) (concerning subsequent amendment to FCRA) (stating that the "most common users and furnishers of information" include "government agencies."). Thus, when Congress directed consumer reporting agencies to notify the "person who provided *any item* of information in dispute," 15 U.S.C. § 1681i(a)(2)(A) (emphasis added), Congress necessarily included federal agencies among the "persons" to whom such a notice could be sent. And by simultaneously amending §§ 1681n and 1681o to authorize civil liability against any "person"—a term expressly defined since the 1970 Act to include governments and governmental agencies—Congress necessarily understood that federal agencies that failed to comply with

their § 1681s-2(b)(1) obligations could be subject to civil liability just as a private furnisher of information would be.

By contrast, if "person" were read to exclude federal agencies, the reforms to the consumer-dispute process enacted by the 1996 amendment would not apply to "any item" of information disputed by the consumer, but only to disputed items furnished by private companies. Nothing in FCRA's text or the legislative history of the 1996 amendment suggests that Congress intended to bifurcate the dispute process depending on the source of information—an outcome that would ill-serve Congress's goal of "enhancing the quality and accuracy of the information provided to consumer reporting agencies." H.R. Rep. No. 103-486, at 49.

III. Arguments that the statutory text is ambiguous lack merit.

For the reasons explained above, the plain language, statutory structure, applicable canons of interpretation, and statutory history and purpose all point in one direction: USDA is a "person" under §§ 1681s-2(b)(1), 1681n, and 1681o. The district court, following the reasoning of the Fourth and Ninth Circuits, rejected this straightforward reading and held instead that FCRA does not "contain[] an express waiver of sovereign immunity for a private right of action alleging a violation of

section 1681s-2(b)." Dist. Ct. Op. 4 (JA 8) (footnote reference omitted). As the D.C. Circuit recognized, however, the reasoning of those courts is "unpersuasive." *Mowrer*, 2021 WL 4343305, at *4.

A. The district court first considered 15 U.S.C. § 1681q, a criminal-liability provision that dates from FCRA's original enactment. *See* 1970 Act, § 619, 84 Stat. at 1134. Section 1681q provides that "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, imprisoned for not more than 2 years, or both." In the district court's view, "reading 'person' to include the United States and its agencies throughout the FCRA" would "subject the United States to criminal penalties" under § 1681q—an "illogic[al] result," according to the district court. Dist. Ct. Op. 7 (JA 11); *see also Robinson*, 917 F.3d at 804–05 (same); *Daniel*, 891 F.3d at 770 (same). Presuming that the courts could avoid that result only if they did not apply the statutory definition to § 1681q, the district court leapfrogged to the conclusion that it could also disregard the statutory definition in construing the FCRA's civil-liability provisions, notwithstanding that applying the definition as written to those provisions would involve no "untenable" outcomes. Dist.

Ct. Op. 7 (JA 11); *see also Robinson*, 917 F.3d at 805. This approach was in error.

The Supreme Court rejected an analogous approach in *United States v. Union Supply Co.*, 215 U.S. 50 (1909). The criminal statute at issue there called for both a fine and imprisonment of "any person" for failing to keep certain records. *Id.* at 54. Because "it is impossible to imprison a corporation," the defendant argued that Congress could not have intended to treat a corporation as a "person" under the provision at issue. *Id.* The Court declined, however, to interpret "person" for purposes of the statute as a whole to exclude corporations just to conform the term to the statute's mandatory criminal penalties, concluding instead that "if one of [the penalties] is impossible," the other should apply "so far as it can." *Id.* at 55. *See also Cook Cty v. United States ex rel. Chandler*, 538 U.S. 119, 128 (2003) ("Municipalities may be not susceptible to every statutory penalty, but that is no reason to exempt them from remedies that sensibly apply." (citing *Lafayette v. La. Power & Light*, 435 U.S. 389, 400–01 (1978))); *Hatch v. Equifax Info. Servs., LLC*, 2021 WL 1923419, at *4 (W.D. Mich. 2021) (recognizing that governments and corporations are "persons" under § 1681q even though they cannot be imprisoned).

Just as it is not possible to imprison a corporation, it may not be possible to impose criminal liability on sovereign entities. *See Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991) ("it is self-evident that a federal agency is not subject to state or federal criminal prosecution."); 4 William Blackstone, Commentaries *33 ("the law … will not suppose [the king] capable of committing a folly, much less a crime"). And even if criminal liability could attach, the standard for finding a waiver of criminal immunity is not necessarily the same as in the civil context. *Cf. E. Transp. Co. v. United States*, 272 U.S. 675, 687–88 (1927) (concluding that Congress had waived immunity for certain admiralty suits without deciding whether the statute "subject the United States itself for prosecution for a crime"). But the answers to these questions do not justify disregarding the application of FCRA's definition of "person" to § 1681q. If criminal liability cannot attach to sovereign entities, or if lack of ambiguity alone is insufficient to effectuate a waiver of a federal agency's criminal immunity, then § 1681q will be inapplicable to such entities even if "person" is interpreted to include them. *Cf. Department of Energy v. Ohio*, 503 U.S. 607, 619 (1992) (holding that civil penalty provisions under the Clean Water Act (CWA) and Resource Conservation

and Recovery Act (RCRA) authorize punitive fines against non-federal polluters, but that those provisions nonetheless apply to the United States insofar as they authorize coercive sanctions against the United States). By contrast, if criminal immunity for such entities can be waived through unambiguous statutory language, then refusing to apply the statutory definition of "person" to avoid such a waiver is nothing more than an impermissible judicial "rewrit[ing]" of "the statutory text." *McNeil v. United States*, 508 U.S. 106, 111 (1993). Thus, the application of the statutory definition does not produce "untenable" outcomes. Dist. Ct. Op. 7 (JA 11).

