NO. 11-192

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES X. BORMES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

JOHN G. JACOBS
JACOBS KOLTON, CHARTERED
122 S. Michigan Ave.
Suite 1850
Chicago, IL 60603

GREGORY A. BECK
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
gbeck@citizen.org

Counsel for Respondent

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QUESTION PRESENTED

Whether the Little Tucker Act's waiver of sovereign immunity for claims "against the United States founded … upon … any Act of Congress," 28 U.S.C. § 1346(a)(2), includes claims brought against the United States under the Fair Credit Reporting Act, which provides a cause of action for damages against the government. 15 U.S.C. §§ 1681a(b), 1681n, 1681o.

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STATEMENT

A. Congress passed the Fair Credit Reporting Act (FCRA) "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). The FCRA provides a private right of action for damages against any "person" who violates its requirements. 15 U.S.C. § 1681c(g)(1). And it defines "person" to mean "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." *Id.* § 1681a(b).

Responding to a surge in identity theft that had "reached almost epidemic proportions," H.R. Rep. No. 108-263, at 25 (2003), Congress in 2003 amended the FCRA to "protect consumers from identity thieves" by "limit[ing] the number of opportunities for identity thieves to 'pick off' key card account information." S. Rep. No. 108-166, at 3 (2003). Identity theft occurs when someone uses another person's identifying information, such as a social-security number or credit account number, to fraudulently obtain credit, bank loans, employment, or utility or cell phone service. *See Prepared Statement of the Federal Trade Commission on The Fair Credit Reporting Act: Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 6 (2003). The Fair and Accurate Credit Transactions Act, enacted as an amendment to the FCRA, prohibits any "person" who "accepts credit cards or debit cards for the transaction of business" from "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1).

To ensure an adequate opportunity to comply with the law, the Federal Trade Commission extensively pub-

licized the new requirements, and Congress delayed implementation until January 1, 2005, for new credit-card receipt equipment, and until December 4, 2006, for equipment in use prior to January 1, 2005. *Id.* § 1681c(g)(3).

B. After the law's effective date, respondent James Bormes used the government's online pay.gov payment system to pay a $350 filing fee using his personal credit card. Pet. App. 86a. A receipt for the payment—displayed on his computer screen and sent in an emailed confirmation—included the credit card's expiration date. *Id.* at 87a. Bormes filed suit in the U.S. District Court for the Northern District of Illinois on behalf of himself and others similarly situated, alleging that the receipt violated § 1681c(g)(1)'s prohibition on printing a credit card's expiration date. *Id.* at 81a.

As the basis for jurisdiction in the district court, Bormes relied on the FCRA's jurisdictional provision, 15 U.S.C. § 1681p, which provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court." Pet. App. 82a-84a. In addition, Bormes alleged jurisdiction under the Little Tucker Act, which waives the United States's sovereign immunity for claims "founded … upon … any Act of Congress." *Id.* Together, the Tucker Act and Little Tucker Act allocate jurisdiction over claims against the United States based on the amount in controversy. The Tucker Act provides jurisdiction in the Court of Federal Claims for claims of any value. 28 U.S.C. § 1491(a)(1). The Little Tucker Act—under which Bormes alleged jurisdiction—provides concurrent juris-

diction in the federal district courts for claims "not exceeding $10,000 in amount." *Id.* § 1346(a)(2).[1]

The district court dismissed the case. Relying on this Court's holding that the United States is immune from suit "except where Congress has 'unequivocally expressed' a waiver of immunity," the court held that the FCRA's express application to any "government" did not "unequivocally express[]" a waiver because Congress did not "expressly insert[] the specific term 'United States' into the statutory language." Pet. App. 27a-28a (quoting *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992)). The court did not address Bormes's alternative claim that the Little Tucker Act independently waives the federal government's sovereign immunity for FCRA claims.

