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NO. 11-192

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES X. BORMES,

Respondent.

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

RESPONDENT'S BRIEF

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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 any "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). The statute 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 publicized the new requirements, and Congress delayed implementation of the requirements 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 his 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). *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" or "any other court of competent jurisdiction." Pet. App. 82a-84a. In addition, Bormes alleged jurisdiction under the Little Tucker Act, which provides concurrent jurisdiction in the federal district courts and the Court of Federal Claims for claims "not exceeding $10,000 in amount, founded … upon … any Act of Congress." *Id.* § 1346(a)(2).[1]

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[1] The Little Tucker Act works in conjunction with the Tucker Act, which provides jurisdiction in the Court of Federal Claims for claims of any value. 28 U.S.C. § 1491(a)(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 based, in whole or in part, on" the Little Tucker Act. Pet. App. 19a.

The government moved to transfer the case to the Seventh Circuit, arguing that the FCRA's jurisdictional provision controlled, not the Little Tucker Act's, and thus that the appeal should have been filed in the Seventh Circuit under 28 U.S.C. § 1291. Pet. App. 18a-22a. A motions panel of the Federal Circuit 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 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" is sufficient, in the absence of the Little Tucker Act, to waive sovereign immunity. *Id.* at 7a-8a.

SUMMARY OF ARGUMENT

A. The Tucker Act, 28 U.S.C. § 1491(a)(1), and Little Tucker Act, 28 U.S.C. § 1346(a)(2), waive the federal government's sovereign immunity for claims brought under "any Act of Congress" that can "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (*Mitchell II*). Claims under the FCRA easily satisfy that test—they are founded on an "Act of Congress" and provide for monetary damages against any "person," which the statute expressly defines to include any "government." 15 U.S.C. §§ 1681a(b), 1681n, 1681o.

Despite the FCRA's clear language, the government argues that the statute cannot fairly be interpreted to provide for damages against the United States because, when Congress amended the FCRA's civil-remedies provisions in 1996 to apply to any "person," it did not ex-

pressly state that it intended the word "person" to conform with the statutory definition. This Court, however, has already rejected the government's effort to impose such an express-statement standard on Tucker Act claims. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). As the Court explained, the Tucker Acts already provide the required sovereign-immunity waiver, and statutes falling within the Tucker Acts' scope thus need not provide a second express waiver of immunity. *Id.* Rather, it is enough that the statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 472.

Even if a separate express waiver of sovereign immunity were required, the FCRA would satisfy that requirement. The FCRA expressly defines "person" to include any "government," and the 1996 amendments must be read in conjunction with that definition. Courts cannot assume that Congress is ignorant of an existing statutory provision, especially when the provision is a definition of a key term. Indeed, it defies belief that Congress could have amended the FCRA's civil-remedies provisions to apply to any "person" without realizing that the statute defined that word.

Aside from Congress's express definition, there are other indications that Congress understood "person" to include the federal government. The 1996 amendments imposed new restrictions on any "person" using a consumer report for employment purposes, but Congress soon after created a limited exception for federal agencies. 15 U.S.C. § 1681b(b). If federal agencies were not "person[s]" under the FCRA, the exception would have been unnecessary. Moreover, related statutes that share the FCRA's definition of "person" contain explicit limits

on the government's liability that are absent from the FCRA. The Truth in Lending Act expressly preserves governmental immunity for civil and criminal penalties, 15 U.S.C. § 1612, while the Equal Opportunity Employment Act exempts government entities from punitive, but not actual, damages. 15 U.S.C. § 1691e(b). Congress's selective exclusion of government entities from liability demonstrates its awareness that those entities would otherwise have faced liability under definitions of "person" identical to the FCRA's.

The government does not dispute that the term "person" includes the United States in some contexts, but argues that the term's "ordinary meaning"—which the government says excludes the United States—should apply for purposes of the statute's civil-remedies provisions. The government advances four reasons to read the statute this way, but none comes close to a justification for setting aside the FCRA's plain language.

First, the government argues that Congress would not likely have imposed liability on state governments in 1996, shortly after this Court held in *Seminole Tribe v. Florida* that Congress lacks the authority to abrogate state sovereign immunity under its Commerce Clause power. 517 U.S. 44 (1996). But Congress drafted the FCRA's amended civil-remedies provisions long before *Seminole Tribe*, and there is no indication that the decision caused Congress to exclude states, much less the federal government, from the statute's coverage.

Second, Congress's express imposition of liability on federal agencies in a section of the FCRA applying to the FBI, 15 U.S.C. § 1681u, indicates only that Congress intended the liability provision as a remedy for government abuse under that section. It does not suggest that

Congress intended to exclude government entities from other liability that applies more broadly to any "person."

Third, the government's broad characterization of Congress's intent to limit the waiver of sovereign immunity in the Privacy Act, 5 U.S.C. 552a, sheds no light on the scope of the FCRA's waiver. The two statutes, though overlapping to some degree, were passed at different times and cover different subjects. Because the statutes are capable of coexisting without modification, there is no basis for reading the Privacy Act's independent sovereign-immunity waiver as a limitation on liability under the FCRA.

Fourth, the legislative history of the 1996 amendments does nothing to undermine the FCRA's plain language. Even clear legislative history cannot undermine unambiguous statutory text, and an *absence* of legislative history certainly cannot do so.

B. Because the FCRA falls within the scope of the Tucker Acts' jurisdictional grant, the Tucker Acts' waiver of sovereign immunity applies unless Congress withdrew the waiver in the FCRA. Such a withdrawal cannot be presumed, but must be unambiguously expressed.

The government argues that Congress intended the Tucker Acts to serve as a comprehensive remedial regime that applies only to claims that would otherwise lack a judicial damages remedy. But the Tucker Acts' plain language applies to claims under *any* Act of Congress, not just those without remedies, and the cases on which the government relies do not support its position. Those cases each involved statutes in which Congress intended to limit judicial review of certain claims, and in which allowing a claim under the Tucker Acts would have allowed plaintiffs to circumvent that limit. But Congress's intent to foreclose the Tucker Acts' remedy

must be clearly expressed, and none of the government's cases suggests that a statute's provision of a remedial regime is sufficient to indicate that intent.