In any event, even if, as to the criminal liability provision, § 1681q, "contextual considerations would prevent application of the 'person' definition as written, … no such contextual considerations apply with respect to sovereign immunity, where the only interpretive constraint is that Congress waive it unambiguously." *Mowrer*, 2021 WL 4343305, at *5. For these reasons, the use of "person" in § 1681q does not create ambiguity as to the meaning of "person" in the FCRA provisions at issue here.

B. For similar reasons, the district court's reliance on 15 U.S.C. § 1681s is misplaced. That section grants the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) primary authority to enforce "compliance with the requirements" of FCRA against "persons subject thereto." 15 U.S.C. § 1681s(a) (FTC); *see also id.* § 1681s(b)(1)(H) (CFPB). Section 1692s(c)(1) also authorizes the states to bring an action against "any person" to enjoin a violation of FCRA and to recover damages "on behalf of the residents of the State." *Id.* § 1681s(c)(1).

The district court concluded that § 1681s is "silent about a lawsuit against a government entity," Dist. Ct. Op. 7 (JA 11), but that merely sidesteps the question whether FCRA's definition of "person" applies to § 1681s as it does to other FCRA provisions. The district court identified nothing in § 1681s that would preclude its application. Although the Fourth and Ninth Circuits thought it unusual that the FTC and CFPB could enforce FCRA against federal agencies, *Robinson*, 917 F.3d at 805; *Daniel*, 891 F.3d at 771, "the federal government routinely investigates itself," as the D.C. Circuit recently explained, *Mowrer*, 2021 WL 4343305, at *5. Indeed, the Equal Credit Opportunity Act (ECOA), which, like

FCRA, is part of the broader Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1691f, also authorizes the FTC and the CFPB to enforce ECOA against "person[s]," 15 U.S.C. § 1691c(a)(9), (c); and defines "person" to include a "government or governmental subdivision or agency," *id.* § 1691a(f). This Court and others have recognized that ECOA's definition of "person" includes the federal government. *See*, *e.g.*, *Ordille v. United States*, 216 F. Appx. 160, 164 (3d Cir. 2007) (holding that ECOA waives sovereign immunity)[2]; *Garcia v. Vilsack*, 563 F.3d 519, 521 (D.C. Cir. 2009) (recognizing that the government may be liable under ECOA); *Moore v. U.S. Dep't of Agriculture*, 55 F.3d 991, 994 (5th Cir. 1995) (same). There is thus nothing novel about FCRA's similar administrative

[2] The district court, citing *Ordille*, recognized that ECOA's definition of "person" is "almost identical to the FCRA" definition. Dist. Ct. Op. 10 (JA 14). The court concluded, however, that ECOA waived the government's sovereign immunity because the substantive provisions of that statute did not provide for criminal liability and exempted the government from punitive damages. *See* 15 U.S.C. 1691e(b). The court did not explain why identical statutory definitions in closely related statues could be interpreted differently based on the remedies that Congress chose to provide in each. The court also did not address the fact that ECOA's *administrative* enforcement provision is indistinguishable from FCRA's, even as the court invoked the existence of that scheme as a reason for not following FCRA's definition of "person."

(or private) enforcement mechanisms. *See also* 15 U.S.C. § 1602(d)–(e); 1607(a)(6), (c); 1612(b) (Truth in Lending Act provisions defining "person" to include the government and subjecting persons to administrative enforcement, while exempting governments from civil penalties). And the Fourth and Ninth Circuits identified no principle of sovereign immunity that protects a federal agency vis-à-vis another component of the federal government.

Moreover, if the term "person" in § 1681s(a) and (b) did not include *any* sovereign entities, the FTC and the CFPB would lack statutory authority to enforce FCRA against state-government violators, even though states lack sovereign immunity in an action brought by the federal government. *See PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2258 (2021) (recognizing that states lack sovereign immunity in "suits by the Federal Government"). The lack of federal enforcement would leave a gaping hole in the FCRA enforcement regime, because the states enjoy sovereign immunity vis-à-vis private plaintiffs, which Congress cannot abrogate. *Id*. at 2259; *see also*, *e.g.*, *Hutchinson v. Carco Grp., Inc.*, No. CV 15-1570, 2015 WL 5698283, at *8 (E.D. Pa. Sept. 29, 2015) ("Congress enacted the FCRA pursuant to its Commerce clause

powers and, thus, lacked the authority to take away the States' sovereign immunity in that statute.").

With respect to actions brought by states, the district court demanded that Congress be "exceptionally clear" if it chooses to authorize the states to enforce statutes against federal agencies. Dist. Ct. Op. 8 (JA 12) (citing RCRA, 42 U.S.C. § 6901 *et seq.*, as an example of a valid authorization); *see also Daniel*, 891 F.3d at 771 n.5 (stating that RCRA is more "explicit[]" and detailed than FCRA); *cf. Ohio*, 503 U.S. at 619 (addressing state actions under the CWA and RCRA against the United States). The court, however, cited no principle for this heightened standard for state enforcement actions. And the sovereign-immunity canon, under which a waiver of immunity must be "clearly discernable from the statutory text in light of traditional interpretative rules," *supports* waiver here. *Mowrer*, 2021 WL 4343305, at *3 (quoting *Cooper*, 566 U.S. at 291). In any event, § 1681s(c)(1) only authorizes states to bring actions for relief similar to what a private party can bring under §§ 1681n and 1681o, except that a state may obtain injunctive relief and statutory damages "on behalf of the residents of the State" for negligent violations. Authorizing states to obtain such relief is no more

"anomalous," *see Robinson*, 917 F.3d at 805, than authorizing private litigants to do so.[3] And to the extent that state actions under FCRA against federal agencies raises unique concerns, *see Daniel*, 891 F.3d at 770–71; *Robinson*, 917 F.3d at 805, the D.C. Circuit has explained that "contextual considerations" might "prevent application of the 'person' definition as written," but such "no such contextual considerations apply" to actions for civil liability by consumers harmed by statutory violations, *Mowrer*, 2021 WL 4343305, at *5.

