1   IN THE SUPREME COURT OF THE UNITED STATES

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3   STEVEN ALAN LEVIN,   :

4   Petitioner   :   No. 11-1351

5   v.   :

6   UNITED STATES, ET AL.   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Tuesday, January 15, 2013

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:07 a.m.

14   APPEARANCES:

15   JAMES A. FELDMAN, ESQ., Washington, D.C.; appointed by

16   this Court, on behalf of Petitioner.

17   PRATIK A. SHAH, ESQ., Assistant to the Solicitor

18   General, Department of Justice, Washington, D.C.;

19   on behalf of Respondents.

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1   P R O C E E D I N G S

2   (10:07 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first this morning in Case 11-1351, Levin v. United

5   States.

6   Mr. Feldman?

7   ORAL ARGUMENT OF JAMES A. FELDMAN

8   ON BEHALF OF THE PETITIONER

9   MR. FELDMAN: Mr. Chief Justice, and may it

10 please the Court:

11   As the language and structure of the

12 Gonzalez Act demonstrate, Congress did not completely

13 eliminate the long-recognized tort remedy that's

14 available to essentially everybody else in the country

15 when doctors perform surgery without a patient's

16 consent.

17   By abrogating the intentional tort exception

18 to the FTCA for the class of cases covered by the

19 Gonzalez Act, Congress both preserved a remedy for the

20 victims of that tort, and, by virtue of the Gonzalez

21 Act's exclusive remedy provision, they made certain that

22 the Federal employees themselves would not be sued.

23   As everyone understood at the time of the

24 enactment, that was the meaning of the terms of the

25 Gonzalez Act. The Act has two clauses, an operative

1   clause and an introductory clause.

2   The operative clause says, in simple

3   declarative terms, that the intentional tort exception

4   to the Federal Tort Claims Act shall not apply to any

5   cause of action arising out of a wrongful act or

6   omission in the performance of medical functions.

7   JUSTICE GINSBURG: Mr. Feldman, but it says,

8   first, "for purposes of this section." And, as I -- I

9   understand your argument, those words don't count. In

10   other words, you would be making -- you would interpret

11   the statute the same way if the sentence started with

12   "the provisions of Section 2680(h)."

13   MR. FELDMAN: No, Your Honor. That's not

14   right. We -- we -- that -- that -- the part after the

15   introductory clause says, "The provisions of the

16   intentional tort exception shall not apply to medical

17   malpractice cases." And that would make it apply across

18   the government to any government employee who is

19   performing those medical functions.

20   By saying, "for purposes of this section,"

21   Congress limited it in accordance with the case -- the

22   agency by agency approach that it had adopted in this

23   area and limited it to just the cases that are covered

24   by the Gonzalez Act; that is, by malpractice that's

25   committed by doctors of the Department of Defense, the

4

1   National Guard, the Armed Forces Retirement Home, and so

2   on.

3   And so the -- each clause serves quite an

4   important function. Congress had before the Gonzalez

5   Act -- they had already passed the statutes dealing, for

6   example, with the Public Health Service that's

7   essentially written in the same terms, with the Veterans

8   Administration -- although part of that was then added

9   later -- with the State Department doctors, and so on.

10   And so they were proceeding on an agency by

11 agency basis, and the way to accomplish that was to

12 first say, we -- we think that the intentional tort

13 exception should not apply to these cases because in

14 medical batteries of the sort that we -- as alleged in

15 this case, are so close to the kinds of medical

16 malpractice cases that are going to be brought against

17 the government anyhow.

18   But then, in each statute, they say, "for

19 purposes of this section," because it's only the

20 agencies, only the personnel covered by those sections,

21 and the torts covered by those sections.

22   JUSTICE GINSBURG: The Veterans

23 Administration, it doesn't say that, does it?

24   MR. FELDMAN: The Veterans --

25   JUSTICE GINSBURG: Yes.

1   MR. FELDMAN: The Veterans Administration,

2   originally -- the original Veterans Administration

3   statute, which was from about 1965, doesn't have this

4   1089(e) intentional tort exception at all in it.

5   But then they added it later, about 10 years

6   after this statute, and then they added a provision that

7   was slightly worded differently, but it achieves exactly

8   the same result. Instead of saying, "for purposes of

9   this section," it says, "by the personnel named in

10   Section A," which accomplishes exactly the same thing.

11   And, actually, if you look at the history of

12   that statute, the Senate report on that statute, quite

13   clearly, recites that Congress understood that 1089(e),

14   the statute here, has exactly the effect that I said.

15   And they said, we are modeling it on that provision.

16   And then they did tinker with the wording, and there's

17   actually no explanation for the specific change.

18   But it's not uncommon that, in statutes that

19   have been reviewed by different committees and passed 10

20   or 12 years apart, that Congress would have a -- they

21   would use slightly different language to achieve,

22   essentially, the same purpose.

23   JUSTICE BREYER: What would -- what do you

24   do, if anything, about those of us -- I hope more than

25   one -- who actually look at legislative history, and the

1   House and Senate Report -- the Senate Report says

2   Subsection (e) would nullify a provision of the Tort

3   Claims Act, which would otherwise exclude any action for

4   assault and battery, then the House says about the same

5   thing.

6   So, when I look at those two things, I think

7   the purpose of this Act was to do just exactly what the

8   other side says, it was to get rid of assault and

9   battery as an exception and said the government of the

10   United States will pay for unlawful assault and battery.

11   That's what the two reports say. That's why

12   they passed it.

13   MR. FELDMAN: Right. I believe, actually,

14   that's our -- that -- that's the way we read it, exactly

15   like that, which is the -- by nullifying the intentional

16   tort exception -- what the intentional tort exception

17   provides is -- actually, what it says, is, "The

18   provisions of the Federal Tort Claims Act shall not

19   apply to any case arising out of assault, battery," and

20   so on.

21   And, by eliminating that, the -- the

22   provisions of the Federal Tort Claims Act are otherwise

23   totally applicable to cases of medical battery, like

24   this, or other kinds of intentional tort.

25   And so, for cases, covered by the Gonzalez

1   Act -- that is, cases of medical malpractice committed

2   within the scope of employment by the doctors of the

3   certain specified agencies that Congress has named --

4   for those cases, there is no intentional tort exception,

5   and, therefore, you can bring an action against the

6   government.

7   CHIEF JUSTICE ROBERTS: I don't quite

8   understand your answer to Justice Ginsburg on the "for

9   purposes of this section."

10   What the section does is provide that the

11   remedy against the United States is exclusive. But what

12   the 1089(e) goes on to say is that the 26 -- the 2680(h)

13   provision doesn't apply. So I don't see how that -- I

14   mean, the -- the reference is to the exclusivity, not to

15   the waiver of the limitation on -- on intentional torts.

16   MR. FELDMAN: Well, I don't think that

17   that's right. I mean, I think, for purposes of this

18   section, you have to read it in context. And the fact

19   is that 2680 -- the term "2680(h) of Title 28" doesn't

20   appear elsewhere in the Gonzales Act.

21   The only work that that provision does in

22   the law, section -- the intentional tort exception,

23   2680(h) of Title 28, the only work that that does is to

24   make the -- is in the Federal Tort Claims Act, is to

25   make the -- the Act inapplicable to those kinds of

1   cases.

2   So when they say, in simple terms, that

3   shall not apply, all that could mean -- all that could

4   possibly mean is you eliminate that, and then you have

5   the Tort Claims Act how it is. And then what the four

6   purposes of this section does is say, but we're not

7   doing that across the board for every Federal employee

8   everywhere or even every malpractice case. We are just

9   doing it for the claims that are covered -- for the

10   cases that are covered in this section -- for purposes

11   of this section.

12   In this section, if you look at (a), then,

13   (a), which is the -- you know, basic exclusive remedy

14   provision that Your Honor mentioned, what (a) does is

15   deal specifically with -- intent with medical

16   malpractice committed by doctors and personnel.

