



9-1-2021

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Recommended Citation

George D. Boan, *"Say the Magic Words": How Sovereign Immunity Absolves the Federal Government from Its Obligations Under the Fair Credit Reporting Act*, 99 N.C. L. REV. 1617 (2021).

Available at: <https://scholarship.law.unc.edu/nclr/vol99/iss6/6>

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“Say the Magic Words”: How Sovereign Immunity Absolves the Federal Government from Its Obligations Under the Fair Credit Reporting Act*

In the many decades following World War II, America has become a country run on credit. Hardly a day passes in which the average citizen has not been offered a new credit card, loan, or opportunity to refinance their existing debt. Underpinning it all is a vast credit ecosystem processing incredible amounts of data. When Congress passed the Fair Credit Reporting Act, it attempted to establish rules of the road to protect the hundreds of millions of citizens interacting with this ecosystem every day. The federal government, as the nation’s largest employer and purveyor of student financial aid, is a massive player in the credit ecosystem. But what happens when a citizen tries to hold the federal government accountable when it breaks the rules governing this ecosystem? As it turns out, results vary depending on where the plaintiff resides.

In the 2019 case Robinson v. United States Department of Education, the Fourth Circuit considered whether the definition of “person” in the Fair Credit Reporting Act created a waiver of sovereign immunity. Ultimately, the Robinson court, agreeing with the Ninth Circuit, determined that the answer to this question was no, denying plaintiffs access to the civil enforcement provisions of §§ 1681n–o. However, the Seventh Circuit continues to hold such a waiver did occur. When provided the opportunity to settle the issue once and for all, the Supreme Court denied certiorari.

This Recent Development argues that the Supreme Court should have resolved the circuit split by granting certiorari to overrule Seventh Circuit decisions contrary to precedent. Further, it argues the Fourth Circuit failed to appreciate that its ruling, combined with state sovereign immunity, absolves all “governments” from the Fair Credit Reporting Act’s enforcement provisions. The Fair Credit Reporting Act was meant to protect citizens from the consequences of unscrupulous actors in the credit ecosystem, the federal government being one such actor. While the reasoning against a waiver of

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sovereign immunity is sound, these outcomes cannot be reconciled with why the Act was conceived.

This Recent Development concludes by advocating for a congressional amendment to the Fair Credit Reporting Act. The addition of an explicit waiver of sovereign immunity to § 1681n is necessary to ensure the Act's desired deterrent effect. Because it may be some time before the Supreme Court has an opportunity to address the matter again, this Recent Development calls upon Congress to amend the Act to ensure its continued vitality by clearly stating that willful violations of the Act entitle injured individuals to sue the federal government. Congress should do so through an even more explicit waiver of sovereign immunity, using the "magic words" that the Fourth and Ninth Circuits so desperately desire: "United States." Such changes may be the only way to ensure one of the biggest players in the game abides by the rules.

INTRODUCTION

A credit report in the United States is like a digital shadow: a picture of who you really are, following you everywhere you go. Trying to get a job? An apartment? Your first car? A student loan? Your digital shadow helps a lender make the final call. But what happens when those responsible for maintaining the shadow make errors they refuse to correct? The results can be catastrophic.¹

Aware of these realities, Congress passed the Fair Credit Reporting Act of 1970 ("FCRA" or "the Act")² "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy."³ Originally, the FCRA almost exclusively regulated Credit Reporting Agencies ("CRAs"),⁴ due to their "vital role in assembling and evaluating consumer credit."⁵ The Consumer Credit Reporting Reform Act of 1996 (the "1996

1. "For example, Kenneth Baker, a husband and father, was unable to qualify for a mortgage due to inaccuracies within his credit report. After a year of unsuccessful attempts to correct the inaccuracies, he felt humiliated, became depressed, and soon-after committed suicide. His suicide note referenced his difficulties with the [Credit Reporting Agencies]." Michael R. Guerrero, Comment, *Disputing the Dispute Process: Questioning the Fairness of § 1681s-2(a)(8) and § 1681j(a)(1)(A) of the Fair and Accurate Credit Reporting Act*, 47 CAL. W. L. REV. 437, 439 (2011).

2. Pub. L. No. 91-508, 84 Stat. 1127 (codified as amended at 15 U.S.C. §§ 1681–1681x).

3. *Saunders v. Branch Banking & Tr. Co. of Va.*, 526 F.3d 142, 147 (4th Cir. 2008) (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007)).

4. FED. TRADE COMM'N, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT 2 (2011), <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf> [<https://perma.cc/7XW5-B7ZG>] (noting the FCRA also imposed requirements on "users of consumer reports and other third parties to provide certain notices to consumers").

5. Fair Credit Reporting Act § 602(a)(3) (codified as amended at 15 U.S.C. § 1681(a)(3)).

Reform Act”)⁶ expanded the scope of the FCRA by imposing duties on a new class of entities—“furnishers” of information to CRAs.⁷ However, rather than define “furnisher,” the FCRA instead utilizes its statutory definition of “person” to impose its substantive obligations upon furnishers.⁸ Since its inception, the FCRA’s definition of “person” has included, *inter alia*, “any . . . government or governmental subdivision or agency”⁹ To make these substantive obligations operative, the FCRA imposes civil liability on “persons” who are willfully or negligently noncompliant with the substantive requirements of the Act.¹⁰ The federal government happens to be “one of the largest furnishers of credit information in the country”¹¹ and, as a “government,” coincides with the FCRA’s interpretation of “person.” So, can the federal government be held liable under the FCRA? As it turns out, it comes down to where you live.

The decision in *Robinson v. United States Department of Education*¹² furthers an existing circuit split regarding the question of sovereign immunity under the FCRA. The Fourth¹³ and Ninth Circuits¹⁴ now hold there is no waiver of sovereign immunity within the context of the general definition of “person” in § 1681a(b) and the civil enforcement provisions of §§ 1681n–o, while the Seventh Circuit¹⁵ maintains there is. The Supreme Court’s decision not to resolve the circuit split leaves a potentially large number of injured individuals without any form of meaningful relief under the Act, while others are entitled to relief on the same grounds. This Recent Development argues that the Supreme Court’s denial of certiorari in *Robinson* was at odds with its Rule 10(a) considerations governing a writ of certiorari,¹⁶ especially in the face of evidence that no government whatsoever is liable under the FCRA’s § 1681n and § 1681o enforcement provisions. Thus, at a minimum, amendment of the Act is necessary to protect Americans from the misfeasance of the federal government and to fulfill the intended purposes of the Act.

6. Pub. L. No. 104-208, 110 Stat. 3009-426 (codified as amended at 15 U.S.C. § 1681s-2).

7. *See id.* § 623(a) (codified as amended at 15 U.S.C. § 1681s-2(a)).

8. *See generally id.* (applying the majority of obligations imposed under the law to “[a] person”).

9. Fair Credit Reporting Act § 603(b) (emphasis added) (codified as amended at 15 U.S.C. § 1681a(b)).

10. *See* 15 U.S.C. §§ 1681n–o.

11. *Robinson v. Dep’t of Educ.*, 140 S. Ct. 1440, 1441–42 (2020) (Thomas, J., dissenting from the denial of certiorari).

12. 917 F.3d 799 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1440 (2020).

13. *Id.*

14. *See Daniel v. Nat’l Park Serv.*, 891 F.3d 762, 762 (9th Cir. 2018).

15. *See Bormes v. United States*, 759 F.3d 793, 794 (7th Cir. 2014); *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 826 (7th Cir. 2016).

16. SUP. CT. R. 10(a), <https://www.supremecourt.gov/ctrules/2019RulesoftheCourt.pdf> [https://perma.cc/E8WJ-H7YY]. While Rule 10 considerations do not compel the Supreme Court to grant a petition for a writ of certiorari, one reason for granting such a petition is when “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter” *Id.*

This Recent Development proceeds in six parts. Part I briefly discusses the FCRA and its pertinent provisions surrounding furnishers of information. Part II discusses sovereign immunity and decisions that have analyzed the concept within the context of the FCRA's civil enforcement provisions. Part III lays out the relevant factual and procedural backgrounds of *Robinson*, and Part IV explains the Fourth Circuit's reasoning and analysis. Part V then argues that (1) the Supreme Court should have granted certiorari to overrule Seventh Circuit decisions contrary to statutory-construction precedent, and (2) the Fourth Circuit failed to appreciate that its ruling on the matter, combined with state sovereign immunity, absolves all "governments" from the FCRA's enforcement provisions. Part VI argues that the addition of an explicit waiver to § 1681n is necessary to ensure the Act's desired deterrent effect. Finally, this Recent Development concludes by explaining the significant implications of the *Robinson* court's decision. Because it may be some time before the Supreme Court has an opportunity to address the matter, this Recent Development calls upon Congress to amend the Act to ensure its continued vitality by clearly stating that willful violations of the Act entitle injured individuals to sue the federal government. Congress should do so through an even more explicit waiver of sovereign immunity, using the "magic words" that the Fourth and Ninth Circuits so desperately desire: "United States."

