No.

SUPREME COURT OF THE UNITED STATES

RICHARD BERNHOLZ,

Petitioner

v.

UNITED STATES INTERNAL REVENUE SERVICE,

Respondent

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL BRADLEY CLAPP
121 Munger Street
Middlebury, VT 05753
(802)343-1042
clapplaw@aol.com

PAUL S. VOLK
Blodgett Watts & Volk, P.C.
72 Hungerford Terrace
Burlington, VT 05402
802)862-8919
pvolk@bwvlaw.com
Counsel of Record

Counsel for Petitioner

QUESTION PRESENTED

The Federal Tort Claims Act ("FTCA") permits individuals to bring claims against the United States for negligent or wrongful acts or omissions of government employees that are acting within the scope of their employment. *See* 28 U.S.C. § 1346(b)(1). Where the United States is immune from suit, unless otherwise waived, the FTCA included such a broad waiver of immunity. However, there is a list of exceptions to the waiver of immunity, codified at 28 U.S.C. § 2680. Section 2680 (c) reads: "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . [a]ny claim arising in respect of the assessment or collection of any tax or customs duty . . ." 28 U.S.C. § 2680(c).

The question presented is whether *any* conduct by the Internal Revenue Service which may broadly be construed as a mechanism for the assessment and collection of a tax, including the conduct alleged in Petitioner's underlying suit, falls within 28 U.S.C. 2680(c)'s exception to the waiver of immunity?

PARTIES TO THE PROCEEDINGS BELOW

The Plaintiff–Appellant in the Second Circuit Court of Appeals was Petitioner Richard Bernholz. The Defendant–Appellee was the United States Internal Revenue Service.

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The summary order of the Court of Appeals, affirming the district court's decision (App., *infra*, 1a–5a), appears at *Bernholz v. United States IRS*, 801 F. App'x 45, 45 (2d Cir. 2020). The decision of the District Court, granting Respondent's motion to dismiss (App., *infra*, 6a–13a), appears at *Bernholz v. United States IRS*, No. 5:18-cv-217, 2019 U.S. Dist. LEXIS 230922 (D. Vt. Sep. 25, 2019).

JURISDICTION

The Unites States Court of Appeals for the Second Circuit initially entered its judgment on April 20, 2020. The court of appeals denied Petitioner's request for panel rehearing on May 15, 2020. The Second Circuit's mandate and final summary order issued on May 22, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

The relevant statutory provisions are 28 U.S.C. § 1346(b)(1) and 28 U.S.C. § 2680 (c), and are reproduced in the Appendix at 15a–18a.

INTRODUCTION

This petition presents a question regarding the applicability of 28 U.S.C. § 2680 (c)'s exemptions to the waiver of sovereign immunity under the Federal Tort Claims Act.

STATEMENT OF THE CASE

A. Factual background

Petitioner pleaded guilty in the United States District Court for the District of Vermont to one count of filing a false income tax return or returns and one count of failing to maintain appropriate records relative to a federal firearms dealer/licensee on June 18, 2013. App., *infra,* 20a. Prior to his guilty plea, Petitioner, the United States Attorney's Office for the District of Vermont, and Respondent, the Internal Revenue Service ("IRS"), engaged in lengthy and thorough plea negotiations by which they agreed on the amount owed to Respondent IRS by Petitioner. Largely based on Respondent's participation in these negotiations, it was determined that as a condition of Petitioner's plea he would pay $9,668.17 in past due taxes, interest, and penalties, for tax years 2008, 2009, and 2010. Petitioner also agreed to pay $1,224 in past taxes to the State of Vermont. *Ibid.*

The calculation of this amount was determined with the direct assistance of the U.S. Attorney's Office, agents of the Respondent, Petitioner and his defense counsel, and a CPA retained by Petitioner. *Ibid.* Petitioner paid all amounts agreed upon prior to his sentencing hearing. The plea agreement was accepted by the district court and Petitioner's sentence was imposed on August 7, 2014. Petitioner was sentenced to time served (with credit for one hour spent in booking) and payment of a required $125 in special assessments. *Ibid.*

