No. 11-192

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES X. BORMES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent's interpretation of the Tucker Act would turn sovereign-immunity law upside down. The established test for determining whether a statute's remedial scheme exposes the United States to damages liability looks to whether that statute contains an "unequivocal expression of elimination of sovereign immunity." *Lane* v. *Peña*, 518 U.S. 187, 192 (1996) (internal quotation marks omitted). Respondent and the Federal Circuit, however, would allow a plaintiff to avoid that clear-statement rule simply by citing the Tucker Act or Little Tucker Act in his complaint. Indeed, in respondent's view, a plaintiff who adds those few extra words to his complaint can effectively reverse the clear-statement rule, imposing a burden on the government to demonstrate that Congress has unambiguously *not* waived the United States' sovereign immunity. Br. 26-29.

That approach, which would impose enormous burdens on the public fisc, finds no support in this Court's

precedents. Neither respondent nor the court of appeals has identified a single case in which this Court has authorized a Tucker Act suit under either a statute that already contains its own remedial scheme or a statute that applies generally (rather than to the United States exclusively). The court of appeals' decision here, which crosses both of those lines at once, cannot be reconciled with this Court's consistent recognition of the Tucker Act's limitations—most importantly, that the Tucker Act is inapplicable where Congress has provided specific remedies under a particular statute.

The Federal Circuit's threshold error of applying the Tucker Act to the native civil-remedies provisions of the Fair Credit Reporting Act (FCRA) alone requires vacatur of its decision. But even assuming that initial step were defensible, the court of appeals' decision contains other, independent errors as well. It disregards the Tucker Acts' express limitation to "cases not sounding in tort," 28 U.S.C. 1346(a)(2), 1491(a)(1) (Supp. IV 2010); it contrives an ad hoc remedy that resembles neither a normal FCRA suit nor a normal Tucker Act suit; and it opens the door to a potentially dramatic expansion of federal liability that Congress did not intend.

I. THE TUCKER ACTS DO NOT APPLY TO STATUTES WITH SELF-CONTAINED REMEDIAL SCHEMES

When Congress designed FCRA's general civil-remedies provisions, 15 U.S.C. 1681n (Supp. IV 2010) and 15 U.S.C. 1681*o*, it either intended that those provisions impose damages liability on the United States or it did not. The answer to that question of congressional intent lies in an examination of whether Sections 1681n and 1681*o* themselves clearly encompass suits against the United

States. See *Lane*, 518 U.S. at 192. The answer does not lie in the Tucker Acts.

1. As the government's opening brief explains (at 17-30), the Tucker Acts' function is to provide an autonomous remedial scheme in certain situations where Congress has not otherwise addressed questions of remedy. Congress did not intend them, and this Court has not applied them, as an interpretive rule for determining whether the United States can be sued under a statute's own native remedial provisions. Rather, this Court's cases have consistently recognized that if Congress enacts a statute with its own complete remedial scheme, and does not provide a statutory remedy for certain types of claims against the United States, a claimant may not resort to the Tucker Acts to expand the remedies available. See U.S. Br. 20-23; *Hinck* v. *United States*, 550 U.S. 501, 506-507 (2007); *United States* v. *Fausto*, 484 U.S. 439, 448 (1988); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982); *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 834 (1976); *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122, 131 (1869); see also *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 740-741 (1982); *United States* v. *Testan*, 424 U.S. 392, 403-404 (1976).

Respondent never directly engages with that doctrine, let alone explains why it does not apply in the context of FCRA. He instead tries (Br. 26-27) to recast the precedents cited by the government as a series of one-off cases involving special statutes uniquely preclusive of a Tucker Act remedy. But that pointillistic approach to this Court's decisions overlooks their common theme: "the well-established principle that, in most contexts, a precisely drawn, detailed statute pre-empts more general remedies." *Hinck*, 550 U.S. at 506 (internal quotation marks and citation omitted); *Fausto*, 484 U.S. at 448 (1988) (relying on

