

No. 22-846

**In The
Supreme Court of the United States**

UNITED STATES DEPARTMENT OF AGRICULTURE
RURAL DEVELOPMENT RURAL HOUSING SERVICE,

Petitioner,

v.

REGINALD KIRTZ,

Respondent.

**On Writ Of Certiorari To The United States
Court Of Appeals For The Third Circuit**

**BRIEF OF AMICI CURIAE
NATIONAL CONSUMER LAW CENTER, PUBLIC
JUSTICE, UC BERKELEY CENTER FOR CONSUMER
LAW & ECONOMIC JUSTICE, AND THE HOUSING
CLINIC OF JEROME N. FRANK LEGAL SERVICES
ORGANIZATION AT YALE LAW SCHOOL
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI CURIAE¹

The **National Consumer Law Center** (NCLC) is a national nonprofit research and advocacy organization that works for consumer justice and economic security for low-income and other disadvantaged people, including older adults. NCLC draws on over fifty years of expertise regarding the Fair Credit Reporting Act (FCRA) and its protections for consumers. NCLC provides information, legal research, and policy analysis to Congress, state legislatures, administrative agencies, and courts. NCLC publishes *Fair Credit Reporting* (10th ed. 2022), the definitive treatise on FCRA. The Court has cited NCLC's treatises with approval. NCLC's interest in this case flows from its efforts to protect the integrity of FCRA and the rights of consumers under the Act.

Public Justice is a national public interest legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. Public Justice has long maintained an Access to Justice Project, which seeks to ensure that civil courts are an effective tool that people with less power can use to win just and equitable outcomes and hold to account

¹ Pursuant to Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amici, their members, and their counsel has made a monetary contribution to support the brief's preparation or submission. In addition, this brief does not represent the institutional view of any law school or university with which Amici are affiliated.

those with more power. Towards that end, Public Justice has an interest in addressing overbroad immunity doctrines and ensuring that consumers are afforded adequate protection under the law, including FCRA. Public Justice has appeared before this Court as a party or amicus in cases regarding FCRA and other consumer-protection laws.

The UC Berkeley Center for Consumer Law & Economic Justice is the leading law school research and advocacy center dedicated to ensuring safe, equal, and fair access to the marketplace. Through regular participation as an amicus before this Court, the federal courts of appeals, and state appellate courts, the Center seeks to develop and enhance protections for consumers, especially those who compose critical segments of the national economy. The Center appears in this proceeding to ensure FCRA's private remedies are available for all Americans when their credit information is mishandled by the federal government.

The Housing Clinic of Jerome N. Frank Legal Services Organization at Yale Law School is a legal clinic in which law students, supervised by faculty attorneys, provide legal assistance to people who cannot afford private counsel. The Center's clients often deal with credit reporting errors that adversely affect their ability to secure housing and otherwise participate in the housing market. The Clinic has appeared before this Court as an amicus in cases regarding FCRA and other consumer-protection laws.



SUMMARY OF ARGUMENT

The civil liability sections of the Fair Credit Reporting Act (FCRA or Act) unambiguously waive the sovereign immunity of the United States. Respondent Kirtz has persuasively explained why the text of FCRA clearly subjects federal agencies not only to the Act's substantive standards of conduct, but also to its private enforcement provisions. Amici agree with Mr. Kirtz and will not retread that ground.

Amici write separately to underscore that the express purpose of FCRA can be served only if the Act's sections apply to all furnishers, including both private market participants *and* federal agencies. Congress enacted FCRA out of a recognition that the health of the national economy depends on fair and accurate credit reporting. *See* 15 U.S.C. § 1681(a). Credit reports and scores can determine everything from where a person lives to where she works to whether her small business survives. The federal government plays a central role in the distribution and use of this data. When federal agencies appropriately use and accurately report consumer information, they facilitate access to credit and other opportunities. In particular, certain key segments of the population, like farmers and veterans, rely on government programs in the absence of private lenders. But when federal agencies provide inaccurate consumer information to consumer reporting agencies, those same individuals suffer. Take a veteran who receives a home loan from the Department of Veterans Affairs (VA). If the VA erroneously furnishes information about that loan that makes the veteran look

like a riskier borrower than he is, he may have to accept a higher interest rate on a credit card or lose his security clearance.