C. The district court expressed concern that applying the statutory definition of "person" would "expose the Government to punitive damages" under § 1681n(a)(2) if a FCRA violation were determined to be willful, and it noted that there is a "presumption against the imposition of punitive damages on governmental entities." Dist. Ct. Op. 8 (JA 12)

[3] Section 1681s(c)(1) provides that the remedies that FCRA authorizes states to obtain are "[i]n addition to such other remedies as are provided under State law." Notwithstanding the definition of "person" as used in § 1681s(c)(1), this preservation of state-law remedies may not be sufficient to waive federal sovereign immunity with respect to such remedies. *Cf. Idaho ex rel. Director*, 508 U.S. at 9 (statute "making 'the State laws' applicable to the United States" did not waive immunity with respect to payment of certain state filing fees). That question is not presented here.

(quoting *Daniel*, 891 F.3d at 771 (internal quotation marks omitted)). Although the Supreme Court has considered the presumption in deciding whether a governmental entity is a "person" that may be liable under a statute, *see Cook Cty*, 538 U.S. at 129; *Stevens*, 529 U.S. at 784–85, the statutes at issue in those cases did not expressly define "person" to include governmental entities. Congress, however, "may impose punitive damages on government entities, so long as it does so 'expressly,'" *Mowrer*, 2021 WL 4343305, at *5 (quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 n.21 (1981)), and Congress has done just that in FCRA by defining "person" to include governments. If faithfully applying the unambiguous text exposes the government to punitive damages, the courts lack "the authority to narrow [a] waiver that Congress intended." *Idaho ex rel. Director*, 508 U.S. at 7 (internal quotation marks omitted).

D. The district court purported to find ambiguity in the statutory definition of "person" based on the "interpretive presumption that 'person' does not include the sovereign." Dist. Ct. Op. 8 (JA 12) (quoting *Vt. Agency*, 529 U.S. at 780–81). The court found that presumption relevant, "[e]ven when a term is defined in the statute," *id.*, because the court believed "it may be appropriate to 'consider the ordinary meaning

… particularly when there is a dissonance between that ordinary meaning and the reach of the definition,'" *id*. (quoting *Bond v. United States*, 572 U.S. 844, 861 (2014)); *see also Robinson*, 917 F.3d at 802–03 (relying on the presumption and citing *Bond*).

In *Bond*, the Supreme Court considered the definition of "chemical weapon" in the Chemical Weapons Convention Implementation Act of 1998, 18 U.S.C. § 229F(1)(A), and whether the statute applied to a domestic crime, occurring within a single state, of using a chemical to injure another person, 572 U.S. at 848. The Court found "ambiguity" in the statute "from the improbably broad reach of the key statutory definition," the context of the chemical weapons treaty that the statute was enacted to implement, and the consequences for state authority of federalizing traditionally state-level crimes. *Id*. at 860; *see also id*. at 866 ("If section 229 reached Bond's conduct, it would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States."). In that context, the Court observed 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.

In contrast, in FCRA, there is no "dissonance" between the "ordinary meaning" of person and a definition that treats the government as a "person." To the contrary, the Supreme Court has long recognized that the presumption that the sovereign is not a "person" does not impose a "'hard and fast rule of exclusion'" and applies only "[i]n the absence of an express statutory definition." *Return Mail*, 139 S. Ct. at 1861–62 (quoting *United States v. Cooper Corp*., 312 U.S. 600, 604–05 (1941)). In addition, unlike in *Bond*, Congress's decision to waive federal agencies' immunity from civil liability does not raise any federalism or other constitutional concerns, and, as explained above, *supra* pp. 26–28, the context of the 1996 amendment supports giving the definition its plain meaning. Accordingly, while *Bond* instructs that an ambiguous definition should be interpreted with a view toward the term being defined, it does not give courts permission to override an unambiguous statutory definition in favor of the presumptive meaning of the term that the definition was intended to replace. *See Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021) (applying statutory definition of "exceeding

authorized access" rather than what "any ordinary speaker of the English language would think" of the meaning of that phrase); *Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020) ("The problem with this otherwise plausible argument is that Congress supplanted the ordinary meaning of 'government' with a different, express definition."); *cf. Ohio*, 503 U.S. at 613 n.5 (noting that the CWA and RCRA define states as "citizens" entitled to bring citizen suits).

E. The district court faulted Congress for not using "the level of explicitness that [it] ordinarily uses to waive immunity" because the relevant provisions do not identify the "United States" by name. Dist. Ct. Op. 9 (JA 13). For example, the court observed that 15 U.S.C. § 1681u(j) creates a cause of action against "[a]ny agency or department of the United States" for obtaining or disclosing consumer reports in violation of certain nondisclosure obligations. Dist. Ct. Op. 9 (JA 13). The court also cited waivers in other statutes that "expressly mention 'the United States,'" and where "the waiver is found in liability sections and is not deduced from broad language in the definition section." *Id.* (citing 28 U.S.C. § 1346(a) and 12 U.S.C. § 2674).

FCRA, however, uses "explicit" language, defining "person" to include "any … government or governmental subdivision or agency." As explained above, that phrase "as used in a federal statute, surely includes the federal government." *Mowrer*, 2021 WL 4343305, at *4. Indeed, the district court did not purport to construe that phrase in a way that excludes federal agencies, but nonetheless concluded that the statute must "expressly mention" the United States by name to waive sovereign immunity. That conclusion flatly contradicts the Supreme Court's admonition that Congress is "never required" to use "magic words" to waive the government's immunity. *Cooper*, 566 U.S. at 291; *see also Daniel*, 891 F.3d at 772 (recognizing that Congress does not "need [to] use 'magic words' to waive sovereign immunity," but declining to find waiver because Congress did not "specifically mention the 'United States'"); *Robinson*, 917 F.3d at 803–04 (same).

