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-Appellees.

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

The Fair Credit Reporting Act (FCRA) creates a cause of action against "[a]ny person" that negligently or willfully violates that statute, 15 U.S.C. §§ 1681n & 1681o, and defines "person" to include "any … government or governmental subdivision or agency," *id.* § 1681a(b). The FCRA thus unambiguously waives the federal government's sovereign immunity from suit for FCRA violations, including that of defendant-appellee U.S. Department of Agriculture Rural Development Rural Housing Service (USDA).

Originally, FCRA's civil-liability provisions extended only to a "consumer reporting agency or user of information." Pub. L. No. 91-508, tit. VI, §§ 616 & 617, 84 Stat. 1114, 1134 (1970). In 1996, when Congress extended FCRA's civil-liability provisions to "[a]ny person" that fails to comply with its FCRA responsibilities, Congress explained that the amendment was designed to "enhance[e] the quality and accuracy of the information provided to consumer reporting agencies." H.R. Rep. No. 103-486, at 49 (1994). Under the statute as amended, when consumers dispute "any item" of information on their credit reports, 15 U.S.C. § 1681i(a)(1)(A), the person that furnished the information has to

"reinvestigate" and "update information that has been determined to be incorrect or inaccurate"—a responsibility backed up by "civil liability" if the furnisher negligently or willfully failed to carry it out. S. Rep. No. 103-209, at 7 (1993); *see also* 15 U.S.C. § 1681s-2(b)(1) (requiring furnishers of information to investigate disputes and take corrective action). Excluding federal agencies—major furnishers of information that appears on credit reports—from the full scope of the 1996 reforms would seriously undermine the goals that Congress sought to achieve. *See* Kirtz Br. 26–29.

USDA disputes little of this. It does not contest that it is a "governmental … agency" covered by FCRA's definition of "person." It does not dispute that applying that definition to the statute's civil-liability provisions would waive the government's sovereign immunity unequivocally. And it does not deny that such a reading would further the objectives of the 1996 amendment.

Rather, USDA argues that, because courts can decline to apply an otherwise binding statutory definition where application of the definition would *undermine* the statutory scheme, a court may also decline to apply a statutory definition where doing so would *advance* the purpose of the

statute. To support this argument, USDA relies on the principle that ambiguities in waivers of sovereign immunity are resolved in favor of the government. But that principle applies where a statute remains ambiguous *after* traditional canons of statutory construction have been considered. It does not give courts license to interpret defined terms as if the statutory definition does not exist. The circumstances in which context shows that a statutory definition cannot be given its literal effect are rare. Where those circumstances are not present, there is no basis for regarding the statute as ambiguous for purposes of assessing whether Congress has waived sovereign immunity.

USDA provides no meritorious basis for refusing to apply FCRA's statutory definition in interpreting its civil-liability provisions. And because there is no dispute that FCRA unambiguously waives USDA's immunity when the definition is applied, this Court should reverse the judgment of the district court and remand this case so the district court can adjudicate the merits of plaintiff-appellant Reginald Kirtz's FCRA claim against the agency.

ARGUMENT

I. FCRA's definition of "person" applies to the statute's civil-liability provisions.

A. FCRA extends civil liability to "[a]ny person" that negligently or willfully fails "to comply with any requirement imposed" by the statute. 15 U.S.C. §§ 1681n & 1681o. All parties agree that the term "person" in §§ 1681n and 1681o, if undefined, would not include federal agencies. The statute does define "person," however, and defines it to include "any … government or governmental subdivision or agency." *See id.* § 1681a(b). That definition—by expressly including "any" government or government agency—unambiguously includes federal government agencies. USDA does not contest that plain reading. Accordingly, the sole question in dispute is whether FCRA's definition of "person" applies to §§ 1681n and 1681o. If it does, then FCRA waives USDA's sovereign immunity. *See* Kirtz Br. 17.