When *nongovernmental* furnishers and users of credit information misreport or misuse credit data, consumers unequivocally have a remedy: sections 1681n and 1681o. These provisions offer consumers a means of redress and create a strong incentive for furnishers to avoid reporting inaccurate consumer credit information in the first place. Consumers harmed by government errors should receive the same protections. The Act's overarching purpose—to protect the national economy and the financial health of all Americans by ensuring fair and accurate reporting of credit data—would be undermined if the federal government, one of the nation's largest furnishers and users of such data, were not subject to those same provisions.

Ultimately, a straightforward reading of the text of FCRA establishes that sections 1681n and 1681o unambiguously apply to the federal government and waive sovereign immunity. *See* Resp. Br. 13–19. That is all that is needed to resolve this case. But the accuracy of that reading is powerfully corroborated by its concordance with the fundamental purpose and context of the Act.



ARGUMENT

I. Holding Federal Agencies Accountable When They Mishandle Consumer Credit Information Serves the Express Purpose of FCRA.

Congress enacted FCRA to protect the health of the national economy by promoting fair and accurate credit reporting. As the nation's largest lender, the federal government plays an outsized role in the quality of data underlying that reporting and can thereby cause significant harm when it makes errors as a furnisher of consumer information. The government can also perpetuate harm when it uses inaccurate consumer information to make lending, employment, and other eligibility determinations. Applying the civil liability provisions to federal agencies ensures that consumers have meaningful recourse when harmed, and that the government has sufficient incentives to further FCRA's express purpose to promote fair and accurate credit reporting.

A. FCRA Underscores the Importance of Fair and Accurate Credit Reporting to the National Economy.

Credit reports and scores influence Americans' ability to participate in every aspect of the marketplace. Credit information impacts underwriting decisions that determine a consumer's ability to obtain a credit card, home mortgage, auto loan, and even initial capital to launch a small business. 15 U.S.C.

§§ 1681a(d), 1681b(a)(3).² Decisionmakers also use credit information for a wide variety of non-credit uses, like “employment,” “in connection with the underwriting of insurance,” and to determine “eligibility for a license.” 15 U.S.C. § 1681b(a)(3); *see also Midland Funding, LLC v. Johnson*, 581 U.S. 224, 233 (2017) (recognizing that credit report containing debt not discharged in bankruptcy could impact “individual’s ability to borrow money, buy a home, and perhaps secure employment” (citing, *inter alia*, 15 U.S.C. § 1681c(a)(4))).

The wide range of uses of credit reports makes clear that “[q]uality information is the lifeblood of strong, vibrant markets.”³ Congress understood this fact when enacting FCRA, finding that the health of the national economy is “dependent upon fair and accurate credit reporting” because “[i]naccurate credit reports directly impair the efficiency of the banking system.” 15 U.S.C. § 1681(a)(1); *see also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007) (same (citing, *inter alia*, 15 U.S.C. § 1681)). Inaccurate information, for example, interferes with lenders’ ability to evaluate risk and provide appropriately calibrated credit terms.

² *See also* Consumer Fin. Prot. Bureau, *Annual Report of Credit and Consumer Reporting Complaints* 5 (Jan. 2022), <https://perma.cc/JR7V-E6W3>.

³ Arthur Levitt, Chairman, U.S. Sec. & Exch. Comm’n, *Quality Information: The Lifeblood of Our Markets*, Speech at The Economic Club of New York, New York City, NY (Oct. 18, 1999).