The government identifies no statutory limits common to all "remedial statutes" that claims under the Tucker Acts would allow parties to circumvent. The government argues only that the Tucker Acts would allow plaintiffs to rely on substantive statutory claims for damages under the FCRA "while invoking the Tucker Act to remove any sovereign-immunity limitation." U.S. Br. 25. That, however, is precisely the function that the Tucker Acts are supposed to serve. The Tucker Acts do not create substantive damages claims; they simply provide jurisdiction and waive sovereign immunity for claims premised on other sources of law. The government's concern about circumvention of sovereign-immunity limits is particularly misplaced when applied to FCRA claims, which expressly provide claims against the federal government. The government's position that remedial statutes fall outside the Tucker Acts' scope would mean that, by expressly creating a cause of action for damages against the "government," the FCRA eliminated the means for obtaining that relief.

In the alternative, the government argues that, even if some remedial statutes are capable of coexistence with the Tucker Acts, particular features of the FCRA render it incompatible with the Tucker Acts' remedial scheme. But statutes are presumed to be compatible with the Tucker Acts as long as the statutes are capable of coexistence. The features of the FCRA on which the government relies here do not conflict with the Tucker Acts and do not distinguish the FCRA from other typical federal statutes.

The FCRA's grant of jurisdiction to district courts is merely an application of the default rule for cases arising under federal law. Especially given the statute's additional allowance of jurisdiction in "any other court of competent jurisdiction," 15 U.S.C. § 1681p, the FCRA's jurisdictional provision cannot be read as a clear statement of Congress's intent to foreclose the Tucker Acts' remedy. Nor does the FCRA's two-year statute of limitations render it incompatible with the Tucker Acts. This Court has held that the Tucker Acts' six-year limitations period provides only an outside limit on the time in which to file suit, and statutory claims brought under the Tucker Acts may provide a shorter period. *See United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 8 (2008). Thus, none of the FCRA's features on which the government relies even suggests, much less unambiguously demonstrates, Congress's clear intent to withdraw the Tucker Acts' remedy.

C. The government is also wrong that FCRA claims are excluded from the Tucker Acts based on the Acts' exclusion of claims "sounding in tort." The Tucker Acts waive sovereign immunity over five separate classes of claims, but the tort exclusion modifies only the last of those: claims "for liquidated or unliquidated damages not sounding in tort." 28 U.S.C. § 1346(a)(2); 28 U.S.C. § 1491(a)(1). Thus, the Acts' plain language waives sovereign immunity for claims based on "*any* Act of Congress," regardless of whether the claims "sound[] in tort." 28 U.S.C. § 1346(a)(2) (emphasis added); 28 U.S.C. § 1491(a)(1). Although this Court's early cases adopted inconsistent interpretations of the tort exclusion's scope, the Court since 1933 has consistently applied the Tucker Acts to statutory and constitutional claims without asking whether the claims sound in tort. *See Jacobs v. United States*, 290 U.S. 13, 27 (1933).

Even assuming that the Tucker Acts' tort exclusion applies to claims based on federal statutes, the exclusion would not apply here because the FCRA claim in this case is not a tort. Although the government's definition of "tort" to include any legal wrong independent of contract would include FCRA claims, treatises from around the time Congress passed the Tucker Acts recognize the government's definition as incomplete. As these authorities explain, a tort is a legal wrong for which the *common law* provides a remedy for damages. When a remedy is provided by statute—as in the FCRA—the claim is not a tort. The government primarily relies on *Schillinger v. United States* for its argument that statutory claims can constitute torts. 155 U.S. 163 (1894). The patent statute at issue in *Schillinger*, however, provided for an "action on the case," which courts at the time interpreted as creating a common-law claim for trespass. In contrast, there is no common-law cause of action analogous to the FCRA's claim for printing credit card numbers and expiration dates.

The government's definition of "tort" to include all non-contractual wrongs would lead to other problems. It would define statutory claims as torts, even though such claims are not covered by the Federal Tort Claims Act. And it would render meaningless all the classes of claims under the Tucker Acts other than those founded on contracts, thus flying in the face of this Court's decisions recognizing non-contractual Tucker Act claims.

ARGUMENT

I. The FCRA Falls Within the Scope of the Tucker Acts' Sovereign Immunity Waiver.

As sovereign, the "United States may not be sued without its consent and … the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*,

463 U.S. 206, 212 (1983) (*Mitchell II*). Accordingly, jurisdiction over a suit against the federal government requires both "a clear statement from the United States waiving sovereign immunity," and "a claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citations omitted). Both requirements are satisfied here.

A. The Tucker Acts Waive Sovereign Immunity for "Any Act of Congress" that Authorizes Damages Claims Against the United States.

Both the Tucker Act, 28 U.S.C. § 1491, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), provide federal jurisdiction over "[a]ny … civil action or claim against the United States" that is founded on, among other things, "the Constitution, or any Act of Congress, or any regulation of an executive department." This language provides the "clear statement" required for a waiver of sovereign immunity. *See White Mountain Apache Tribe*, 537 U.S. at 472 ("The Tucker Act contains such a waiver."); *see also Mitchell II*, 463 U.S. at 218 ("The Tucker Act itself provides the necessary consent.").

To fall within the scope of the Tucker Acts' waiver, a claim must be one for money damages against the United States. *Mitchell II*, 463 U.S. at 218. Moreover, the "Act of Congress" or other source of law on which the claim is based must "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Id.* "[I]f a claim falls within this category, the existence of a waiver of sovereign immunity is clear." *Id.* at 218.

B. The FCRA Is an "Act of Congress" that Expressly Creates a Damages Claim Against the United States.

The FCRA falls squarely within the scope of the Tucker Acts' sovereign-immunity waiver. The statute is indisputably an "Act of Congress," which the government concedes is "literally encompasse[d]" by the Tucker Acts. U.S. Br. 20. Moreover, by its express language, the FCRA "create[s] substantive rights to money damages" against the United States. *Mitchell II*, 463 U.S. at 218. Specifically, the FCRA provides a right of action for damages against "any person" who violates the Act's requirements, and expressly defines "person" to include "any … government or governmental subdivision or agency." 15 U.S.C. § 1681a(b). Two separate sections of the FCRA subject "[a]ny *person*" to damages for willfully or negligently "fail[ing] to comply with any requirement imposed" by the Act. 15 U.S.C. §§ 1681n, 1681o (emphasis added). One such requirement—the one at issue in this case—provides that "no *person* that accepts credit cards or debit cards for the transaction of business shall print 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) (emphasis added). The FCRA's plain language thus subjects "any … government," including the United States, to monetary liability for printing receipts that include the prohibited credit card information.