"comprehensive nature" of statute and absence of a statutory remedy for certain employees); *Erika, Inc.*, 456 U.S. at 208 (relying on statute's "precisely drawn provisions" and omission of a remedy for certain types of claims); *Brown*, 425 U.S. at 834 (relying on the principle that "a precisely drawn, detailed statute pre-empts more general remedies"); *Nichols*, 74 U.S. (7 Wall.) at 131 (relying on limitations placed on remedies when Congress "carefully constructed a revenue system"); see also *Sheehan*, 456 U.S. at 740-741 (noting that "Congress' intent to prohibit a backpay claim by a Service employee would obviously be subverted if the employee could sue under the Tucker Act whenever he asserted a violation of the Service's regulations governing termination"); *Testan*, 424 U.S. at 404 (noting that if respondents' claim were to proceed, "many of the federal statutes—such as the Back Pay Act—that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous").

That principle applies with full force here. This Court has long presumed "congressional familiarity" with the "common rule" that "any waiver of the National Government's sovereign immunity must be unequivocal." *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992). Under that clear-statement rule, Congress can be confident that its enactment of a generally applicable remedial scheme will have no impact on the federal Treasury unless it has specifically considered and plainly consented to that result. See *Lane*, 518 U.S. at 190-200 (no governmental liability under Section 504(a) of the Rehabilitation Act of 1973); see also *United States Dep't of Energy*, 503 U.S. at 619-620 (no governmental liability for punitive fines under the Clean Water Act).

But that confidence necessarily depends upon the specific-governs-the-general principle. Without it, the enactment of any new remedial scheme could potentially give rise to damages actions against the United States whether or not Congress intended them (or even thought about them). All a plaintiff would need to do is cite one of the Tucker Acts and his burden to establish governmental liability would reduce from a clear-statement rule to a fair-interpretation rule. Pet. App. 7a. The ease of that maneuver would subvert the main purpose of the clear-statement rule: assuring that Congress has in fact focused on the specific issue and exercised its exclusive constitutional prerogative to permit suit against the United States. See *OPM* v. *Richmond*, 496 U.S. 414, 425 (1990) (observing that the powers of the Executive and Judicial Branches are "limited by a valid reservation of congressional control over funds in the Treasury"); see also *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001) ("In traditionally sensitive areas, . . . the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (brackets and citation omitted). And under respondent's approach, the Federal Circuit would have license to interpret even ambiguous statutes, including ones that this Court has found not to satisfy the clear-statement rule, to impose monetary liability on the United States.

2. Respondent asserts (Br. 28) that this "is precisely the function that the Tucker Acts are *supposed* to serve." But he identifies not a single case applying them that way. The cases he cites to support his assertion—*United States* v. *Navajo Nation*, 556 U.S. 287, 290 (2009), and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)—applied the Tucker Act's fair-interpretation frame-

work in the very different context of statutes that are *not* generally applicable and did *not* contain their own remedial schemes. See *Navajo Nation*, 556 U.S. at 295 (statutes regulating relationship between United States and Indian tribes); *Mitchell II*, 463 U.S. at 226 (same). As the United States explains in its opening brief (at 26-27), and respondent nowhere disputes, this Court has *never* applied the fair-interpretation framework to hold the government liable under a generally applicable remedial scheme like FCRA's.

In arguing that the Court should do so for the first time here, respondent relies on two critically flawed premises. First, like the court of appeals (Pet. App. 7a), he would apply the fair-interpretation test to each and every federal statute. This Court, however, has repeatedly turned back Tucker Act claims on threshold specific-governs-the-general grounds without ever reaching the fair-interpretation test. See U.S. Br. 22-23; *id.* at 26 (discussing the fair-interpretation arguments raised, but never considered, in *Hinck* and *Erika, Inc.*).

Second, respondent would take the further step of shifting the burden to the United States to "unambiguously" prove "Congress's clear intent to *withdraw* the Tucker Acts' remedy" any time the Federal Circuit deemed the watered-down fair-inference test to be satisfied. Br. 9 (emphasis added); see *id.* at 26-32. That proposal would effectively reverse the normal clear-statement rule, and make damages remedies against the United States the norm rather than the exception. The cases cited by respondent (*id.* at 26) do not support such an approach.