As Mr. Kirtz's opening brief explained (at 20, 24), FCRA's definition of "person" unambiguously applies to the statute's civil-liability provisions, which use that defined term to describe who is liable under the statute. As the Supreme Court has reiterated, "[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 (2018) (quoting *Burgess v. United States*, 553 U.S. 124, 130 (2008) (internal quotation marks omitted)); *see also Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021) ("When a statute includes an explicit definition of a term, we must follow that definition, even if it varies from a term's ordinary meaning." (cleaned up)); *Pellegrino v. U.S. Transp. Sec. Admin.*, 937 F.3d 164, 178 (3d Cir. 2019) (same).

That principle determines the outcome here because FCRA's plain text provides that its definitions "are applicable" to the whole statute, 15 U.S.C. § 1681a(a), "[l]eaving no doubt as to the definition's reach." *Digital Realty Tr.*, 138 S. Ct. at 777. Indeed, where Congress wanted to displace FCRA's general definition of "person" in favor of a more tailored definition, it did so expressly. *See* 15 U.S.C. § 1681g(g)(1)(G) (carving out certain entities from the definition of "person," solely "[a]s used in this subsection"), *cited in* Kirtz Br. 24.

USDA responds that "[a] statutory definition of a term need not *inevitably* control each and every use of that term in a statute." USDA Br. 9 (emphasis added). It is true that, although an "express definition" is "*virtually* conclusive," a court may decline to apply it in "*exceptional*"

circumstances. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019) (emphasis added, internal quotation marks omitted). Exceptional circumstances involve situations where rote application of the statutory definition would be "incompatible with Congress'[s] regulatory scheme" or would "destroy one of the statute's major purposes." *Digital Realty Tr.*, 138 S. Ct. at 778 (cleaned up).

Cases cited by USDA (at 16 n.6) exemplify the proper application of this principle. For example, in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), the Supreme Court held that, although the definition of "air pollutant" in the Clean Air Act includes greenhouse gases, the Environmental Protection Agency (EPA) was not compelled to include greenhouse gases in certain air pollutant permitting requirements, where "their inclusion would radically transform those programs and render them unworkable as written." *Id.* at 320; *see id.* at 319 (stating that the definition "does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme.").

In *United States v. Public Utilities Commission*, 345 U.S. 295 (1953), also cited by USDA, the Court held that the Federal Power Act's definition of "person," which excluded municipalities, did not apply to statutory provisions that "contemplate[d] municipalities as users and distributors of power" and as parties who may file complaints and rehearing petitions. *Id.* at 312. The Court explained that applying "the literal words would bring about an end completely at variance with the purpose of the statute." *Id.* at 315.

Similarly, in *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009), the Supreme Court—in what it recognized as an "unusual case"—declined to apply the definition of "political subdivision" in the Voting Rights Act in light of "specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns" unique to that statute. *Id.* at 206–07 (internal quotation marks omitted).

Likewise, this Court declined to apply the statutory definition of "claim" to a retroactivity clause in the False Claims Act because the definition, when plugged into the relevant provisions, made "no sense" and would "render[] superfluous" other statutory language. *United States*

ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98 v. Farfield Co., 5 F.4th 315, 331–32 (3d Cir. 2021).[1]

In contrast to these cases, applying FCRA's definition of person to the statute's civil-liability provisions would not render FCRA self-contradictory or thwart its operation or evident purposes. Importantly, USDA never suggests that it would. Indeed, USDA does not take issue with Mr. Kirtz's argument (Kirtz Br. 25–29) that applying the definition to §§ 1681n and 1681o *advances* FCRA's purpose of promoting fairness and accuracy in credit reporting, as well as the specific goal of the 1996 amendment of requiring furnishers—all furnishers—to investigate and respond to consumer disputes. *See* 15 U.S.C. § 1681s-2(b). Because applying the statutory definition is fully consistent with, and would not

[1] In the three other cases cited by USDA (at 16 & n.6), the Supreme Court did not consider whether to apply a statutory definition to the statute's operative provisions but, rather, how to interpret an applicable but ambiguous statutory definition. *See King v. Burwell*, 576 U.S. 473, 489–90 (2015) (concerning definition of "Exchange" under the Affordable Care Act); *Bond v. United States*, 572 U.S. 844, 860 (2014) (interpreting definition of "chemical weapon"); *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575–76 (2007) (concerning definition of "modification" in the Clean Air Act); *see also* Kirtz Br. 39–42 (discussing *Bond*). Here, USDA does not suggest that FCRA's definition of "person" can reasonably be interpreted to exclude federal agencies.

damage, the structure, language, operation and evident objectives of FCRA, there is no basis for departing from the usual rule that "[s]tatutory definitions control the meaning of statutory words." *Burgess*, 553 U.S. at 129 (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)). And without a basis for departing from the usual rule, there is no support for USDA's contention that the definition of "person" does not apply fully to §§ 1681n and 1681o.