I. THE FCRA AND "FURNISHERS"

Following the conclusion of World War II, a consumer credit revolution occurred in the United States. Between World War II and the enactment of the FCRA, "consumer debt grew almost twenty-fold"¹⁷ to \$116 billion in 1969.¹⁸ The size and scope of the credit reporting industry exploded in an effort to facilitate the massive increase in consumer credit transactions.¹⁹ So too rose consumer complaints about the accuracy of credit reports, as well as concerns over consumers' inability to correct errors and lack of general insight into the reports' contents.²⁰ While Congress recognized CRAs as "absolutely essential" due to the value of the credit reporting industry, "the fact the system ha[d] been built up with virtually no public regulation or supervision" was a problem.²¹ In response, Senator William Proxmire introduced what would become the FCRA in an attempt to solve three basic problems: inaccuracies or misleading

17. Albert S. Jacquez & Amy S. Friend, *The Fair Credit Reporting Act: Is It Fair for Consumers?*, 5 LOY. CONSUMER L. REP. 81, 82 (1993).

18. 115 CONG. REC. 33,408 (1969). As of April 2021, that number sat at nearly \$4.2 trillion. *Consumer Credit - G.19*, BD. GOVERNORS FED. RSRV. SYS. (Apr. 7, 2021), <https://www.federalreserve.gov/releases/g19/current/> [https://perma.cc/5HDJ-AM9J].

19. *See* 115 CONG. REC. 33,408 (1969).

20. *See id.* at 33,409.

21. *Id.* at 2410-11.

information, irrelevant or outdated information, and issues with confidentiality.²² While the original FCRA was a valiant effort to address these problems, subsequent amendments have made clear that easy solutions in the age of technological change were aspirational at best.²³

As much as the FCRA was a response to a credit explosion of the past, Congress has repeatedly attempted to keep up with an ever-expanding credit ecosystem. The 1970 FCRA's laser-focus on CRAs left a gaping hole with regard to furnishers, particularly because "consumer credit information found within a credit report often originates with the same business entities that use the information to extend credit to consumers: for example, the furnishers are often the creditors of the consumer."²⁴ As furnishers report debtor-creditor relationships to CRAs, a feedback loop is created as "CRAs collect, aggregate, and analyze data received from furnishers" and the CRAs subsequently "profit from this data by selling it to creditors, employers, insurers, and even consumers."²⁵ By 1996, consumer report inaccuracies and the difficulties in fixing them were at a boiling point.²⁶

One change enacted by the 1996 Reform Act was to expand the scope of the FCRA by imposing duties on furnishers.²⁷ The 1996 Reform Act's amendments imposed duties on furnishers of information to provide accurate information in the first place,²⁸ and it imposed duties in cases where a furnisher was informed otherwise. Section 1681s-2(b) covers "[d]uties of furnishers of information upon notice of dispute" and states, in relevant part, "[a]fter receiving notice . . . of a dispute with regard to the completeness or accuracy of any information provided by a *person* to a consumer reporting agency, the *person* shall . . . conduct an investigation with respect to the disputed information . . . [and] review all relevant information . . ."²⁹ Rather than statutorily define a "furnisher" in imposing these new duties, the FCRA instead uses its standard definition of "person" to define the covered entity, a definition which notably

22. *See id.* at 2411.

23. *See, e.g.,* NAT'L CONSUMER L. CTR., FAIR CREDIT REPORTING § 1.4.6 (9th ed. 2017), <https://library.nclc.org/fcr/010102-0> [<https://perma.cc/SY4M-8G3F>] (noting that the 1996 amendments had to address nearly every aspect of the original FCRA).

24. Guerrero, *supra* note 1, at 441.

25. *Id.* at 443.

26. *See* NAT'L CONSUMER L. CTR., *supra* note 23, § 1.4.6. Prior to amendment of the FCRA in 1996, "errors in consumer credit reports were the number one item of complaint" at the Federal Trade Commission. *Id.* "Forty-eight percent of the consumer reports studied by Consumers Union had errors, twenty percent had errors serious enough to cause credit to be denied." *Id.*

27. Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 623(a), 110 Stat. 3009-426, 3009-447 to 3009-448 (codified as amended at 15 U.S.C. § 1681s-2(a)). While this Recent Development focuses specifically on duties imposed upon furnishers, the 1996 Reform Act "revised nearly every section of the FCRA." NAT'L CONSUMER L. CTR., *supra* note 23, § 1.4.6.

28. *See* 15 U.S.C. § 1681s-2(a).

29. *Id.* §§ 1681s-2(b)(1)(A)–(B) (emphasis added).

includes “any . . . government or governmental subdivision or agency, or other entity.”³⁰

To add teeth to the new duties, the 1996 Reform Act also expanded the scope of the FCRA’s civil damages provisions.³¹ In the original FCRA, civil suits were authorized for “any actual damages,” punitive damages, and costs and attorneys’ fees, against “[a]ny consumer reporting agency or user of information” who willfully violated the Act.³² The 1996 Reform Act replaced the “any consumer reporting agency” language in the original FCRA with “[a]ny person who fails to comply with any provision of this title with respect to any other person shall be liable”³³ While a subtle difference, the FCRA now imposes civil liability on “any person” who “willfully fails to comply with any requirement imposed under [the Act] with respect to any consumer,”³⁴ or who “is negligent in failing to comply with any requirement imposed under [the Act]”³⁵ With the changes, any time the federal government is treated as a “person” furnishing information to CRAs, it could theoretically face civil liability.

What then happens when 42.9 million consumers owe nearly \$1.57 trillion in federal student loans in 2020,³⁶ accounting for over one-third of all outstanding consumer debt?³⁷ Compound these statistics with the federal government being “the nation’s largest employer”³⁸ and you have a furnisher with astronomical potential liability. However, did Congress intend to waive the federal government’s sovereign immunity by imposing duties on furnishers? Litigants have repeatedly sought the answer to that question.

II. SOVEREIGN IMMUNITY AND THE FCRA

In the same breath in which Congress enacted duties on furnishers to work with consumers, it stripped away nearly all their power to enforce those duties themselves. In fact, only a single private right of action exists against furnishers—failure to comply with obligations to participate in reinvestigations

30. *Id.* § 1681a(b) (emphasis added).

31. Consumer Credit Reporting Reform Act of 1996 § 2412.

32. Fair Credit Reporting Act, Pub. L. No. 91-508, § 616, 84 Stat. 1127 (emphasis added) (codified as amended at 15 U.S.C. § 1681n); *see also id.* § 617 (codified as amended at 15 U.S.C. § 1681o) (imposing civil liability on “[a]ny consumer reporting agency or user of information” who negligently violated the Act).

33. Consumer Credit Reporting Reform Act of 1996 § 2412 (emphasis added).

34. 15 U.S.C. § 1681n.

35. *Id.* § 1681o.

36. *Federal Student Aid Portfolio Summary*, FED. STUDENT AID, <https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls> [<https://perma.cc/S5EW-G8B2>].

37. As of April 2021, that overall outstanding consumer debt sat at nearly \$4.2 trillion. *Consumer Credit – G.19*, *supra* note 18.

38. *Federal Employers*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/odep/program-areas/employers/federal-employment> [<https://perma.cc/7YZC-7UM6>].

conducted by CRAs when consumers dispute the accuracy or completeness of information with a CRA.³⁹ Sovereign immunity exists to extinguish this sole right if the furnisher is the federal government. “It has been settled since at least the mid-nineteenth century that the United States may not be sued without its consent,”⁴⁰ and multiple circuits have attempted to discern whether the FCRA’s definition of “person” evinced such consent.