None of those cases involved, as this case does, the question whether the Tucker Act provides a remedy for the violation of a statute. Instead, each of those cases considered the question whether the Tucker Act provided

a mechanism for recovering a money judgment as just compensation for a taking of property under the Fifth Amendment. See *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 519-522 (1998) (plurality opinion); *Preseault* v. *ICC*, 494 U.S. 1, 11-19 (1990); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1019 (1984); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 125-136 (1974). This Court has long recognized that plaintiffs may bring such takings claims under the Tucker Act. See, *e.g.*, *United States* v. *Causby*, 328 U.S. 256, 267 (1946). The cases cited by respondent have therefore presumed that Congress intends to allow such claims, unless the statute authorizing the taking, or the nature of the claim, indicates otherwise. *Preseault*, 494 U.S. at 12; see *Eastern Enters.*, 524 U.S. at 520 (plurality opinion); *Monsanto Co.*, 467 U.S. at 1017; *Regional Rail Reorg. Act Cases*, 419 U.S. at 126; compare *Eastern Enters.*, 524 U.S. at 521-522 (plurality opinion) (finding no compensatory remedy and citing, *inter alia*, *Babbitt* v. *Youpee*, 519 U.S. 234 (1997), and *Hodel* v. *Irving*, 481 U.S. 704 (1987)).

Unlike those cases, this one involves neither the Just Compensation Clause nor an argument that a statute "withdraws" a Tucker Act remedy that this Court has long recognized. Respondent seeks not to preserve a Tucker Act remedy approved by this Court's precedents, but instead to expand the Tucker Act well beyond those precedents to permit damages actions against the United States under a statutory remedial scheme of general applicability. That novel argument contravenes the specific-governs-the-general principle; would undermine this Court's sovereign-immunity jurisprudence (and Congress's reliance upon it); and should be rejected.

II. RESPONDENT'S PROPOSED REMEDY IS AT ODDS WITH BOTH THE TUCKER ACTS AND FCRA

Even assuming the Tucker Acts' fair-inference rule could supplant the clear-statement rule for determining whether a statute's self-contained remedial scheme permits suits for money damages against the United States, conflicts between FCRA and the Tucker Acts preclude a Tucker Act remedy here. U.S. Br. 30-40. In attempting to fit the square peg of FCRA's remedial scheme into the round hole of the Tucker Acts, respondent and the court of appeals jury-rig a remedy that neither statute authorizes and that Congress would never have envisioned. See *ibid.*

1. First and foremost, permitting FCRA claims under the Tucker Acts flouts the Tucker Acts' limitation to "cases not sounding in tort." U.S. Br. 30-33. Respondent seeks to avoid that limitation by arguing that it applies only to claims for "liquidated or unliquidated damages" and that the definition of "tort" in the Tucker Acts should be much narrower than the one provided in *Black's Law Dictionary* around the time they were enacted. Br. 33-40. Those arguments lack merit.

As a threshold matter, because "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign," *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999), "[a]ny ambiguities" in the Tucker Acts' not-sounding-in-tort limitation must be resolved "in favor of immunity," *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012). Respondent fails to demonstrate that his interpretations are correct, let alone unambiguously so.

As respondent acknowledges (Br. 35), this Court recognized in *Schillinger* v. *United States*, 155 U.S. 163 (1894), that the not-sounding-in-tort limitation "even if qualifying only the clause immediately preceding, and not

extending to the entire grant of jurisdiction found in the section, is a clear endorsement of the frequent ruling of this court that cases sounding tort are not cognizable in the Court of Claims." *Id.* at 169. "[S]ome element of contractual liability," the Court explained, "must lie at the foundation of every action." *Id.* at 167. Because respondent has never even tried to show that an "element of contractual liability" underlies his FCRA suit here, that suit is not cognizable under the Tucker Acts.