17   JUSTICE SOTOMAYOR: Well, one of the

18   strongest arguments by your adversary has to do with the

19   incongruity between these claims and the Westfall ruling

20   by this Court. It's more a policy argument than a

21   language argument, but how do you address the fact that

22   we will be interpreting, essentially, two statutes that

23   are almost identical, but with different conclusions now, if

24   we were to adopt your view.

25   MR. FELDMAN: Right. I -- I think there

1 are -- there are a few reasons why the statutes have to

2 be construed differently. I mean, one is that, if you

3 look at the Court's decision in Smith, where it

4 construed that provision of the Westfall Act, it -- the

5 Court never suggested that the language -- the part of

6 the Westfall Act whose language is the same as this

7 supported its conclusion there. It was relying on other

8 provisions in the Westfall Act.

9   In particular, there was a provision that

10 said, "Once the government substitutes itself for the

11 defendant, the case shall proceed, subject to all the

12 exceptions and limitations in the Tort Claims Act." And

13 the Court said, well, yes, that -- that gives us a clear

14 understanding that, whether there's exceptions or not,

15 we want that case to proceed -- to proceed. That

16 provision isn't here in the Gonzalez Act.

17   And there was another provision in the

18 Westfall Act -- in the Smith case, in the Westfall Act,

19 that dealt with making a specific exception for Bivens

20 cases. And, again, that provision isn't here. And

21 that --

22   JUSTICE SCALIA: But why -- why would

23 Congress want to treat them differently?

24   MR. FELDMAN: Right. I think the reason is,

25 when they were dealing in this case with this area in

1   1976, they were dealing with a specific problem of

2   medical malpractice, and they were looking at that --

3   that problem, doctors, doctors had to get insurance,

4   what are we going to do about that for Federal

5   employees?

6   And they were -- when they focused on that

7   problem -- actually, as the Executive Branch itself said

8   in a letter that was sent to the Senate committee, it

9   said there's an urgent need, both, to assure adequate

10   remedies for tort victims and to protect Federal

11   employees.

12   And that's what they were trying to do here,

13   and I think you see it throughout the Gonzalez Act.

14   But --

15   JUSTICE SCALIA: But why -- why did they

16   feel the need here to assure adequate remedies for tort

17   victims, where they did not in -- in the Westfall Act?

18   MR. FELDMAN: Well --

19   JUSTICE SCALIA: I mean -- you know, injured

20   tort victims are injured tort victims. It does seem --

21   you know, rather odd that, in -- in one instance,

22   Congress would be concerned and, the other, not

23   concerned.

24   MR. FELDMAN: Right. I think the difference

25   is that, here, they were dealing specifically with the

1   problem of medical malpractice. 12 years later, when

2   they got around to the Westfall Act, they weren't

3   looking at medical malpractice.

4   They were looking, generally, at a whole --

5   the whole problem of government employees being sued

6   after this Court's decision in the Westfall case, a

7   problem that particularly affected, actually, lower

8   level government employees who were -- it's clear,

9   couldn't take advantage of the discretionary function

10   exception.

11   And, when they are looking at the broad

12   universe of employees, they took a different approach

13   and decided, well, we're just going to -- some people

14   are just going to be out of luck because this is the --

15   the determination that Congress made -- felt was

16   appropriate there.

17   But, when it was looking at the specific

18   problem of medical malpractice in the Gonzalez Act, it

19   definitely took the position, as everybody said at the

20   time and as the structure of the Act itself showed, that

21   they wanted to preserve remedies. And there are two

22   provisions in the Westfall Act that make that clear --

23   JUSTICE ALITO: Well, maybe we could address

24   this in slightly more concrete terms. You have two --

25   two situations. In one case, a Federal employee who's

1   driving a car deliberately runs somebody down. And, in

2   the second case, a government doctor grabs somebody who

3   doesn't want an operation and performs the operation

4   anyway.

5   Now, as -- under your reading, there

6   would -- there would be a claim against the government

7   in the second situation, but not in the first situation;

8   is that right?

9   MR. FELDMAN: That -- that's correct.

10   JUSTICE ALITO: Why would Congress want

11   that?

12   MR. FELDMAN: The reason they'd want it is

13   this: In the first situation, that -- that really

14   arose -- that -- that problem came with the Tort Claims

15   Act when it was first enacted in 1946. And, when

16   Congress was looking at the universe of Federal

17   employees, they felt -- and, especially, given the law

18   at that time and that continued really up to the

19   present, that, when a Federal employee or average

20   Federal employee, for the types of intentional torts

21   that they commit, especially a battery, it's

22   extraordinarily unlikely that that's going to be within

23   that scope of that employee's employment.

24   And Congress felt, well, we want to just

25   eliminate that altogether. It's not just to hold the

1   government responsible for that kind of a claim, when

2   some Federal clerk slugs someone or something like that,

3   and that was the determination they made.

4   When they got around to 1976, to dealing

5   with the particular problem of medical malpractice,

6   the -- it doesn't actually usually happen -- these kinds

7   of claims don't arise -- I'm not aware of anywhere a

8   doctor just grabs somebody and throws him, physically,

9   into the operating room. They happen when the doctor is

10   performing some procedure and performs a different

11   procedure or a procedure that was not authorized by the

12   patient.

13   And that -- that is very closely related to

14   core medical malpractice claims of exactly the sort that

15   they were dealing with here. It's very closely related

16   to informed consent claims, which I believe the

17   government -- I read the government to be conceding,

18   could be brought against the government.

19   And they thought there was no reason to

20   distinguish -- to distinguish one type of medical

21   malpractice from another. We want all of these claims,

22   we want to provide a remedy, and they all should be

23   brought against the government.

24   I would add one other --

25   JUSTICE KENNEDY: In law review commentaries

1 and maybe in lower courts' opinion, is there -- is it

2 fair to say that the weight of authority is to criticize

3 the battery-negligence distinction as being productive

4 of litigation and not really making a lot of sense?

5   MR. FELDMAN: I think that is fair to say,

6 and -- you know, States -- a lot of States have dealt

7 with this by dealing with -- in statutory -- in

8 statutes, not in common law development, so they

9 could kind of rationalize the system and say, look, this

10 is the kinds of claims you're going to have.

11   But the key thing is that everybody in the

12 country, I think, under every State's law, if a doctor

13 performs an operation that you didn't consent to, you

14 have an action in tort. And that protects both you and

15 provides an incentive -- an important incentive, to

16 doctors and medical personnel, to be sure that they are

17 only doing what they are authorized to do.

18   There is not a hint that, when Congress was

19 dealing with the Westfall Act -- I keep saying, "the

20 Westfall Act" -- when Congress was dealing with the

21 Gonzalez Act, there is not a hint that they were trying

22 there to say, well, we want to save money or something

23 by eliminating those kind of very, very traditional tort

24 claims from those victims, and we don't want those

25 people to have compensation.

1   JUSTICE GINSBURG: Mr. Feldman, do I

2   understand the mechanics of this right, that, if the

3   injured person sued the United States directly, that

4   suit would fail because the battery exclusion would

5   apply, but it's only by suing the officer -- the doctor

6   and then getting the United States substituted that the

7   battery exception is abrogated; is that right?

8   MR. FELDMAN: No, I don't -- I don't believe

9   that that's correct. There is nothing in this Act that

10   says it should make any difference. There is nothing,

11   certainly, in Subsection (e) or anywhere else in the Act

12   that says it should make any difference, whether you are

13   suing the government or suing the -- or suing the -- or

14   suing the doctor. If you sue the government, the

15   government says, well, we have a defense that the

16   intentional tort exception applies.

17   You would say, no, it says here, for

18   purposes of this section, the intentional tort exception

19   does not apply. And what that means, "for the purposes

20   of this section," is for claims that are covered by this

21   Act, which is claims that are medical tort claims

22   brought against personnel of the affected agencies who

23   are acting within the scope of their authority.

24   JUSTICE SOTOMAYOR: Are there any -- I'm

25   sorry.