The first major decision on the matter came in the Seventh Circuit case *Bormes v. United States*.⁴¹ In *Bormes*, the case had been remanded from the Supreme Court with the specific objective of determining “whether FCRA itself waives the Federal Government’s immunity to damages under § 1681n.”⁴² James Bormes, an attorney, attempted to sue the federal government for providing too much information in an email receipt sent in response to filing fees paid to the federal courts, a potential violation of § 1681c(g)(1).⁴³ While Bormes failed on the merits of his claim, the Seventh Circuit concluded “[s]ection 1681a(b) does what it has done since 1970 . . . waive sovereign immunity for all requirements and remedies that another section authorizes against any ‘person.’”⁴⁴ This holding, grounded strictly in textual analysis (that the federal government is a “government” and, under § 1681a(b), a “government” is a “person”), was subsequently narrowed by the Seventh Circuit in *Meyers v. Oneida Tribe of Indians of Wisconsin*.⁴⁵ In *Meyers*, a nearly identical claim was brought by Jeremy Meyers, a plaintiff who made purchases at multiple stores owned by the Oneida Tribe of Indians of Wisconsin.⁴⁶ Similar to the plaintiff in *Bormes*, Meyers claimed too much information had been placed on his printed receipts, a violation of § 1681c(g)(1).⁴⁷ The Seventh Circuit found that the use of “government” in the FCRA’s definition of “person” to waive *tribal* sovereign immunity was a bridge too far, as “Congress has demonstrated that it knows how to unequivocally abrogate immunity for Indian Tribes. It did not do so . . .”⁴⁸ Thereby, *Meyers* seemingly left any further narrowing of the waiver in the Seventh Circuit open to future debate.

39. See 15 U.S.C. § 1681s-2(c) (limiting §§ 1681n–o liability to violations of 15 U.S.C. § 1681s-2(b)).

40. Helen Hershkoff, *Jurisdiction over Actions Against the United States—The Sovereign Immunity Problem*, in 14 FED. PRAC. & PROC. JURISDICTION § 3654 (4th ed. 2021).

41. 759 F.3d 793 (7th Cir. 2014).

42. *Id.* at 795 (quoting *United States v. Bormes*, 568 U.S. 6, 16 (2012)).

43. *Id.* Similar to the use of “person” as operative in § 1681s-2 furnisher duties, § 1681c(g) states “no person that accepts credit cards or debit cards for the transaction of business . . .” § 1681c(g)(1).

44. *Bormes*, 759 F.3d at 796.

45. 836 F.3d 818 (7th Cir. 2016).

46. *Id.* at 820.

47. *Id.*

48. *Id.* at 827.

The Ninth Circuit, on the other hand, was entirely unconvinced by the Seventh Circuit's reasoning, as discussed in *Daniel v. National Park Service*.⁴⁹ As in *Bormes* and *Meyers*, the controversy in *Daniel* again revolved around § 1681c(g) and the contents of a purchase receipt, this time paid for an entrance pass to a national park.⁵⁰ Whereas *Bormes* and *Meyers* dubiously alleged a procedural violation of § 1681c(g) was a sufficient injury to establish standing,⁵¹ the plaintiff in *Daniel* alleged more by stating she was the victim of identity theft following the transaction at issue.⁵² While the plaintiff in *Daniel* was deemed to lack standing due to insufficient evidence linking the identity theft to the transaction at issue,⁵³ the court conducted a thorough analysis on the validity of the waiver of sovereign immunity.⁵⁴ "Construing the FCRA as a whole," the *Daniel* court "view[ed] the statute as ambiguous with respect to whether Congress waived immunity for Daniel's suit," so, "because '[a]ny ambiguities in the statutory language are to be construed in favor of immunity,' Daniel's suit was properly dismissed."⁵⁵ The *Daniel* court bolstered this claim by noting that Congress enacted an explicit waiver of sovereign immunity in § 1681u(j) less than one year before it expanded liability to "person[s]" under the FCRA.⁵⁶

With the Seventh and Ninth Circuits firmly divided on the issue, plaintiff Anthony Robinson provided an opportunity for the Fourth Circuit to decide whether the country's largest furnisher of information could be held accountable by consumers under the FCRA.⁵⁷

49. 891 F.3d 762 (9th Cir. 2018).

50. *Id.* at 765.

51. *See Bormes v. United States*, 759 F.3d 793, 798 (7th Cir. 2014) (striking down the claim on the merits because the receipt at issue did not meet the statutory requirements); *Meyers*, 836 F.3d at 822 (refraining from an in-depth analysis of standing due to the ease with which the case could be dismissed on the question of sovereign immunity).

52. *See Daniel*, 891 F.3d at 766–67.

53. *See id.* at 767.

54. *Id.* at 768–76. As the court also noted, "giving Daniel leave to amend the complaint would be futile because the FCRA does not waive the federal government's sovereign immunity from Daniel's suit." *Id.* at 765.

55. *Id.* at 769, 774 (quoting *FAA v. Cooper*, 566 U.S. 284, 290 (2012)).

56. *See id.* at 771–72; *see also* Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, § 601, 109 Stat. 976–77 (codified as amended at 15 U.S.C. § 1681u(j)) ("*Any agency or department of the United States . . . is liable . . .*" (emphasis added)).

57. *See Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799, 802 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1440 (2020).

III. FACTUAL AND PROCEDURAL BACKGROUND OF *ROBINSON*

It is no mystery in America that increased educational attainment generally results in higher lifetime earnings,⁵⁸ as well as many other benefits.⁵⁹ Whether for a certificate, associate's degree, or bachelor's degree, substantial numbers of first-time, full-time students take out loans.⁶⁰ The U.S. Department of Education administers the William D. Ford Federal Direct Loan Program ("Direct Loan"), which provides loans to students and parents for postsecondary education costs.⁶¹ It was through interaction with this program that Anthony Robinson ran into trouble. Robinson claimed he did not authorize Direct Loan to open a loan account in his name.⁶² However, he subsequently discovered there were open Direct Loan student loan accounts being reported on his Experian, Equifax, and TransUnion (collectively, the "credit reporting agencies") credit reports.⁶³ In November 2011, Robinson began disputing the Direct Loan accounts with the credit reporting agencies, as well as directly with the Pennsylvania Higher Education Assistance Agency ("PHEAA") and Direct Loan.⁶⁴

After a few years of trying to correct the errors, Robinson filed suit against the PHEAA, the U.S. Department of Education ("USDE"), and the credit reporting agencies in the U.S. District Court for the District of Maryland, Southern Division.⁶⁵ He alleged claims for violations of the FCRA, due to their treatment of the allegedly fraudulent student loan in his name, as well as a common-law defamation claim.⁶⁶ He also alleged that the USDE violated the FCRA "by failing to fully and properly investigate [his] disputes," and by

58. See Tim Stobierski, *Average Salary by Education Level: The Value of a College Degree*, NE. UNIV. (June 2, 2020), <https://www.northeastern.edu/bachelors-completion/news/average-salary-by-education-level/> [<https://perma.cc/KB7R-HRFU>] ("Associate degree holders earn more . . . than their peers whose education stopped after high school . . . translating into more than \$293,000 over a typical 40-year career.").

59. See, e.g., *How Does a College Degree Improve Graduates' Employment and Earnings Potential?*, ASS'N PUB. & LAND-GRANT UNIVS., <https://www.aplu.org/projects-and-initiatives/college-costs-tuition-and-financial-aid/publicvalues/employment-earnings.html> [<https://perma.cc/PBA9-MQ73>] ("Life expectancy is also longer for those who attend college.").

60. See *Loans for Undergraduate Students*, NAT'L CTR. EDUC. STAT., https://nces.ed.gov/programs/coe/indicator_cub.asp [<https://perma.cc/Y25V-TLEX>] (last updated May 2020) ("Some 44 percent of first-time, full-time degree/certificate-seeking undergraduate students were awarded loan aid in 2017–18 . . . not includ[ing] Parent PLUS Loans or other loans made directly to parents.").

61. *Robinson*, 917 F.3d at 800.

62. *Id.*

63. *Robinson v. Pa. Higher Educ. Assistance Agency*, No. GJH-15-0079, 2017 WL 1277429, at *1 (D. Md. Apr. 3, 2017), *aff'd sub nom. Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1440 (2020).

64. *Id.*

65. *Id.*

66. *Id.*

“failing to review all information” related to his claim.⁶⁷ The complaint brought claims under § 1681n and § 1681o, which provide civil causes of action for willful and negligent FCRA violations, respectively.