Congress reiterated the importance of quality credit information when enacting the Consumer Credit Reporting Reform Act of 1996, which amended FCRA to expand civil liability to furnishers—the creditors, debt collectors, and other entities that share the data with consumer reporting agencies that is then compiled into credit reports. As Representative Kennedy explained, “[i]f these reports are not accurate, or if they are distributed without legitimate purpose, then our whole society suffers. Consumers may be unfairly deprived of credit, employment, and their privacy. And businesses may lose out on the opportunity to gain new customers.” 140 Cong. Rec. 76 (June 16, 1994) (statement of Rep. Joseph P. Kennedy II). By extending civil liability to furnishers, Congress ensured that the entities that report consumer credit data have incentives to advance the accuracy of that information.

B. Federal Agencies Routinely Handle the Credit Information of Millions of Americans Across Critical Segments of the Economy.

As the nation’s largest lender, the federal government is one of the most common furnishers of consumer credit information. Pet. Br. 38 (citation omitted); *Chiang v. Verizon New England, Inc.*, 595 F.3d 26, 35 n.7 (1st Cir. 2010) (“government agencies” are among the “most common [] furnishers of information” to credit reporting agencies (quoting H.R. Rep. 108–263, at 24 (2003))). Thus, the substantive data that the

federal government furnishes to credit bureaus regularly determines an individual’s eligibility for affordable credit, insurance, employment, rental housing, and benefits. In addition to being the largest lender, the federal government is also the nation’s largest employer,⁴ which means federal agencies are among the entities that regularly use consumer information to make this range of eligibility determinations.

The federal government’s diverse loan portfolio across critical sectors of the economy demonstrates the breadth of credit information it both uses and furnishes. Among other examples, USDA offers direct loans to assist farmers and ranchers in acquiring or enlarging their family farms. 7 U.S.C. §§ 1922, 1923.⁵ The Department of Commerce’s (DOC) Federal Fisheries Program provides fixed rate loans to fishermen to purchase or refurbish commercial fishing vessels. 46 U.S.C. § 53702.⁶ For its part, the Small Business Administration (SBA) provides a variety of direct loans and loan guarantees to small business owners and entrepreneurs, including for specific natural disasters or emergency relief. 15 U.S.C. §§ 631, 636(a), 661; *see, e.g.*,

⁴ *See, e.g.*, U.S. Office of Personnel Mgmt., *Goal 1: Position the Federal Government as a Model Employer*, <https://perma.cc/3ULL-NWG3> (noting that the federal government is “the nation’s largest employer”); Office of Mgmt. & Budget, *Budget of the U.S. Government: Fiscal Year 2023* at 38 (2023), <https://perma.cc/TC6M-B2LA> (same).

⁵ *See also* USDA, *Guaranteed Farm Loan Frequently Asked Questions*, <https://perma.cc/T7BQ-6V82>.

⁶ *See also* NOAA, *Fisheries Finance Program* (last updated Aug. 29, 2023), <https://perma.cc/G8JP-ZZHA>.

13 C.F.R. § 120.2 (describing SBA’s general business loans); 13 C.F.R. §§ 123.1–123.5 (describing different disaster loans).⁷ And the VA offers direct loans to veterans seeking to purchase homes in rural areas. 38 U.S.C. § 3711; 38 C.F.R. § 36.4519.

These programs serve to promote economic development and access to credit among key populations in the national economy. *See, e.g.*, 15 U.S.C. § 631(a) (declaring a national policy to promote “the interests of small-business concerns in order to preserve free competitive enterprise”); *United States v. Shimer*, 367 U.S. 374, 383 (1961) (recognizing congressional policy “to enable veterans to obtain loans and to obtain them with the least risk of loss upon foreclosure”).

Administering these and other programs requires the federal government to use and furnish consumer credit information, thereby placing its activities under the aegis of FCRA. *See* Pet. Br. 25 (“FCRA’s statutory definition of ‘person’ covers the United States and federal agencies[.]” (citing 15 U.S.C. § 1681(k))). For instance, federal agencies use potential borrowers’ credit reports to assess their creditworthiness before approving their applications for direct VA housing loans, SBA loans,⁸ and DOC fisheries loans. 38 U.S.C. §§ 5701(g),

⁷ *See also* SBA, *Loans*, <https://perma.cc/AN9A-U2XK>; SBA, *Disaster Loan Assistance*, <https://perma.cc/7NUT-3CKT>.