B. Lacking any argument that applying FCRA's statutory definition of "person" to §§ 1681n and 1681o would be problematic, USDA relies heavily 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). *See* USDA Br. 17–19. As explained in Mr. Kirtz's opening brief (at 46–47), in *Employees*, the Supreme Court declined to construe an amendment to a statutory definition in the Fair Labor Standards Act (FLSA) to require states to waive sovereign immunity when operating hospitals or schools. *See* 411 U.S. at 282–83, 285.

USDA reads *Employees* to stand for the principle that "a definitional provision should not be construed to waive immunity in combination with the use of a defined term, absent indication that

Congress deliberately intended that result." USDA Br. 17. In fact, nothing in *Employees* suggests that the Supreme Court's decision turned in any way on whether the claimed waiver involved application of a definition.[2] Nor does *Employees* or any other case cited by USDA hold, or suggest, that a statutory definition may not work together with a provision that it controls to effect an unequivocal expression of congressional intent. Rather, *Employees'* holding turned on the Court's determination that, although Congress had undoubtedly intended to subject state institutions to the substantive requirements of the FLSA,

[2] Indeed, *Employees* acknowledged that the holding in *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964)—that a state's operation of a railway in the face of a federal statute subjecting rail carriers to suit waived sovereign immunity—had turned on the statutory definition of the term "carrier," and nothing in *Employees* questioned that aspect of *Parden*. *See* 411 U.S. at 282. *Parden*'s holding that a state constructively waives sovereign immunity by engaging in conduct to which Congress has attached liability was overruled by the Supreme Court in *College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board*, 527 U.S. 666, 680 (1999). After *College Savings Bank*, if Congress wishes to supersede state sovereign immunity absent express state consent, it must do so by exercising some constitutional source of authority to abrogate state sovereign immunity. But that proposition has no bearing on this case, which involves Congress's express waiver of the United States' own sovereign immunity, not imposition of constructive waiver on states.

the *legislative history* of the FLSA amendments did not support the view that it likewise intended to subject them to private actions for monetary relief. As the Court put it, there was "not a word in the history of the 1966 amendments to indicate a purpose of Congress" to authorize such suits. *Id*. at 285.

To that extent, however, *Employees*' approach to determining whether Congress has unequivocally provided for a waiver of sovereign immunity has been superseded by later Supreme Court decisions holding that the determination whether a statute waives sovereign immunity depends on a statute's text—its language, structure, context, and the purposes they reflect—not on legislative history. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (stating that "legislative history has no bearing on the ambiguity point" when considering waivers of sovereign immunity); *see also Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (stating that legislative history is "generally … irrelevant" to

"whether Congress intended to abrogate" state sovereign immunity).[3] Notably, none of the four circuits that have decided whether FCRA waives federal immunity regarded *Employees* as relevant precedent, even though the government invoked *Employees* in three of those cases. *See Mowrer v. U.S. Dep't of Transp.*, 14 F.4th 723 (D.C. Cir. 2021); Brief of Appellee, *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799 (4th Cir. 2019) (No. 18-1822), 2018 WL 4740066, at 15 (U.S. *Robinson* Brief); Brief of Appellee, *Daniel v. Nat'l Park Serv.*, 891 F.3d 762 (9th Cir. 2018) (No. 16-35689), 2017 WL 473860, at 17–18 (U.S. *Daniel* Brief); Br. of Appellee the United States, *Bormes v. United States*, 759 F.3d 793 (7th Cir. 2014) (No. 13-1602), 2013 WL 3989833, at 16 (U.S. *Bormes* Brief).