The district court granted the government’s motion to dismiss for lack of subject matter jurisdiction on sovereign immunity grounds and dismissed Robinson’s claims against the USDE.⁶⁸ After comparing the alleged waiver of sovereign immunity in the FCRA to that of several other recognized waivers of sovereign immunity, in addition to provisions within the FCRA, the district court reasoned that the FCRA’s language did not unequivocally and unambiguously waive sovereign immunity.⁶⁹ As neither the Supreme Court nor the Fourth Circuit had squarely ruled whether the FCRA waives sovereign immunity for purposes of its civil enforcement scheme, the district court evaluated the reasoning from *Bormes*,⁷⁰ as well as a number of district court opinions, which split when weighing the use of “person” as a waiver of sovereign immunity.⁷¹ The *Robinson* district court found itself aligning with the recent district court decision in *Daniel v. National Park Service*,⁷² which rejected the reasoning used in *Bormes*.⁷³ The district court found Robinson’s assertion that the federal government waived immunity in all remedial provisions that utilized the term “person” would, among other things, absurdly expose the federal government to criminal prosecutions—a result Congress could not have intended “absent a clear statement.”⁷⁴ It further delved into administrative remedies that would provide Robinson redress in the absence of a remedy under the FCRA.⁷⁵ However, it is questionable whether effective remedies even exist at all.⁷⁶

67. *Robinson*, 917 F.3d at 800. 15 U.S.C. § 1681s-2(b) covers “[d]uties of furnishers of information upon notice of dispute” and, in relevant part, “[a]fter receiving notice . . . of a dispute with regard to the completeness or accuracy of any information provided by a *person* to a consumer reporting agency, the *person* shall . . . conduct an investigation with respect to the disputed information . . . [and] review all relevant information . . .” § 1681s-2(b)(1)(A)–(B) (emphasis added).

68. *Robinson*, 2017 WL 1277429, at *4.

69. *Id.* at *2–4.

70. *See Bormes v. United States*, 759 F.3d 793, 795 (7th Cir. 2014).

71. *See Robinson*, 2017 WL 1277429, at *2–4; *Daniel v. Nat’l Park Serv.*, No. CV 16-18-BLG-SPW, 2016 WL 4401369, at *2–5 (D. Mont. Aug. 17, 2016), *aff’d*, 891 F.3d 762 (9th Cir. 2018).

72. 2016 WL 4401369, at *1.

73. *Id.* at *4 (“[T]he Court believes that the district court opinions from this circuit are more persuasive than *Bormes* and finds that the FCRA does not contain an unequivocal waiver of sovereign immunity.”).

74. *Robinson*, 2017 WL 1277429, at *4.

75. *See id.* (referencing 34 C.F.R. § 685.214 and *Ogunmokun v. Am. Educ. Servs./PHEAA*, No. 12-CV-4403 (RRM) (JO), 2014 WL 4724707, at *4 (E.D.N.Y. Sept. 23, 2014)). However, the regulations the *Robinson* district court referenced refer to the discharge of payments on loans created by *schools*, rather than the USDE, and make no mention of corrections to the credit report of the consumer, an essential part of Robinson’s desired redress.

76. Guerrero, *supra* note 1, at 439 (“Under current credit reporting legislation and regulation, consumers are provided few remedies for experienced wrongs. This apparent lack of redress is due to

On appeal, the Fourth Circuit affirmed the district court's decision.⁷⁷ The Fourth Circuit concluded that, despite the FCRA's statutory definition of "person," there is an interpretative presumption that "'person' does not include the sovereign,"⁷⁸ and because it is plausible "Congress used 'person' according to its ordinary meaning," then sovereign immunity has not been unambiguously waived.⁷⁹ The court used a variety of additional interpretive methods, including comparison to other acts with acknowledged waivers, legislative history, and an analysis of the consequences of accepting the waiver, in addition to decisions from the Seventh and Ninth Circuits, which will be discussed at length below.⁸⁰

Robinson then petitioned the Supreme Court for review, and the Court denied certiorari.⁸¹ Notably, Justice Thomas and Justice Kavanaugh dissented from the denial of certiorari.⁸² Due to the federal government's role as the "Nation's primary student-loan lender," and its status as "one of the largest furnishers of credit information in the country," Justice Thomas argued the potential liability opened up under the FCRA with a waiver of sovereign immunity is potentially massive.⁸³ Justice Thomas noted that "[b]ecause the question presented in this petition has divided the Circuits and concerns a matter of great importance, it warrants our review."⁸⁴ Without taking up the issue, "borrowers of federal loans in Illinois, Indiana, and Wisconsin have access to a cause of action against the Federal Government while borrowers with the same types of loans in 14 other States are barred from suit."⁸⁵ The Supreme Court was keenly aware that failure to resolve the split would create a "situation[] where litigants obtain different outcomes under the same federal law merely because of the geographic location where their case is decided,"⁸⁶ an arbitrary outcome that undermines the entire system of justice.

the current credit reporting system's failure to provide a framework of incentives and penalties to motivate CRAs and furnishers to adequately address disputes, or, more generally, to ensure the accuracy of consumer credit information.").

77. *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799, 800 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1440 (2020). By the time of the appeal, all claims against the nonfederal defendants had run their course. *Id.*

78. *Id.* at 802 (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000)).

79. *Id.* at 803.

80. *See infra* Part V.

81. *Robinson v. Dep't of Educ.*, 140 S. Ct. 1440, 1440 (2020).

82. *Id.*

83. *Id.* at 1441–42 (Thomas, J., dissenting from the denial of certiorari) ("[T]he Federal Government is responsible for 90 percent of student loans nationwide in a market that has tripled between 2007 and 2018, from \$500 billion to a staggering \$1.5 trillion.").

84. *Id.* at 1442.

85. *Id.* at 1441.

86. *See* Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 990 (2020) (discussing the problem of increasing numbers of unresolved circuit

IV. REASONING OF THE *ROBINSON* COURT

The issue before the Fourth Circuit was whether the United States waived sovereign immunity for suits alleging that the federal government willfully or negligently violated the FCRA.⁸⁷ This required the court to determine whether the inclusion of “government or governmental subdivision or agency” within the Act’s definition of “person” waived sovereign immunity to civil actions under the FCRA’s general liability provisions.⁸⁸ The Fourth Circuit held that the FCRA did not unambiguously and unequivocally waive the federal government’s sovereign immunity from liability for Robinson’s civil enforcement claims.⁸⁹

Writing for the Fourth Circuit, Judge Wilkinson began by pointing out that “sovereign powers have ‘traditionally enjoyed’ a ‘common-law immunity from suit.’”⁹⁰ As such, “[t]he Department of Education . . . enjoys as a federal agency a presumption of immunity from the present lawsuit.”⁹¹ The court noted the strength of the doctrine is most important in the context of money damages, as these judgments “allow ‘the judgment creditor’ to compete with ‘other important needs and worthwhile ends . . . for access to the public fisc,’”⁹² stakes which make consent to suit by the people a prerequisite.⁹³ This was the basis of Justice Thomas’s dissent to the denial of certiorari.⁹⁴ For these reasons, in addition to relying on previous precedent,⁹⁵ the court stated sovereign immunity “can only be waived by statutory text that is unambiguous and unequivocal.”⁹⁶ As such, “[t]he plaintiff bears the burden of showing that the government has waived sovereign immunity at the motion to dismiss stage.”⁹⁷

The Fourth Circuit began its analysis by stating the purposes of the FCRA: to “ensure fair and accurate credit reporting, promote efficiency in the

splits, caused largely by increasing caseloads in the U.S. circuit courts and a significant reduction in the number of cases decided by the U.S. Supreme Court).

87. *Robinson v. U.S. Dep’t of Educ.*, 917 F.3d 799, 801 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1440 (2020).

88. *See* 15 U.S.C. §§ 1681n–o.

89. *Robinson*, 917 F.3d at 806.

90. *Id.* at 801 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

91. *Id.*

92. *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)).

93. *Id.* (citing *United States v. Mitchell*, 463 U.S. 206, 212 (1983)).

94. *Robinson v. Dep’t of Educ.*, 140 S. Ct. 1440, 1441 (2020) (Thomas, J., dissenting from the denial of certiorari) (“Were the Federal Government to be stripped of sovereign immunity without consent, ‘private suits for money damages would place unwarranted strain on the [Government’s] ability to govern in accordance with the will of [its] citizens.’” (quoting *Alden v. Maine*, 527 U.S. 706, 750–51 (1999))).