Respondent's argument that *Schillinger* is no longer good law (Br. 33-37) is misguided. The only case he cites that does anything but approvingly refer to *Schillinger* in passing is *Dooley* v. *United States*, 182 U.S. 222 (1901) (cited at Resp. Br. 33). And while some statements in *Dooley* could be read to cast doubt on *Schillinger*, this Court has expressly held that *Dooley* "did not overrule *Schillinger*." *Basso* v. *United States*, 239 U.S. 602, 606 (1916). Even after *Dooley*, the Court has continued to rely on *Schillinger* to dismiss claims that sound in tort. See *id.* at 606-608 (rejecting claim asserted to be "founded upon the Constitution" because it sounded in tort); see also *United States* v. *Nederlandsch-Amerikaansche Stoomvart Maatschappij*, 254 U.S. 148, 152-155 (1920) (same); cf. *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723, 1729 (2011) (describing Tucker Act as a waiver for "non-tort claims").

Nor did the Court silently overrule *Schillinger* in *Jacobs* v. *United States*, 290 U.S. 13 (1933), or *United States* v. *Causby*, *supra*, neither of which even mentions *Schillinger*. The "only question before" the Court in *Jacobs* was whether interest was allowable on a particular Tucker Act claim under the Just Compensation Clause. 290 U.S. at 16. *Causby* likewise involved a claim under the Just Compensation Clause. 328 U.S. at 258; see also *Monsanto*

Co., 467 U.S. at 1016-1019 (same) (cited at Resp. Br. 36). This Court's recognition of a Tucker Act remedy for a Just Compensation Clause violation does not suggest that the Tucker Acts' not-sounding-in-tort exception is inapplicable to statutory and constitutional claims. To the contrary, as cases cited in *Causby* illustrate, the Court has long understood that the Just Compensation Clause creates an implied contract to pay in the event of a taking. See 328 U.S. at 267; *Yearsley* v. *W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940) (noting that for "a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims"); *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932) (noting that if a taking occurs, "the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract"); *Hollister* v. *Benedict & Burnham Mfg. Co.*, 113 U.S. 59, 67 (1885) (noting that "the law would imply a promise of compensation" in an eminent-domain case); see also *Jacobs*, 290 U.S. at 16 ("A promise to pay * * * was implied because of the duty to pay imposed by the Amendment.").

The only other cases respondent cites (see Br. 36-37) for the proposition that this Court will infer a Tucker Act remedy without inquiring into the nature of the claim involved statutes imposing trust-law duties on the United States. See *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472, 474-476 (2003); *Mitchell II*, 463 U.S. at 224-228. A breach-of-trust claim, however, does not sound in tort. See John W. Salmond, *Jurisprudence* § 169, at 435 (2d ed. 1907) ("A tort may be defined as a civil wrong, for which the remedy is an action for damages, and which is not solely a breach of contract or a breach of trust.");

1 Edwin A. Jaggard, *Hand-Book of the Law of Torts* 5 (1895) ("A breach of trust, adultery, or the refusal to pay just compensation for a relief to a vessel in distress are wrongs; but none of them are torts."). Indeed, although it has not always been recognized as such, trust law can be considered a close relative of contract law. See generally John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625 (1995); see also, *e.g.*, Fredric W. Maitland, *Equity also the Forms of Action at Common Law: Two Courses of Lectures* 115 (A.H. Chaytor & W.J. Whittaker eds., 1st ed. 1909) ("[The] trust was originally regarded as an obligation, in point of fact a contract though not usually so called.").

Because constitutional provisions and statutes thus sometimes impose obligations "not sounding in tort," respondent errs in asserting (Br. 40) that the government's position would inflexibly foreclose Tucker Act claims based on those sources of law. Respondent himself, however, would define the term "tort" so narrowly that the not-sounding-in-tort limitation could *never* apply to "statutory claims." *Id.* at 37-39. Contrary to respondent's suggestion (*id.* at 39), the Federal Tort Claims Act, which does not even use the word "tort" in its operative text, does not support that narrow definition. See U.S. Br. 33; 28 U.S.C. 1346(b)(1). And the definition cannot be squared with *Schillinger*'s recognition that a statute providing "for the recovery of damages for the infringement of a patent" was a "tort" for Tucker Act purposes. 155 U.S. at 169; see Rev. Stat. § 4919 (1878); U.S. Br. 32-33.