Despite what appeared to be this resolution, in the three consecutive years following Petitioner's plea and sentencing, Respondent sent him a refund check for $6,848.10. Upon receipt of the first erroneously–issued refund check, Petitioner immediately contacted his counsel, who disclosed the issue to the U.S. Attorney's Office and began coordinating next steps to address the problem. App., *infra*, 20a–21a. All parties agreed that Petitioner would not cash the refund check. At this time, Respondent was on notice of the issue. However, despite Petitioner and counsel's best efforts, he continued to receive the same erroneously–issued refund check for the following two years. At no time did Petitioner make any attempt to cash the checks, and instead he continued to be required to engage counsel to assist in how to proceed. *See id.* at 21a. Following receipt of the third erroneously–issued refund check, Petitioner and counsel were referred by the U.S. Attorney's Office in the District of Vermont to several of Respondent IRS's agents. Petitioner was again required to retain his own CPA to assist in an accounting. *See id.*

After considerable coordination between the parties, in October 2016, Petitioner was presented with a final accounting by Respondent's CPA, Agent Christopher Morse. Agent Morse, on behalf of Respondent, determined that somehow Petitioner was to be refunded approximately $17.00. Petitioner, his counsel, and Petitioner's privately–retained CPA reviewed Respondent's accounting and all parties agreed that this disposition was reasonable. The agreement was discussed through counsel with the assigned Assistant U.S. Attorney and the agreement was executed and returned (with the third erroneously–issued check) to Agent Morse. *See id.*

Petitioner never received the $17.00 refund check. Rather, Petitioner was thereafter sent a number of statements and notices by Respondent that alleged that he owed thousands of dollars in unpaid taxes, fines, and penalties. These notices also threatened that Petitioner risked seizure of his home, assets, bank accounts and the like. App., *infra*, 21a–22a. Petitioner again was forced to retain counsel and a private CPA to attempt to resolve the issue.

Petitioner also subsequently filed a claim for administrative costs with Respondent IRS. His claim was denied by a letter dated March 14, 2018. Petitioner administratively appealed, and his request was again denied in a letter dated July 10, 2018. *Id.* at 22a.

B. Procedural background

Following denial of his requests for administrative relief, Petitioner brought an action setting forth the above facts and making claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b)(1), and pendent state claims for negligence and gross negligence. His complaint was filed on December 10, 2018. App., *infra*, 19a–25a. Respondent filed a Motion to Dismiss on May 1, 2019. App., *infra*, 26a–36a. Respondent's motion to dismiss largely argued that the court lacked subject matter jurisdiction because of an exemption to its waiver of immunity under the FTCA. Respondent cited 28 U.S.C. § 2680 (c)'s exemptions to the FTCA's waiver of immunity. Specifically, Respondent argued that the statutory waiver of immunity did not apply because waiver does not apply to "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty. . ." 28 U.S.C. § 2680 (c).

Petitioner's Opposition to Motion to Dismiss was filed on May 13, 2019 (*Id.* at 37a–43a), and Respondent's reply on May 28, 2019. *Id.* at 44a–48a. Petitioner argued that where the tax had been both assessed and collected in advance of Petitioner's sentencing, the alleged tortious conduct did not fall within this exemption to the waiver of immunity. A hearing was held in the district court on Respondent's motion and the court ultimately agreed with Respondent, and an order granting Respondent's motion to dismiss was entered on September 25, 2019. App., *infra*, 6a–13a. In dismissing Petitioner's claims, the district court cited to precedent of this Court in *Kosak v. United States*, 465 U.S. 848, 104 S. Ct. 1519, 79 L. Ed. 2d 860 (1984), reasoning that the Court has interpreted the "arising in respect of" language in Section 2680 (c) broadly. *Id.* at 10a. Additionally, the district court further expanded its reasoning in reliance on factually inapposite Second Circuit cases, as discussed *infra*.