95. *Robinson*, 917 F.3d at 802 (noting that ambiguity “exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government” (quoting *FAA v. Cooper*, 566 U.S. 284, 290–91 (2012))).

96. *Id.*

97. *Id.* (citing *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995)).

banking system, and protect consumer privacy”⁹⁸ when handling consumer credit information. The court then dove into the basis of Robinson’s claim—that the USDE violated the FCRA provision that requires “persons” to “conduct an investigation with respect to the disputed information” after being notified that a consumer disputes information relating to their credit.⁹⁹ Subsequently, “[a]ny person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer” for actual damages, costs, and attorney’s fees.¹⁰⁰

In determining whether the federal government is a “person” for purposes of the FCRA’s general civil liability provisions, the court started its inquiry with the text of the statute.¹⁰¹ The court acknowledged Robinson’s claim that, “[s]ince the federal government is a government, any government is a person, and as any person can be liable . . . the federal government can be liable for FCRA violations.”¹⁰² However, the court was quick to counter that “[t]here is a ‘longstanding interpretive presumption that “person” does not include the sovereign.’”¹⁰³ The court went on to note the United States is not “ordinarily” considered to be a person and, because it is plausible Congress used “person” according to its ordinary meaning, sovereign immunity had not been unambiguously waived.¹⁰⁴

The court then proclaimed statutory waivers of sovereign immunity are normally quite clear.¹⁰⁵ The court noted the language used in the Little Tucker Act, the Federal Tort Claims Act, the Clean Water Act, and the Resource Conservation and Recovery Act, as well as other statutes, all contain explicit language denoting the “United States” may be held liable.¹⁰⁶ In contrast, the definition of “person” Robinson relied on does not specifically mention the “United States” or the “federal government.”¹⁰⁷ Notably, the FCRA actually contains an explicit waiver of sovereign immunity with regard to information

98. *Id.* (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007)).

99. *Id.* (referring to 15 U.S.C. § 1681s-2(b)(1)(A)).

100. 15 U.S.C. § 1681o. Section 1681n applies to willful FCRA violations and adds punitive damages to the remedies for negligent violations under § 1681o. *Id.* § 1681n(a)(2).

101. *Robinson*, 917 F.3d at 802.

102. *Id.*

103. *Id.* (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000)).

104. *Id.* at 803 (citing *FAA v. Cooper*, 566 U.S. 284, 290–91 (2012)).

105. *Id.*

106. *Id.*; see Little Tucker Act, 28 U.S.C. § 1346(a)(2) (mentioning a “civil action or claim against the United States”); Federal Tort Claims Act, 28 U.S.C. § 2674 (“The United States [is] liable . . .”); Clean Water Act, 33 U.S.C. § 1365(a)(1) (“[A]ny citizen may commence a civil action on his own behalf . . . against any person . . . including (i) the United States, and (ii) any other governmental instrumentality or agency . . .”); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(A) (“[A]ny person may commence a civil action on his own behalf . . . against any person . . . including (a) the United States, and (b) any other governmental instrumentality or agency . . .”).

107. *Robinson*, 917 F.3d at 803.

provided to the Federal Bureau of Investigation in connection with its counterterrorism efforts.¹⁰⁸ Hence, in the court's eyes, Congress used considered judgment in either creating a waiver or not with regard to the federal government.

The court also noted the awkward results of applying Robinson's reasoning to the overall statutory scheme. The Act's enforcement provisions authorize criminal proceedings against "[a]ny person."¹⁰⁹ The court pointed out the "statute allows prosecution of 'any government,' not *the employees of* any government."¹¹⁰ Further, a construction of "person" that includes the federal government would allow federal agencies and even the states to enforce the Act against the federal government.¹¹¹ What is more, § 1681n would potentially allow punitive damages against the federal government, "trampl[ing] yet another presumption, this time 'against imposition of punitive damages on governmental entities.'"¹¹²

The opinion went on to discuss the challenges posed by the broad exposure to liability the language "any government" creates.¹¹³ In applying the Act, one would have to consider its implications for foreign, tribal, and state governments, in addition to the federal government.¹¹⁴ Noting the relative closeness in time between the decision in *Seminole Tribe of Florida v. Florida*¹¹⁵ and Congress's amendment to the FCRA,¹¹⁶ the court concluded such a wide-ranging waiver of immunity could not have been Congress's intent.¹¹⁷

The court also made clear that "just as the ordinary meaning of 'person' has always applied to the FCRA's enforcement provisions, the statutory definition of 'person' has always applied to the FCRA's substantive

108. See 15 U.S.C. § 1681u(j) ("Any agency or department of the *United States* obtaining or disclosing any consumer reports, records, or information contained therein in violation of [§ 1681u] is liable [for statutory, actual, and sometimes punitive damages] to the consumer to whom such consumer reports, records, or information relate." (emphasis added)).

109. *Id.* § 1681q.

110. *Robinson*, 917 F.3d at 805 (rejecting Robinson's argument that other courts have allowed the waiver on the basis of suit against federal employees); see *Bormes v. United States*, 759 F.3d 793, 796 (7th Cir. 2014).

111. See § 1681s(a)(1) (allowing FTC enforcement); § 1681s(b)(1)(H) (allowing CFPB enforcement); § 1681s(c) (allowing state enforcement).

112. *Robinson*, 917 F.3d at 805 (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000)).

113. See *id.*

114. *Id.*

115. 517 U.S. 44 (1996). In *Seminole Tribe of Florida*, the Court held that Congress lacks the power to abrogate state sovereign immunity under the Commerce Clause. *Id.* at 47.

116. *Robinson*, 917 F.3d at 805; see also Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-426 (codified as amended at 15 U.S.C. § 1681s-2).

117. *Robinson*, 917 F.3d at 805. The Court pointed out interpreting the term otherwise would be in stark contrast to the Court's "duty to construe the statutory language with that conservatism which is appropriate in the case of a waiver of sovereign immunity." *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 590 (1941)).

provisions.”¹¹⁸ The Fourth Circuit asserted the two are not the same, in contrast to the stance taken by the Seventh Circuit in *Bormes*.¹¹⁹ Its textual and structural analysis complete, the court concluded it was clear that no unambiguous and unequivocal waiver of sovereign immunity had taken place.¹²⁰

The court was then forced to acknowledge the existing circuit split on the issue. Referring to the Ninth Circuit opinion in *Daniel*, the Fourth Circuit mentioned the Ninth Circuit too “employed a holistic approach in interpreting FCRA to preserve federal sovereign immunity,” reaching the same conclusion that “[d]istilling a clear waiver of sovereign immunity in the FCRA would require us to treat ‘the United States’ as a ‘person’ in each provision,” creating absurd results when applied to the enforcement provisions, as discussed above.¹²¹ Thus, it was obvious a waiver had not occurred. When exploring the Seventh Circuit’s initial view that the FCRA set forth a waiver of federal sovereign immunity in *Bormes*,¹²² the court made clear that decision was undermined in *Meyers*, when the Seventh Circuit upheld tribal sovereign immunity under the FCRA,¹²³ seemingly in contrast to the *Bormes* reading of “any . . . government” and what may be within that scope.¹²⁴ As the *Daniel* court recognized and the *Robinson* court reaffirmed, “the Seventh Circuit’s logic regarding tribal sovereign immunity should apply equally to the United States.”¹²⁵

V. ANALYSIS OF THE *ROBINSON* COURT’S REASONING

While the Fourth Circuit was willing to rule definitively on the matter, the Supreme Court was not ready to do the same. Both courts recognized the importance of the issue before them. However, even in the face of substantial evidence establishing the Act’s ambiguity, and thus nonwaiver, the Supreme Court refused to resolve the existing circuit split. As such, the Seventh Circuit and any other courts that decide to follow its lead are welcome to use its rudimentary analysis to allow private citizens to sue the federal government, and potentially states, under the FCRA, “undermin[ing] a legal principle that many believe is fundamental: courts should apply federal laws uniformly.”¹²⁶ At

118. *Id.* at 806.

119. *Id.* at 806–07; see *Bormes v. United States*, 759 F.3d 793, 795 (7th Cir. 2014) (“The United States concedes that it is a ‘person’ for the purpose of [the FCRA’s] substantive requirements.”).

120. *Robinson*, 917 F.3d at 806.

121. *Robinson*, 917 F.3d at 806 (quoting *Daniel v. Nat’l Park Serv.*, 891 F.3d 762, 770 (9th Cir. 2018)).