The district court's comparison to § 1681u(j) highlights its error. As the district court recognized, that provision "deal[s] with disclosures by government agencies and would not apply to other actors." Dist. Ct. Op. 9 (JA 13). Accordingly, § 1681u(j) uses language to refer solely to federal agencies, rather than to "persons" generally. Sections 1681n and 1681o,

by contrast, create a cause of action against all persons—including governmental agencies—capable of violating their duties under FCRA and, thus, uses the defined term "person" to effectuate Congress's intent. No canon of statutory construction permits a court to find a waiver of sovereign immunity with respect to § 1681u(j), but not §§ 1681n and 1681o, where both provisions are unambiguous as to their scope. *Cf. Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1475 (2020) ("[T]he expansive language of the provision—*any* addition from *any* point source—strongly suggests its scope is not so limited."); *Boyle v. United States*, 556 U.S. 938, 950 (2009) (declining to stray from "clear but expansive text of the statute").

The district court also imposed an arbitrary rule that a waiver must be "found in liability sections" and not "deduced from broad language in the definition section." Dist. Ct. Op. 9–10 (JA 13–14). That rule cannot be reconciled with the principle that "Congress need not state its intent [to waive immunity] in any particular way." *Cooper*, 566 U.S. at 291. Waivers of federal sovereign immunity have thus been found where the "liability section" of a statute, viewed in isolation, would not have fully revealed Congress's intent to subject the federal government to suit. *See*

Lane, 518 U.S. at 193 (citing "any complaint" language in 29 U.S.C. § 794a(a)(1) as an express waiver of federal immunity); *cf. Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (holding that Congress made its intent to abrogate state sovereign immunity "unmistakably clear" by defining the term "public agency" in a separate statutory provision to encompass state agencies). The sovereign-immunity canon does not displace the general rule that "statutes must be read as a whole." *Guam v. United States*, 141 S. Ct. 1608, 1613 (2021) (cleaned up).

To be sure, this Court has previously suggested that, in the context of Congress's decision to abrogate *state* sovereign immunity (as opposed to waiving federal immunity), a statutory definition may not be sufficient evidence of an intent to abrogate where other indicia of congressional intent suggest that Congress did not have such an intent. *See United States v. Union Gas Co.*, 832 F.2d 1343, 1347–48 (3d Cir. 1987) (*Union Gas II*); *see also United States v. Union Gas Co.*, 792 F.2d 372, 376 n.6 (3d Cir. 1986) (*Union Gas I*) ("abrogation requires a showing of 'plain intent' rather than merely 'plain meaning.'"), *vacated on other grounds,* 479 U.S. 1025 (1987). In affirming *Union Gas II*, however, the Supreme Court clarified that statutory definitions can "convey a message of

unmistakable clarity" and provide a "background understanding" as to Congress's intent to abrogate state immunity. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 8 (1989), *overruled on other grounds*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Subsequently, in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the Supreme Court held that Congress need not abrogate state immunity "in a single section or in statutory provisions enacted at the same time." *Id.* at 76.

The suggestions in *Union Gas I* and *II*, moreover, were based on *Employees of Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri,* 411 U.S. 279 (1973), in which the Supreme Court had concluded that an amendment to the definition of "employer" to include certain state-run facilities under the Fair Labor Standards Act (FLSA) did not abrogate state immunity under an FLSA cause of action applicable to an "employer." *Id.* at 282–83, 285. The Court reached that conclusion because the legislative history of the amendment did not reveal an intent to abrogate state immunity and because the Secretary of Labor retained authority to enforce the FLSA against states. *Id.* at 285–86. The Supreme Court, however, has since made clear that "[l]egislative history generally will be irrelevant to

a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). And the critical factor in *Employees*—that the FLSA could still be enforced against state facilities by the Labor Secretary—would not support the application of *Employees*' reasoning here, because federal enforcement mechanisms under FCRA are tied to FCRA's definition of "person," and the effect of the district court's interpretation would be to eliminate both private and federal enforcement mechanisms against state governments. *See supra* pp. 36–37.

For these reasons, even assuming that the standard for congressional abrogation of state immunity is equivalent to the one for waiving federal immunity, there is no basis for excluding consideration of FCRA's statutory definition in assessing whether Congress has waived federal agencies' immunity by authorizing a cause of action against them.

CONCLUSION

This Court should reverse the judgment of the district court.

October 7, 2021
Corrected: January 7, 2022

Respectfully submitted,

/s/ *Nandan M. Joshi*

Matthew B. Weisberg
Weisberg Law PC
7 South Morton Ave.
Morton, Pa 19070
(610) 690-0801
mweisberg@weisberglawoffices.com

Nandan M. Joshi
Allison M. Zieve
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
njoshi@citizen.org

Attorneys for Plaintiff-Appellant

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1. Bar Membership. I certify that I am a member of the bar of this Court.

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/s/ *Nandan M. Joshi*
Nandan M. Joshi

ATTACHMENT

No. 21-2149

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REGINALD KIRTZ,

Plaintiff-Appellant,

v.