Respondent points out (Br. 38-39) that the statute at issue in *Schillinger* used a common-law term ("action on the case") to describe the damages action it created. But that particular damages action was still "created by statute." Resp. Br. 39. Respondent's suggestion that the

statute in *Schillinger* created a common-law claim is nonsensical. The definitions of "statutory law" and "common law" are mutually exclusive. See *Black's Law Dictionary* 313 (9th ed. 2009) (defining "common law" as the "body of law derived from judicial decisions, rather than from statutes or constitutions"); *id.* at 1547 (defining "statutory law" as the "body of law derived from statutes rather than from constitutions or judicial decisions"). Moreover, respondent's suggestion would apply equally to FCRA's general civil-remedies provisions, which define causes of action by reference to the common-law concepts of willfulness and negligence. See 15 U.S.C. 1681n (Supp. IV 2010); 15 U.S.C. 1681*o*; see, *e.g.*, *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 58, 68-69 (2007) (looking to common law to define "willfully" in Section 1681n).

In any event, tort treatises around the time of the Tucker Act's enactment (including one cited by respondent himself) recognized that statutory claims can be torts. See 1 Jaggard 348 ("Remedies for torts may be either * * * (a) *Statutory*; or (b) Common-law") (emphasis added); Resp. Br. 37 (citing that treatise); see also Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 650-658 (1880) (discussing tort claims based on statutes); see also *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring in part and concurring in the judgment) (relying on Cooley's treatise, which "tracked Blackstone's view," to conclude that "the cause of action created by [42 U.S.C. 1983] is, and was always recognized as, a tort claim"). This Court has itself similarly recognized that statutory causes of action may "sound in tort." See *City of Monterey*, 526 U.S. at 709 ("[T]here can be no doubt that [42 U.S.C. 1983] claims sound in tort."); *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974)

("A damages action under the [Fair Housing Act] sounds basically in tort."); *Labine* v. *Vincent*, 401 U.S. 532, 535 (1971) (noting that "Louisiana had created a statutory tort" for wrongful death). At a bare minimum, respondent's far more cramped definition is not "unavoidable," as would be necessary to expand the scope of the Tucker Act's sovereign-immunity waiver. *Cooper*, 132 S. Ct. at 1455 n.12.

2. Permitting FCRA suits under the Tucker Acts would also create a conflict with FCRA's native jurisdictional provision, 15 U.S.C. 1681p. As the government's opening brief explains (at 33-37), Section 1681p authorizes a FCRA suit "in any appropriate United States district court, without regard to the amount in controversy, *or* in any *other* court of competent jurisdiction" (emphasis added). Neither respondent nor the court of appeals disputes that Section 1681p *always* permits a FCRA plaintiff to go to district court, regardless how much recovery he seeks. The Tucker Acts, on the other hand, *never* permit a plaintiff with a claim over $10,000 to go to district court, but instead vest exclusive jurisdiction in the Court of Federal Claims. 28 U.S.C. 1346(a)(2), 1491(a)(1) (Supp. IV 2010). Because the different jurisdictional provisions cannot be merged without doing violence to one or the other, they should not be merged at all.