C. Bormes appealed the district court's decision to the Federal Circuit. Pet. App. 18a. Although the Seventh Circuit would ordinarily have had jurisdiction over an appeal from a decision of an Illinois federal district court, Bormes based his appeal on 28 U.S.C. § 1295(a)(2), which provides the Federal Circuit with exclusive jurisdiction over "an appeal from a final decision of a district court of the United States … if the jurisdiction of that court was

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[1] Although the general Tucker Act expressly provides jurisdiction only to the Court of Federal Claims for claims of more than $10,000, this Court held in *Bowen v. Massachusetts* that the Act does not oust the district courts of their general federal-question jurisdiction. 487 U.S. 879, 891 & nn. 15-16, 91 (1988). Nevertheless, because the general Tucker Act conditions the government's waiver of sovereign immunity on filing in the Court of Federal Claims, a district court cannot—even if it has jurisdiction—award any relief unless the plaintiff can invoke a basis for waiver of immunity. *See Van Drasek v. Lehman*, 762 F.2d 1065, 1071 n.10 (D.C. Cir. 1985).

based, in whole or in part, on" the Tucker Act. Pet. App. 19a.

The government moved to transfer the case to the Seventh Circuit, arguing that the FCRA's jurisdictional provision controlled rather than the Little Tucker Act, and thus that the appeal should have been filed in the Seventh Circuit in accordance with 28 U.S.C. § 1291. Pet. App. 18a-22a. A motions panel of the Federal Circuit, however, disagreed, holding that the Federal Circuit was the proper forum for appeal of Bormes's claims because those claims were based in part on the Little Tucker Act. *Id.*

Following briefing and argument on the merits of the appeal, the Federal Circuit vacated the district court's decision. *Id.* at 1a-17a. The Federal Circuit held that the FCRA's creation of a cause of action against the "government"—which the government conceded at oral argument includes the United States—fell within the Little Tucker Act's waiver of immunity for claims "against the United States founded … upon … any Act of Congress." *Id.* Because Bormes's claims fell within the scope of the Little Tucker Act's waiver, and because Congress had not indicated its intent to withdraw the Little Tucker Act's remedy for FCRA claims, the Federal Circuit court concluded that the Little Tucker Act waived sovereign immunity for FCRA claims. *Id.* at 7a, 13a. The court did not reach the question whether the FCRA's provision of a cause of action against any "government" would have been sufficient, in the absence of the Little Tucker Act, to independently waive sovereign immunity. *Id.* at 7a-8a.

REASONS FOR DENYING THE PETITION

I. There is No Circuit Split on the Question Presented.

A. As the government acknowledges (at 8), there is no split among the courts of appeals on the question whether the Little Tucker Act waives the government's sovereign immunity for FCRA claims. On the contrary, the Federal Circuit below expressly followed the only other court of appeals decision to have addressed the question. *See* Pet. App. 18a (relying on *Talley v. U.S. Dep't of Agric.*, 595 F.3d 754, 762 (7th Cir. 2010), *reh'g en banc granted, opinion vacated* (June 10, 2010), *aff'd by equally divided court*, No. 09-2123, 2010 WL 5887796 (7th Cir. Oct. 1, 2010)). Like the Federal Circuit here, Judge Easterbrook's opinion in *Talley* held that the FCRA's express provision of damages against any "government" falls within the Little Tucker Act's waiver of immunity for claims "founded … upon … any Act of Congress." 28 U.S.C. § 1346(a)(2). Although the Seventh Circuit later vacated that decision and granted rehearing en banc, the evenly divided en banc court reached the same result, without opinion. *Talley*, 2010 WL 5887796. Thus, no court of appeals has adopted a position contrary to the Federal Circuit's decision here.

The government argues that a split on the question presented is unlikely to develop because the Federal Circuit has exclusive jurisdiction over Little Tucker Act claims. But nothing prevents the government from appealing adverse sovereign-immunity decisions to the regional courts of appeals. *See, e.g.*, *First Va. Bank v. Randolph*, 110 F.3d 75, 75 (D.C. Cir. 1997). In such an appeal, a regional court of appeals would be confronted with the question of whether it has appellate jurisdiction, or whether the Little Tucker Act vests exclusive jurisdiction with the Federal Circuit. *See Vietnam Veterans*