Despite the FCRA's straightforward language, the government argues that the FCRA cannot be "fairly interpreted" to allow damages claims against the United States for two general reasons. First, the government argues that Congress did not expressly state that the

word "person," as used in the FCRA's liability provisions (as opposed to its definitional provisions), includes the United States. Second, the government points to four factors that it argues show that Congress did not intend the United States to be considered a "person" under the Act. The government is wrong on both counts.

1. The FCRA Expressly Subjects Any "Person," Including Any "Government," to Liability for Damages.

The government claims an "absence of evidence" that Congress considered the FCRA's definition of "person" when it subjected "any person" to liability for violating the statute's requirements. U.S. Br. 46. The government contends that, when Congress defined the term "person" in 1970, the FCRA did not impose significant liability on the government because the statute's liability provisions at that time did not apply to "person[s]," but to "consumer reporting agenc[ies]" and "user[s] of information." U.S. Br. 22-23. It then argues that, when Congress amended the liability provisions in 1996 to cover any "person," it did not expressly state in the statute's text or legislative history that it intended the word "person," already defined in the FCRA to include the "government," to conform to the existing statutory definition. *Id.* This Court should reject the government's invitation to read Congress's express definition out of the statute. *See U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 504 (1993) (refusing to "read words out of the statute").

A. The government's argument that Congress should have provided an express statement about the meaning of "person" in the 1996 amendments derives from cases in which this Court required a clear manifestation of Congress's intent to abrogate sovereign immunity. See U.S. Br. 45-46. The government relies on *Em-*

ployees of the Department of Public Health & Welfare, in which this Court held that state hospitals were immune from liability under the Fair Labor Standards Act because Congress had not stated in "clear language" its intent to abrogate state immunity. 411 U.S. 279 (1973). The government also relies on *Library of Congress v. Shaw*, which held that the United States was immune to awards of interest in the absence of an express statement that specifically and unambiguously waived the federal government's sovereign immunity to such awards. 478 U.S. 310, 319 (1986).

Those cases, however, did not involve claims under the Tucker Acts, and the standards they set forth are inapplicable here. Because the Tucker Acts waive the government's sovereign immunity for claims based on "any Act of Congress," Congress "need not provide a second waiver of sovereign immunity" for statutes that fall within its scope. *White Mountain Apache Tribe*, 537 U.S. at 472-73 (quoting *Mitchell II*, 463 U.S. at 218-19). Thus, when a case is brought against the United States under the Tucker Acts, "the separate statutes and regulations need not … be construed in the manner appropriate to waivers of sovereign immunity." *Id.* Rather, it is enough that the statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 472. This "fair interpretation" standard "demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity," requiring only a statute that is "reasonably amenable to the reading that it mandates a right of recovery in damages." *Id.*

Although the government purports to apply the "fair interpretation" test, U.S. Br. 40, its insistence that Congress expressly confirm that it "considered and intend-

ed" the statute's plain meaning, U.S. Br. 46, is in fact an "express statement" test of the sort this Court applies to waivers of sovereign immunity. This Court has already rejected a similar effort by the government to "substitute a plain and explicit statement standard for the [Tucker Acts'] less demanding requirement of fair inference." *White Mountain Apache Tribe*, 537 U.S. at 477. In *White Mountain Apache Tribe*, the Court rejected the government's "demand [for] an explicit provision for money damages to support every claim that might be brought under the Tucker Act," holding that the statute's creation of a trust relationship between the federal government and the tribe was sufficient—even in the absence of an express liability provision—to create a "fair inference that the Government [was] subject to duties as a trustee and liable in damages for breach." *Id.*; *see also Mitchell II*, 463 U.S. 206 (inferring a damages claim against the government under a different trust statute). At the very least, the FCRA's *express* imposition of liability against any "government" is as "reasonably amenable" to a reading that it creates a damages claim against the United States as those statutes for which this Court has found such a claim to be merely *implied* by the statutory text.

B. Even if the Tucker Acts required a separate express statement waiving sovereign immunity, the FCRA would satisfy that requirement here. The express-statement requirement derives from the presumption that a sovereign—absent a clear statement to the contrary—has not waived its immunity to suit. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008). But the presumption does not "displace[] the other traditional tools of statutory construction," *id.*, including the "cardinal canon … that courts must assume that a legislature says in a statute what it means and means in a

statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see also FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) ("What we … require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools."). The presumption thus does not justify disregarding a statute's plain language. *See Richlin Sec. Serv. Co.*, 553 U.S. at 590 (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). For the doctrine to come into play, a statute must at least be "susceptible of … interpretations that do not authorize monetary relief." *Nordic Vill. Inc.*, 503 U.S. at 34; *Cooper*, 132 S. Ct. at 1448 (same).

There is no ambiguity under the FCRA. The statute expressly defines the term "person" to include "*any* … government or governmental subdivision or agency." 15 U.S.C. § 1681a(b) (emphasis added); *see Meese v. Keene*, 481 U.S. 465, 484 (1987) (recognizing "the respect we normally owe to the Legislature's power to define the terms that it uses in legislation"); *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) ("Statutory definitions control the meaning of statutory words … ."). The phrase "any … government," by its plain language, includes the federal government. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980) (describing "any" as "expansive language [that] offers no indication whatever that Congress intended" to limit a statute's reach). The FCRA's imposition of liability on any "person"—and thus on any "government"—unambiguously waives the federal government's sovereign immunity. *See Moore v. U.S. Dep't of Agric.*, 55 F.3d 991, 994 (5th Cir. 1995) (holding that a materially identical definition of "person" in the Equal Credit Opportunity Act "une-

quivocally expresse[d] Congress' intention[]" that "governmental entities are liable under the Act").