1   Are there any other tort claims besides the

2   lack of consent battery claim at issue here that could

3   be encompassed by the Intentional Tort Act, as it

4   relates to medical malpractice?

5   Let's assume that it's not an operation, but

6   sexual behavior with a patient in their hospital room,

7   something of that nature.

8   Is that covered under the Gonzalez Act, as a

9   claim against the United States?

10   MR. FELDMAN: If it would be an assault or

11   battery that was committed by -- within the scope of the

12   professional's employment, then it would be. But it's

13   always the question of whether it's within the scope of

14   employment.

15   And I think, usually, the -- the case law --

16   I mean, I think, usually, the cases are that a doctor

17   who commits a sexual assault on a patient or something

18   is not acting within -- in the kind of circumstances you

19   are talking about, is not acting within the scope of

20   employment.

21   But that would be a case-by-case

22   determination. There might be some kind of case

23   where -- you know, it would depend on the facts of the

24   case.

25   JUSTICE SOTOMAYOR: This exception you're --

1   you're talking about is regularly applied in the lower

2   courts?

3   MR. FELDMAN: What -- I beg your pardon?

4   JUSTICE SOTOMAYOR: In the lower courts,

5   this determination is regularly made?

6   MR. FELDMAN: The -- the scope of employment

7   determination is made every day because that is made --

8   that is applicable throughout, in any kind of respondeat

9   superior situation, whenever the employer of the medical

10   professional is sued and that kind of thing -- or -- or

11   nonmedical professional, for that matter. That --

12   JUSTICE SCALIA: Of course, when the

13   government removes the case, it concedes that point,

14   doesn't it, normally? Where a case is removed from

15   State court, the government -- the Attorney General must

16   certify that it was within the scope of employment, no?

17   MR. FELDMAN: That's correct. That's

18   correct. And that is actually one of the two -- one of

19   two of the key provisions of the Act, that kind of

20   establish -- that could make it very clear that what

21   Congress was trying to do was preserve remedies because,

22   in that very provision, after it talks about removing

23   when the Attorney General has certified that it's within

24   the scope of employment, it says, "The case can be

25   remanded if the removed case is one such that" there --

1   "that no remedy against the United States is available."

2   And what that shows is that Congress knew

3   that there would be actions that would continue to be

4   brought against doctors. And they actually wanted to

5   provide for that, right there, and say it should be --

6   those should be remanded to State court, and then they

7   will proceed against the doctor in State court.

8   Then there is -- so that there would be --

9   JUSTICE SCALIA: What was that case, where

10   no action against the United States is available?

11   MR. FELDMAN: That would be a case, for

12   example --

13   JUSTICE SCALIA: Not -- not by reason of

14   the -- of the battery?

15   MR. FELDMAN: No, it wouldn't be -- if

16   Congress didn't have this provision in the statute --

17   JUSTICE SCALIA: I understand.

18   MR. FELDMAN: -- it would have been by

19   reason -- that would have been.

20   JUSTICE SCALIA: Yes, yes.

21   MR. FELDMAN: Another one would be a foreign

22   tort, which is also another exception under the Tort

23   Claims Act --

24   JUSTICE SCALIA: I see.

25   MR. FELDMAN: -- a discretionary function

1   case, and there are some in the medical context.

2   JUSTICE SCALIA: I got you.

3   MR. FELDMAN: Or one of the other

4   exceptions. All of those exception cases, they go on.

5   They go on, and Congress -- Congress could have closed

6   all of them down.

7   And, in fact, if Congress was worried that

8   there would be -- really, if their sole purpose here was

9   to say, we don't want any actions to be brought against

10   Federal employees, they should -- they could have just

11   said, we don't want any actions to be brought against

12   Federal employees. But, instead, they are providing for

13   what happens and for the continuation of the action

14   against the doctor.

15   JUSTICE ALITO: Now, the government has an

16   alternative interpretation, and I know you think it's

17   wrong. But would you go further and say that it's not a

18   plausible interpretation?

19   MR. FELDMAN: I would. I think that

20   because, as the court -- when the courts used -- you

21   know, a number of different formulations to -- to talk

22   about that -- I think you are referring to a kind of

23   strict construction rule that -- that applies to waivers

24   of sovereign immunity, which we don't think is

25   applicable here.

1   But, even where that rule does apply,

2   really, the question is, is it a reasonable degree of

3   clarity that Congress intended to waive immunity? Is it

4   -- as the Court has said, is it clearly discernible from

5   a fair reading of the statute that they intended to

6   waive?

7   And it has to be clear, and I think it is

8   clear here. And that was what everybody at the time of

9   the statute thought. It's what the government itself

10   thought up through the time of the -- of the Smith case,

11   15 --

12   JUSTICE ALITO: But was the

13   interpretation adopted by the district court and by the

14   Ninth Circuit, but you still say is implausible.

15   MR. FELDMAN: I think so. I would add

16   that -- I am not here to defend the Ninth Circuit's

17   judgment, but I would add that they had a pro se

18   litigant before them, and I don't think they had access

19   to the full degree of presentation that they might have

20   had, if -- if it had been more fully developed.

21   But I do think that, when the Court is

22   making that determination of what's clearly discernible

23   from a fair reading of the statute, the Court has also

24   made it clear, though, that what you don't do is take

25   each word in the statute and say, we're going to take

1   the most pro-government meaning of this word, and then

2   you add them altogether.

3   What you do is you look at the statute as a

4   whole, you look at the context of the statute, you look

5   at the structure of the statute, and then you say what

6   is plausible, what is clearly discernible from a fair

7   reading.

8   JUSTICE GINSBURG: Mr. Feldman, when the

9   Westfall Act, which doesn't abrogate the intentional

10 tort provision, when that was passed, why -- was there

11 any reason why Congress kept these five or six separate

12 acts, like the Gonzalez Act, instead of saying, well, we

13 did this piecemeal for particular agencies, and, now, we

14 we're dealing with Federal employees across the board, so

15 there is no reason why we should have these five or six

16 that go another way?

17   MR. FELDMAN: Well, I can give you the

18 answer that the government gave in its brief in Smith,

19 which is the Gonzalez Act and the other four or five

20 statutes continue to serve two -- at least two vital

21 functions, and one is specifically this: That they

22 eliminate the -- the intentional tort exception and,

23 therefore, allow relief for victims of intentional tort

24 in this medical malpractice context, just like victims

25 of other kinds of malpractice.

1   The other thing is there are some cases, for

2   instance, foreign torts, where there is another

3   provision of the Gonzalez Act, 1089(f), that provides

4   for indemnifying or holding harmless doctors, when

5   judgments are against them in certain -- when there's a

6   foreign tort, when the doctor has been detailed to a

7   non-Federal agency, or if the circumstances are such as

8   are likely to preclude a remedy under the Tort Claims

9   Act.

10   So, again, Congress in that -- that

11   provision remains important because there could be a

12   foreign judgment against the doctor or something, even

13   after the Westfall Act, and that would -- that gives the

14   authority to reimburse the doctor, if the agency

15   determines that -- that that's appropriate.

16   But that provision also shows that Congress

17   intended that to preserve remedies here because it would

18   have made no sense for Congress to say, we want to

19   provide for the indemnification or reimbursement of the

20   doctor, if what they really were trying to do was

21   eliminate all the cases against doctors.

22   JUSTICE KAGAN: Mr. Feldman, is --

23   JUSTICE SCALIA: It -- it --

24   CHIEF JUSTICE ROBERTS: Justice --

25   JUSTICE SCALIA: It's right on the same

1   thing, so I -- that provision ends -- and I am

2   strengthening you -- your last point -- that provision

3   ends, "if the circumstances are such as are likely to

4   preclude the remedies of third persons against the

5   United States described in Section 1346(b) of Title 28."

6   That clearly envisions that, in the ordinary

7   case, those remedies against the United States would not

8   be precluded.

9   MR. FELDMAN: That's right. And the -- and

10   the choice that Congress had -- had here, really, was

11   between taking intentional tort cases and allowing them

12   to be continued to be brought against doctors and then

13   subject to this kind of reimbursement provision, which

14   they had provided for, or saying, no, we want these to

15   just be brought against the government and to protect

16   the Federal employees much more fully. And so that was

17   the purpose of 1089(e).