TRANS UNION LLC, PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY D/B/A AMERICAN EDUCATION SERVICES, AND U.S. DEPARTMENT OF AGRICULTURE RURAL DEVELOPMENT RURAL HOUSING SERVICE,

Defendants-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:20-cv-05231
Hon. Mitchell S. Goldberg

JOINT APPENDIX
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Counsel listed on following page

October 7, 2021

Mark B. Stern
Sarah Carroll
Civil Division, Appellate Staff
U.S. Department of Justice
950 Pennsylvania Avenue NW
Rm. 7511
Washington, DC 20530
(202) 514-4027
sarah.w.carroll@usdoj.gov

Attorneys for Defendant-Appellee

Nandan M. Joshi
Allison M. Zieve
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
njoshi@citizen.org

Matthew B. Weisberg
Weisberg Law PC
7 South Morton Ave.
Morton, PA 19070
(610) 690-0801
mweisberg@weisberglawoffices.com

Attorneys for Plaintiff-Appellant

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGINALD KIRTZ	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
	:	**No.: 20-5231**
v.	:	
	:	
TRANS UNION, LLC, et al.	:	
	:	
Defendants	:	

NOTICE OF APPEAL

Plaintiff REGINALD KIRTZ hereby appeals to the United States Court of Appeals for the Third Circuit from the order (ECF 30) granting the motion to dismiss of defendant U.S. DEPARTMENT OF AGRICULTURE (USDA) and the order and final judgment entered on June 9, 2021 (ECF 38) as to USDA.

WEISBERG LAW

/s/ Matthew B. Weisberg
Matthew B. Weisberg, Esquire
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
PHILADELPHIA DIVISON

REGINALD KIRTZ	:	
	:	Civil Action No. 20-5231
Plaintiff,	:	
v.	:	**JURY TRIAL DEMANDED**
TRANS UNION, LLC, et al.	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I, Matthew B. Weisberg, Esquire, hereby certify that on this 15th day of June, 2021, a true and correct copy of the foregoing Notice of Appeal was served via e-filing on all counsel of record:

Evan R. Rutter, Esquire
Schuckit & Associates PC
4545 Northwestern Dr
Zionsville, IN 46077

Casey Green, Esquire
Sidkoff, Pincus & Green, P.C.
1101 Market Street
2700 Aramark Tower
Philadelphia, PA 19107

Andrew J. Petsu , Jr., Esquire
PHEAA
1200 N 7th Street
Harrisburg, PA 17102

Paul J. Koob, Esquire
U.S. Attorney's Office
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106

Nandan M. Joshi
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009

WEISBERG LAW

/s/ Matthew B. Weisberg
Matthew B. Weisberg, Esquire
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGINALD KIRTZ	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
	:	**No.: 20-5231**
v.	:	
	:	
TRANS UNION, LLC, et al.	:	
	:	
Defendants	:	

ORDER

AND NOW, this 9th day of June 2021, upon consideration of Plaintiff's Consent Motion to Vacate and Enter Final Judgment as to the United States (Doc. No. 37), it is hereby **ORDERED** that the Court's May 28, 2021, Order granting certification pursuant to 28 U.S.C. § 1292(b) is **VACATED**.

It is **FURTHER ORDERED**, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and in light of the Court's May 4, 2021, order granting the motion to dismiss of defendant United States Department of Agriculture Rural Housing Service (USDA), that there is no just reason for delay in entering final judgment on all claims against USDA because the judgment presents a novel question of sovereign immunity and final judgment as to USDA would not affect Plaintiffs' claims against Trans Union or PHEAA or prejudice those defendants. The Clerk of Court shall enter final judgment against Plaintiff and in favor of USDA on the claims asserted against USDA.

BY THE COURT:

/s/ Mitchell S. Goldberg
MITCHELL S. GOLDBERG, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGINALD KIRTZ,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	**NO. 20-5231**
TRANS UNION, LLC, et al.	:	
Defendants.	:	

ORDER

AND NOW, this 4th day of May, 2021, upon consideration of Defendant U.S. Department of Agriculture's Motion to Dismiss (Doc. No. 21) and Plaintiff's Response (Doc. No. 26), it is hereby **ORDERED** that the Motion is **GRANTED** and that all claims against Defendant Department of Agriculture are **DISMISSED**.

BY THE COURT:

/s/ Mitchell S. Goldberg
MITCHELL S. GOLDBERG, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGINALD KIRTZ,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	**NO. 20-5231**
TRANS UNION, LLC, et al.	:	
Defendants.	:	

Goldberg, J. **May 4, 2021**

MEMORANDUM

Plaintiff Reginald Kirtz has sued multiple Defendants alleging violations of the Fair Credit Reporting Act. One such Defendant, the United States Department of Agriculture Rural Development Rural Housing Service, maintains that it is immune from suit and has filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b). For the following reasons, I will grant this Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Complaint sets forth the following facts:[1]

Plaintiff maintained accounts with Defendants, Pennsylvania Higher Education Assistance Agency d/b/a American Education Services ("AES") and United States Department of Agriculture Rural Development Rural Housing Service ("USDA"). On or about July 15, 2016, Plaintiff's AES account was closed with a balance of zero and, on or about June 7, 2018, Plaintiff's USDA account

[1] In considering a facial challenge to jurisdiction under Federal Rule of Civil Procedure 12(b), I must accept all factual allegations in the complaint as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading, the plaintiff may be entitled to relief. Atiyeh v. Nat'l Fire Ins. Co. of Hartford, 742 F. Supp. 2d 591, 596 (E.D. Pa. 2010).

was closed with a balance of zero. Plaintiff's credit report from Defendant Trans Union, dated October 10, 2018, showed both accounts closed with a zero balance on or about these dates. (Am. Compl. ¶¶ 10–12.)

Despite the accounts showing a zero balance, both AES and USDA continued to report the status of Plaintiff's payment history ("pay status") as "Account 120 Days Past Due Date" as of the October 10 Trans Union Report. An account that is listed as closed with a balance of zero could not simultaneously be past due, thus, according to Plaintiff, the reported pay statuses were false on their face. Plaintiff asserts that this status misled the algorithms used to determine Plaintiff's credit score by making it appear Plaintiff was still late on accounts that were closed, lowering Plaintiff's credit score and damaging Plaintiff's creditworthiness. (Am. Compl. ¶¶ 10–12.)