That Congress did not expressly redefine "person" in the text of the 1996 FCRA amendments does not mean, as the government suggests, that the word as used in the amendments lacks a defined statutory meaning. The amendments did not create a new, freestanding statute—they amended the FCRA and thus must be interpreted as part of that already-existing statutory scheme. *See Texas v. E. Texas R. Co.*, 258 U.S. 204, 217 (1922) (holding that "amendments … are to be read in connection with [the amended statute] and with other amendments of it"). Because the FCRA already defined the word "person" when Congress amended the statute in 1996, the amendments must be read in conjunction with that definition "as if [they] were originally incorporated" in the Act. *Pennsylvania Co. v. United States*, 236 U.S. 351, 362 (1915); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.5 (1999) (holding that an amendment to the Communications Act was "*part of*" the Act, the existing provisions of which Congress must have been aware). Congress is not required to clutter statutes with redundant definitions every time it amends a statute, and, in light of the existing definition, Congress's decision not to redefine "person" in the 1996 amendments signifies only that "nothing more need be said." *Burns v. United States*, 501 U.S. 129, 136 (1991); *see also United States v. Singleton*, 16 F.3d 1419, 1428 (5th Cir. 1994) (holding that Congress is not required "to repeat itself, restating in each subsequent enactment an intention Congress thought it clearly expressed once already").

Indeed, given the statutory definition of "person," the lack of any indication, much less express statement, that Congress intended the word under the 1996

amendments to have a meaning other than its statutory definition is dispositive here. When Congress acts against the background of existing legislation, courts "should assume that [it] was aware" of the law's existing provisions, and should avoid "any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882). Thus, an amendment's use of language from the original statute signals Congress's intent—absent evidence to the contrary—to adopt that language's established meaning. *See FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1184 (2011) (holding that, where an amendment used a word that already existed in the statute, Congress intended the word to have the same meaning). That principle is especially true when the language at issue is Congress's definition of a critical statutory term. As this Court wrote in *Sorenson v. Secretary of the Treasury*, "it defies belief that Congress [could be] unaware," when amending a statute, of a term it "had previously expressly defined." 475 U.S. 851 (1986).

C. That the word "person," as used in the FCRA's 1996 amendments, conforms to the word's statutory definition is reinforced by Congress's use of the word in the statute's substantive provisions. The 1996 amendments imposed two new requirements on "person[s]" who use credit reports for employment purposes. 15 U.S.C. § 1681b(b). First, the amendments prohibit any "person" from obtaining a consumer report for employment purposes without first providing notice to the consumer and obtaining written authorization. *Id.* § 1681b(b)(2). Second, the amendments prohibit the "person" obtaining the consumer report from taking any "adverse action" based on the report before providing the consumer a copy of the report and a written description of the consumer's rights under the FCRA. *Id.* § 1681b(b)(3). The

following year, however, Congress adopted an "exception" to the "adverse action" requirement under § 1681b(b)(3). *See* Intelligence Authorization Act for Fiscal Year 1998, Pub. L. No. 105-107, § 311, 111 Stat. 2248 (codified at 15 U.S.C. § 1681(b)(4)). The exception provides that § 1681b(b)(3)'s notice requirements "shall not apply" to "an agency or department of the United States Government" if the agency makes written findings that the report is "relevant to a national security investigation" and that there is a specific need for secrecy. 15 U.S.C. § 1681b(b)(4)(A).

These requirements, and the associated exception, demonstrate Congress's understanding that the word "person," as used in the 1996 amendments, includes government entities. If federal agencies were not "person[s]" under the FCRA, they would not be subject to the requirements of the section, and the exception would have been unnecessary. The exception also demonstrates Congress's understanding that federal agencies, except under specific and narrowly defined circumstances, are subject to the FCRA's requirements. The exception expressly applies only to the notices related to "adverse actions" required by § 1681b(b)(3), and thus does not excuse federal agencies from § 1681b(b)(2)'s requirement of notice and consent before obtaining a consumer report for employment purposes. And, even in the context of sensitive national-security investigations where the exception applies, Congress carefully enumerated the reasons sufficient to justify withholding disclosure, and required agencies to provide the disclosure as soon as the investigation is complete or secrecy is no longer required. *Id.* § 1681b(b)(2).

Congress has exhibited a similar understanding in statutes related to the FCRA that share its definition of

"person." The Truth in Lending Act (TILA), 15 U.S.C. § 1601, and the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691, were both enacted around the same time as the FCRA and codified as part of the Consumer Credit Protection Act.[2] TILA imposes liability for actual damages and other forms of relief on "any creditor" violating the statute's requirements. 15 U.S.C. § 1640. The statute defines "creditor" as a "person" who extends credit under defined circumstances, and defines "person"—like the FCRA—to include any "government or governmental subdivision or agency." *See* 15 U.S.C. § 1602(d), (e) (defining "person" to include an "organization," and "organization" to include the enumerated government entities). Unlike the FCRA, however, TILA includes an express preservation of governmental immunity, providing that "[n]o civil or criminal penalty provided under this subchapter for any violation thereof may be imposed upon the United States or any department or agency thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision." 15 U.S.C. § 1612.

Similarly, the ECOA imposes liability for actual damages on "[a]ny creditor" who violates the law's prohibitions. 15 U.S.C. § 1691e(a). The law defines "creditor" to include "any person," and again defines "person" to include a "government or governmental subdivision or agency." 15 U.S.C. § 1691a(e), (f). Examining this language, the Fifth Circuit held that the statutory defini-

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[2] Congress originally enacted the FCRA in 1970 as Title IV of the Consumer Credit Protection Act. *See* Pub. L. No. 91-508, 84 Stat. 1134. TILA (Title I of the Act) was enacted two years earlier, in 1968, *see* Pub. L. No. 90-321, 82 Stat. 146; and the ECOA (Title VI), four years later, in 1974, *see* Pub. L. No. 93-495, 88 Stat. 1521.

tions "unequivocally expresse[d] Congress' intention[]" that "governmental entities are liable [for actual damages] under the Act." *Moore*, 55 F.3d at 994. In contrast, the ECOA's provision for *punitive* damages, set forth in the following paragraph, applies to "[a]ny creditor, *other than a government or governmental subdivision or agency*." 15 U.S.C. § 1691e(b) (emphasis added). Thus, the ECOA's plain language subjects government entities to liability for actual, but not punitive damages.

Congress's selective exclusion of government entities from liability under TILA and the ECOA demonstrates its awareness that, without the exclusions, those entities would have been subject to liability under statutory definitions of "person" identical to the FCRA's. *See Moore*, 55 F.3d at 994 ("Congress … would not have specifically preserved the United States' immunity unless it believed that such immunity had been previously waived."); *see also U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 619 (1992) (holding that the Clean Water Act's definition of "person" to include government entities was overridden by express limitations in the statute's liability provisions).