18   They said, we want to steer this into the

19   same channel that all the other malpractice actions are

20   going into.

21   JUSTICE KAGAN: Mr. Feldman, as I understand

22   your argument and -- and the differences that you have

23   with the government, you have one set of differences

24   about the meaning of 1089(e), but then another set about

25   this question of, if it were true that the government

24

1   was immune from suit, could you bring a tort suit

2   against the doctors?

3   And the government said -- says no. And you

4   say, yes, you might be able to do that. But do you have

5   to answer that question, at all, in order to say that

6   you're correct on 1089(e)?

7   MR. FELDMAN: No. I mean, that's -- that

8   question isn't at issue in this case. That would really

9   only be directly at issue if somebody brought a suit

10   against the doctor. But --

11   JUSTICE KAGAN: So there is a lot of going

12   back and forth about this question of what would happen

13   if the government were immune, would the individual

14   doctor be immune? But that is, essentially, irrelevant

15   to the question before us; is that correct?

16   MR. FELDMAN: I -- I just wouldn't say it's

17   irrelevant because what the -- the provisions that I

18   have been talking about show is that Congress --

19   Congress was not trying, in this Act, unlike in the

20   Westfall Act, which doesn't have either of these two

21   provisions, the reimbursement and remand provision that

22   I've talked about -- unlike in the Westfall Act,

23   Congress wasn't trying to save money or other -- do

24   something else by just eliminating remedies for victims.

25   It was trying to -- as the Executive Branch

1   said, as I said, to assure remedies for all tort victims

2   and to protect doctors in a variety of different ways.

3   And given that that's what they were trying to do in the

4   Gonzalez Act, which is clear from the structure, that

5   also helps clarify what 1080 -- or makes more clear what

6   1089(e) means.

7   JUSTICE KAGAN: Saying it a different way, I

8   don't have to accept your broader argument; I can remain

9   ambivalent about your broader argument and still accept

10 your narrower argument.

11   MR. FELDMAN: Yes.

12   JUSTICE KAGAN: Is that correct?

13   MR. FELDMAN: Yes. That is correct.

14   I would add that, with respect to the strict

15 construction standard, I don't think it does apply in --

16 in this context. The Court has never applied it in the

17 Federal Tort Claims Act context. In the Gonzalez Act,

18 1089(e), specifically, refers to the Federal Tort Claims

19 Act. It says, "Section 2680(h) of Title 28."

20   Each of the other provisions of the Gonzalez

21 Act, for their operation, also depend on the Federal

22 Tort Claims Act. The exclusive remedy provision talks

23 about the Tort Claims Act. The reimbursement provision,

24 the remand version, each of them -- the whole statute is

25 really part of the Federal Tort Claims Act machinery.

1   And, when Congress invoked that machinery

2   here, I think it knew and I think it was consistent with

3   this Court's precedents that the Court applied the same

4   rule that it applied in the Dolan case, which is

5   construing the words in accordance with their reason and

6   normal tools of statutory construction, without a strict

7   construction rule.

8   Although, as I said, I do think that it is

9   clear what the meaning of -- of the provision is, if

10   they do -- you do apply the rule.

11   Thank you.

12   CHIEF JUSTICE ROBERTS: Thank you,

13   Mr. Feldman.

14   Mr. Shah?

15   ORAL ARGUMENT OF PRATIK A. SHAH

16   ON BEHALF OF THE RESPONDENTS

17   MR. SHAH: Mr. Chief Justice, and may it

18   please the Court:

19   Subsection (e) of the Gonzalez Act states,

20   in pertinent part, that, "For purposes of this section,"

21   which refers to the Gonzales Act, "the FTCA's

22   intentional tort exception shall not apply."

23   The question in this case is whether those

24   words unequivocally waive sovereign immunity for medical

25   battery claims like Petitioner's. The answer is --

1   CHIEF JUSTICE ROBERTS: Well, the

2   "unequivocally" -- we have a lot of cases that say you

3   don't get -- you certainly get the benefit of the

4   "unequivocally" standard, when you are talking about a

5   waiver of sovereign immunity in the first instance, but

6   you don't keep getting the benefit over and over again

7   when you are talking about, as in this case, an

8   exception to an exception to an exception.

9   MR. SHAH: Well, Your Honor, I think the --

10   the canon actually applies most strongly in this set of

11   circumstances. And let me talk about Dolan and the line

12   of cases which recognizes a very narrow exception to the

13   normal presumption against waivers of sovereign

14   immunity.

15   Dolan and the -- and its predecessor cases

16   recognize that the narrow exception to the canon, when

17   construing the scope of exceptions that were enacted

18   alongside the broad waiver of sovereign immunity in the

19   FTCA itself. And the purpose of drawing that exception

20   to the canon was it didn't want -- the Court didn't want

21   to defeat Congress's purpose as manifest in the broad

22   waiver itself.

23   Those exceptions were cutting back on the

24   contemporaneous waiver of sovereign immunity. The Court

25   said, we don't want to cut back, given the uniquely

1   broad waiver that the FTCA enacts. It's a narrow rule

2   exception limited to those circumstances that hasn't

3   been applied outside those circumstances.

4   Unlike those cases, this case is not

5   construing the scope of an exception that was enacted

6   alongside the FTCA that was trying to cut back on the

7   waiver of sovereign immunity.

8   To put it more concretely, on the day before

9   the Gonzalez Act was enacted, there was no question that

10   sovereign immunity barred the type of claim at issue;

11   that is, no one had any dispute that the FTCA's baseline

12   of sovereign immunity applied and would have blocked

13   this claim.

14   The question is whether --

15   CHIEF JUSTICE ROBERTS: Well, but that was

16   because, at that point, there was an exception to the

17   exception of sovereign immunity.

18   MR. SHAH: Correct.

19   CHIEF JUSTICE ROBERTS: And you're going

20   even a step further, to say you get the benefit of the

21   unequivocal test that you've set forth at even the next

22   stage.

23   MR. SHAH: Here's --

24   CHIEF JUSTICE ROBERTS: No, you've already --

25   you've already used up your benefit of an unequivocal

1   requirement when you've got the interpretation of the

2   FTCA itself, which is the waiver of sovereign immunity.

3   MR. SHAH: Well, Your Honor, we haven't used

4   it up because of the scope of interpreting Section

5   2680(h). You wouldn't apply the waiver because of the

6   exception that was enacted in Dolan. That's Dolan

7   itself. If we were just talking about construing the

8   scope of Section 2680(h) itself, I would agree

9   completely with you.

10   What we have here is, some years later, we

11   have a baseline of sovereign immunity. Everyone agrees

12   that the FTCA and its exceptions have struck the

13   appropriate balance.

14   CHIEF JUSTICE ROBERTS: Wait a minute. You

15   agree with me that you don't get the benefit of your

16   higher standard of interpretation with respect to

17   2680(h)?

18   MR. SHAH: With respect to the terms of

19   2680(h) as enacted at that time. The difference --

20   CHIEF JUSTICE ROBERTS: But then the -- then

21   the heightened standard of use sort of resurrects again,

22   when you get to considering an exception to 2680(h).

23   MR. SHAH: The reason, Your Honor, is that

24   you have a baseline of sovereign immunity. What 26 --

25   in order for -- for the other side to prevail, Section

1   1089(e) has to waive sovereign immunity.

2   It has to -- it has to enact a new waiver of

3   sovereign immunity that, undisputedly, applied the day

4   before the Gonzalez Act. That is when the canon should

5   apply most strongly, when -- when the other side is

6   saying that Congress --

7   JUSTICE SOTOMAYOR: What do you need more

8   clear than "(h) doesn't apply"?

9   MR. SHAH: Well, Your Honor --

10   JUSTICE SOTOMAYOR: I mean, I don't know how

11   much clearer Congress has to get than to say it's

12   nullified.