of Am. v. Sec'y of the Navy, 843 F.2d 528, 534 (D.C. Cir. 1988) (holding that the Little Tucker Act does not "creat[e] an exception to the general principle that a federal court may determine its own jurisdiction"). That jurisdictional issue turns on the same question as the issue of sovereign immunity—whether the district court had jurisdiction under the Little Tucker Act. *See United States v. Mitchell*, 463 U.S. 206, 216 (1983) ("If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit."); *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 927 (9th Cir. 2009) ("[T]he waiver of sovereign immunity is coextensive with the jurisdiction the statute confers."). For this reason, the regional courts of appeals can—and often do—decide questions of sovereign immunity under the Little Tucker Act. *See, e.g.*, Pet. App. 7a ("If the Little Tucker Act authorizes the district court to hear this case, it also provides the waiver of sovereign immunity … ."); *Wopsock v. Natchees*, 279 F. App'x 679, 684 (10th Cir. 2008) ("For the Little Tucker Act to apply, and Federal Circuit jurisdiction to attach, a court must determine whether the substantive law can be fairly interpreted as mandating compensation by the Federal Government.").[2]

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[2] *See also, e.g.*, *Tootle v. Sec'y of Navy*, 446 F.3d 167, 174 (D.C. Cir. 2006) ("There cannot be exclusive jurisdiction under the Tucker Act if there is no jurisdiction under the Tucker Act."); *Dotson v. Griesa*, 398 F.3d 156, 177 (2d Cir. 2005) ("Because a finding of sovereign immunity would deprive this court of subject matter jurisdiction, we address that question first."); *Am. Fed'n of Gov't Employees Local 1 v. Stone*, 146 F. App'x 704, 705 (5th Cir. 2005) ("Our appellate jurisdiction in this case is limited initially to determining whether the district court had jurisdiction under the Little Tucker Act … ."); *Kalodner v. Abraham*, 310 F.3d 767, 769 (D.C. Cir. 2002); *Randall v. United States*, 95 F.3d 339, 346 (4th Cir. 1996) (noting

(continued …)

If, as the government contends, the Tucker Act does not apply to FCRA claims, then the regional circuits, rather than the Federal Circuit, have jurisdiction over FCRA appeals and could reach a result contrary to the Federal Circuit's decision here. *See Chabal v. Reagan*, 822 F.2d 349, 355 (3d Cir. 1987) (holding that the regional courts of appeals must examine whether a plaintiffs' claims properly fall under the Tucker Act even if it means disagreeing with the Federal Circuit); *Shaw v. Gwatney*, 795 F.2d 1351, 1353 (8th Cir. 1986) ("If we agree with the [government] that the district court acted beyond its power in awarding back pay, that court's decision could not have been based [on the Tucker Act] … , and we have jurisdiction … .").

Indeed, the government made precisely this argument below, urging that the case be transferred to the Seventh Circuit on the ground that Bormes's FCRA claims did not fall within the Little Tucker Act's waiver of sovereign immunity. *See* Pet. App. 11a. Accordingly, the government is wrong that this Court must decide this case in the absence of disagreement among the courts of appeals.

B. The Seventh Circuit's decision in *Talley* suggests a second means by which the regional circuits could decide the question presented. The plaintiff there, while invoking the Little Tucker Act for its waiver of sovereign immunity, relied for jurisdiction on the FCRA's separate grant of jurisdiction to the district courts, 15 U.S.C. § 1681p, and the general grant of federal-question jurisdiction under 28 U.S.C. § 1331. *Talley*, 595 F.3d at 762-63. As the now-vacated *Talley* opinion explained, the

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that analysis of appellate jurisdiction in a regional court of appeals requires a decision regarding the Tucker Act's waiver of sovereign immunity).

Tucker Act is "*both* a grant of jurisdiction and a waiver of sovereign immunity," and "if the plaintiff elects to use the latter without the former, then jurisdiction does not arise under the Tucker Act." *Id.*

In *Talley* and similar cases where the plaintiff does not invoke the Little Tucker Act as a basis for jurisdiction, the Federal Circuit's exclusive jurisdiction over appeals of claims arising under the Little Tucker Act does not apply. *See* 28 U.S.C. § 1295(a)(2) (providing exclusive Federal Circuit jurisdiction over claims in which jurisdiction is based on the Little Tucker Act). The regional courts of appeals in such cases are thus free to independently interpret the scope of the Little Tucker Act's waiver as applied to the FCRA and, potentially, to disagree with the Federal Circuit's interpretation here. *See Talley*, 595 F.3d at 762 ("[T]he only way to determine what role this court plays has been to determine whether and how the Tucker Act applies."); *see also First Va. Bank*, 110 F.3d at 77 (holding that cases "rest[ing] on some other provision of federal law for the requisite governmental consent to suit … are to be heard in the regional courts of appeals, not the Federal Circuit").