2. There Is No Evidence that Congress Intended to Exclude the United States from the FCRA's Definition of "Person."

The government does not articulate an alternative interpretation of the FCRA's definition of "person" that would exclude the federal government, and, in fact, acknowledges that the term includes the United States at least "in some FCRA contexts." *See* U.S. Br. 40-41. Yet it asks this Court, in construing the statute's liability provisions, to set aside Congress's definition in favor of the word's "ordinary meaning." U.S. Br. 46. The government cites a number of authorities that define the

word "person" to exclude government entities. *Id.* None of those authorities, however, addresses a statutory definition that expressly defined "person" to include the "government." When, as here, a statute includes an explicit definition, a court "must follow that definition, *even if it varies from that term's ordinary meaning*." *Stenberg v. Carhart*, 530 U.S. 914, 942-43 (2000) (emphasis added); *see also W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945) ("Of course, statutory definitions of terms used therein prevail over colloquial meanings."). Indeed, "[t]here would be little use" in a statutory definition if courts were free "to choose a meaning for [themselves]." *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935).

The government identifies four "factors" that it claims indicate that Congress did not intend the FCRA's definition of "person" to apply to the 1996 amendments. None of these factors provides a basis for setting aside the statute's express language.

A. The government first contends that Congress could not have intended the FCRA's 1996 amendments to impose monetary liability on the states, given that this Court had decided "mere months" earlier in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that Congress lacked authority under its Commerce Clause power to abrogate a state's sovereign immunity. U.S. Br. 47. The chronology of the FCRA's enactment, however, contradicts the government's point. While it is true that the 1996 amendments did not become law until shortly after this Court decided *Seminole Tribe*, the relevant portion of the amendments, which expanded the FCRA's liability provisions to cover any "person," was included in separate House and Senate bills passed in 1994, more than two years *before Seminole Tribe*. *See* S. Rep. No. 783, 103d Cong. (1994) (passed by a Senate vote on May 4,

1994); H.R. Rep. No. 1015, 103d Cong. (1994) (passed by a House vote on June 13, 1994). The government is thus simply mistaken when it characterizes the amendments as a "response" to *Seminole Tribe*.

Moreover, whether or not Congress believed that it lacked authority to abrogate state sovereign immunity under the FCRA, this "factor" does not suggest that Congress intended a definition of "person" other than the one set forth in the statute. Assuming that Congress lacks that authority, states could nonetheless waive their *own* immunity—either generally or in specific cases—and consent to suit on FCRA claims. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (holding that a provision of the Lanham Act imposing liability on states could not abrogate the states' sovereign immunity, but noting that states could waive their immunity to those claims). Moreover, that states may be entitled to invoke sovereign immunity for FCRA claims does not justify reading *other* government entities out of the statutory definition. Even setting aside states, the FCRA's definition of "person" to include any "government" would, in the 1996 liability provisions, still encompass the United States, as well as political subdivisions like counties and municipalities that are not entitled to Eleventh Amendment immunity. *See N. Ins. Co. of N.Y. v. Chatham Cnty.*, 547 U.S. 189 (2006).

B. The government next argues that FCRA amendments in the 1996 Intelligence Authorization Act demonstrate that Congress understood how to expressly impose liability on the federal government when it wished to do so. *See* 15 U.S.C. § 1681u. Section 1681u grants the FBI authority to obtain consumer information, under limited circumstances, for national security purposes. *Id.* In that context, the section's liability provision is de-

signed only to provide a remedy for government abuse of the specified authority. The section's express reference to federal agencies, which *limits* the scope of liability under the section, does not suggest that governments are excluded from liability provisions that Congress applied to *any* "person" under the Act.

C. The government argues that applying the statutory definition of "person" would conflict with the purpose of the Privacy Act, 5 U.S.C. 552a, to limit government liability for privacy violations. Broad conceptions of statutory purpose are a questionable guide even when interpreting a single statute. *See Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986). And Congress's purpose in enacting a *different* statute is surely irrelevant to construction of the FCRA. *See Doe v. Chao*, 540 U.S. 614, 626 (2004) (rejecting "reliance on the legislative histories of completely separate statutes"); *see also Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008) (holding that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination"). Although the subject matters of the FCRA and the Privacy Act have some overlap, the statutes were enacted at different times, cover different subjects, and coexist without need for judicial modification. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). In any case, because the FCRA unambiguously subjects the United States to liability, there is no basis for turning to another statute for guidance. *See Greenport Basin & Constr. Co. v. United States*, 260 U.S. 512 (1923).

D. Finally, the government argues that if Congress had intended to impose liability on the United States, that intent should be evident from the statute's legislative history. 'The "theory of the dog that did not bark" on which the government relies, however, is a weak guide to statutory interpretation. *See Harrison*, 446 U.S. at 592. This Court does not require Congress to state its understanding of a statute's plain language. As the Court has explained, "it 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." *Id.* at 592; *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385, n.2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning").

In those cases where the Court has relied on an absence of legislative history, it has done so to establish that Congress intended to *retain* a statute's established meaning. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004) (finding "scant indication" that Congress intended to limit the scope of an existing provision); *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (expressing doubt that Congress "withdrew, without comment, an important category of elections" from the statute's protection); *Church of Scientology v. IRS*, 484 U.S. 9 (1987) (holding that an amendment to the Internal Revenue Code did not exclude redacted material from the statutory definition of "return information"). The government here, however, invokes congressional silence for the opposite purpose—to show that Congress intended its 1996 amendments to adopt a definition of "person" *different* from the existing statutory meaning. Whatever its legitimacy for other purposes, "mere silence in the

legislative history cannot justify" reading new elements into a statute's plain text. *Whitfield v. United States*, 543 U.S. 209, 216 (2005).

II. The FCRA Does Not Demonstrate Congress's Intent to Withdraw the Tucker Acts' Waiver.

Because the FCRA is an "Act of Congress" providing for money damages against the government, the Tucker Acts' waiver of sovereign immunity applies "unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *E. Enterprises v. Apfel*, 524 U.S. 498, 520 (1998). A repeal of the Tucker Acts' grant of jurisdiction is disfavored. *Id.* Thus, "a Tucker Act remedy exists unless there are unambiguous indications to the contrary." *Preseault v. I.C.C.*, 494 U.S. 1, 13 (1990); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-19 (1984); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 126-36 (1974).