In any event, as Mr. Kirtz's opening brief explained (at 46–47), *Employees*' conclusion that the FLSA did not abrogate state immunity rested on the Court's understanding that the Secretary of Labor could

[3] None of the cases cited by USDA to show the Supreme Court's reliance on legislative history (at 18 n.7) concerns a waiver of federal sovereign immunity. The one case that relates to abrogation of state immunity, *Quern v. Jordan*, 440 U.S. 332 (1979), was decided a decade before *Dellmuth*, and its holding—that *Ex parte Young*, 209 U.S. 123 (1908), authorized relief against the state—did not rest on an examination of legislative history, *see* 440 U.S. at 346.

still enforce its provisions against state facilities. Citing the Labor Secretary's power, the Court explained that "private enforcement of the [FLSA] was not a paramount objective," which helped explain, in the Court's view, why the policy of the FLSA as amended did not reveal an intent to compel waivers of state sovereign immunity. 411 U.S. at 286.

By contrast, FCRA is "designed to be largely self-enforcing, the capacity of consumers to bring private actions to enforce their rights under the statute [being] at least equally important" as federal enforcement. S. Rep. No. 103-209, at 6 (quoting testimony by the Federal Trade Commission's Director of Credit Practices). Nothing in the statute's structure, context, or purposes suggests that Congress did not intend the statute to authorize a private right of action against federal government agencies, as its language indicates. Indeed, the statutory language and structure—and in particular its use of the defined term "person" to define not only the scope of the statute's private right of action, but also its provisions for governmental enforcement, 15 U.S.C. §§ 1681s(a) & (b)—indicate exactly the opposite.

USDA's contrary arguments suggest either that, unlike in *Employees*, there is *no* mechanism for enforcing against federal agencies

(or any "state, local, tribal, or foreign government," USDA Br. 14) the substantive obligations Congress unambiguously intended to impose on them, *or* that the term "person" means different things in the statute's neighboring enforcement provisions, including some government agencies for some provisions but not others. Neither reading of the statute is consistent with its plain meaning.

Finally, USDA seeks to buttress reliance on *Employees* by arguing that the Supreme Court "employed the same mode of analysis in *Library of Congress v. Shaw*, 478 U.S. 310 (1986)." USDA Br. 19. *Shaw*, which does not cite *Employees*, concerned a special rule of sovereign immunity under which "the United States is immune from an interest award" absent an "express congressional consent to the award of interest *separate from* a general waiver of immunity to suit." *Id*. at 314 (emphasis added). The Court held that a statute "making the United States liable 'the same as a private person' waives the Government's immunity from attorney's fees, but not interest." *Id*. at 319 (quoting 42 U.S.C. § 2000e-5(k)). To the extent that *Shaw* is relevant here, it supports Mr. Kirtz's argument that, by using the defined term "person" in §§ 1681n and 1681o, Congress intended to hold federal agencies liable for damages

(except, perhaps, with respect to interest) to the same extent as any private person that violated FCRA would be.

II. No other FCRA provision justifies refusing to apply FCRA's definition of "person" to §§ 1681n and 1681o.

For the reasons explained above, USDA has not offered a valid basis, grounded in the plain text of FCRA or any canon of statutory construction, for disregarding the statutory definition of "person" that the courts "must follow" when interpreting §§ 1681n and 1681o. *Burgess*, 553 U.S. at 130 (internal quotation marks omitted). In an attempt to introduce ambiguity where there is none, USDA adopts the reasoning of the Fourth and Ninth Circuits in *Robinson* and *Daniel*, which principally looks to other provisions of FCRA that use the term "person." Arguing that applying FCRA's definition of "person" to those provisions would produce results that are "anomalous," "problematic," and "unusual," USDA Br. 20–27 (internal quotation marks omitted), USDA urges this Court to disregard the statutory definition when interpreting the civil-liability provisions—notwithstanding the absence of any peculiar results when the definition is applied in that context. As the D.C. Circuit has stated, that "reasoning is unpersuasive." *Mowrer*, 14 F.4th at 729.