C. That only two decisions of the courts of appeals have addressed the question presented reflects the relative newness of the FCRA claims at issue—which did not come fully into effect until December 4, 2006, 15 U.S.C. § 1681c(g)(3)—rather than a structural barrier to review in the regional circuits. Indeed, the government does not identify even district court decisions, other than those below and in *Talley*, that have yet decided the question presented here. In the absence of *any* decision adopting the government's position, there is no need for this Court to intervene.

II. The Federal Circuit Correctly Held that Congress Waived Sovereign Immunity for FCRA Claims.

The FCRA subjects any "person"—which the Act expressly defines to include any "government"—to monetary liability for violating its prohibitions. 15 U.S.C. §§ 1681a(b), 1681n, 1681o. The government argues that the FCRA's provision of a cause of action against the government does not bring the FCRA within the Little Tucker Act's waiver of sovereign immunity for claims brought under "any Act of Congress," but instead implicitly *revokes* the Little Tucker Act's waiver. At the same time, however, the government contends that the FCRA's "detailed remedial regime" demonstrates Congress's intent to provide *no* remedy for monetary claims against the government. Pet. 9-10. The upshot of the government's argument is that Congress, by expressly creating a cause of action for damages against the "government," succeeded only in *eliminating* any means for obtaining that monetary relief. Nothing in this Court's decisions supports that illogical result.

A. The FCRA Does Not Demonstrate Congress's Intent to Withdraw the Little Tucker Act's Sovereign-Immunity Waiver.

1. A waiver of sovereign immunity requires a "clear statement from the United States of its intent to subject the government to suit." *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472-73 (2003). This Court has long held, however, that the Little Tucker Act contains the requisite clear language. *See id.* The Act provides that "[t]he district courts shall have original jurisdiction" over "[a]ny … civil action or claim against the United States, not exceeding $10,000 in amount" that is founded on, among other things, "any Act of Congress." 28 U.S.C. § 1346(a)(2). In light of that existing waiver, the right to bring a damages claim against the govern-

ment requires only a statute creating a right of recovery against the government. *White Mt. Apache Tribe*, 537 U.S. at 473. Congress "need not provide a second waiver of sovereign immunity." *White Mt. Apache Tribe*, 537 U.S. at 472-73 (quoting *Mitchell*, 463 U.S. at 218-19).

As the Federal Circuit recognized, the FCRA easily passes that threshold—it is an "Act of Congress" that expressly provides for monetary damages against the "government." Because it falls within the scope of the Little Tucker Act's waiver, the FCRA need not contain an *additional* plain statement waiving immunity. The government argues—without citation to authority—that the Little Tucker Act's waiver is limited to "certain substantive rights as to which no complete damages remedy has otherwise been provided," and thus does "not apply to statutes that, like the FCRA, have their own self-contained remedial schemes." Pet. 11. The Act, however, contains no such limitation. Rather, it applies by its express terms to claims arising under "*any* Act of Congress." 28 U.S.C. § 1346(a)(2) (emphasis added).

The government relies for its contrary reading on this Court's cases holding that the Act's waiver extends even to claims that lack an express provision for relief, as long the statute is "reasonably amenable to the reading that it mandates a right of recovery in damages." *White Mt. Apache Tribe*, 537 U.S. at 473. For example, the Court has found a waiver of immunity for claims brought under the Takings Clause based on the Fifth Amendment's provision for "just compensation," although the Fifth Amendment contains no express cause of action for an award of damages. *See Preseault v. ICC*, 494 U.S. 1, 14 (1990). That the Little Tucker Act waives sovereign immunity even in the absence of an express damages provision, however, does not suggest the *lack* of a waiver when a statute does expressly provide for such relief. On the contrary, this Court has stressed that, because the

Tucker Act does not itself create a substantive right to recover money damages, litigants "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions"—such as the specific FCRA provisions at issue in this case. *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). To adopt the government's position would mean that, by providing in the FCRA for damages against the "government," Congress *withdrew* a waiver of sovereign immunity that—in the absence of the provision—would otherwise have been available.