Following entry of the district court's judgment, Petitioner filed a timely notice of appeal on October 15, 2019. Petitioner's appellate brief was filed in the Second Circuit Court of Appeals on December 5, 2019. Petitioner argued that the district court erred in seemingly concluding that Respondent IRS was not directly involved in the assessment of the back taxes, penalties, and interest owed by the Respondent, and therefore directly involved in the plea negotiations and agreement ultimately accepted and ordered by the sentencing court. Petitioner further argued that the district court relied on factually inapposite cases to reach its conclusion that the alleged conduct fell within the exception to waiver of sovereign immunity based upon the assessment and collection of taxes. Respondent's brief was filed on January 15, 2020. Without oral argument, which had originally been asked for and scheduled, but then cancelled by the Court, the United States Court of Appeals for the Second Circuit issued an initial summary order affirming the judgment of the district court on April 20, 2020. *See* App., *infra*, 1a–5a. Petitioner timely filed a petition for panel rehearing on May 12, 2020. His request was denied on May 15, 2020. *Id.* at 14a. Mandate and the final summary order was issued on May 22, 2020. *Ibid.*

ARGUMENT

Resolution of the question presented is of important national significance. While the question presented appears narrow, disposition of the issue by the courts below has resulted in a broad expansion of sovereign immunity regarding essentially *any* tort claims against the IRS. In affirming the district court's order granting Respondent's motion to dismiss, and therefore holding that Respondent's conduct is entirely exempted from the FTCA's waiver of sovereign immunity, the Second Circuit affirmed the expansion of immunity to protect virtually all actions of the IRS and its' agents. In reasoning that this Court and the Second Circuit have "construed this exception broadly," (App., *infra*, 3a), the Second Circuit expanded the exemption to essentially include all conduct performed by the IRS. As Petitioner has argued repeatedly, the underlying conduct does not fall within the assessment or collection of taxes exception to the statutory waiver of sovereign immunity because the tax in question had long-since been assessed *and* collected at the time that the erroneous refund checks were issued, re–issued, supposedly addressed, and then essentially ignored by Respondent.

The lengthy factual background of this case highlights the patently negligent—and grossly negligent—conduct of Respondent IRS. Despite this, the rulings of the courts below have found a way to reason around the direct and substantial involvement of the IRS's agents in negotiating Petitioner's underlying plea agreement. Once that agreement was adopted and *ordered* by the sentencing court, the actions of Respondent IRS became clear violations of that order. Respondent IRS was further put on notice of these violations, and of the detriment to Petitioner, and *repeatedly* engaged in the process of trying to remedy the problem while also *repeatedly* continuing to violate the order. Respondent IRS has never contested this factual background. Rather, it has blamed Petitioner for its wrongdoing and now relies on an overbroad interpretation of the FTCA's exception to the waiver of sovereign immunity to shield its obvious and repetitive negligent and/or grossly negligent shortcomings. Following the orders of the courts below to their logical conclusions, nothing the IRS does may ever be actionable in tort. Why? Because it is the taxing entity, and following the courts' reasoning as discussed herein, it therefore cannot be sued, even for otherwise actionable wrongdoing, under the FTCA. This far-reaching outcome, and the slippery slope it creates, is why this Court should grant this petition.