The government advances two arguments for its conclusion that Congress did not intend the Tucker Acts' remedy to apply to FCRA claims. First, the government argues broadly that Congress did not intend the Tucker Acts to apply to *any* statute that provides its own "remedial scheme." U.S. Br. 10. In the alternative, the government argues that, even if some remedial statutes fall within the scope of the Tucker Acts' waiver, specific features of the FCRA render it incompatible with the Tucker Acts. Neither of the government's arguments, however, provides any evidence that Congress intended to withdraw FCRA claims from the Tucker Acts' jurisdiction.

A. The government first argues that "Congress would not … have intended a Tucker Act remedy for statutes" that already provide their own "statutory judicial remedy." U.S. Br. 20. According to the government,

Congress intended the Tucker Acts to provide a "fully formed remedial scheme" that takes effect only when a statute does not provide a "judicial damages remedy" of its own. *Id.* at 10. As the government acknowledges, however, the Tucker Acts' plain language contains no exception for remedial statutes. U.S. Br. 20. Rather, the Acts provide jurisdiction over claims under "*any* Act of Congress." 28 U.S.C. § 1346(a)(2) (emphasis added); 28 U.S.C. § 1491(a)(1).

The cases on which the government relies also fail to support its contention that the Tucker Acts' jurisdiction excludes remedial statutes. Those cases involved statutes that unambiguously demonstrated Congress's intent "to preclude judicial review" of particular claims. *United States v. Fausto*, 484 U.S. 439, 443-44 (1988). As in those cases, Congress has in limited circumstances "withdrawn the Tucker Acts' grant of jurisdiction" through subsequently enacted legislation. *Preseault*, 494 U.S. at 12. But this Court does 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). In *Fausto*, for example, this Court held that the Tucker Acts did not waive sovereign immunity for claims under the Back Pay Act. 484 U.S. 439. 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 the limitations on remedies that Congress intended. *Id.*

The other cases cited by the government also relied on Congress' intent to limit particular claims. In *Hinck v. United States*, the Court held that a limited statutory remedy adopted "against a backdrop of decisions uniformly rejecting the possibility of any review" demonstrated Congress's intent to establish exclusive jurisdiction in the Tax Court. 550 U.S. 501, 506 (2007). Similarly, *Brown v. General Services Administration* held that Title VII withdrew the Tucker Acts' grant of jurisdiction by "unambiguous[ly]" demonstrating Congress's intent to "create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." 425 U.S. 820, 834 (1976). And in *Nichols v. United States*, this Court held that permitting jurisdiction in the Court of Claims would have allowed the plaintiff to bypass a statute requiring payment of duties under protest before filing suit. 74 U.S. 122 (1868); *see also United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982) (holding that "Congress deliberately intended to foreclose" a Tucker Act remedy).

In contrast, the government identifies no statutory limits common to all "remedial statutes" that the Tucker Acts would allow parties to evade. The government argues only that bringing FCRA claims under the Tucker Acts would allow parties to rely on substantive claims for damages under the FCRA "while invoking the Tucker Act to remove any sovereign-immunity limitation." U.S. Br. 25. That, however, is precisely the function that the Tucker Acts are *supposed* to serve. As this Court has explained, the Tucker Acts do not themselves "create substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on *other* sources of law (e.g., statutes or contracts)." *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (emphasis added); *see also Mitchell II*,

463 U.S. at 216-217, 218 (holding that the Tucker Acts do not "create any substantive right," and that a damages claim against the United States must be grounded on some other "source of substantive law"). Far from excluding "independent remedial schemes" from their scope, the Tucker Acts thus *require* "specific rights-creating or duty-imposing statutory or regulatory prescriptions" for their waiver to apply. *Navajo Nation*, 556 U.S. at 506.

The government's argument that the Tucker Acts would allow plaintiffs to circumvent sovereign-immunity limits is particularly misplaced when applied to FCRA claims. 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." To accept the government's position that remedial statutes fall outside the Tucker Acts' scope would lead to the paradoxical result that Congress, by expressly creating a damages claim against the government, succeeded only in eliminating the means for obtaining those damages. Nothing in the Tucker Acts' text or this Court's decisions supports that illogical result.

B. In the alternative, the government argues that, even assuming that the Tucker Acts are capable of waiving sovereign immunity for remedial statutes, specific features of the FCRA render it incompatible with the Tucker Acts' waiver. U.S. Br. 30. None of the features of the FCRA on which the government relies, however, demonstrates an incompatibility with the Tucker Acts, or even distinguishes the FCRA from any other typical federal statutory cause 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 arising under federal statutes, to hold that such jurisdiction conflicts with the Tucker Acts would entirely eliminate statutory causes of action from the Acts' jurisdiction.

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 Mims v. Arrow Fin. Servs.*, 132 S. Ct. 740, 749 (2012). As this Court has recognized, the Tucker Acts' 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 v. Massachusetts*, 487 U.S. 879, 891 & nn. 15-16, 910 (1988). Jurisdiction in the district courts thus remains available for all Tucker Act claims.

To be sure, the general 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 plaintiffs from filing such cases in the Court of Federal Claims. The FCRA does not provide that district court jurisdiction is exclusive, but that a claim may be brought in the district courts "*or in any other court of competent jurisdiction*." 15 U.S.C. § 1681p; *see Baird v. United States*, 71. Fed. Cl. 536, 541 n.10 (2006) ("The FCRA does not appear … to limit jurisdiction to the Dis-

trict Courts and State courts."). Jurisdiction over damages claims against the government under the FCRA and the Tucker Acts is thus coextensive: plaintiffs may file in district court, but are limited to the Court of Federal Claims if they wish to recover more than $10,000.

The government responds to this point by asserting that "[t]here is no evidence" that Congress believed the Court of Federal Claims to be a "court of competent jurisdiction" under the FCRA's jurisdictional provision. U.S. Br. 36. But that argument misses the point. It is the government's burden to show that Congress in the FCRA unambiguously withdrew the Tucker Acts' remedies. *See Preseault*, 494 U.S. at 13. The FCRA's permissive grant of jurisdiction to district and unspecified "other" courts does not create the sort of "exclusive … judicial scheme" that this Court has found sufficient to satisfy that burden. *Brown*, 425 U.S. at 834. Indeed, even where Congress has directed claims to a special court, this Court has held that the Tucker Acts' remedies remain available. *See Regional Rail Reorg. 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 Acts' remedies). If a provision for a special three-judge court is not inconsistent with the Tucker Acts, the FCRA's unremarkable jurisdictional provision is surely not inconsistent either.