122. *Bormes*, 759 F.3d at 796.

123. *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 827 (7th Cir. 2016) (finding that reading “any government” to allow suits against tribes would be “shoehorning” a tribal immunity waiver, and that “shoehorning is precisely what [the court] cannot do.”).

124. *Robinson*, 917 F.3d at 806.

125. *Id.* at 807 (citing *Daniel v. Nat’l Park Serv.*, 891 F.3d 762, 774 (9th Cir. 2018)).

126. Cohen & Cohen, *supra* note 86, at 1010.

the same time, the Fourth and Ninth Circuit opinions illustrate that the FCRA's enforcement provisions have become all bark and no bite with regard to "any . . . government," whether federal, tribal, state, or otherwise. For litigants such as Anthony Robinson—and potentially millions more governmental debtors—a yearslong battle for an accurate credit report becomes another casualty under an Act that purports to provide relief. The FCRA's inclusion of "government" in the definition of "person" could not have intended such a result.

Section V.A makes the case that the Supreme Court should have granted certiorari, while Section V.B argues state sovereign immunity principles provide evidence that the inclusion of "government" in "person" did not waive sovereign immunity and, further, makes the enforcement provisions entirely inapplicable to any government.

A. *The Supreme Court Should Have Granted Certiorari To Resolve an Important Matter on Which the Courts of Appeals Are in Conflict*

Dissenting from the denial of certiorari in *Robinson*, Justice Thomas wrote that "[o]ne of this Court's primary functions is to resolve 'important matter[s]' on which the courts of appeals are 'in conflict.'"¹²⁷ A waiver of sovereign immunity at any level has always been one such matter.¹²⁸ Particularly, as district courts in multiple circuits continue to address similar suits without binding precedent on the issue,¹²⁹ the Supreme Court had the option to settle this important matter going forward. Instead, litigants such as Anthony Robinson are deprived of a legal cause of action solely based on their geographic positioning, while the federal government retains significant potential liability in other locales.

The Supreme Court should have used the *Robinson* decision to repudiate the reasoning used by the Seventh Circuit in *Bormes* and *Meyers*. *Bormes* was previously in the hands of the Supreme Court, who at that time did not weigh in on the issue of whether the "FCRA itself waives the Federal Government's immunity to damages actions under § 1681n."¹³⁰ On remand, the *Bormes* court held that because the United States is a government and the statutory definition of person includes "any . . . government[,]" . . . what § 1681a(b) does is waive sovereign immunity for all requirements and remedies that another section

127. *Robinson v. U.S. Dep't of Educ.*, 140 S. Ct. 1440, 1442 (2020) (Thomas, J., dissenting from the denial of certiorari) (quoting *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 408 (2018) (Thomas, J., dissenting from the denial of certiorari) (citing SUP. CT. R. 10(a))).

128. See generally Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409 (2016) (providing an in-depth dive into the origins of sovereign immunity and its implications for all levels of government).

129. See, e.g., *Stein v. U.S. Dep't of Educ.*, 450 F. Supp. 3d 273, 277 (E.D.N.Y. 2020); *Johnson v. Trans Union, LLC*, No. CV 16-1240, 2019 WL 3202212, at *2-4 (W.D. La. July 15, 2019).

130. *United States v. Bormes*, 568 U.S. 6, 16 (2012).

authorizes against any ‘person.’”¹³¹ When the issue again arose in the Seventh Circuit in *Meyers*, the court diminished the analytical quality of the *Bormes* decision by noting “the government conceded that it was a ‘person’ for purposes of the Act so the court had no reason to engage in a full analysis of the scope of the term ‘any government.’”¹³²

For Anthony Robinson, bringing suit years later in a circuit without binding precedent, the reasoning of *Bormes* made his case seem like a slam dunk. He was dealing with the federal government, not a tribal government. However, as the *Robinson* court noted, this completely disregards the longstanding interpretive presumption that a statutory “person” does not include the sovereign.¹³³ As the Seventh Circuit noted in *Meyers*, “[i]t must be said with ‘perfect confidence’ that Congress intended to abrogate sovereign immunity and ‘imperfect confidence will not suffice.’”¹³⁴ Just as *Meyers* concluded the ambiguity of “any . . . government” could not be shoehorned into a waiver of tribal immunity, it likewise cannot be shoehorned into a waiver of sovereign immunity.

The Supreme Court itself has provided the candle by which to illuminate supposed waivers and their scope, making its decision to ignore a divergence all the more confounding. As *Robinson* observed, the Supreme Court in *FAA v. Cooper*¹³⁵ issued a directive that ambiguities be resolved in favor of immunity.¹³⁶ In *Cooper*, the Court acknowledged an actual waiver of sovereign immunity existed in the Privacy Act.¹³⁷ However, even once a waiver is established, the *Cooper* Court mandated that courts must “construe any ambiguities in the scope of a waiver in favor of the sovereign.”¹³⁸ Clearly, the federal government’s bar is extremely low when it comes to waivers of sovereign immunity, as the government’s argument must simply be “plausible.”¹³⁹ The Seventh Circuit, through *Meyers*, has come to the conclusion that “government” as a part of “person” is “plausibly” ambiguous, as evidenced through its carveout, and thus does not constitute a waiver of sovereign immunity.¹⁴⁰

131. *Bormes v. United States*, 759 F.3d 793, 795–96 (7th Cir. 2014).

132. *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 826 (7th Cir. 2016).

133. *Robinson v. U.S. Dep’t of Educ.*, 917 F.3d 799, 802 (4th Cir. 2019).

134. *Meyers*, 836 F.3d at 827 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989), *superseded by statute*, 20 U.S.C. § 1403).

135. 566 U.S. 284 (2012).

136. *Id.* at 290 (“Any ambiguities in the statutory language are to be construed in favor of immunity . . .”).

137. *See id.* at 287.

138. *Id.* at 291.

139. *See id.* at 290–91.

140. *See Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 826 (7th Cir. 2016); *Lane v. Pena*, 518 U.S. 187, 192 (1996) (“A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied.”).

Further, *Bormes* also completely disregarded the fact that “statutory construction is a ‘holistic endeavor,’”¹⁴¹ thus, “when deciding whether the language is plain, the Court must read the words ‘in their context and with a view to their place in the overall statutory scheme.’”¹⁴² As the *Robinson* court explained, applying the *Bormes* construction throughout the FCRA would result in absurd consequences, a situation in which the Supreme Court has said courts should be especially reluctant to construe the waiver.¹⁴³ This is even more so when the FCRA contains an explicit waiver of sovereign immunity in another enforcement provision, as *Robinson* noted § 1681u does.¹⁴⁴ Regardless of the liability implications, the Supreme Court should have overruled the Seventh Circuit simply on statutory construction grounds. Fortunately, district courts in circuits without definitive precedent on the issue have already begun to adopt the holistic reasoning of the Fourth and Ninth Circuits,¹⁴⁵ indicating the impact of *Bormes* may be constrained to the Seventh Circuit until the circuit overrules its own precedent. However, plaintiffs continue to request the *Bormes* treatment,¹⁴⁶ and thus, uncertainty in the application of federal law remains.

B. *The Robinson Court Failed To Appreciate that Its Decision Completely Absolves All Governments from the FCRA’s Enforcement Provisions*

The Fourth Circuit failed to acknowledge state sovereign immunity not only creates additional ambiguity, but, in combination with *Meyers*’s tribal sovereign immunity carveout, completely absolves *all* governments from the FCRA’s enforcement provisions. The FCRA is a statute of general applicability; thus, the statute substantively reaches everyone within a federal jurisdiction not specifically excluded.¹⁴⁷ The statutory definition of “person”

141. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quoting *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

142. *King v. Burwell*, 576 U.S. 473, 474 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

143. *Robinson v. U.S. Dep’t of Educ.*, 917 F.3d 799, 804 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1440 (2020); *see also Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991) (indicating courts should be “especially reluctant to read ‘person’ to mean the sovereign” when that reading is “decidedly awkward”).

144. *Robinson*, 917 F.3d at 803–04 (“Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of [§ 1681u] is liable to the consumer to whom such consumer reports, records, or information relate’ for statutory, actual, and sometimes punitive damages.” (quoting 15 U.S.C. § 1681u(j))).