Mr. Kirtz has already addressed many of USDA's arguments and will not repeat that discussion here. *See* Kirtz Br. 30–39, 42–44. We add a few additional points in response to USDA brief.

A. Despite USDA's protestations that faithfully applying the statutory definition to various FCRA provisions would produce anomalous outcomes, much of its argument has nothing to do with whether such outcomes are unacceptable. Instead, USDA's argument rests on erroneous arguments about the language Congress used to achieve its ends. For example, USDA does not identify anything strange about Congress authorizing punitive damages against federal agencies for willful misconduct. *See* USDA Br. 20–21. As USDA concedes, Congress may authorize punitive damages against the government. *Mowrer*, 14 F.4th at 730. Although it must do so "expressly," *id.* (quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 n.21 (1981)), here, Congress satisfied that requirement in FCRA by defining "person" to include federal agencies and then using the defined term "person" in § 1681n. Because FCRA's language is clear, USDA's discussion of the need for clarity on this point adds nothing to the analysis. *See United States v. Idaho ex rel. Dir., Idaho Dept. of Water Res.*, 508 U.S. 1, 7 (1993)

(holding that courts lack "the authority to narrow [a] waiver that Congress intended" (internal quotation marks omitted)).

The same error permeates USDA's reliance on the provisions that authorize civil enforcement of FCRA by federal and state agencies. USDA calls it "anomalous" and "unusual," for Congress to authorize the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (CFPB), and state attorneys general to file civil actions against a federal agency for FCRA violations. USDA Br. 23, 25; *see* 15 U.S.C. § 1681s. But USDA acknowledges that Congress has authorized similar enforcement actions in other statutes. USDA Br. 23–26 (discussing the Equal Credit Opportunity Act, Clean Water Act, Resource Conservation and Recovery Act, and Toxic Substances Control Act). USDA then pivots, arguing that "comparable language" is absent in FCRA. *Id*. at 25, 26. That argument begs the question: whether the definition of "person" applies to use of the term "person" in § 1681s. When the statutory definition of "person" is applied to the term "person" in § 1681s, that section unambiguously authorizes federal or state enforcement against federal agencies. *See* Kirtz Br. 34–37.

Notably, USDA does not argue that application of the definition to § 1681s would be "incompatible with Congress'[s] regulatory scheme" or "destroy one of [FCRA's] major purposes." *Digital Realty Tr.*, 138 S. Ct. at 778 (cleaned up). Indeed, as Mr. Kirtz has explained (at 36), the *failure* to apply the statutory definition to § 1681s would undermine FCRA's purposes by depriving the FTC and the CFPB of "statutory authority to enforce FCRA against state-government violators," leaving a "gaping hole" in FCRA's enforcement regime. USDA ignores the gutting of federal enforcement authority that its limited reading of § 1681s would produce.

B. USDA's reliance on 15 U.S.C. § 1681u(j) is also meritless. Section 1681u(j) provides for damages against the federal government for disclosure of consumer credit information obtained by the Federal Bureau of Investigation from a consumer reporting agency. The provision is worded almost identically to §§ 1681n and 1681o, except that instead of using the defined term "person," § 1681u(j) refers directly to "[a]ny

agency or department of the United States" as the potential defendant.[4] USDA correctly notes that "'differences in language' in the same statute generally 'convey differences in meaning.'" USDA Br. 22 (citation omitted). And Mr. Kirtz has explained the difference in meaning that Congress intended: Whereas § 1681u(j) addresses actions against the federal government for a discrete breach of duties specific to it and inapplicable to other persons (and provides for a different statutory damages amount than §§ 1681n and 1681o), §§ 1681n and 1681o create a cause of action against all persons—including governmental agencies—who violate duties under FCRA. Kirtz Br. 44. In other words, § 1681u(j) specifically mentions the federal government not because the term "person" would fail to include it, but because using that term would *also* include others that Congress did not intend § 1681u(j) to cover. "The fact that section [1681u] imposes liability only on federal agencies thus says little about whether FCRA's other causes of action cover the United

[4] Section 1681u(j) states: "Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of …."

States through broader language encompassing 'any ... government.'" *Mowrer*, 14 F.4th at 729.