13   MR. SHAH: Sure.

14   JUSTICE SOTOMAYOR: What more does it have

15   to say; the exception doesn't apply, and then what's

16   left?

17   MR. SHAH: Your Honor, if all it said is

18   that the intentional tort exception does not apply, I

19   would agree with you, that that would be enough. And

20   that's exactly what Congress said in the 1988 --

21   JUSTICE SCALIA: But it didn't -- it didn't

22   want to say it shall not apply for everything. It

23   didn't want to eliminate the intentional tort exception

24   for everybody, right? It only wanted to eliminate it

25   for the people covered by -- by the Gonzalez Act.

1   MR. SHAH: That -- that may well be true,

2   and Congress, when it enacted the 1988 VA Act, did it in

3   the most direct way. It said, "The intentional tort

4   exception shall not apply with respect to personnel

5   employed by the VA."   But it --

6   JUSTICE SCALIA: It might have said that,

7   but, if it wanted to be more parsimonious in its

8   language, it could simply say for purposes of this

9   section.

10   MR. SHAH: Well --

11   JUSTICE SCALIA: Which section applies only

12   to these particular individuals.

13   MR. SHAH: Justice Scalia, I think it might

14   be helpful to take a step back. We have four statutes

15   starting in 1965, then 1976. The Gonzalez Act was part

16   of that chain. All four statutes in this relevant

17   subsection, the analogue, the Subsection (e) here, said,

18   "For purposes of this section, the intentional tort

19   exception shall not apply."

20   Then we get to 1988, the last one in the

21   line, which is the VA amendment. It changes that

22   language. It eliminates that opening proviso for

23   purposes of this section. The legislative history

24   accompanying it says, look, we want to allow intentional

25   tort remedies for veterans.

1   It does so -- the only reason I can conceive

2   of that Congress would have done it is because it didn't

3   think that the prior four model statutes did it clearly

4   enough. And I think that is the reason. And -- and if

5   we were in a normal statutory --

6   JUSTICE SCALIA: It was a -- it was a

7   different Congress. They don't always use the same

8   language. Come on.

9   MR. SHAH: Well, Your Honor, they used the

10   identical language --

11   JUSTICE SCALIA: You're -- you're lucky they

12   even remember the earlier statutes.

13   (Laughter.)

14   MR. SHAH: Well, Your Honor, they use the

15   identical language in every other provision of that

16   statute. They made an affirmative decision to change

17   the language of Subsection (e). Now, if this were an

18   ordinary --

19   JUSTICE SOTOMAYOR: Now, what do you do with

20   Justice Breyer's point -- or with your adversary's

21   point? I know you'll tell us don't look at the

22   Congressional Record because it suits you right now,

23   because when it doesn't, you point to it extensively.

24   But what do you do with the Veterans Act

25   record that says, we are modeling ourselves after the

1   Gonzalez Act, including its nullification of the

2   intentional tort?

3   MR. SHAH: Well -- well, Your Honor, it said

4   the first part. It did not say the second part. There

5   is nothing in that legislative history that says it

6   is -- it thought 1089(e) nullified the intentional tort

7   exception. It says it's patterned after the Gonzalez

8   Act, and then it changed the main language, the opening

9   proviso of that provision.

10   Now, if this were an ordinary case of

11   statutory interpretation, this Court would have to

12   figure out whether, by changing that language, did

13   Congress just want to tinker with the language to

14   clarify its intent? Did it intend to have a dispositive

15   change by making that change in language?

16   But this is not an ordinary case of

17   statutory interpretation.

18   JUSTICE SCALIA: Well, listen, I -- you

19   know, I don't -- I don't much care about legislative

20   history, but -- but, if I did --

21   (Laughter.)

22   JUSTICE SCALIA: -- I wouldn't think that --

23   that you would say it is patterned after another Act,

24   where you change a very basic provision, whether suit

25   can be brought against the United States or not.

1   MR. SHAH: Well, Your Honor, it is

2   patterned --

3   JUSTICE SCALIA: I mean, that's sort of

4   rudimentary and fundamental to it. It doesn't seem to

5   me they would say it's patterned after it. But -- you

6   know, I -- I don't care.

7   (Laughter.)

8   MR. SHAH: Well, Your Honor, it is patterned

9   in the sense it does use the operative language. It

10   takes out the key opening proviso, which is the entire

11   dispute in this case.

12   But legislative history, while it might be

13   important if this were a normal statutory interpretation

14   case, this Court has said, time and time again, you

15   cannot look to the legislative history to supply an

16   unequivocal waiver that is not present in the text

17   itself.

18   JUSTICE KAGAN: Well, let's go back to the

19   text then, Mr. Shah. As I understand your argument, it

20   goes something like this: This provision is there to --

21   to prevent people from drawing a mistaken inference.

22   And the inference would be that the doctors were liable

23   because the government was not. Now, there are a

24   thousand ways to do that pretty clearly.

25   You could just say, irrespective of whether

1   the government is liable, the doctors are not -- or some

2   such thing.

3   MR. SHAH: Sure.

4   JUSTICE KAGAN: But, instead, what Congress

5   did was it enacted a kind of "let's pretend" provision,

6   right? Let's pretend that the government is liable, so

7   then the inference won't arise. Now, that has to be not

8   just not the best way of achieving Congress's objective;

9   it has to be the worst, right, because, then, you're

10   raising the inference that in fact the government is

11   liable.

12   Why would Congress have wanted to do that?

13   MR. SHAH: Well, Your Honor, I agree with

14   you, Congress could have written this provision in a

15   different way and more clear ways, but I think it's

16   helpful --

17   JUSTICE KAGAN: I'm saying something more

18   than that.

19   MR. SHAH: Sure.

20   JUSTICE KAGAN: It could not have written it

21   in a worse way.

22   (Laughter.)

23   MR. SHAH: Well, I would disagree with that.

24   But let me -- let me take a step back here, on sort of

25   the landscape in which Subsection (e) was enacted.

1   Both sides agree that, without Subsection

2   (e), covered medical personnel would have faced the risk

3   of personal liability for medical battery claims. Both

4   sides also agree that Subsection (e) was enacted to

5   obviate that risk and, in fact, successfully does so

6   under either side's construction. Everyone agrees on

7   that.

8   The dispute here is whether Congress

9   accomplished that objective by, A, assuming the

10   existence of an available tort remedy for purposes of

11   the Gonzalez Act's conferral of immunity, as the text of

12   the provision suggests; or, instead, whether it takes

13   the substantial further step of actually amending the

14   FTCA, which is a separate -- an entirely separate

15   statute and, thereby, provide a remedy against the

16   United States.

17   The latter construction, I don't think is

18   unmistakably correct, it's not unavoidable. And -- and,

19   because of that, the unequivocal waiver requirement

20   favors the government --

21   JUSTICE BREYER: You're -- you're -- I'm

22   picking up from -- I find Justice Scalia's hypothetical

23   interpretations of legislative history very useful.

24   So the -- the -- and I --

25   (Laughter.)

1   JUSTICE SCALIA: Thank you. Thank you, dear

2   colleague. I appreciate that.

3   (Laughter.)

4   JUSTICE BREYER: The -- the thing where we

5   are in this -- it' -- we have a -- we have a statute,

6   1089, basically, and it says you can sue the government

7   for the tort of an employee -- I'm oversimplifying, I'm

8   oversimplifying so. And we should interpret that narrowly,

9   okay? We should interpret that -- absolutely has to be

10   definite, and it is pretty definite.

11   Now, what we have is an exception to that.

12   And the exception is an exception for battery, but not

13   battery. Can't sue the United States for battery. And

14   we're supposed to interpret that, I guess, as broadly as

15   possible. If you have a plausible argument that it

16   could be broader, you get it, as long as it's plausible.

17   Then what we have -- because, after all,

18   after these two things, you can still sue the person who

19   hit you over the head, you can go sue him in a State

20   court, can't you? Now, oh, now, we bring a new Act

21   there. And this new Act says, we are going to have a

22   little exception to the exception. Right? And we are

23   supposed to interpret that one, I guess, as narrowly as

24   possible.