⁸ Commercial SBA loans implicate FCRA even though the Act applies only to consumer reports. The Federal Trade Commission (FTC) has determined that a lender has a “permissible purpose to obtain a consumer report” under the Act “in connection with a business credit transaction when the consumer is or will

5701(i); 13 C.F.R. § 120.150; 38 C.F.R. § 1.916; 50 C.F.R. § 253.13(c); *see also United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 736 (1979) (recognizing that SBA and the predecessor to USDA’s Farm Service Agency “promulgated exhaustive instructions to ensure that loan recipients are financially reliable and to prevent improvident loans”).⁹ And USDA’s Guaranteed Rural Housing Program requires applicants to demonstrate a “verifiable credit history” evidenced by a credit report or credit score. *See, e.g.*, 7 C.F.R. § 3555.151(i). By using credit information to assess loan applicants’ ability to repay before extending its loans, “the Government . . . is in substantially the same position as private lenders.” *Kimbell*, 440 U.S. at 737.

be personally liable on the loan as a co-signer or guarantor.” FTC, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations* 5 (2011), <https://perma.cc/S484-NRG8>. Thus, for example, SBA obtains credit reports on the individuals who apply for business disaster loans, which then appear as inquiries on their consumer reports. And SBA may report to consumer reporting agencies any defaults as defaults by both the business and the individual applicant. Laura Roden, *SBA Disaster Loans: What to Know*, LendingTree, at “Does a disaster loan show up on my credit report?” (Mar. 10, 2023), <https://perma.cc/P82S-ASFE>.

⁹ *See also* SBA, *Disaster Assistance Program: Standard Operating Procedure 50-30-9* at 87 (2018), <https://perma.cc/H3B2-KQUH> (requiring SBA to obtain credit reports for all individual applicants and business principals to determine that the overall credit of an applicant is “satisfactory prior to recommending a loan approval”); SBA, *Lender and Development Company Loan Programs: Standard Operating Procedure 50-10-7* at 24, 221 (2023), <https://perma.cc/HT4V-Z2C4> (authorizing SBA lenders of 7(a) and 504 loans to consider an applicant’s “personal credit history” and “personal credit reports”).

Furthermore, *all* federal agencies are authorized to furnish to consumer reporting agencies particular information about a borrower and their unpaid debt when attempting to collect on a loan. 31 U.S.C. § 3711(e)(1); *see, e.g.*, 7 C.F.R. § 3.12 (authorizing USDA to report unpaid debts to credit bureaus); 15 C.F.R. § 140.3 (authorizing same for SBA). Because government agencies act essentially like commercial lenders when assessing a borrower's creditworthiness and then furnishing information on her debts, FCRA's substantive provisions, including regarding accuracy, sensibly apply to them.

C. Individual Participants in the Market Suffer When Either Private or Government Actors Furnish Inaccurate Credit Information.

Despite the significance of credit information to consumers' day-to-day lives and the market's stability, inaccuracies abound that can harm individuals and the broader economy. Credit errors directly impact Americans' ability to participate in all aspects of the economy by making them look like riskier borrowers, workers, or tenants than they are. Credit reporting inaccuracies include attributing debts to the wrong consumer, erroneously declaring a consumer as deceased, incorrectly recording payment history or account status, and incorrectly dating a debt so that it appears on a credit report longer than it should.¹⁰ In 2012, FTC

¹⁰ Chi Chi Wu, Michael Best & Sarah Bolling Mancini, Nat'l Consumer Law Center, *Automated Injustice Redux: Ten Years*

found that 1 in 5 consumers have verified errors in their credit reports, and 1 in 20—roughly 10 million Americans—have errors so significant that they were put in a different credit risk tier altogether.¹¹ More recent studies indicate that these troubling error rates persist.¹²