2. The cases on which the government relies do not support its contention that the Tucker Act is inapplicable to any statute providing its own "comprehensive remedial regime." Those cases involved statutes demonstrating Congress's intent "to preclude judicial review" of previously available claims. *United States v. Fausto*, 484 U.S. 439, 443-44 (1988). In *Fausto*, for example, this Court reversed the Federal Circuit's holding that the Tucker Act waived sovereign immunity for claims under the Back Pay Act. *Id.* at 443. The Court relied on another statute—the Civil Service Reform Act—in which Congress had "deliberate[ly] excluded … employees in respondent's service category" from entitlement to such relief. *Id.* at 455. To nevertheless allow the claims to proceed under the Tucker Act, the Court concluded, would allow employees to circumvent Congress's statutory scheme. *Id.* Similarly, the Court in *Brown v. General Services Administration* held that Title VII withdrew the Tucker Act's grant of jurisdiction by "unambiguous[ly]" demonstrating an intent to "create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." 425 U.S. 820, 834 (1976); *see also Hinck v. United States*, 550 U.S. 501 (2007) (holding that the Internal Revenue Code established Congress's intent to establish exclusive juris-

diction in the Tax Court over claims to abate interest on federal taxes).

As these cases recognize, Congress has in limited circumstances "withdrawn the Tucker Act grant of jurisdiction" through subsequently-enacted legislation. *Preseault*, 494 U.S. at 12. But this Court will not "presume" that subsequent legislation "worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed." *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (internal quotation marks omitted). As the Court has repeatedly held, "a Tucker Act remedy exists unless there are unambiguous indications to the contrary." *Preseault*, 494 U.S. at 13; *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-19 (1984); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 126-36 (1974).[3]

Unlike the statutes at issue in the cases on which the government relies, nothing in the FCRA suggests that Congress intended to withdraw jurisdiction under the Little Tucker Act. Far from expressing an "unambiguous intention to withdraw the Tucker Act remedy," *Preseault*, 494 U.S. at 12, the FCRA provides a cause of action for damages against the "government." If Congress intended the FCRA to *eliminate* the possibility of obtaining monetary relief, it could not have chosen a more misleading way of expressing it.

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[3] *See also Slattery v. United States*, 635 F.3d 1298, 1315 (Fed. Cir. 2011) (rejecting the government's argument that that the FDIC statute withdrew Tucker Act jurisdiction because "[a]ny such withdrawal must be specific and unambiguous"); *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997) (holding that appellants "clearly [we]re entitled to bring a Tucker Act claim" under the Alaska Native Claims Settlement Act "because Congress did not explicitly preclude such suits when it enacted" the statute).

3. None of the features of the FCRA on which the government relies to show the statute's "comprehensive" nature distinguish the statute from other typical federal statutory causes of action.

First, the FCRA's grant of jurisdiction to federal district courts is merely an application of the default rule that the district courts have jurisdiction over "all civil actions arising under the … laws … of the United States." 28 U.S.C. § 1331. Because district court jurisdiction is *always* available over causes of action created by federal law, to hold that such jurisdiction conflicts with the Little Tucker Act would entirely eliminate the Act's application to claims brought under "any Act of Congress."

Fortunately, there is no such conflict. On the contrary, the Little Tucker Act *itself* provides jurisdiction in the district courts for claims of $10,000 or less. And although the general Tucker Act, on its face, grants jurisdiction only to the Court of Federal Claims, Congress's grant of jurisdiction to one court does not withdraw jurisdiction from another unless Congress specifies that the grant is exclusive. *See Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990); *Tafflin v. Levitt*, 493 U.S. 455 (1990). As this Court has recognized, the Tucker Act's grant of jurisdiction to the Court of Federal Claims does not expressly oust the district courts of their concurrent federal-question jurisdiction under § 1331. *See Bowen*, 487 U.S. at 891 & nn. 15-16, 91. Jurisdiction in the district courts thus remains available for all Tucker Act claims.