25   You see -- so, now, what we are -- because

1   that's an exception to something which should be

2   interpreted as broadly as possible, which is an

3   exception to something that should be interpreted as

4   narrowly as possible.

5   So I think I get it like Costello used to, I

6   don't know what I'm talking about.

7   (Laughter.)

8   JUSTICE BREYER: Because there are a lot of

9   words in these things. And -- and so given all these

10   words and -- this is where the Chief Justice started --

11   I mean, can't we at least look at legislative history,

12   to try to figure out what Congress was doing by the time

13   we get to the exception to the exception to the

14   exception?

15   MR. SHAH: No -- no, Your Honor. This Court

16   has made quite clear you cannot look at the

17   legislative history. And the fact that, if you find

18   this confusing --

19   JUSTICE BREYER: Yes.

20   MR. SHAH: -- Justice Breyer, if you find

21   it's not --

22   JUSTICE BREYER: Well, then you win, as long

23   as I find it confusing.

24   (Laughter.)

25   MR. SHAH: -- unequivocally clear, we win,

1   and you don't look to the legislative history for

2   clarity. That's the point of what --

3   JUSTICE BREYER: Well, I don't find it all

4   that confusing. What it says is that this battery

5   exception, which is in (h), is not supposed to apply

6   when we look at the military doctors. That's what it

7   says.

8   MR. SHAH: Your Honor --

9   JUSTICE BREYER: And if -- and you say, ah,

10   but it says, "for purposes of this section." Okay. I

11   look at "for purposes of this section," and the purposes

12   of this section -- the very first whole sentence has to

13   do with 1089. It has to do with the scope. It has to

14   do with the general waiver.

15   MR. SHAH: Well, the "for purposes of this

16   section" language, I think, is the key phrase, and this

17   section refers to the Gonzalez Act. What the Gonzalez

18   Act primarily does -- what Sections (a) through (c) are

19   all about, are about conferring personal immunity. So I

20   think --

21   JUSTICE SCALIA: I don't think those are the

22   key words. I think the key words are "shall not apply."

23   "Shall not apply."

24   MR. SHAH: Well, Your Honor --

25   JUSTICE SCALIA: It isn't shall be deemed

1   inapplicable.

2   MR. SHAH: Your Honor, I think, when we are

3   reading it --

4   JUSTICE SCALIA: It is not a hypothetical.

5   It says, "They shall not apply to any cause of action,"

6   etc.

7   MR. SHAH: I think, when we are reading it

8   against the canon -- the sovereign immunity canon, I

9   think we would expect Congress to speak more clearly.

10   And Congress gave us two examples of how it spoke more

11   clearly in this very context.

12   One is, in 1974, the sole -- the only time

13   it amended Section 2680(h), it amended it within the --

14   the provision itself; that is, it amended the language

15   of 2680(h) to add a law enforcement proviso that said,

16   "This exception applies except with respect to law

17   enforcement in certain circumstances."

18   That's one way --

19   JUSTICE BREYER: Okay. But why? Why would

20   they have wanted to do that? That is to say, look, if

21   you cut the exception to the exception to the exception,

22   the presumption, da, da, da, out of it, what we've got

23   on your interpretation is that a person who's hurt by a

24   battery committed by a government official, given your

25   interpretation, has no remedy at all. I mean,

1   previously, he could have at least sued in State court.

2   MR. SHAH: Well --

3   JUSTICE BREYER: Now, what you're saying is

4   Congress tried to do with this language is say, hey, you

5   can't sue in State court; and, by the way, when you try

6   to sue the Federal government, we are not going to give

7   you your suit, either. Why do that?

8   MR. SHAH: Well, Your Honor, I don't

9   think -- I don't think that's true. I think before --

10   before the Gonzalez Act came along, there was a split in

11   the circuits. That's why the Gonzalez Act came along.

12   There were -- there were circuits that did not allow a

13   claim to proceed personally against the physician.

14   There were circuits that recognized absolute

15   immunity against a personal suit, even while it was

16   undisputed that battery claim could not proceed against

17   the government.

18   That -- and what -- what Congress said, if

19   you want to look at legislative history, what the Senate

20   Report says is, in light of this D.C. Circuit decision

21   that went the other way, Congress enacted the Gonzalez

22   Act because it was primarily concerned about conferring

23   personal immunity.

24   Every time the Senate Report talks about the

25   purpose of the bill -- it's on page 1, heading, "Purpose

1 of the Bill" -- it says conferring personal immunity,

2 nothing about expanding the government's tort liability.

3   JUSTICE GINSBURG: Mr. Shah, this is not

4 always the government's position. In fact, in a brief

5 to this Court, in the Smith case, the government took

6 the position that Mr. Feldman is presenting to us.

7   What occurred to turn on the light for the

8 government, to see that it was wrong in the Smith case

9 and come up with this -- the interpretation you are now

10 advancing?

11   MR. SHAH: Sure, Justice Ginsburg. Well,

12 the first thing I would say is that Section 1089(e) was

13 not directly at issue in Smith, and the issue had really

14 been litigated quite sparsely, both before and after

15 Smith.

16   Once this case presented itself, the

17 government revisited its position. I think there were

18 two --

19   JUSTICE KAGAN: But this is not a side

20 issue, Mr. Shah. In fact, you used your understanding

21 of 1089(e) as an argument to produce that the result this

22 Court reached in Smith, so it was -- it was not a very

23 large issue, but it was -- it was an argument.

24   You said -- you know, we should reach the

25 result that we -- that you wanted in Smith because

1   1089(e) would continue to have this effect.

2   MR. SHAH: Well, Your Honor, I don't agree

3   with that characterization. The government's argument

4   would have been identical, with or without 1089(e). But

5   I don't want to quibble about --

6   JUSTICE KAGAN: It was a supportive

7   argument. I am not saying that it was the but-for

8   argument, but it was clearly a supportive argument in

9   your brief.

10   MR. SHAH: Your Honor, if you want to read

11   it that way, I think that's fine. I think --

12   JUSTICE SCALIA: Why -- why else was it

13   there? Just for fun?

14   (Laughter.)

15   MR. SHAH: No, I agree. It was in order

16   to --

17   JUSTICE SCALIA: It was obviously there to

18   support your position. Now, your position would have

19   been the same. Now, that's true. Your position would

20   have been identical, but the only purpose of that

21   argument was to support that position.

22   MR. SHAH: Your Honor, I agree. It -- it

23   supported that position --

24   CHIEF JUSTICE ROBERTS: And that was

25   successful. The Court relied on that argument several

1   times in its opinion.

2   MR. SHAH: I don't believe so, Your Honor.

3   I don't believe the Court --

4   CHIEF JUSTICE ROBERTS: We certainly -- we

5   certainly cited Smith.

6   MR. SHAH: Yes, but the Court did not

7   interpret 1089(e). I think Smith -- what Smith

8   hopefully said, Your Honor -- and this is one of the

9   reasons why the government revisited its position --

10   what the Court said in the Smith decision -- you don't

11   have to take my word of what the legislative history

12   says.

13   What the -- what the Court in Smith itself

14   said is that the sole purpose of the Gonzalez Act -- not

15   the primary purpose, not a purpose, not a chief

16   purpose -- the sole purpose of the Gonzalez Act -- and

17   it's talking about the Gonzalez Act as a whole -- was to

18   confer personal immunity and not to create malpractice

19   rights in favor of plaintiffs.

20   What Justice Ginsburg --

21   CHIEF JUSTICE ROBERTS: Your friend -- your

22   friend says that, in Smith -- I'm sorry for the

23   confusion -- the Court addressed your argument on the

24   meaning of the Gonzalez Act several times.

25   MR. SHAH: Your Honor, it did not address

1   1089(e) at all, and -- and I think that's plain as day

2   from -- from the opinion. What the Court said in Smith

3   is that the purpose of the Gonzalez Act -- the sole

4   purpose of the Gonzalez Act is to confer personal

5   immunity. And what it also said is the Gonzalez Act

6   does not create malpractice rights in favor of

7   plaintiff.