Second, as the Federal Circuit below recognized, the FCRA's provision for punitive damages does not conflict with the Tucker Acts. Pet. App. 14a-15a. If punitive damages cannot be imposed on the government under the Tucker Acts, as the Federal Circuit held, it would mean only that plaintiffs in cases under the Tucker Acts would be limited to claims for actual damages. It would

not suggest, however, that Congress intended to deny *all* remedies under the FCRA.

Third, 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 Acts' waiver of immunity, however, is not limited to causes of action with six-year limitations periods. As this Court has explained, Congress intended the Tucker Acts' 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). Thus, the FCRA's two-year period could not possibly indicate Congress's clear intent to withdraw the Tucker Acts' remedy.

III. FCRA Actions Do Not Fall Within the Tucker Acts' Exclusion of Claims "Sounding in Tort."

The government argues that claims under the FCRA "sound[] in tort" and are thus expressly excluded from the Tucker Acts' scope. Statutory claims, however, are not covered by the Tucker Acts' tort exclusion, and, in any event, an FCRA claim does not sound in tort.

A. Under the Tucker Acts' express language, jurisdiction over a claim based on an "Act of Congress" does not depend on whether the claim "sound[s] in tort." The Tucker Acts set forth five categories of claims for which Congress waived sovereign immunity: claims "founded *either* upon [1] the Constitution, *or* [2] any Act of Congress, *or* [3] any regulation of an executive department, *or* [4] upon any express or implied contract with the United States, *or* [5] for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1346(a)(2) (emphasis added); 28 U.S.C. § 1491(a)(1); *see Dooley v. United States*, 182 U.S. 222, 224 (1901) (holding that the Tucker Acts recognize "distinct classes of cases").[3]

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[3] The distinctness of each category of claims is emphasized by a prior version of the Tucker Act, which listed each category of claim in a separately numbered paragraph:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> (1) Founded upon the Constitution; or
>
> (2) Founded upon any Act of Congress; or
>
> (3) Founded upon any regulation of an executive department; or
>
> (4) Founded upon any express or implied contract with the United States; or

(continued)

The Tucker Acts' use of the word "either" and the disjunctive "or" demonstrates that the Acts cover claims that fall within any one of the listed categories. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Because "a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows," *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), the statutory exclusion for cases "sounding in tort" applies only to the final category of claims: claims for "liquidated or unliquidated damages." *See Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002). Thus, the Tucker Acts waive the government's sovereign immunity for the third category of claims—claims under "*any* … Act of Congress"—regardless of whether the claims "sound[] in tort." 28 U.S.C. 1346(a)(2) (emphasis added); 28 U.S.C. § 1491(a)(1).[4]

Despite some early uncertainty, this Court ultimately concluded, consistent with the Tucker Acts' plain language, that the tort exclusion does not apply to federal

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> (5) For liquidated or unliquidated damages in cases not sounding in tort.

Act of June 25, 1948, ch. 646, § 1, 62 Stat. 940 (1948).

[4] The Tucker Acts' grant of jurisdiction over claims for "liquidated or unliquidated damages in cases not sounding in tort" covers common-law claims (i.e., claims not founded on the Constitution, statutes, or regulations) that are based in neither contract nor tort. The provision is rarely invoked, and has been described by the Court of Claims as a "still-amorphous and unfamiliar part of our jurisdiction." *Eastport S. S. Corp. v. U.S.*, 372 F.2d 1002, 1013 (Ct. Cl. 1967). This Court applied the provision in *United States v. Cornell Steamboat Co.* to find jurisdiction over a claim for salvage. 202 U.S. 184, 190 (1906) (holding that a salvage claim can "properly be said to be one for unliquidated damages in a case not sounding in tort").

statutory or constitutional claims. Before 1933, the Court articulated contradictory interpretations of the exclusion. *See* Charles C. Binney, *The Element of Tort As Affecting the Legal Liability of the United States*, 20 Yale L.J. 95, 100 (1910) (surveying early cases). In some cases, the Court held that the Tucker Acts grant jurisdiction over claims founded on the Constitution or federal statute, regardless of whether the claim is a tort. In *Dooley v. United States*, for example, the Court held that "[t]he words 'not sounding in tort' … refer[] only to the [final] class of cases"—i.e., actions for "liquidated or unliquidated damages." 182 U.S. at 224. Thus, the Court concluded that claims founded on federal statutes, "whether … tortious or not," fell within the "class of cases specified in the Tucker act, of claims founded upon a law of Congress." *Id.*

In other cases, the Court adopted the opposite interpretation, holding that the tort exclusion applied to all categories of claims recognized by the Tucker Acts. *See, e.g.*, *Schillinger v. United States*, 155 U.S. 163 (1894). The Court in *Schillinger* relied on a line of cases, originating before the Tucker Acts, holding that the Court of Claims lacked jurisdiction over "claims against the government for mere torts," and thus that "[s]ome element of contractual liability must lie at the foundation of every action." *Id.* at 167. Justice Harlan, in dissent, argued that the plaintiff's patent-infringement claim was equivalent to a claim for taking under the Fifth Amendment, and was thus "founded upon the constitution of the United States … even if the appropriation had its origin in tort." *Id.* at 179. The majority, however, read the Tucker Acts' tort exclusion, "even if qualifying only the clause immediately preceding," as an endorsement of its pre-Tucker Act cases excluding non-contract claims. *Id.* at 169.

This Court resolved the controversy in a line of cases beginning with *Jacobs v. United States*, 290 U.S. 13, 27 (1933). There, the Court held—directly contrary to *Schillinger*—that the Tucker Acts' grant of jurisdiction for claims "founded on the Constitution" includes claims under the Fifth Amendment, without regard to whether the claims sound in contract or tort. *Id.* The Court reaffirmed that holding in *United States v. Causby*, concluding again that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." 328 U.S. 256, 267 (1946); *see* Justin Torres, *The Government Giveth, and the Government Taketh Away: Patents, Takings, and 28 U.S.C. § 1498*, 63 N.Y.U. Ann. Surv. Am. L. 315, 332 (2007) ("Taken together, *Jacobs* and *Causby* … gutted the central holding of *Schillinger*.").