Respondent's attempts to reconcile the provisions are unavailing. He first contends that "[j]urisdiction in the district courts" is "available for all Tucker Act claims." Br. 30. If respondent means to suggest that any Tucker Act claim, regardless of amount, can be filed in district court, he wrongly severs the general Tucker Act's sovereign-immunity waiver from its exclusive grant of jurisdiction to the Court of Federal Claims. See U.S. Br. 37. Indeed, respondent himself acknowledges that "the general Tucker Act limits its waiver of sovereign immunity to actions filed

in the Court of Federal Claims." Br. 30. If he is instead simply pointing out that the Little Tucker Act allows district courts to hear Tucker Act claims up to $10,000, his point is correct but irrelevant. The conflict between Section 1681p and the general Tucker Act remains, and the Little Tucker Act's sovereign-immunity waiver reaches only the types of claims that the general Tucker Act's waiver also reaches. U.S. Br. 35; see *United States* v. *Sherwood*, 312 U.S. 584, 590-591 (1941); see also *id.* at 591 ("[W]e think that the Tucker Act did no more than authorize the District Court to sit as a court of claims.").

Respondent next contends (Br. 30-31), as did the court of appeals (Pet. App. 12a), that the Court of Federal Claims is an "other court of competent jurisdiction" in which Section 1681p would permit a FCRA suit. That contention simply looks past the fundamental conflict. Even accepting respondent's premise that the Court of Federal Claims is an "other court" in which a FCRA suit might lie, Section 1681p still *also* permits a suit of any amount in district court, whereas the Tucker Acts do not. Respondent's proposal that FCRA plaintiffs "may file in district court, but are limited to the Court of Federal Claims if they wish to recover more than $10,000" (Br. 31) cannot be squared with Section 1681p's categorical grant of FCRA jurisdiction to district courts. In any event, for reasons explained in the government's opening brief (at 36), interpreting the phrase "other court of competent jurisdiction" to include the Court of Federal Claims is circular, ahistorical, and contrary to how this Court has previously interpreted the phrase. Respondent's lone citation to a footnote in a 2006 claims-court decision (Br. 30) does not show otherwise.

Respondent finally contends (Br. 31) that there should be a presumption in favor of applying the Tucker Acts that would overcome the jurisdictional conflict. But respond-

ent's urging of such a presumption here is a product of his mistaken reliance, discussed at pp. 6-7, *supra*, on inapposite cases addressing whether particular statutes withdraw a previously recognized Tucker Act remedy under the Just Compensation Clause. In particular, the case he cites for the proposition that "even where Congress has directed claims to a special court, this Court has held that the Tucker Acts' remedies remain available" (Br. 31) addressed a Just Compensation Clause claim. See *Regional Rail Reorg. Act Cases*, 419 U.S. at 125-136. It did not address the issue here: whether the Tucker Act can provide a remedy for the violation of a statute that contains its own specific jurisdictional provision in conflict with the Tucker Act's.

3. Respondent also offers no justification for contriving a remedial scheme that excises FCRA's provision for punitive damages and abbreviates the normal Tucker Act statute of limitations. U.S. Br. 37-40. If this were an ordinary FCRA suit, it would permit recovery of punitive damages. 15 U.S.C. 1681n(a)(2). And if it were an ordinary Tucker Act claim against the federal government, the statute of limitations would be six years rather than two or five. Compare 28 U.S.C. 2401(a) (Supp. IV 2010), 28 U.S.C. 2501, with 15 U.S.C. 1681p. Respondent's a la carte remedy is inconsistent with both statutory schemes. Cases relied upon by respondent and the court of appeals, in which this Court has applied the narrower of two freestanding statutes of limitations, provide no authority for courts to pick and choose component parts of existing statutory remedies in order to infer both a waiver by Congress of the United States' sovereign immunity to suit and the creation of a new cause of action against the United States. See U.S. Br. 39 (discussing *United States* v. *Clintwood Elkhorn*

Mining Co., 553 U.S. 1 (2008), and *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941)).

III. CONGRESS DID NOT INTEND TO EXPOSE THE UNITED STATES TO DAMAGES ACTIONS UNDER FCRA

Respondent devotes the majority of his brief to the argument that FCRA's general civil-remedies provisions themselves expressly authorize suit against the United States. Br. 10-26. Even if that argument were correct, it would not support the Federal Circuit's assertion of jurisdiction over this case, because it would not suggest that the Tucker Acts are an appropriate vehicle for bringing a FCRA suit. Respondent's argument, however, is not correct. For reasons explained in the United States' opening brief (at 40-55), no fair inference, let alone any clear statement, of congressional intent to expose the United States to monetary liability can be drawn from FCRA's general civil-remedies provisions.