USDA's only response is that, having "employed such explicit language in exposing the federal government to damages under FCRA in § 1681u(j), Congress presumably would have done the same had it intended to impose" liability under §§ 1681n and 1681o "later that same year, on so much larger a scale." USDA Br. 22. USDA's presumption is not grounded in any principle of statutory construction, and it squarely contradicts the Supreme Court's admonition that Congress is "never required" to use "magic words" to waive immunity and "need not state its intent in any particular way." *FAA v. Cooper*, 566 U.S. 284, 291 (2012). As the Seventh Circuit aptly put it, "Congress need not add 'we really mean it!' to make statutes effectual." *Bormes*, 759 F.3d at 796.

C. Both parties have noted that FCRA's criminal provision, section 1681q, also uses the term "person." Regardless of whether Congress can render the government criminally liable for its actions, section 1681q offers no reason not to apply the definition of "person" fully to section 1681n and 1681o. Under the principles set forth in *United States v. Union Supply Co.*, 215 U.S. 50 (1909), and its progeny, *see* Kirtz Br. 31, when

faced with criminal sanctions that cannot be imposed on a defendant, courts do not rewrite the statute; rather, they do not impose the sanctions on that defendant. On the other hand, if the government can be held criminally liable, there is likewise no basis for rewriting the statute to avoid that result. *See* Kirtz Br. 32–33; *see also E. Transp. Co. v. United States*, 272 U.S. 675, 687–88 (1927) (addressing waiver of immunity without deciding whether Congress may "subject the United States itself for prosecution for a crime").

USDA argues that, if this Court would not apply § 1681q to government defendants, then it cannot apply §§ 1681n and 1681o to government defendants because "the central premise of plaintiff's theory" is that "a court has no choice but to mechanically apply the 'person' definition throughout the Act." USDA Br. 27–28. That description of Mr. Kirtz's argument is inaccurate: As discussed above (*supra* p.5), the applicable canon of statutory construction states that a court must apply a statutory definition absent "some exceptional reason." *Sturgeon*, 139 S. Ct. at 1086. Assuming that this Court were to conclude that the prospect of criminal liability against a sovereign constituted such an exceptional reason, that reason for disregarding the full statutory definition would

apply only to § 1681q. It would not support USDA's request that the Court disregard the statute's unambiguous definition when interpreting FCRA's civil-liability provisions, §§ 1681n and 1681o.

III. USDA's remaining arguments lack merit.

A. Citing *Robinson*, 917 F.3d at 805, USDA argues (at 21) that it would be "particularly anomalous" and "plainly unconstitutional" for the 1996 amendment to expose states to liability because the Supreme Court had held that same year in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that Congress cannot abrogate state sovereign immunity by exercising its Commerce Clause power. The 1996 amendment, however, is fully consistent with *Seminole Tribe*.

Seminole Tribe holds that, "to determine whether Congress has abrogated the States' sovereign immunity, [courts] ask *two questions*: first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power." *Id.* at 55 (cleaned up, emphasis added). The 1996 amendment answers the first question in the affirmative, because the definition of "person" is "unmistakably clear," *id.* at 56 (quoting *Dellmuth*, 491 U.S. at 228), and use of that defined term

in §§ 1681n and 1681o unequivocally expresses Congress's intent to abrogate. As to the second question, although *Seminole Tribe* holds that Congress may not abrogate state sovereign immunity pursuant to its Commerce Clause power, USDA does not contest that Congress does have the power to render federal agencies civilly liable under the FCRA. Moreover, although Congress could not, under *Seminole Tribe*, abrogate *state* immunity to private FCRA lawsuits, the 1996 amendment enables a state to be held liable under FCRA where it waives its immunity (*e.g.*, in state court). *See* 15 U.S.C. § 1681p (authorizing FCRA actions in federal district court or "any other court of competent jurisdiction").