Whether the furnisher is governmental or private, the harm from inaccurate credit information extends to many aspects of Americans' financial lives. For instance, employers frequently run credit reports when deciding whom to hire,¹³ and employers are more likely to opt for applicants without seemingly negative credit histories. Inaccurate credit information can be particularly harmful to servicemembers and others devoted to national security who must maintain security clearances. It is difficult to obtain or keep a security clearance with a credit report that erroneously reflects

After a Key Report, Consumers Are Still Frustrated Trying to Fix Credit Reporting Errors 14–22 (Feb. 2019), <https://perma.cc/N43B-AE57>.

¹¹ Fed. Trade Comm'n, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* (Dec. 2012), <https://perma.cc/8PWV-MMCA>.

¹² Consumer Fin. Prot. Bureau, *Consumer Credit Trends: Disputes on Consumer Credit Reports* 3 n.2 (Oct. 2021), <https://perma.cc/XT4W-MCFT> (describing results from 2021 study from *Consumer Reports* that found that 11 percent of consumers were able to identify at least one error in their credit reports).

¹³ Chi Chi Wu & Ariel Nelson, Nat'l Consumer Law Center, *Mission Creep: A Primer on Use of Credit Reports & Scores for Non-Credit Purposes* 6 (Aug. 2022).

excessive debt, a high debt-to-income ratio, accounts referred to collections, or other negative information.¹⁴

Inaccurate credit information can also limit borrowers' access to affordable credit. For example, credit card applicants may have to accept a higher interest rate or fees along with a lower credit limit.¹⁵ And just as a strong credit score can facilitate access to the various federal lending programs described above, an erroneously weak one can hinder such access, thereby frustrating both the purpose of those programs to promote access to credit in key populations and the purpose of FCRA to ensure fair and accurate credit reporting and a stable banking system.

Inaccuracies likewise impact Americans' housing options at a time of unprecedented prices and a critical

¹⁴ 2022 Annual Report, *supra* n.2, at 30; FAQ: *I'm in the Military, Can a Debt Collector Have My Security Clearance Revoked if I Fall Behind on Paying My Debt?*, Consumer Fin. Prot. Bureau (Oct. 30, 2017), <https://perma.cc/7S8M-G63L> (“[F]ailing to pay debts on time can result in negative information on your credit reports and may cause your security clearance to be pulled when it’s up for review.”); *see also, e.g., In the matter of: Applicant for Security Clearance*, ISCR Case No. 22-02200 (Def. Off. of Hearings & Appeals Apr. 27, 2023), <https://perma.cc/W64L-W9GS> (denying former member of the Navy eligibility for access to classified information based on three delinquent debts).

¹⁵ Consumer Fin. Prot. Bureau, *The Impact of Differences Between Consumer and Creditor-Purchased Credit Scores, Report to Congress* 8 (July 19, 2011), <https://perma.cc/5VG5-VQK8> (describing risk-based pricing whereby lenders offer applicants with poor credit histories less favorable—that is, more expensive—terms).

shortage in supply.¹⁶ Because of an erroneous default listed on a credit report, an otherwise qualified borrower may be subjected to more burdensome mortgage terms and more expensive home insurance¹⁷; a reliable tenant denied rental housing¹⁸; and homeowners and renters alike required to pay onerous deposits for necessities like electricity, gas, and water.¹⁹ Errors interfere with consumers' access to other necessities as well, like car loans and affordable car insurance.²⁰

This potential harm does not depend on whether the source of inaccurate consumer information is a private furnisher or the government. Nor is there any indication that the source of inaccuracy was a relevant distinction when Congress amended FCRA in 1996 to provide a remedy against furnishers who violated certain substantive requirements. Now, FCRA creates civil liability for “[a]ny person” for negligent and willful violations of the Act, 15 U.S.C. §§ 1681n, 1681o, defining “person” expansively to include “any . . . government,” *id.* § 1681a(b). When businesses operating in

¹⁶ See Nathaniel Meyersohn, *The Invisible Laws That Led to America's Housing Crisis*, CNN (Aug. 5, 2023), <https://perma.cc/EF5L-KG39> (noting “homes cost more than they ever have . . . even adjusting for inflation” and the “U.S. housing market is short some 6.5 million homes”).