Plaintiff sent a letter to Trans Union disputing the inaccurate pay statuses on both the AES and USDA accounts. According to the Complaint, Trans Union did not undertake a good faith investigation into the disputed pay statuses, which would have uncovered the inaccuracy. Plaintiff alleges that Trans Union transmitted the dispute to AES and USDA, neither of which undertook any good faith investigation to uncover and corrected the inaccurate pay statuses. Both AES and USDA continue to erroneously report an overdue pay status, and Trans Union continues to incorporate these statuses in Plaintiff's credit report. (Am. Compl. ¶¶ 16, 18, 20–21.)

Plaintiff filed this action on October 20, 2020, alleging violations of the Fair Credit Reporting Act ("FCRA") against all three Defendants. Specifically, the Amended Complaint sets forth both willful and negligent violations of section 1681s-2(b) against the USDA. The USDA filed the present Motion to Dismiss for Lack of Subject Matter Jurisdiction on January 7, 2021, and Plaintiff responded on January 26, 2021.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may seek dismissal of a complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A motion pursuant to Rule 12(b)(1) challenges the power of the court to hear the case. Petruska v. Gannon Univ., 462 F.3d 294, 302 (3d Cir. 2006). A challenge to jurisdiction may be either facial or factual. Gould Electrs. Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000) (citing Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). In a facial challenge, the court will limit evaluation to only the allegations in the pleadings and assume the truthfulness of the complaint. Mortensen, 549 F.2d at 891. A factual attack, however, offers no such deference to the plaintiff's allegations and the court may weigh evidence outside of the facts in the pleadings to determine whether jurisdiction exists. Id.

III. DISCUSSION

The USDA's challenge to subject matter jurisdiction here is facial and asserts that the Court lacks jurisdiction over this case pursuant to the doctrine of sovereign immunity. The USDA contends that the FCRA contains no waiver of immunity that would allow Plaintiff to bring suit against it. Plaintiff responds that the FCRA allows civil action for damages against "[a]ny person" who negligently or willfully violates the substantive provisions, and the Act defines "person" to include "government or governmental subdivision or agency" thus providing a waiver of sovereign immunity.

Under the doctrine of sovereign immunity, it is well established that the United States is protected from suit in federal court unless Congress has waived such immunity. U.S. v. Bein, 214 F.3d 408, 412 (3d Cir. 2000) (citing United States v. Mitchell, 463 U.S. 206, 212 (1983)). A waiver of the government's immunity "must be unequivocally expressed in statutory text and will not be

implied." Lane v. Pena, 518 U.S. 187, 192 (1996) (citation omitted). Even when a waiver is unequivocally expressed, the scope of that waiver must be strictly construed in favor of the government, settling any ambiguity in favor of immunity. United States v. Williams, 514 U.S. 527, 531 (1995). Ambiguity exists when there is a "plausible" reading of the statute that does not impose "monetary liability on the Government." United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992). Without such unambiguous waiver, the court lacks subject matter jurisdiction over the case. Bein, 214 F.3d at 412.

The question before me is whether the FCRA contains an express waiver of sovereign immunity for a private right of action[2] alleging a violation of section 1681s-2(b). This section imposes a duty on a person, who furnishes information to a consumer reporting agency ("CRA") and who receives notice from a CRA of a consumer dispute regarding the accuracy of such information, to conduct an investigation and correct information found to be inaccurate or incomplete. 15 U.S.C. § 1681s-2(b). Section 1681n(a) authorizes a private right of action for actual, statutory, and punitive damages against "[a]ny person" who willfully fails to comply with the substantive requirements of the Act, including section 1681s-2(b). 15 U.S.C. § 1681n(a). Additionally, section 1681o(a) authorizes a private right of action for actual damages against "[a]ny person" who negligently fails to comply with the substantive requirements of the Act, including section 1681s-2(b). 15 U.S.C. § 1681o(a). Other than authorizing a private right of action, the FCRA also subjects "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses" to a criminal fine and or imprisonment. 15 U.S.C. § 1681q. Finally, the FCRA authorizes the Federal Trade Commission,

[2] A private right of action is "the right of an individual to bring suit to remedy or prevent an injury that results from another party's actual or threatened violation of a legal requirement." Wisniewski v. Rodale, Inc., 510 F.3d 294, 297 (3d Cir. 2007).

the Consumer Financial Protection Bureau, and state governments to commence investigations and enforcement actions against "person[s]" who violate the substantive provisions of the FCRA. 15 U.S.C. § 1681s. The FCRA defines "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, *government or governmental subdivision or agency*, or other entity." 15 U.S.C. § 1681a(b) (emphasis added).

Although the United States Court of Appeals for the Third Circuit has not ruled on whether the FCRA contains a waiver of sovereign immunity, three other Circuit Courts have examined this issue. Compare Robinson v. U.S. Dep't of Educ., 917 F.3d 799, 806 (4th Cir. 2019) (holding that the FCRA did not unequivocally waive the DOE's sovereign immunity), cert. denied, 140 S. Ct. 1440, [3] and Daniel v. Nat'l Park Serv., 891 F.3d 762, 769 (9th Cir. 2018) (holding that the FCRA is ambiguous thus did not unequivocally waive sovereign immunity); with Bormes v. United States, 759 F.3d 793, 795 (7th Cir. 2014) (holding the FCRA waived sovereign immunity).

As noted above, in Bormes, the Seventh Circuit found that the FCRA permits suit against a federal government entity. Bormes, 759 F.3d at 795. There, the Court reasoned that the statute authorizes suit against "any person," which includes "any . . . government." Because "[t]he United States is a government," the Bormes court concluded that Congress expressly waived immunity. Id. The Court explained that the government conceded it was a "person" under the substantive requirements of the FCRA, thus its argument that it was not a "person" for the liability sections was not supported by the statutory language. Id. Additionally, the Court noted that exposing federal employees to criminal liability was "not so outlandish that we should read § 1681a(b) to mean something other than what it says." Id. at 796.