B. USDA's reliance (at 40–41) on the Seventh Circuit's decision in *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (7th Cir. 2016), is misplaced. To begin with, the Seventh Circuit agrees that FCRA waives the federal government's immunity for violations of §§ 1681n and 1681o. *See Bormes*, 759 F.3d at 796–97. In *Meyers*, the Seventh Circuit considered a different question—whether FCRA abrogates the sovereign immunity of Indian tribes—and concluded that the term "government" in FCRA's definition of "person" does not unambiguously encompass tribal entities. *Id.* at 826. In so holding, the court recognized that tribes are in

a different position than the federal government "[b]ecause there is no debate that the United States is a government." *Id*. (citing *Bormes*, 759 F.3d at 795). In this case, USDA does not dispute that it is a "governmental … agency" covered by FCRA's definition of "person"—a point with which the Seventh Circuit agrees. *Meyers* is inapposite.

C. The history of the 1996 amendment supports reading FCRA's civil-liability provisions to apply to the federal government. *See* Kirtz Br. 26–29. The history shows Congress sought to improve the accuracy and fairness of consumer reports by ensuring that, whenever a consumer contests "*any item* of information" on a credit report, 15 U.S.C. § 1681i(a)(1)(A) (emphasis added), the following actions would occur: (1) the consumer reporting agency would notify the "person" that furnished the information of the dispute, *id.* § 1681i(a)(2)(A); and (2) that "person" would investigate the dispute and make any necessary corrections, *id*. § 1681s-2(b)(1). The legislative history further reflects that Congress intended to give its reforms teeth by providing for civil liability against furnishers that failed to comply with their § 1681s-2(b) responsibilities. *See* S. Rep. No. 103-209, at 7; H.R. Rep. No. 103-486, at 49.

USDA acknowledges that "the federal government routinely … provides information to consumer reporting agencies," USDA Br. 33, and it does not disagree that federal agencies are subject to the substantive duties that the 1996 reforms imposed on furnishers, *see id.* at 35, 39–40 (distinguishing between FCRA's substantive and enforcement provisions).[5] While invoking the legislative history of the 1996 amendment to argue that §§ 1681n and 1681o are ambiguous, USDA Br. 29–35, USDA cites nothing in the legislative history (much less in the statutory text) to support its view that, when it comes to a furnisher's failure to investigate and correct a disputed item of information,

[5] Although USDA does not affirmatively state its position on whether the term "person" in § 1681s-2(b) includes federal agencies, the cases on which it principally relies—*Robinson*, *Daniel*, and *Employees*—recognize that sovereign-immunity considerations do not permit a court to refuse to apply a defined term to a statute's substantive requirements. *See Robinson*, 917 F.3d at 806 (stating that "the substantive and enforcement provisions in FCRA are not one and the same."); *Daniel*, 891 F.3d at 770 ("Congress did not intend for the law's enforcement provisions to apply against the federal government."); *Employees*, 411 U.S. at 283 (observing that states, while immune to suit, "are constitutionally covered" by the "literal language" of the FLSA, as the Court held in *Maryland v. Wirtz*, 392 U.S. 183 (1968)).

Congress intended the 1996 amendment to apply differently where the furnisher is a federal agency. *See* Kirtz Br. 29.

USDA points to isolated comments in the legislative history that indicate that Congress was primarily focused on private-sector furnishers. *See* USDA Br. 30. To be sure, private-sector furnishers were cited in the House and Senate reports as examples of the universe of furnishers that would covered by the 1996 amendment. *See*, *e.g.*, H.R. Rep. No. 103-486, at 49 (referring to "persons who furnish information to consumer reporting agencies, *such as* banks and retailers" (emphasis added)); S. Rep. No. 103-209, at 1 ("Much of this information is submitted by credit providers, *such as* banks and finance companies" (emphasis added)). If Congress were concerned solely with the accuracy of information furnished to consumer reporting agencies by private-sector entities, however, it would have exempted federal agencies from § 1681s-2(b)'s requirements altogether. Instead, it used the defined term "person," which includes government agencies, in § 1681s-2(b), as in §§ 1681n and 1681o. In so doing, Congress made federal-agency furnishers subject to the same requirements and remedies that apply to furnishers in the private sector.