¹⁷ *Mission Creep*, *supra* n.13, at 8–9; *The Impact of Differences, Report to Congress*, *supra* n.15, at 5–6, 8.

¹⁸ *Mission Creep*, *supra* n.13, at 7–8; see also Consumer Fin. Prot. Bureau, *Tenant Background Checks Market* 7–9 (Nov. 2022), <https://perma.cc/9XA6-TF3U>.

¹⁹ *Mission Creep*, *supra* n.13, at 10.

²⁰ *Id.* at 8–9.

any number of markets—from credit to insurance to employment to ordinary business transactions—furnish inaccurate consumer credit information, consumers unquestionably have an important remedy: FCRA’s private enforcement provisions, sections 1681n and 1681o. When the federal government does the same, particularly as a major furnisher of information across all of these markets, consumers need a remedy too.

D. Harms from Inaccurate Credit Information Are Exacerbated in Markets Where the Federal Government Plays an Exclusive or Dominant Role.

The impact of inaccurate consumer information, and the need for a meaningful remedy, is even greater when the federal government has unilateral or near unilateral control of a particular market. Because individuals lacking capital in these markets generally have no alternative lender, they must rely on federal agencies. In these circumstances, it is all the more important that federal agencies appropriately use and accurately furnish credit information.

There are many contexts in which the federal government effectively exercises monopoly power as the sole creditor. Direct loans to farmers and ranchers from USDA, for instance, are available only “when credit is not available elsewhere.” 7 C.F.R. § 761.1(c); 7 U.S.C. § 1934. Likewise, the VA extends direct housing loans to veterans seeking to buy homes in rural or

suburban areas *only if* they can demonstrate that private capital is unavailable in such “housing credit shortage” communities. 38 U.S.C. § 3711(c). SBA takes a similar approach. *See* 13 C.F.R. § 120.101 (noting that “business loan assistance” is only available when “the desired credit is not otherwise available on reasonable terms” from private sources); *see also Kimbell*, 440 U.S. at 736 (observing that certain governmental agricultural and small business loans were “primarily designed to assist farmers and businesses that cannot obtain funds from private lenders on reasonable terms”). Federal agencies furnish information related to these loans to consumer reporting agencies. *See* 31 U.S.C. § 3711(e)(1).

Under these circumstances, Congress expressly identified a need and prioritized more effective credit assistance for key segments of the population that may have no other sources of credit. Because these borrowers cannot simply seek out other lenders with proven records of fairly and accurately handling consumer information, the federal agencies administering these programs bear a particular responsibility to appropriately use and accurately report such data.

Emergencies represent another scenario in which the government may be the sole provider of credit because the private sector lacks a financial incentive to participate. SBA’s disaster and emergency loans—along with special initiatives created in the early days of the COVID-19 pandemic—extend credit to small businesses and entrepreneurs when private capital is altogether unavailable. *See* 15 U.S.C. § 636(c)

(authorizing private disaster loans); *id.* § 636(a)(36) (establishing the Paycheck Protection Program, which offered forgivable loans to employers to support payroll expenses during COVID-19 pandemic); 13 C.F.R. § 120.101 (noting that SBA’s “business loan assistance,” which includes disaster and emergency loans, is only available when “the desired credit is not otherwise available on reasonable terms” from private sources).²¹ Likewise, the Federal Emergency Management Agency (FEMA) provides financial assistance to individuals and households during major disasters, 42 U.S.C. § 5174,²² but only when applicants are unable to make a private insurance claim, 44 C.F.R. § 206.113. And as with the programs described above, federal agencies rely on credit information to administer these programs and in turn are authorized to disclose such information to consumer reporting agencies.²³ Appropriate use and accurate reporting of consumer information is thus vital under these emergency circumstances when consumers are especially vulnerable and the federal government dominates the marketplace.