1. The key premise of respondent's argument is that the term "person" must be interpreted precisely the same way every place it appears in FCRA. Respondent suggests, for example (Br. 18-19), that because the United States is a "person" for purposes of a certain substantive FCRA provision, 15 U.S.C. 1681b(b)(3), it also must be a "person" for purposes of damages liability as well. But the "tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has or should have precisely the same scope in all of them, * * * has all the tenacity of original sin and must constantly be guarded against." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 n.8 (2004) (citation omitted); see, *e.g.*, *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001). As the Court has very recently reiterated, the identical-meaning assumption

"readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1360 (2012) (quoting *Cline*, 540 U.S. at 595).

Even when a statute provides a specific definition for a term, the precise interpretation of the term may still vary depending on context. Although the statutory definition typically controls, factors including the "creat[ion] of obvious incongruities in the language," *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949), or "constitutional concerns," *Northwest Austin Mun. Util. Dist. No. 1* v. *Holder*, 557 U.S. 193, 206-207 (2009) (*Northwest Austin*), can counsel in favor of contextual variations. See also, *e.g.*, *Philko Aviation, Inc.* v. *Shacket*, 462 U.S. 406, 412 (1983); *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 764 (1949); Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 20.8 at 135 & n.7 (7th ed. 2009). Indeed, the government's opening brief discusses a case, nowhere addressed by respondent, in which this Court declined to apply a statutory definition of the term "person" inflexibly. U.S. Br. 42-43 (discussing *United States* v. *Public Utils. Comm'n*, 345 U.S. 295 (1953)). The Court has additionally declined to apply a statutory definition of "employer" in the Fair Labor Standards Act that would have abrogated state sovereign immunity. See U.S. Br. 45-46 (discussing *Employees of the Dep't of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279 (1973)).

Respondent never directly addresses the government's argument (U.S. Br. 42-44) that Congress did not intend uniform application of 15 U.S.C. 1681a(b)'s definition of "person." He offers no explanation for why it would make

sense for the FCRA provision imposing criminal liability, including up to two years of imprisonment, on "person[s]" to apply to the United States (or States). See 15 U.S.C. 1681q. Nor does he explain why the FCRA provision authorizing suits by certain federal agencies against "person[s]" should be interpreted to permit intramural suits naming the United States or other federal agencies. See 15 U.S.C. 1681s(a) (Supp. IV 2010); 15 U.S.C. 1681s(c)(1); see also *United States* v. *Cooper Corp.*, 312 U.S. 600, 609 (1941) (finding it "obvious" that provisions imposing criminal and civil liability on "any person" did not include the United States).

In addition to those "obvious incongruities," *Lawson*, 336 U.S. at 201, respondent's argument that the term "person" always includes the United States, regardless where in FCRA it appears, would create "constitutional concerns," *Northwest Austin*, 557 U.S. at 207. Respondent does not dispute that his reading would necessarily include not only the United States, but also States, as potential defendants under FCRA's general civil-remedies provisions; that the civil-remedies provisions would thus represent an attempt by Congress to use its Commerce Clause authority to abrogate state sovereign immunity; or that this Court had held just months before FCRA was amended, in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), that Congress had no such Commerce Clause authority. U.S. Br. 46-47.

Although respondent argues (Br. 22-23) that the House of Representatives and the Senate originally approved bills containing the relevant language before this Court decided *Seminole Tribe*, the final version of the bill was passed six months after that decision. Compare *Seminole Tribe*, 517 U.S. at 44 (decided Mar. 27, 1996), with H.R. Rep. No. 863, 104th Cong., 2d Sess. 458 (Sept. 28, 1996) (conference

report); 142 Cong. Rec. 25,873-25,874 (Sept. 28, 1996) (House vote); *id.* at 26,736 (Sept. 30, 1996) (Senate vote). And respondent provides no evidence to support his implausible hypothesis (Br. 23) that, notwithstanding *Seminole Tribe*, Congress might have included States within the remedial provisions merely on the hope that they would voluntarily waive their sovereign immunity to FCRA suits. The much more reasonable interpretation, and the one required by traditional principles of constitutional avoidance, is that the term "person" in FCRA's general civil-remedies provisions should have its ordinary meaning, which would not include either States or the United States. U.S. Br. 45-46.