In affirming the district court's decision, the Second Circuit also relied on this Court's decision in *Kosak* and factually inapposite caselaw in the Second Circuit. The leading case on the interpretation of the "arising in respect of" language is from this Court. In *Kosak v. United States,* this Court set out to apply the "arising in respect of" language in 28 U.S.C. § 2680(c)'s exception to the waiver of sovereign immunity. *See Kosak v. United States*, 465 U.S. 848, 104 S. Ct. 1519 (1984). That case involved an acquitted defendant's claim for damages to his art collection while held in the custody of the United States as a result of charges against him for smuggling the collection into the United States. In response, Defendant, the United States of America, sought to invoke § 2680(c)'s exemption for claims arising in respect to the detention of goods by officers of customs. *Id.* at 849-52. Ultimately, this Court, in concluding that "any claim arising in respect of" means any claim "arising out of" held in favor of the United States. *Id.* at 854. Notably, the Court cautioned against "unduly generous interpretations of the exceptions" as they "run the risk of defeating the central purpose of the statute." *Id.* at 853, n. 9, citing *United States v. Yellow Cab Co.*, 340 U.S. 543, n. 5, 71 S. Ct. 399, 403 (1951). The Court further provided: "We think that the proper objective of a court attempting to construe one of the subsections of 28 U. S. C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception'——no less and no more." *Id.*, quoting *Dalehite v. United States*, 346 U.S. 15, 31, 73 S. Ct. 956, 965 (1953). Here, the district court and Second Circuit's interpretation of the relevant language is far too expansive and goes beyond the "words of reason" as applied to the facts of the case. In so doing, the courts below have shielded virtually all conduct on the part of the IRS and its' agents from suit under the FTCA—it is difficult to imagine a factual circumstance which would not be covered by this expanded definition of sovereign immunity.

In reaching this holding, the Second Circuit also relied on *Aetna Casualty & Surety Company v. United States*, 71 F.3d 475 (2d Cir. 1995). In *Aetna*, the plaintiff alleged that it was subrogee to a tax refund owed to a now bankrupt company from the IRS. *Id.* at 477. The Second Circuit held that the alleged claims arose in respect to the assessment or collection of taxes. *Id.* As applied to Petitioner's claims herein, the Second Circuit specifically reasoned: "As we explained in *Aetna*, '[w]e understand the § 2680 (c) exception to cover claims arising out of the operation of the government's *mechanism* for assessing and collecting taxes.'" App., *infra*, 4a, quoting *Aetna*, 71 F.3d at 478 (emphasis added). The Second Circuit further added, in reliance on *Weiner v. IRS*, "[t]hat mechanism includes attempts to collect tax deficiencies that have already been satisfied. . .as well as the misdirection of tax refunds." App., *infra*, 4a, internal citations omitted, citing *Weiner v. IRS*, 986 F.2d 12 (2d Cir. 1993). In *Weiner*, plaintiff brought claims against the IRS for erroneously executing levies on her pension fund. *Weiner*, 986 F.2d at 12. In that case, the IRS had explained that the error was a "computer error" and the Second Circuit held that the statutory exception to the waiver of immunity applied.

The Second Circuit's reliance on the concept of exempting any conduct that falls within the *mechanism* of assessing and collecting taxes was too broad as applied to this case. Reliance on these cases for this assertion ignores what actually happened in Petitioner's underlying criminal matter. In none of the cited cases was the IRS itself *directly* involved in and on notice of its alleged wrongdoing and still repeatedly continued the conduct resulting in damages to the complaining party. Affirming the district court's grant of sovereign immunity to Respondent IRS, and therefore dismissal of Petitioner's claims, expanded the statutory exception to the FTCA's express waiver of sovereign immunity to literally include virtually any act of an agent of the IRS. This cannot, and should not be held, to have been the intent of §2680(c)'s exception to the otherwise applicable waiver of sovereign immunity by the Unites States Government.

CONCLUSION

Respectfully, this Court should grant the petition and schedule the matter for briefing and oral argument.

/s/ Michael B. Clapp, Esq.
MICHAEL BRADLEY CLAPP
121 Munger Street
Middlebury, VT 05753
(802)343-1042
clapplaw@aol.com

/s/ Paul S. Volk, Esq.
PAUL S. VOLK
Blodgett Watts & Volk, P.C.
72 Hungerford Terrace
Burlington, VT 05402
802)862-8919
pvolk@bwvlaw.com
Counsel of Record