²¹ See, e.g., SBA, *Disaster Assistance*, <https://perma.cc/24DT-RNRW>.

²² See FEMA, *Individual Assistance* (last updated July 10, 2023), <https://perma.cc/C3KU-PCE>.

²³ Dep’t of Homeland Security, 78 Fed. Reg. 25,282, 25,287 (April 30, 2013); SBA, 69 Fed. Reg. 58,598, 58,617 (Sept. 30, 2004); see also 44 C.F.R. § 6.20(l).

E. The Incentive of Civil Liability Effectuates the Goals of FCRA—to Protect Consumers and Preserve the Integrity of the Marketplace.

FCRA’s rules and corresponding liability provide the necessary incentive to preserve the accuracy of consumer credit information; immunizing the federal government from liability would be wholly inconsistent with this purpose as well as the Act’s text. As USDA concedes, “FCRA’s statutory definition of ‘person’ covers the United States and federal agencies.” Pet. Br. 25 (citing 15 U.S.C. § 1681k); *see also* 15 U.S.C. § 1681a(b) (defining “person”). And FCRA imposes a number of requirements on persons who use or furnish credit data. *See, e.g.*, 15 U.S.C. § 1681b(b) (requirements for persons using consumer reports for employment purposes); 15 U.S.C. § 1681g(g) (requirements for persons extending certain home mortgages); 15 U.S.C. § 1681s-2 (requirements for persons furnishing information to credit bureaus). FCRA establishes a complete framework for issues related to consumer credit information, and its substantive and enforcement provisions go hand in hand. Not only do the civil liability provisions ensure that harmed consumers have meaningful recourse, they also ensure more faithful compliance with the rules and so prevent harm to consumers in the first place.

Private enforcement mechanisms play a central role in securing compliance with consumer-protection laws. *See, e.g., Riggs v. Gov’t Emp. Fin. Corp.*, 623 F.2d 68, 73 (9th Cir. 1980) (“Congress intended to secure

compliance with the [Truth in Lending] Act by creating a civil recovery incentive for private litigants.”)²⁴ FCRA is no different. As FTC’s Associate Director for Credit Practices stated, because FCRA “was designed to be largely self-enforcing, the capacity of consumers to bring private actions to enforce their rights under the statute is at least equally as important” as FTC doing so.²⁵ Absent the stick of private enforcement under sections 1681n and 1681o, furnishers have little reason to expend the resources necessary to investigate and cure inaccurate information. Even if participants in the consumer credit market might have an interest in the overall integrity of the market, it costs creditors more when a borrower defaults than it profits creditors when a borrower repays a debt.²⁶ This reality means that creditors and other entities are likely to act cautiously and over-value derogatory information about a borrower even if it cannot be verified or matched with certainty. *Id.* Thus, without FCRA to urge otherwise, these entities tend to focus on the quantity of

²⁴ See also J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1151 (2012) (listing consumer-protection statutes in which Congress “has created private rights of action and incorporated other enforcement incentives, such as damage multipliers, statutory damages, punitive damages, and fee shifting” to incentivize statutory compliance).

²⁵ See Hearing on S. 783 Before the Comm. on Banking, Hous. & Urban Affairs, 103rd Cong. 47 (1993) (statement of David Medine, Assoc. Director for Credit Practices, FTC).

²⁶ See Fed. Trade Comm’n, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* at 47 (2004), <https://perma.cc/T3WY-R79U>.

information, not its accuracy. *Id.* Potential damages actions under FCRA, therefore, provide furnishers with one of the only incentives to ensure the fairness and accuracy of the credit information they convey.