145. *See, e.g., Stein v. U.S. Dep’t of Educ.*, 450 F. Supp. 3d 273, 277 (E.D.N.Y. 2020); *Johnson v. Trans Union, LLC*, No. CV 16-1240, 2019 WL 3202212, at *2–4 (W.D. La. July 15, 2019); *Gray v. Equifax Info. Sys., LLC*, No. 19-62425-CIV, 2021 WL 1290252, at *3–4 (S.D. Fla. Feb. 8, 2021).

146. *See, e.g., Gray*, 2021 WL 1290252, at *1 (“Plaintiff requests that the Court follow the Seventh Circuit’s decision in *Bormes v. United States . . .*”).

147. *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 827 (7th Cir. 2016) (noting that whether FACTA (as part of the FCRA) is a statute of general applicability is not the issue, as “[w]hether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violations of the statute are two entirely different questions” (emphasis added) (citation omitted)).

includes “any . . . government or governmental subdivision or agency,”¹⁴⁸ and thus substantively applies to any such covered entity. However, because the FCRA was passed subject to Congress’s Commerce Clause powers, the FCRA has extremely limited authority to waive sovereign immunity for sovereign entities other than the federal government or to subject those entities to federal suit. The Supreme Court has asserted that “[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”¹⁴⁹ Interestingly enough, Justice Thomas’s dissent in the *Robinson* denial of certiorari cited *Alden v. Maine*,¹⁵⁰ a preeminent case on the topic that built upon *Seminole Tribe of Florida*. In *Alden*, the Court explained that private suits against nonconsenting states “may threaten their financial integrity,” “place[] unwarranted strain on the States’ ability to govern in accordance with the will of their citizens,” and create “compet[ition] with other important needs and worthwhile ends for access to the public fisc.”¹⁵¹ Among many rationalizations for why Congress could not subject the state to suit in *Alden*, Congress was held to be constitutionally barred from impugning the state public fisc on federalism grounds.¹⁵² “Like the federal government, states have a direct relationship with and obligation to the governed.”¹⁵³

Just as *Meyers* curtailed the *Bormes* decision when faced with the consequence of tribal sovereign immunity being abrogated, the same is true when state sovereign immunity is waived. While all cases discussing this particular provision revolved around whether the federal government waived its sovereign immunity, the fact that the exact same logic would have impermissibly waived sovereign immunity for states makes it clear that the same language could not have unequivocally waived federal sovereign immunity, because “any . . . government” would have to include state governments, due to the applicability of the FCRA to them in its substantive provisions. The logical conclusion is that by leaving “government” sufficiently undefined within the definition of “person,” only one form of government could even potentially be held liable in the enforcement provisions of the FCRA, that being the federal government. As the FCRA’s enforcement provisions actually

148. 15 U.S.C. § 1681a(b).

149. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996).

150. 527 U.S. 706, 758–60 (1999) (holding Congress could not subject a state to suit in state court without its consent when state probation officers brought an action against the state for a violation of overtime provisions of the Fair Labor Standards Act).

151. *Id.* at 750–51.

152. See Smith, *supra* note 128, at 452 (“If Congress could authorize suits against states under its Commerce Clause power, this would give Congress the ‘power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney’s fees, and even punitive damages [that] could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design.” (quoting *Alden*, 527 U.S. at 750)).

153. *Id.*

contain an explicit waiver in which it uses “[a]ny agency or department of the United States”¹⁵⁴ rather than “person,” all governments are effectively excluded from liability under the enforcement provisions of the FCRA, rendering the inclusion of “government” in the definition of “person” completely superfluous with regard to the enforcement provisions of the FCRA. As such, with regard to governmental entities, the FCRA is a statute with no teeth when it comes to private rights of action and fulfilling its purpose to protect consumers. When Anthony Robinson is denied a job, an apartment, or a credit card after years of struggling against the USDE, he sits alone with those consequences; the courts are powerless to make things right.

VI. AMENDING THE LANGUAGE OF § 1681N TO PROTECT CONSUMERS AND MAINTAIN DESIRED DETERRENCE

As has been discussed, consumers are provided only one private right of action against furnishers, centered on failures to comply with obligations to participate in reinvestigations.¹⁵⁵ Section V.B established that should the furnisher be any government or its constituent parts, consumers are left with no private remedies. These facts make the case that, at a minimum, an amendment to § 1681n is needed to ensure the provision’s continued vitality as a means of recourse for consumers when the federal government violates the FCRA. While *Robinson* asserts that waivers of sovereign immunity need not “use magic words,”¹⁵⁶ with respect to the FCRA, the magic words “United States” are indeed necessary. Under *Robinson*, *Daniel*, and subsequent cases now relying on their reasoning, the federal government has not waived sovereign immunity in its enforcement provisions through the use of “person.” Because consumers are not provided private recourse against the federal government under § 1681n and § 1681o, the remaining powers of enforcement lie at the discretion of the Federal Trade Commission (unless the entity is regulated by another federal agency), which has subsequently moved general administration of the Act to the Bureau of Consumer Protection.¹⁵⁷ As noted in *Robinson*, “the prospect of the [Consumer Financial Protection Bureau] pursuing a civil action against the United States” is hardly less odd than it pursuing a criminal prosecution of the United States.¹⁵⁸ As such, it is safe to assume the federal

154. See 15 U.S.C. § 1681u.

155. *Id.* § 1681s-2(c) (limiting §§ 1681n–o liability to violations of § 1681s-2(b)).

156. *Robinson v. U.S. Dep’t of Educ.*, 917 F.3d 799, 804 (4th Cir. 2019) (quoting *FAA v. Cooper*, 566 U.S. 284, 291 (2012)), *cert. denied*, 140 S. Ct. 1440 (2020).

157. See 16 C.F.R. § 1.71; see also 15 U.S.C. § 1681s(a)(1) (allowing FTC enforcement); § 1681s(b)(1)(H) (allowing CFPB enforcement). The FTC’s Bureau of Consumer Protection and the CFPB have concurrent jurisdiction under the Fair Credit Reporting Act and coordinate any enforcement actions under the Act. See 12 U.S.C. § 5514(c)(3)(A). For the purpose of this Recent Development, the distinction is negligible.

158. *Robinson*, 917 F.3d at 805.

government and subsequently “any . . . government” acting as a furnisher is free to willfully or negligently avoid compliance with the FCRA furnisher obligations without fear of any enforcement mechanisms whatsoever (unless explicitly authorized elsewhere), both governmental and private. Such a situation harkens back to why furnisher obligations were enacted in the first place.¹⁵⁹

To rein in rogue governmental furnishers, precision is needed where ambiguity has proven to be insufficient. Interestingly, Congress enacted the FCRA’s explicit waiver of sovereign immunity contained in § 1681u(j) less than one year before Congress expanded §§ 1681n–o liability to “person[s]” under the FCRA.¹⁶⁰ Notably, § 1681u(j)(3) authorizes punitive damages should the violation be willful or intentional.¹⁶¹ While *Robinson* argued exposing the federal government to punitive damages “would trample yet another presumption, this time ‘against imposition of punitive damages on governmental entities,’”¹⁶² Congress expressed it was explicitly willing to subject the United States to such punitive damages under the FCRA. Even *Daniel* was willing to acknowledge punitive damages are acceptable so long as the provision is “explicit in licensing punitive damages against the sovereign, as it was in § 1681u(j).”¹⁶³ Despite all the faults in its reasoning, *Bormes* was insightful in regarding how to address governmental exposure under the Act: “If the interaction of § 1681a(b) and § 1681n(a)(2) creates excessive liability—which it won’t if federal officers obey the statute—then the solution is an amendment, not judicial rewriting of a pellucid definitional clause.”¹⁶⁴ The problem is not the liability itself, but rather that the courts are trying to clean up Congress’s mess. Just as Congress has done in the past, it must once again take up the pen and amend.

To rationalize its role as problem solver in the interim, the court in *Daniel* bolstered its textual analysis with legislative history by stating “[t]he lack of any reference to potential federal liability is particularly glaring given the federal government’s role as the nation’s largest employer, lender, and creditor, and its corresponding vulnerability to suit under the new FCRA provisions.”¹⁶⁵ However, one must keep in mind that when the FCRA was amended in 1996, “[t]he driving force behind the changes was the significant amount of inaccurate information that was being reported by consumer reporting agencies and the

159. Guerrero, *supra* note 1, at 438.

160. See Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, §§ 601, 624, 109 Stat. 976–77 (codified as amended at 15 U.S.C. §§ 1681n–o).

161. 15 U.S.C. § 1681u(j)(3) (“[I]f the violation is found to have been willful or intentional, such punitive damages as a court may allow . . .”).