USDA places great weight on Congressional Budget Office (CBO) estimates of the cost of the 1996 amendment, which do not include the costs to the federal government of complying with § 1681s-2(b)'s command that furnishers investigate disputes and take corrective action. *See* USDA Br. 31. "[T]he CBO is not Congress," however, "and its reading of the statute is not tantamount to congressional intent." *Sharp v. United States*, 580 F.3d 1234, 1239 (Fed. Cir. 2009); *cf. United States v. Reynard*, 473 F.3d 1008, 1015 (9th Cir. 2007) ("[A]lthough the CBO report certainly provides support for construing the DNA Act to be retroactive, it can hardly be deemed conclusive evidence of Congress's intent."). As the CBO explains, its cost estimates are based an interpretation of proposed legislation prepared by its "analysts." CBO, *How CBO Prepares Cost Estimates* (Feb. 2018), at 2, available at https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53519-costestimates.pdf. The CBO analyst that prepared the cost estimate for the 1996 amendment may have misread the language of the proposed bills or otherwise overlooked a potential budgetary impact on the federal government. Such omissions are not unusual. *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1316 (2020) ("Nor did the [CBO]

'score'—that is, calculate the budgetary impact of—the Risk Corridors program," which ended up running a "deficit exceed[ing] $12 billion" over three years). CBO scoring mistakes cannot create ambiguity where none exists in the statutory text. *Cf. Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it," quoting *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011)).

D. Contrary to USDA's contention (at 36–38), the Privacy Act of 1974 has no bearing on the question presented. FCRA is focused on the fairness and accuracy of information contained in consumer reports, and it is directed at the consumer reporting industry, including furnishers, whether private or governmental. The Privacy Act "provide[s] certain safeguards for an individual against an invasion of personal privacy" arising out of federal-agency recordkeeping. Pub. L. No. 93-579, § 2(b), 88

Stat. 1896, 1896 (1974), *codified at* 5 U.S.C. § 552a note, and it is directed at federal government records generally.[6]

The civil remedies authorized by each statute reflect these differences. The Privacy Act's civil remedies provision, which has not been materially amended since its 1974 enactment, authorizes injunctive relief for an agency's failure to correct a record, 5 U.S.C. § 552a(g)(2)(A), and a minimum of $1000 in actual damages for "intentional or willful" conduct, *id.* § 552a(g)(4), where an agency's failure to "to maintain a record accurately and completely" results in "an adverse agency determination" to the plaintiff. *Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1007 (D.C. Cir. 2009). By contrast, FCRA, with respect to furnishers (governmental or private), imposes damages liability only where the furnisher, after receiving a dispute about a specific item of information, negligently or willfully fails to "conduct an investigation,"

[6] The two statutes speak to one another in that Congress amended the Privacy Act in 1982 to authorize federal agencies to report information to consumer reporting agencies when the government had a claim against an individual. *See* 31 U.S.C. § 3711(e); Debt Collection Act of 1982, Pub. L. No. 97-365, §§ 2, 3, 96 Stat. 1749, 1749 (amending Privacy Act by enacting 5 U.S.C. § 552a(b)(12)); *see also* Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(k)(1), 110 Stat. 1321, 1321-365 (making reporting of claims information mandatory for federal agencies).

"review all relevant information" provided by the consumer, and "report" the results to the consumer reporting agency. 15 U.S.C. § 1681s-2(b). Although the Privacy Act and FCRA may both apply when federal agencies furnish claims information to consumer reporting agencies, the subject matters of the two statutes historically have been distinct.

Thus, there is no basis for USDA's suggestion that Congress's debates and decisions about the scope of remedies under the Privacy Act in 1974 are relevant to ascertaining its intent when it extended FCRA liability to all "person[s]" in the 1996 amendment. For that reason, although the government raised its Privacy Act argument in *Bormes*, *Daniel*, and *Robinson*, not one of those courts thought it merited discussion in its decision. *See* U.S. *Bormes* Brief at 26–29; U.S. *Daniel* Brief at 32–35; U.S. *Robinson* Brief at 27–29 (all cited *supra* at p.12).

CONCLUSION

For the forgoing reasons and those provided in Mr. Kirtz's opening brief, this Court should reverse the judgment of the district court.

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Respectfully submitted,

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