8   That was one of the things that the

9   government looked at in reformulating its position and

10   adopting its current position, was the decision in

11   Smith, which came after our brief. The other thing we

12   looked at --

13   JUSTICE KENNEDY: Well, you did -- you did

14   say, in the reply brief, that the point of the Gonzalez

15   Act, it says, "would enable plaintiffs to pursue those

16   claims against the United States."

17   MR. SHAH: You are correct.

18   JUSTICE KENNEDY: I know you would have been

19   disappointed if we didn't ask you about this.

20   MR. SHAH: Yes, you are correct. We said

21   it. This is a change of position. We revisited it.

22   There were a couple things we looked at in coming to

23   our --

24   JUSTICE KENNEDY: And I -- but it -- and

25   Justice Kagan indicated, this wasn't just an aside.

1   This was rather a central theory for your interpretation

2   of the Act; maybe not the only theory, but a central

3   theory.

4   MR. SHAH: I -- again, I -- I disagree,

5   fundamentally, with that characterization. It's two

6   sentences in our brief. It's at the back end of the

7   brief. It was not fundamental to the position in Smith.

8   The Court did not rely on it at all in Smith.

9   But, even if all that were true, I think the

10   important thing is why we changed our position. The one

11   is -- the first and foremost is the statements in the

12   Court's decision in Smith itself, which, obviously,

13   post-dated our brief --

14   JUSTICE SCALIA: I don't find that

15   inconsistent with the position argued. There -- you are

16   talking about the statement that the sole purpose was --

17   was to --

18   MR. SHAH: The two statements, the sole

19   purpose of the Gonzalez Act is to confer immunity,

20   not --

21   JUSTICE SCALIA: I don't think it is the

22   sole purpose, even if you -- you accept your friend's

23   interpretation.

24   MR. SHAH: But, no --

25   JUSTICE SCALIA: No, no. The sole purpose

1 is to assure immunity to these doctors. Now, in

2 assuring immunity to these doctors, we -- we are not

3 going to leave these people without any remedy, and so

4 we allowed them a remedy against the United States.

5   That's subsidiary to the sole purpose of the

6 Act. Sure, the sole purpose is to -- is to -- is to

7 help these doctors. But, in order to do it and be fair

8 at the same time, you have to allow suit against the

9 United States. I think you could still say the sole

10 purpose was to help the doctors.

11   MR. SHAH: Well, Your Honor, I would

12 disagree with that. The other side's brief says, all

13 along, the sole purpose of this Act was not just to

14 confer personal immunity, but it had a dual purpose.

15   The dual purpose was to confer personal

16 immunity -- and this is, time and time again, in the

17 other side's brief -- to -- to confer personal immunity

18 and also to provide adequate remedies to tort

19 plaintiffs. That was not, we submit, a purpose, let

20 alone a primary purpose, of the Gonzalez Act.

21   JUSTICE GINSBURG: Why would -- why would

22 Congress -- I mean, the Veterans Administration Act came

23 after the four or five others, and Congress thought it

24 was patterning that Act after the Gonzalez Act.

25   Why would Congress want to provide this

1   battery remedy if a Veterans Administration medical

2   person messed up, but not if it was an armed service

3   doctor?

4   MR. SHAH: Of course, Congress doesn't say.

5   I think there are two potential reasons, Justice

6   Ginsburg. One might be the -- as -- as this Court has

7   recognized, the special solicitude that Congress pays

8   veterans, and it may have wanted to open up remedies to

9   veterans that were unavailable to others.

10   I think the second potential reason is the

11   defense side reasons. The defendants in Veterans Act

12   cases are civilian Veterans Administration employees.

13   In a Gonzalez Act case, by and large, the defendants are

14   going to be active military personnel. Congress is

15   often hesitant to create -- expand judicial remedies

16   against active military personnel because of the risk it

17   poses to interfering with military function and order.

18   So I think those are two reasons why

19   Congress may have decided to -- to change course in the

20   Veterans Act in 1988, after it had four provisions that

21   said exactly the same thing, using the four purposes of

22   this Act provision, it changed it, and it must have

23   changed it for a reason.

24   Two potential reasons are to change the

25   result, which, of course, under which the government

1   would win; or because it think -- it thought it needed

2   to speak more clearly, in order to waive sovereign

3   immunity. And, under the presumption against sovereign

4   immunity waivers, the government would also prevail.

5   JUSTICE KAGAN: Mr. Shah, your basic theory

6   of the case, which is that, in order to make absolutely

7   certain that everyone gets the benefit of the

8   intentional tort exception, both the government and

9   individual doctors, in order to make that absolutely

10   clear, Congress writes a provision saying that the

11   intentional tort exception shall not apply.

12   Now -- I mean, the -- the position, I have

13   to say, seems to refute itself. If Congress wanted to

14   make absolutely clear that the intentional tort

15   exception would apply, it wouldn't have written a

16   provision saying that it doesn't apply.

17   MR. SHAH: Well, the provision that you

18   describe, Justice Kagan, is not this provision. It's

19   the 1988 Veterans Act amendment, which says the

20   intentional tort exception shall not apply. This

21   provision says, "for purposes of this section," that is,

22   for purposes of the Gonzalez Act's conferral of immunity

23   in Subsection (a), that the -- the intentional tort

24   exception shall not apply.

25   Now, sometimes, when Congress uses the four

1   purposes of this section's formulation, sometimes, it

2   uses words like "assume that" or "consider that," as

3   it -- as cited in the other side's brief, in footnote 4,

4   on page 18. However, other times, when it uses "for

5   purposes of this section," even though it intends

6   somewhat of a counterfactual inquiry, it eliminates

7   those words.

8   In Title 10 itself, Section 10 USC 335 says,

9   "for purposes of this section" -- the exact language is,

10   "For purposes of this chapter, the term 'State' includes

11   Guam and the Virgin Islands."

12   Now, there's no dispute that Congress was

13   not trying to add Guam and the Virgin Islands as the

14   51st and 52nd States of the Union. What it meant is,

15   when applying the provisions of this section, treat Guam

16   and Virgin Islands as if they are States. So --

17   JUSTICE BREYER: Would you -- are you

18   finished there?

19   MR. SHAH: Yes, sir.

20   JUSTICE BREYER: Would -- would you go back

21   for a minute and think, before this Act was passed --

22   the Gonzalez Act -- and think of the millions of

23   government employees, and they're in different parts of

24   the country, and some of them commit batteries.

25   Now, you told me before that, where an

1   injured person -- a plaintiff sues a government

2   employee, and they sue under State tort law, and they

3   say, this government employee committed a battery, okay,

4   in the course of duty, you say there was an immunity

5   there.

6   Where did the immunity come from?

7   MR. SHAH: It was -- it was a common law

8   absolute immunity.

9   JUSTICE BREYER: From what?

10   MR. SHAH: One -- one case is the

11 Martinez --

12   JUSTICE BREYER: I mean, what was the theory

13 of it? I mean, here it's just -- it's a person, he's at

14 work, he does happen to work for the Federal government,

15 instead of working for someone else --

16   MR. SHAH: Sure.

17   JUSTICE BREYER: -- and everybody else, you

18 have to respond, and you -- if liable, you'd have to pay

19 damages for the battery. Now, where -- where did the

20 immunity come from --

21   MR. SHAH: The theory was --

22   JUSTICE BREYER: -- if the Federal employee

23 did it?

24   MR. SHAH: The theory behind the individual

25 immunity was the same -- essentially, the same theory

1   behind the Westfall Act immunity that this Court

2   rejected in the Westfall Act decision. So, up until

3   Westfall, there was an argument that there was absolute

4   immunity, that -- that the individual government

5   employees had absolute immunity.