To be sure, the Tucker Act limits its waiver of sovereign immunity to actions filed in the Court of Federal Claims, thus requiring plaintiffs—as a practical matter—to file there when seeking more than the Little Tucker Act's limit of $10,000. But nothing prevents FCRA plain-

tiffs from filing such cases in the Court of Federal Claims. The FCRA does not provide that district court jurisdiction is *exclusive*, as this Court would require before finding withdrawal of the Tucker Act's grant of jurisdiction to the Court of Federal Claims. *See Donnelly*, 494 U.S. 820; *Tafflin*, 493 U.S. 455. Rather, the FCRA provides for jurisdiction in both the district courts and "*any other court of competent jurisdiction*." 15 U.S.C. § 1681p; *see Baird v. United States*, No. 04-1454C, 2006 WL 1516069 (Fed. Cl. June 1, 2006) ("The Court is not persuaded, however, that … claims arising under the FCRA necessarily fall outside the scope of its jurisdiction."). Jurisdiction over damages claims against the government under the FCRA and the Tucker Act is thus coextensive: under either statute, plaintiffs may file in district court, but are limited to the Court of Federal Claims if they wish to recover more than $10,000.

Moreover, even where Congress *has* demonstrated its intent to subject claims to differential treatment by directing claims to a special court, this Court has held that the Tucker Act remedy remains available. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102 at 126-36 (holding that Congress's provision for a special three-judge district court did not conflict with the Tucker Act's remedies). If a provision for a special three-judge court is not inconsistent with the Tucker Act, provision for jurisdiction in the district courts—the default for federal causes of action—is surely not inconsistent either.

Second, the government argues that the FCRA's two-year statute of limitations conflicts with the default six-year limitations period for Tucker Act claims set forth in 28 U.S.C. § 2501. Once again, the government's argument, if correct, would mean that the Tucker Act conflicts with nearly every cause of action arising under federal law. Limitations periods are widespread among

federal statutes, and even statutes lacking such provisions are subject to a default limitations period of four years. *See* 28 U.S.C. § 1658(a) ("Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.").

The Tucker Act's waiver of immunity for claims arising under "any Act of Congress" is not limited to statutes that provide the same limitations period as that Act. As this Court has explained, Congress intended the Tucker Act's six-year limit "merely to place an outside limit on the period within which all suits might be initiated," leaving Congress free to "provide less liberally for particular actions which, because of special considerations, required different treatment." *United States v. A.S. Kreider Co.*, 313 U.S. 443 (1941). When a statute provides a shorter period, as the FCRA does here, the shorter period governs. *See United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 8 (2008).

Third, the government asserts that, because the FCRA provides for remedies under a negligence standard, its cause of action is a claim in "tort" that is excluded under the Tucker Act. Pet. 18-19. But a tort is a common-law cause of action under state law, not a federal-law statutory claim. *See* 28 U.S.C. § 1346(b)(1); *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994). For this reason, the government acknowledges that an FCRA claim is not a tort within the meaning of the Federal Tort Claims Act. Pet. 19-20. Neither logic nor authority supports the proposition that a claim can properly be characterized as a tort for purposes of the Little Tucker Act and, at the

same time, a non-tort for purposes of the Federal Tort Claims Act.[4]

The only case on which the government relies in support of its argument—this Court's 1894 decision in *Schillinger v. United States*—rejected a patent claim premised on an alleged violation of the Takings Clause. 155 U.S. 163 (1894). *Schillinger* was decided before Congress enacted the Patent Act of 1910, and thus was not based on an "Act of Congress." *See Zoltek Corp. v. United States*, 442 F.3d 1345, 1351 (Fed. Cir. 2006). After the Patent Act was promulgated, however, this Court recognized that Congress had "add[ed] the right to sue the United States in the court of claims" for patent infringement. *Crozier v. Fried. Krupp Aktiengesell-schaft*, 224 U.S. 290, 304 (1912).