[3] The Supreme Court recently denied certiorari in this case, with Justice Thomas dissenting and noting that "this important question has divided the Courts of Appeals." Robinson, 140 S. Ct. at 1440 (2020) (Thomas, J. dissenting).

The Fourth and Ninth Circuits, however, have reached the opposite conclusion and found that the FCRA does not unequivocally waive sovereign immunity. Robinson v. U.S. Dep't of Educ., 917 F.3d 799, 806 (4th Cir. 2019), cert. denied, 140 S. Ct. 1440; Daniel v. Nat'l Park Serv., 891 F.3d 762, 769 (9th Cir. 2018). In Daniel, the Ninth Circuit reasoned that reading "person" to include the United States and its agencies leads to implausible results such as imposing excessive punitive damages, federal and state enforcement liability, and criminal liability against the United States. 891 F.3d at 770. The Court explained that in the rare case where Congress did authorize punitive damages against the government and/or civil enforcement by one government agency on another government agency, Congress has been clear in waiving immunity. Id. at 771 n. 5 (citing 42 U.S. § 6961). Additionally, the Court reasoned that the legislative history supports the finding that Congress did not intend to waive sovereign immunity in the FCRA. Id. at. 774–75. The Court noted that because the original FCRA authorized criminal but not civil liability against a "person," if "person" is read to include the United States, then Congress originally intended to waive immunity only for the purpose of criminal prosecution, which is "patently absurd." Daniel, 891 F.3d at 775 (quoting Al-Haramain Islamic Found., Inc. v. Obama, 705 F.3d 845, 854 (9th Cir. 2012)).[4]

The Fourth Circuit followed similar reasoning in Robinson, stressing that "[t]here is a 'longstanding presumption that "person" does not include the sovereign.'" 917 F.3d at 802 (quoting Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 780 (2000)). The Court concluded that implausible results would be reached by reading "person" in the FCRA to include the United States. The Fourth Circuit also noted that the fact that the presumption that

[4] When the FCRA was eventually amended to subject "person[s]" to civil liability, there was no mention of potential costs to the government and the Congressional Budget Office analysis "did not anticipate any costs from defending the federal government against private suits." Daniel, 891 F.3d at 775–76 (citing H.R. Rep. No. 103-486, at 62–63 (1994); S. Rep. No. 103-209, at 32–34 (1994); H.R. Rep. No. 102-692, at 45–46 (1992)).

there is no waiver in the FCRA is bolstered by the fact that established waivers are generally more explicit. Id. at 803–06.

Keeping in mind that "[s]tatutory construction is a holistic endeavor," Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004), for several reasons, I find the reasoning of the Fourth and Ninth Circuits convincing.

First, I agree that reading "person" to include the United States and its agencies throughout the FCRA would lead to illogic results. Such a reading could subject the United States to criminal penalties. See 15 U.S.C. § 1681q. In Bormes, the Court brushed past this issue, reasoning that it "is not so outlandish" that Congress authorized criminal penalties against federal employees. Bormes, 759 F.3d at 796. But as the Ninth Circuit noted in Daniel, the FCRA does not distinguish employees from the government itself and, thus, reading the United States into "person" subjects the government itself to criminal liability, which is untenable. 891 F.3d at 770; see also Conboy v. U.S. Small Bus. Admin., No. 3:18-224, 2020 WL 1244352, at *8 (M.D. Pa. March 16, 2020) (citing Daniel with approval and noting that interpreting "that the United States is a 'person' for purposes of the FCRA and therefore can be subject to the FCRA's criminal penalties" is a "dubious proposition").

The FCRA also authorizes state and federal enforcement against "any person" who violates the substantive requirements of the Act, 15 U.S.C. § 1681s, but is silent about a lawsuit against a government entity. In the rare case where Congress does permit the use of such an enforcement scheme against a governmental entity, the applicable statute is clear and explicit in waiving sovereign immunity. See Daniel, 891 F.3d at 771 n. 5 (citing. 42 U.S.C. § 6961). For example, in the Resource Conservation and Recovery Act ("RCRA"), Congress authorized the Environmental Protection Agency to enforce compliance and "expressly waives any immunity otherwise

applicable to the United States . . . .” 42 U.S.C. § 6961. Notably, the definition of “person” in the RCRA also explicitly includes “each department, agency, and instrumentality of the United States.” 42 U.S.C. § 6903. This language is clearer than the FCRA’s broad definition of “any government” and the subsequent express waiver in the enforcement provision of the RCRA reflects that Congress is exceptionally clear when it intends to waive sovereign immunity. Conversely, the FCRA contains no similar express waiver of immunity suggesting that Congress did not intend to allow “state and federal enforcement” actions against the Government.

Second, as the Fourth and Ninth Circuits noted, reading the FCRA’s definition of “person” as waiving sovereign immunity would expose the Government to punitive damages. See 15 U.S.C. § 1681n(A)(2) (authorizing punitive damages against “any person” for a willful violation of the Act). “There is a ‘presumption against the imposition of punitive damages on governmental entities.” Daniel, 891 F.3d at 771 (quoting Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 785 (2000)). Similar to criminal and civil enforcement provisions, Congress uses clear and unambiguous language when it intends to waive immunity for punitive damages. See Daniel, 891 F.3d at 771.[5]

Third, the “longstanding interpretive presumption that ‘person’ does not include the sovereign” should be followed absent an “affirmative showing of statutory intent to the contrary.” Vt. Agency of Nat. Res., 529 U.S. at 780–81 (citing United States. v. Cooper Corp., 312 U.S. 600, 604 (1941); Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund, 500 U.S. 72, 83 (1991)). Even when a term is defined in the statute, it may be appropriate to “consider the ordinary meaning . . . particularly when there is a dissonance between that ordinary meaning and the reach of the definition.” Bond v. United States, 572 U.S. 844, 861 (2014). The implausible results of imposing

[5] Section 1681u of the FCRA discussed below reflects this express language within the FCRA itself. See 15 U.S.C. §. 1681u.

criminal liability, civil enforcement actions, and punitive damages against the United States supports the presumption that "person" is not meant to include the sovereign in the FCRA.