162. *Robinson*, 917 F.3d at 805 (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000)).

163. *Daniel v. Nat’l Park Serv.*, 891 F.3d 762, 771 (9th Cir. 2018).

164. *Bormes v. United States*, 759 F.3d 793, 796 (7th Cir. 2014).

165. *Daniel*, 891 F.3d at 776.

difficulties that consumers faced getting such errors corrected.”¹⁶⁶ The federal government was as much a furnisher before the amendments as it was after, and thus cannot be separated from the impetus for amendment. Furnishers of credit, including the federal government, have monumental power over the day-to-day lives of consumers. Errors have the power to deny people access to the necessities of life.¹⁶⁷ In Anthony Robinson’s case, his battle in the courts took years, a period in which irreparable harm can be done to one’s life. “Government” is included in the definition of “person” because Congress saw the necessity of applying the substantive requirements of the FCRA upon government. To make those substantive requirements meaningful, Congress needs to amend the language of § 1681n(a). Congress need merely add the verbiage of § 1681u(j)’s existing waiver, “or [a]ny agency or department of the United States,” after “any person.” In doing so, the federal government is only exposed to punitive damages for “willful noncompliance” under the FCRA, a threshold already in place under § 1681u(j).¹⁶⁸

Notably, proof of actual damages is not required for an award of statutory or punitive damages in an instance of willful noncompliance under the FCRA;¹⁶⁹ however, the presence of actual damages is likely to bear on the amount of punitive damages awarded. If § 1681n is amended to allow a consumer to bring a claim against the federal government for willful noncompliance, the Supreme Court’s recent decision in *Spokeo, Inc. v. Robins*¹⁷⁰—that a mere statutory violation may not be enough to establish standing¹⁷¹—is likely to quell the concerns of the federal government. To satisfy the standing requirements of Article III, a “plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial

166. S. REP. NO. 108-166, at 5–6 (2003) (referencing the 1996 Reform Act).

167. NAT’L CONSUMER L. CTR., *supra* note 23, § 1.1.2 (“Information contained in a consumer’s credit reporting file affects their access to home mortgages, car loans, credit cards, utility services, residential tenancies, employment, and insurance. In addition, it can control the rate at which consumers may obtain credit.”).

168. The term “willfulness,” within the meaning of the FCRA, includes acting with “reckless disregard” of one’s obligations under the statute. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007). A Fourth Circuit opinion concluded that “repeated failure to comply with known regulations can move . . . conduct from inadvertent neglect into reckless or deliberate disregard (and thus willfulness) . . .” *Am. Arms Int’l v. Herbert*, 563 F.3d 78, 85 (4th Cir. 2009).

169. NAT’L CONSUMER L. CTR., *supra* note 23, § 12.5.4.1.2; *see also* TRW, Inc. v. Andrews, 534 U.S. 19, 35 (2001) (“Punitive damages . . . could presumably be awarded at the moment of . . . alleged wrongdoing, even if ‘actual damages’ did not accrue at that time.”).

170. 136 S. Ct. 1540 (2016).

171. *Id.* at 1549. In *Spokeo*, a consumer brought an action alleging that a website operator published inaccurate information about him in violation of the FCRA. *Id.* at 1544. The Court held that “a bare procedural violation, divorced from any concrete harm, [does not] satisfy the injury-in-fact requirement of Article III.” *Id.* at 1549. Negligent violations of the FCRA are not actionable in the absence of actual damages, and therefore do not give rise to Article III standing challenges.

decision.”¹⁷² Importantly, the injury must be “concrete.”¹⁷³ Under the FCRA, “the best cases include evidence of damages, such as a denial of credit, and monetary and emotional harm, that resulted from the failure to comply with the FCRA’s reinvestigation requirements,”¹⁷⁴ facts which would create a concrete injury.¹⁷⁵ *Spokeo* noted that although “Article III standing requires a concrete injury even in the context of a statutory violation . . . the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact.”¹⁷⁶ With amendment, it would be the task of Robinson and other plaintiffs to either (1) establish a traditional concrete injury or (2) argue the procedural violation itself is sufficient, a more difficult endeavor.¹⁷⁷

For all the *Robinson* court’s fears of immense federal government liability as “one of the largest furnishers of credit information,”¹⁷⁸ plaintiffs face an arduous road to succeeding in a private action. By waiving sovereign immunity for willful noncompliance, the government is only held accountable for recklessly violating their obligations under the Act. There is a record of the courts finding willful violations of § 1681s-2(b) by furnishers of credit information per § 1681n actions and awarding damages.¹⁷⁹ Thus, there is no reason to think the federal government would not reform to protect itself. However small the likelihood, such accountability creates the desired deterrent effect.

172. *Id.* at 1547. “To establish injury in fact, a plaintiff must show that they suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Notably, the *Daniel* court not only made clear there was no waiver of sovereign immunity, but also that the plaintiff failed to satisfy all three elements, even in the face of alleged identity theft. *Daniel v. Nat’l Park Serv.*, 891 F.3d 762, 767 (9th Cir. 2018).

173. *Spokeo*, 136 S. Ct. at 1548.

174. NAT’L CONSUMER L. CTR., *supra* note 23, § 10.2.1.3.

175. *Spokeo* also recognized that Congress “may ‘elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.’” 136 S. Ct. at 1549 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)). However, courts have been hesitant to accept these new intangible injuries as sufficient for standing.

176. *Id.*

177. *See Trans Union, LLC v. Ramirez*, 141 S. Ct. 2190, 2206 (2021) (holding that even if Congress creates new statutory protections, without a concrete injury separate from the statutory violation, the plaintiff will only have standing if the statutory violation is analogous to an injury historically recognized as a basis for suit in American courts).

178. *Robinson v. U.S. Dep’t of Educ.*, 140 S. Ct. 1440, 1442 (2020) (Thomas, J., dissenting from the denial of certiorari).

179. *See, e.g., Daugherty v. Ocwen Loan Servicing, LLC*, 701 F. App’x 246, 257 (4th Cir. 2017) (affirming a jury finding of willfulness where there was “abundant evidence” that furnisher acted recklessly in failing to investigate and correct erroneous information, resulting in both compensatory and punitive damages).

CONCLUSION

The *Robinson* decision presented an opportunity to close the book on a potential waiver of federal sovereign immunity under the FCRA. While the decision is indeed settled in the Fourth and Ninth Circuits, the waiver is alive and well in the Seventh Circuit, continuing to provide “borrowers of federal loans in Illinois, Indiana, and Wisconsin . . . a cause of action against the Federal Government while borrowers with the same types of loans in 14 other States are barred from suit.”¹⁸⁰ As such, either the (1) Seventh Circuit will have to overturn its own precedent, (2) the Supreme Court will need another opportunity to weigh in, or (3) Congress will need to amend the FCRA to resolve the split. With the closure of the *Robinson* court saga, all these outcomes are unlikely in the near future.

The *Robinson* court revealed a significant barrier for a large number of individuals who are likely to seek redress under the FCRA against “one of the largest furnishers of credit information in the country.”¹⁸¹ While the FCRA continues to impose substantive duties upon the federal government, the *Robinson* and *Daniel* decisions exhibit there are no longer any deterrent effects upon the federal government via the FCRA’s enforcement provisions. Despite the federal government’s monolithic presence in the United States’ credit landscape, consumers are nearly powerless to demand the federal government comply with the FCRA, regardless of the consequences of violations. As credit information becomes increasingly interconnected with the ever-accelerating pace of technological change, while consumer debt continues to simultaneously balloon, the ramifications of noncompliance will only compound.

As such, Congress should amend the language of § 1681n(a) to mimic the language found in the FCRA’s recognized waiver of sovereign immunity, § 1681u(j), changing § 1681n(a) to read “any person” or, additionally, “*any agency or department of the United States*” in willful noncompliance with the FCRA shall be liable for damages. Use of those “magic words” has been deemed essential to waiver and is essential to holding the federal government accountable under the FCRA.

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180. *Robinson*, 140 S. Ct. at 1441.

181. *Id.* at 1442.

** I would like to thank my primary editor, Christie Shaw, for her dedication and insights throughout the publication process of this Recent Development. To the *North Carolina Law Review* Board and Staff, I am eternally grateful for the countless hours devoted to bringing this piece into its final form. And to my family, friends, and partner, Fanny, your unwavering love and support means more to me than I can ever begin to express.