Fourth, the remaining features of the FCRA singled out by the government—its inclusion of a class of potential plaintiffs, a standard of review, and authorization for judicial relief, Pet. 13—are not only consistent with the Little Tucker Act, but essential to a statutory cause of action. Because the Little Tucker Act does not itself create a substantive right to recover money damages, litigants must base their claims on "specific rights-creating or duty-imposing statutory … prescriptions." *Navajo Nation*, 537 U.S. at 506. To conclude that the Act excludes any statute that creates a class of plaintiffs, standards for defendants to violate, or authorization for

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[4] As Judge Easterbrook noted in the Seventh Circuit's now-vacated decision in *Talley*, many torts are subject to standards of liability other than negligence. *Talley*, 595 F.3d at 761. Thus, by the government's logic, "the Tucker Act would not apply to *any* statutory claim, for all statutes use one or more of strict liability, bad intent, or failure to take appropriate precautions." *Id.*; *see also* Pet. App. 15a.

relief would render meaningless Congress's waiver of sovereign immunity for claims brought under "any Act of Congress."

B. The FCRA Creates a Damages Remedy Against the United States.

Much of the government's petition is devoted to a question not reached by the court below—whether, setting aside the Tucker Act, the FCRA independently waives sovereign immunity. The Federal Circuit, agreeing with the Seventh Circuit's vacated opinion in *Talley*, found it unnecessary to decide this question because it found that the Tucker Act provides the necessary waiver. The FCRA's waiver of sovereign immunity, however, provides an independent basis for affirming the Federal Circuit.

The FCRA's plain language subjects any "person" who willfully or negligently fails to comply with the Fair Credit Reporting Act to liability for damages. 15 U.S.C. §§ 1681n, 1681o. The Act defines "person" to include "any … government or governmental subdivision or agency." *Id.* § 1681a(b). Indeed, the government concedes that the word "government" includes the United States. *See* Pet. 22; Pet. App. 10a-11a (noting government's concession at oral argument). The government suggests no way to interpret the FCRA's creation of a cause of action against the United States as anything other than a waiver of sovereign immunity.

The government nevertheless argues that an express waiver is lacking because, when amending the FCRA in 1984 to create a cause of action against any "person" for printing credit card numbers and expiration dates, Congress did not "unequivocal[ly]" state that the word "person," already defined in the FCRA to include the "government," would retain its statutory meaning. Pet. 22-23. In support of this position, the government

points to cases in which this Court rejected a literal application of statutory language where legislative history strongly indicated that the application had not been anticipated by Congress. *Id.*

The FCRA, however, does not involve a convoluted or unexpected application of statutory language. On the contrary, Congress used the word "person" in the same sentence in which it created a cause of action for monetary damages. Congress is presumed to have chosen carefully the words it uses in a statute. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). That principle is no less true when interpreting statutes that waive sovereign immunity. *See Molzof v. United States*, 502 U.S. 301, 307-08 (1992) (following in a sovereign immunity case the "cardinal rule of statutory construction" that Congress is aware of established definitions of the words it uses); *see also Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008) (declining to rely on presumption against waiver of sovereign immunity when there was no "ambiguity left … to construe"); *United States v. Rice*, 327 U.S. 742 (1946) (same). As this Court has explained: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced." *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 383 (1949).

Thus, even if the government could point to evidence in the statute's legislative history indicating that Congress was not aware of its own definition of the word "person," that would not be enough to abrogate the statute's plain language. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (refusing to rely even on apparently clear statements in legislative history

to override a facially applicable congressional grant of jurisdiction to the federal courts). The government, here, in any case, identifies no such evidence. If the *absence* of evidence that Congress meant what it said were sufficient to cast doubt on a statute's plain meaning, it would require Congress to reaffirm the meaning of statutory definitions every time it amends a statute, or force courts to examine extrinsic evidence to determine whether Congress sufficiently understood what it was doing. "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

GREGORY A. BECK
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

JOHN G. JACOBS
JACOBS KOLTON, CHARTERED
122 S. Michigan Ave.
Suite 1850
Chicago, IL 60603

Counsel for Respondent

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