Private enforcement of FCRA's requirements is especially important to hold federal agencies accountable because federal regulators like FTC do not pursue a significant number of FCRA enforcement actions in general. *See, e.g.,* Fed. Trade Comm'n, *40 Years of Experience, supra* n.8, at 4 ("During its 40-year history of enforcing the FCRA, the FTC has brought 87 enforcement actions against CRAs [consumer reporting agencies], users of consumer reports, and furnishers."). Thus, even though it is possible for one federal agency to hold another agency accountable, *see* Resp. Br. 25,²⁷ the low likelihood in this context counsels against permitting the federal government to claim immunity when it violates FCRA's standards.

II. Applying FCRA's Civil Liability Provisions to Federal Agencies Does Not Undermine the Privacy Act, Which Serves a Different Purpose.

USDA resists FCRA's unambiguous text and express purpose by contending that holding federal agencies accountable under FCRA is incompatible with and

²⁷ *See also* Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 Wm. & Mary L. Rev. 893, 896 (1991) ("[T]he Supreme Court has never dismissed an action as nonjusticiable because it could be characterized as *United States v. United States*.").

unnecessary in light of the Privacy Act. Pet. Br. 35–36. USDA is wrong.

As Mr. Kirtz explains, the laws serve different purposes. *See* Resp. Br. 32–33. FCRA is focused on the fairness and accuracy of information contained in consumer reports and is directed at participants in the consumer reporting industry, whether private or governmental. *See supra*, Section I.A. For its part, the Privacy Act is focused on safeguarding against invasions of privacy in the course of federal recordkeeping. *See* Resp. Br. 32.²⁸ Federal agencies generally carry out a variety of tasks involving Americans’ data and information; when they do, they’re bound by the Privacy Act. But when agencies choose to step into the role of a furnisher or user of consumer credit information, they act more like the private entities that participate in the consumer credit market. *See supra*, Section I.B. In those circumstances, agencies must comply with the specific provisions FCRA imposes on all persons in that market, not just the Privacy Act’s distinct provisions governing only agencies’ recordkeeping.

²⁸ *See also* U.S. Dep’t of Justice, *Overview of the Privacy Act of 1974* at 1 (2020), <https://perma.cc/YY28-NGLS>; *Andrews v. Trans Union Corp. Inc.*, 7 F. Supp. 2d 1056, 1066 (C.D. Cal. 1998) (“The Privacy Act and the FCRA are not the same, and do not share the same purposes. The FCRA’s purpose is to balance the needs of commerce and the rights of consumers. The Privacy Act’s main purpose is to forbid disclosure of certain information unless such disclosure is required by the Freedom of Information Act.” (cleaned up) (internal citation omitted)), *rev’d in part on other grounds by TRW Inc. v. Andrews*, 534 U.S. 19 (2001).

These distinct purposes account for FCRA and the Privacy Act’s distinct scopes. Despite some overlap, the laws apply to essentially different conduct. The Privacy Act primarily requires federal agencies to accurately maintain, amend, and provide the records they keep on individuals, which may include some consumer credit information. *See* 5 U.S.C. §§ 552a(g)(1)(C), 552a(g)(2)(A), 552a(g)(3)(A). The concern that animates FCRA, however—unfair and inaccurate consumer credit information—mostly arises in other contexts, like when an entity misuses consumer data or a furnisher fails to investigate disputes about inaccurate information. Accordingly, FCRA focuses on how credit reporting agencies should handle consumers’ disputes about the information furnishers provide. By requiring investigations into such disputes, FCRA provides a “critical check on the accuracy of furnished items and can identify systematic problems with furnishers’ data.”²⁹ Both remedial schemes, therefore, have important but distinct roles to play.



CONCLUSION

In FCRA, Congress created an essential means of redress for consumers harmed when their credit information is inaccurately reported or misused, be it by private or governmental actors. In concluding that sections 1681n and 1681o unambiguously apply to the

²⁹ Consumer Fin. Prot. Bureau, *Supervisory Highlights* § 2.2.2 (Spring 2014).

federal government and waive sovereign immunity, the Court of Appeals correctly interpreted the text of FCRA, and did so in a manner that upholds the Act's express purpose. The judgment of the Court of Appeals should be affirmed.

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