2. Respondent errs in comparing (Br. 19-21) FCRA's general civil-remedies provisions to the civil remedies available under the Truth in Lending Act (TILA) and the Equal Credit Opportunity Act (ECOA). First, contrary to respondent's assertion (Br. 20), the relevant remedial provisions of those statutes were not "enacted around the same time" as those in FCRA. They were enacted between 1968 and 1976, over 20 years before the 1996 amendment that expanded FCRA liability to include "persons." See *id.* at 20 n.2; TILA, Pub L. No. 90-321, Tit. I, §§ 103, 113, 130, 82 Stat. 147, 151, 157 (1968); ECOA, Pub. L. No. 90-321, Tit. V, sec. 503, §§ 702(f), 706, 88 Stat. 1522, 1524 (1974); Equal Credit Opportunity Amendments Act of 1976, Pub. L. No. 94-239, § 5, 90 Stat. 253-254; see also U.S. Br. 43-44. Congress thus was not yet aware of *Seminole Tribe* when it enacted those provisions.

Second, the inference respondent draws from TILA's and ECOA's limitations on governmental liability—that the absence of such limitations in FCRA means Congress intended unlimited FCRA suits against the United States—is backwards. The limitations in TILA and ECOA

demonstrate that Congress at least contemplated that the civil-remedies provisions of those statutes might be interpreted to apply to the United States. But no similar evidence of congressional contemplation of federal liability exists with respect to FCRA's general civil-remedies provisions. In fact, when Congress has wanted to subject an "agency or department of the United States" to liability under FCRA, it has done so expressly. 15 U.S.C. 1681u(i); see U.S. Br. 47-48; *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted).

3. Respondent does not dispute that his interpretation of FCRA would subject the United States to potentially billions of dollars of FCRA liability for acts (including merely negligent mistakes) arising out of routine and ubiquitous federal operations. U.S. Br. 50-55. Yet he cannot locate even a single statement by a single Member of Congress contemplating such a massive burden on the federal fisc. See *Quern* v. *Jordan*, 440 U.S. 332, 343 (1979) (declining to find waiver of state sovereign immunity where "not one Member of Congress" mentioned the issue or its "financial consequences"); see also *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 63 (2004) (finding "scant indication" in the legislative history that Congress meant TILA amendment to repeal longstanding statutory damages cap). He attempts to diminish the significance of that complete congressional silence by suggesting that such silence would be relevant only if offered "to establish that Congress intended to *retain* a statute's established meaning." Resp. Br. 25. But that is exactly how it is relevant here. The pre-1996 version of FCRA did not

impose liability on the United States (see U.S. Br. 42), and at least some Member of Congress, or some government witness testifying before Congress, would very likely have said something if a dramatic change to the status quo and a vast expansion of potential federal liability had been intended. See *Quern*, 440 U.S. at 343 ("[I]f in fact the Members of the 42d Congress believed that [the Civil Rights Act of 1871] overrode [state sovereign] immunity, surely there would have been lengthy debate on this point").

The legislative history's silence on the important question of federal liability is all the more telling when contrasted with the robust debate over the scope of federal liability under analogous provisions of the Privacy Act. U.S. Br. 48-50. The "United States' consent to suit" is "not lightly inferred" even under the Tucker Act, *Mitchell II*, 463 U.S. at 218, and should not be inferred here.

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For the foregoing reasons and those stated in the United States' opening brief, the judgment of the court of appeals should be vacated and the case should be remanded with instructions that it be transferred to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted.

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Solicitor General

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