Fourth, the express waiver of sovereign immunity in another section of the FCRA demonstrates that Congress did not intend to waive such immunity in the liability sections at issue here. Section 1681u prohibits certain disclosures on credit reports "that the Federal Bureau of Investigation has sought or obtained access to [certain] information or records . . . ." 15 U.S.C § 1681u(d)(1)(A). Section 1681u(j) specifically authorizes statutory, actual, and punitive damages against "[a]ny agency or department of the United States" for violating the substantive provisions of section 1681u. 15 U.S.C. § 1681u(j). This section demonstrates that Congress uses particular and explicit language in waiving immunity. While the substantive provisions of section 1681u deal with disclosures by government agencies and would not apply to other actors, the language of the liability section is nonetheless instructive as to how Congress unambiguously waives immunity. This section thus "clouds whether the remedial provisions" relied upon in the present case "extend 'unambiguously' to monetary claims against the United States." Daniel, 891 F.3d 762, 771 (9th Cir. 2018) (citing Ordonez v. United States, 680 F.3d 1135, 1138 (9th Cir. 2012)).

Fifth, a review of other express waivers of sovereign immunity reveals that the definition in the FCRA does not meet the level of explicitness that Congress ordinarily uses to waive immunity. For example, the Little Tucker Act provides that "[t]he district courts shall have original jurisdiction . . . of . . . [a]ny other civil action or claim against *the United States*." 28 U.S.C. § 1346(a) (emphasis added). Additionally, the Federal Tort Claims Act explicitly states "*[t]he United States* shall be liable . . . in the same manner and to the same extent as a private individual . . . ." 12 U.S.C. § 2674 (emphasis added). Not only do these waivers expressly mention "the United States," the waiver is found in liability sections and is not deduced from broad language in

the definition section. A comparison of the language and structure of the FCRA to these waivers, as well as many others, [6] makes clear that FCRA is ambiguous and does not show Congress's unequivocal expression of an intent to waive immunity for civil suits.

Examination of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, which has similar language to the FCRA, is also instructive. See also Ordille v. U.S., 216 F. App'x 160, 164 (3d Cir. 2007). The ECOA authorizes a private right of action against any "creditor" who violates the Act's substantive provisions and defines "creditor" to include "any person," which includes a "government or governmental subdivision or agency. . . ." § 1691a(e), (f). While this language is almost identical to the FCRA, the two statutes contain key distinctions that necessitate different findings on the issue of sovereign immunity. First, unlike the FCRA, the ECOA does not impose criminal liability, meaning there is no implausible result of subjecting the government to criminal penalties by reading "creditor" to include the United States throughout the statute. Second, while the ECOA authorizes punitive damages, that authorization contains an express exemption for "a government or governmental subdivision or agency," which clearly evidences Congress's intent to subject the government to civil suits for actual damages. See Stellick v. U.S. Dep't of Educ., No. 11-cv-0730, 2013 WL 673856, at *3–4 (D. Minn. Feb. 25, 2013).

Finally, although the Third Circuit has not explicitly ruled on whether the FCRA contains a waiver of sovereign immunity, it has shown a tendency to strictly interpret other waivers of immunity. See, e.g., Gentile v. Sec. & Exch. Comm'n, 947 F.3d 311, 315–317 (3d Cir. 2020) (holding that a narrow construction of the Administrative Procedure Act's waiver of sovereign immunity does not extend to agency decisions to initiate investigation); United States v. Craig,

[6] "Indeed the words 'United States' appear in a great many waivers." Robinson v. U.S. Dep't of Educ., 917 F.3d 799, 803 (4th Cir. 2019) (first citing 12 U.S.C. § 3417(a); then citing 42 U.S.C. § 9620(a)(1); then citing 26 U.S.C. § 7433(a); and then citing 46 U.S.C. § 30903(a)).

649 F.3d 509, 513 (3d Cir. 2012) (construing the Civil Asset Forfeiture Reform Act and Federal Rule of Civil Procedure 41(g) narrowly as to not waive immunity for the payment of monetary interest on returned property); Cudjoe *ex rel.* Cudjoe v. Dep't of Veterans Affairs, 426 F.3d 241, 248 (3d Cir. 2005) (reading the waiver in the Toxic Substance Control Act narrowly as to not extend to private suits for money damages); Antol v. Perry, 82 F.3d 1291, 1297–98 (3d Cir. 1996) (declining to incorporate the waiver in the Rehabilitation Act into the Vietnam Era Veterans' Readjustment Assistance Act simply because the latter mentions the former).

In short, the mere fact that a statute can be plausibly read to contain a waiver of sovereign immunity is insufficient. A waiver must be unambiguous. See Cudjoe *ex rel.* Cudjoe v. Dep't of Veterans Affairs, 462 F.3d 241, 247 (3d Cir. 2005) (citing United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992) ("Language subject to varying interpretations will not be construed as a waiver.")). The FCRA does not contain such an unambiguous waiver of sovereign immunity. Therefore, I conclude that the USDA is immune from suit, and I lack jurisdiction over the claims against it. Accordingly, I will grant the USDA's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

CERTIFICATE OF SERVICE

I hereby certify that, on January 7, 2022, the forgoing document was served through the Court's ECF system on counsel for all parties.

/s/ Nandan M. Joshi
Nandan M. Joshi