Since then, this Court has consistently interpreted the Tucker Act as granting jurisdiction over statutory and constitutional claims without first asking whether the claims constitute torts. In *Ruckelshaus v. Monsanto Co.*, for example, the Court found the Tucker Acts applicable to a claim for the government's uncompensated taking of trade secrets under the Federal Insecticide, Fungicide, and Rodenticide Act. 467 U.S. at 993. Although the Court relied on the Restatement of Torts to define trade secrets, it never suggested that the cause of action would be excluded from the Tucker Acts as "sounding in tort." *Id.*; *see also White Mountain Apache Tribe*, 537 U.S. at 472 (holding that the Tucker Acts grant "jurisdiction to award damages upon proof of 'any claim against the United States founded either upon the Constitution, or any Act of Congress'"); *Mitchell II*, 463 U.S. at 218 ("[T]here is simply no question that the Tucker Act provides the United States' consent to suit

for claims founded upon statutes or regulations that create substantive rights to money damages.").

B. Even if the Tucker Acts' tort exclusion applied to "Act[s] of Congress," the exclusion would not affect the claims here because FCRA claims do not "sound[] in tort."

The government broadly defines "tort" to include any "legal wrong committed upon the person or property independent of contract." U.S. Br. 31. The government's definition, while partly correct, is incomplete. Although it is true that a tort is a cause of action "independent of contract," that definition ignores the numerous causes of action—such as, for example, trusts—that are neither contract claims nor torts. *See* 1 Edwin A. Jaggard, *Hand-Book of the Law of Torts* 5 (1895) (defining a tort as a "wrong independent of contract … is like a definition of a horse as a quadruped"). As treatises from around the time Congress passed the Tucker Acts recognize, not every wrong independent of contract is a tort, but only those wrongs recognized as torts at common law. *See* J. F. Clerk, *The Law of Torts* 1 (1889) ("A tort may be described as a wrong independent of contract, for which the appropriate remedy is a common law action."); Frederick Pollock, *The Law of Torts* 3 (1887) ("A tort is an act or omission giving rise, in virtue of the common law jurisdiction of the Court, to a civil remedy which is not an action of contract."); John W. Salmond, *Jurisprudence* 559 (1902) ("A tort may be defined as a civil wrong, independent of contract, for which the remedy is a common law action for damages."). Congress is presumed to know and understand these established meanings. *See Molzof v. United States*, 502 U.S. 301, 307-08 (1992).

Contemporaneous treatises also recognize statutory claims as one category of claim that sounds in neither contract nor tort. *See* W. Edmund Ball, *Principles of Torts and Contracts* 6 (1880) ("Where a statute creates a right or duty, and no remedy is expressly provided, the remedy is by action of tort. But where a specific remedy is provided in the statute, that remedy and that only can be pursued, unless it fails to cover the whole right."); Arthur Underhill, *A Summary of the Law of Torts* 20 (1873) (explaining that the breach of a statutory duty is only a tort if the statute does not "also enforce[] the duty by a penalty recoverable by the party aggrieved" (emphasis omitted)); Salmond, *Jurisprudence*, at 44 (distinguishing common law from statutory law). This Court's decisions from the era thus distinguish between "a tort at common law" and a "cause of action created by statute." *Texas & P. Ry. Co. v. Cox*, 145 U.S. 593, 604 (1892); *see also Metro. R. Co. v. Dist. of Columbia*, 132 U.S. 1, 12 (1889). Because a cause of action under the FCRA is created by statute, it is therefore necessarily not a tort.

In support of its argument that federal statutory claims constitute torts, the government relies primarily on *Schillinger*, 155 U.S. 163. There, the Court held that a patent-infringement claim "sound[ed] in tort," even though based on a federal statute. *Id.* at 169. As previously explained, *Schillinger* is based on the pre-*Jacobs* line of cases, in which the Court held the Tucker Acts' tort exclusion applicable to all categories of Tucker Act claims, and thus no longer reflects this Court's interpretation of the exclusion's scope. But even if it remained good authority, *Schillinger* would not govern this case. When *Schillinger* was decided, the Patent Act provided that damages "may be recovered by action on the case," which courts interpreted to provide a common-law claim for the tort of trespass on the case. *See* Charles Alan

Wright et al., 9 *Federal Practice & Procedure* § 2312 (3d ed. 1998).[5] *Schillinger* relied on the Patent Act's provision of "an action on the case" in concluding that "[t]he case was, *within the language of the statute*, one 'sounding in tort.'" 155 U.S. at 169 (emphasis added). Thus, *Schillinger* stands at most for the proposition that a statute falls within the tort exclusion when the statutory remedy is a common-law tort. The FCRA claim here, however, has no statutory language comparable to the Patent Act's "action on the case," and there is no common-law claim analogous to the FCRA's claim for printing credit card numbers and expiration dates.

C. The government's reading of "tort" to include federal statutory claims suffers from other problems. First, it would render the meaning of "tort" under the Tucker Acts inconsistent with the Federal Tort Claims Act, which excludes federal statutory claims. *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994). Under the government's reading, a federal statutory claim would be excluded from the Tucker Acts as a tort and, at the same time, excluded from the Federal Tort Claims Act as a non-tort. There is no basis for that distinction.

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[5] *See, e.g.*, *Cramer v. Fry*, 68 F. 201, 205 (C.C.N.D. Cal. 1895) ("The statute says: 'That damages for the infringement of any patent may be recovered by action on the case. … There is no obscurity as to what this means. An action on the case is a well-known action in form ex delicto."); *Pitcher v. United States*, 1863 WL 2290 (Ct. Cl. 1863) ("At common law the infringement or disturbance of a right of this kind was held to be a tort, for which an action of trespass on the case was the appropriate, if not the only, remedy at law. Under our statutes in relation to patent rights the same form of action has been prescribed."); *Shreve v. United States*, 1860 WL 4862 (Ct. Cl. 1860) ("[A]n infringement of a patent is a cause of action at the common law.").

Second, to classify all non-contractual wrongs as "torts" under the Tucker Acts, as the government urges here, would render meaningless four of the five categories of claims recognized by the Acts. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks and citations omitted). Under the government's reading of the statute, the Tucker Acts would waive sovereign immunity only for contract claims. All other categories of claims recognized by the Acts—including claims based on the Constitution, statutes, and regulations—would, as non-contractual claims, be excluded "torts." The government's reading would thus fly in the face of this Court's interpretation of the Tucker Acts as "cover[ing] not only contract claims, but also other claims for money damages 'founded either upon the Constitution, or any Act of Congress … .'" *United States v. Hohri*, 482 U.S. 64, 72 (1987).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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