6   JUSTICE BREYER: Why?

7   MR. SHAH: It was a common law immunity

8   that -- it was an offshoot of the sovereign immunity,

9   and it conferred it on the individual employee. This

10   Court, of course, in Westfall, rejected that notion and

11   said -- you know, that immunity doesn't apply, unless

12   you are talking about both beings in the scope of

13   employment and that apply -- that involve discretionary

14   policy decisions at a high enough level.

15   The last point I would make, Your Honor, is,

16   even if you believed -- and I think you do -- that the

17   texts were more naturally read to favor Petitioner, that

18   is not enough. And I think you can look at this Court's

19   decision in Nordic Village.

20   The statutory provision in that case made

21   certain Bankruptcy Court determinations binding on the

22   government, "notwithstanding any assertion of sovereign

23   immunity." The relevant language is reproduced on

24   footnote 10, on page 41 of our brief.

25   That language, "notwithstanding any

1 assertion of sovereign immunity," sounds awfully like a

2 waiver of sovereign immunity. It seems pretty explicit.

3 But what this Court said, in applying the unequivocal

4 waiver requirement, in finding that there was no waiver

5 of sovereign immunity, despite that very explicit

6 language, was that the statute, nonetheless, performed a

7 significant function.

8   Here, the same is true. Section 1089(e),

9 though not authorizing monetary relief, still

10 undisputedly performs a function here. It performs a

11 function of securing the personal immunity conferred by

12 Section 1089(a), that is, for purposes of the Gonzalez

13 Act, the conferral of immunity under Section 1089(a).

14   Just -- just as in Nordic Village, that is

15 enough to construe the statute against a waiver of

16 sovereign immunity.

17   CHIEF JUSTICE ROBERTS: So you want us to

18 decide the case with the unequivocal question before us,

19 in other words, deciding whether that benefit to the

20 government applies in this type of case.

21   MR. SHAH: Yes.

22   CHIEF JUSTICE ROBERTS: It seems to me to be

23 you are really upping the ante here, and it may well --

24 I have no idea why the government took the opposite

25 position below, but that's -- that's putting a lot more

1   at stake in this case than the particular statutory

2   position.

3   MR. SHAH: Well, Your Honor, there are four

4   courts that have decided -- conclusively spoken -- to my

5   knowledge, four courts, in the history, that have

6   interpreted this provision, Section 1089(e). All have

7   come out in the government's favor. There were two

8   district court decisions before the Smith case. Both

9   came out in the government's favor.

10   The only two decisions I am aware of are the

11   two decisions in this case, conclusively interpreting

12   1089(e), the district court and the court of appeals.

13   Both courts in this case relied on the unequivocal

14   waiver requirement. And I think that that's -- it's not

15   a stretch, at all, to apply the unequivocal waiver canon

16   here.

17   In fact, this case is far afield from Dolan.

18   It would be a substantial expansion of the narrow

19   exception in Dolan to say that the unequivocal waiver

20   requirement didn't apply. There was no dispute that

21   sovereign immunity applied the day before the Gonzalez

22   Act was enacted.

23   So the only question is whether the Gonzalez

24   Act enacts a new waiver of sovereign immunity. That is

25   the type of situation in which the canon applies most

1   strongly.

2   And Congress did it in a separate statute.

3   Again, in Dolan, we were interpreting provisions that

4   everyone agreed were part and parcel of the FTCA that --

5   that altered the balance of sovereign immunity. Here,

6   the question is whether it even affects or amends the

7   FTCA in the first place, whether it means to affect the

8   sovereign immunity balance in the first place.

9   That's an especially strong case in which we

10   would want an unequivocal waiver requirement.

11   JUSTICE GINSBURG: Mr. Shah, does it make

12   any sense to distinguish between a medical malpractice,

13   negligence and this unconsented operation, to split

14   those two and say the government is liable for

15   malpractice, but not for this unconsented action.

16   MR. SHAH: Your Honor, I think it makes a

17   lot of sense, and here's why: When Congress enacted the

18   intentional tort exception itself in 1946, one of the

19   principal reasons it -- it did that was because

20   intentional tort claims are sometimes easier to allege

21   but more difficult to disprove.

22   That is particularly true with respect to

23   these sort of lack of consent claims, where you have a

24   patient who has signed consent forms, agreed to a

25   surgery, and says -- and the facts of this case, I

1   think, are illustrative -- says right before the

2   anesthesia kicked in, "I said I don't want the procedure

3   anymore."

4   Now, here, the government was successful in

5   winning on summary judgment dismissal of the actual

6   medical negligence claim, that the doctor's standard of

7   care didn't -- that the doctor's care didn't meet the

8   standard of care.

9   The government won summary judgment on that

10   because there -- there was no evidence -- no expert

11   testimony that supported Petitioner's claim. But his

12   claim that, "I said no right before the anesthesia

13   kicked in," survived summary judgment.

14   And I think it was correct to survive

15   summary judgment, but the problem is that that survived

16   summary judgment, even though the deposition testimony,

17   as pointed out in the government's brief, everyone else

18   in the operating room, including the doctor, said that

19   this patient did not so object, just shows that these

20   claims --

21   JUSTICE SCALIA: Mr. Shah, can I ask you

22   why -- if your interpretation is correct, Subsection (e)

23   did not read -- not for purposes of this section, but

24   rather for purposes of Subsection (a), the provisions of

25   2680(h) shall not apply?

1   MR. SHAH: Well, Your -- may I -- may I

2   respond, Your Honor?

3   For -- this section -- Subsection (a), (b),

4   and (c) all work in tandem. (D) is a settlement

5   provision that really doesn't really have anything to do

6   with this. So, when it says, "for purposes of this

7   section," "Subsection (a)" and "this section" are

8   essentially the only operative provisions of the Act.

9   The only other provisions that do any work

10   are (e) and (f), which come after, obviously, Subsection

11   (e). So, when Congress used the term "for purposes of

12   this section," I think the fair statement is it was

13   referring to Subsections (a) through (c).

14   Thank you.

15   CHIEF JUSTICE ROBERTS: Thank you, counsel.

16   Mr. Feldman, you have 4 minutes remaining.

17   REBUTTAL ARGUMENT OF JAMES A. FELDMAN

18   ON BEHALF OF THE PETITIONER

19   MR. FELDMAN: I -- I just wanted to make a

20   couple of quick points. One is the Court has not

21   applied the clear statement -- the unequivocal statement

22   standard at any time in the Tort Claims Act, not just

23   when it's dealing with exceptions, but, if you go back

24   to the very early cases, the Aetna case, the Yellow Cab

25   case, really, right after the Act was passed, you can

1   see that the Court is saying there, no, we want to

2   interpret this Act to -- consistent with Congress's

3   intent, the way it wanted it interpreted, which is with

4   a fair reading of its words, not in one direction, not

5   in the other.

6   I just also wanted to clarify, in the Smith

7   case because, of a possible misunderstanding, the Court

8   definitely addressed the Gonzales Act, repeatedly, in

9   its opinion in the Smith case, but it didn't -- the

10   Court did not actually address 1089(e).

11   The reason the government, though -- this

12   was important to the government, and, actually, the

13   government's reply brief in the Smith case was, I think,

14   a hundred percent about the Gonzales Act -- was that the

15   other side of the Gonzales Act was saying, if you

16   construe the Westfall Act the way the government wants,

17   that will be an implied repeal, but the Gonzales Act

18   will have nothing left to do.

19   And it was important for the government --

20   that's why they kept saying it. It was important for

21   the government to say, no, the Gonzales Act does have

22   things to do, this is not an implied repeal. And one of

23   the things it does is exactly what we say Section

24   1089(e) does.

25   If there are no further questions?

1   CHIEF JUSTICE ROBERTS: Mr. Feldman, the

2   Court invited you to brief and argue this case as an

3   amicus curiae, and you have ably discharged that

4   responsibility, for which the Court is grateful.

5   MR. FELDMAN: Thank you.

6   CHIEF JUSTICE ROBERTS: The case is

7   submitted.

8   (Whereupon, at 11:05 a.m., the case in the

9   above-entitled matter was submitted.)

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