

1 Judicial Code 128. So parties could rely on that to
2 appeal to the circuit court. So the special review
3 provision to the court of claims did not apply to 2680
4 dismissals. And we suggest that that was sensible
5 because Congress could have wanted judgments against the
6 United States, money judgments against the United States
7 primarily to be reviewed by the specialized court of
8 claims, but to have ordinary dismissals under 2680,
9 jurisdictional dismissals, reviewed in the ordinary
10 course by the circuit.

11 JUSTICE BREYER: I can see that, but -- that
12 is, imagine a plaintiff and the plaintiff brings a
13 lawsuit against the Post Office for negligence. The
14 government's defense is that this is a discretionary
15 function, a particular thing. And the plaintiff says,
16 you're right, it's a discretionary function. And now
17 it's dismissed. All right.

18 Now, if that last thing he read doesn't
19 apply because it was discretionary function and fell
20 within 2680, they then could see the Post Office on the
21 basis that the Post Office has independent authority to
22 sue or be sued. And it's hard to believe, he says, that
23 Congress somehow, when they passed these words, "does
24 not apply", suddenly wanted to revive all kinds of suits
25 against, for example, the Post Office, which otherwise

1 would have been barred by that last provision that he
2 read.

3 MR. VERGONIS: And the Post Office is a
4 great example, Your Honor, because when Congress enacted
5 the sue-and-be-sued clause for the Post Office, they
6 inserted another provision now at 39 U.S.C.,
7 Section 409, which said that tort claims against the
8 Post Office shall be subject to the provisions of the
9 Federal Tort Claims Act.

10 JUSTICE BREYER: So we don't have to worry
11 about the Post Office, the example that he gave. But
12 there may be others. Sue and be sued is a fairly -- I
13 mean, do we know what we're talking about? I like to
14 try to know what I'm talking about. And do we know here
15 what the reach of exempting that last provision from --
16 just erasing it in a discretionary action suit will be?

17 MR. VERGONIS: Two answers to that. The
18 discretionary function exception is a common-law
19 exception, so it may be that suable agencies have that
20 defense available to them anyway. It existed before the
21 FTCA was created as a common-law defense.

22 So the suable agencies who could be sued
23 again can raise other defenses, as this Court held in
24 *FDIC v. Meyer*, just because a suable agency can be sued
25 on a claim doesn't mean that the claim exists against

1 the suable agency. And three of the exceptions under
2 2680 are suable agencies themselves.

3 So if you read 2679 as applying to the
4 exceptions, their reading of the statute, you create a
5 situation where, say, the Panama Canal Company is
6 sued -- well, 2679 on their reading bars that suit
7 against the Panama Canal Company and makes the FTCA
8 exclusive, but then 2680 under the FTCA bars the claim
9 against the -- arising out of the activities of the
10 Panama Canal Company.

11 JUSTICE BREYER: So -- so you're -- can I --
12 are you saying this, in essence? Even if there are
13 other provisions that aren't erased, even if there
14 aren't, this particular erasure means that in an action
15 that is dismissed -- an action against the government --
16 for the reasons listed in those exceptions -- for
17 example, a foreign country, a discretionary exception --
18 in such an action, you can sue the employee where
19 ordinary principals of res judicata wouldn't bar you
20 from suing the employee after all. It's a different
21 party.

22 MR. VERGONIS: That's our position, and --
23 and you can only sue the employee today on
24 constitutional tort claims under Bivens.

25 JUSTICE BREYER: But you're saying any

1 claim, if it falls within -- if the reason for the bar,
2 if the reason for the dismissal falls within the
3 exception, and if they wanted to change that, they
4 should have said so.

5 MR. VERGONIS: That's -- that's exactly
6 right, Your Honor. And -- and --

7 JUSTICE KENNEDY: Is -- is that another way
8 of saying that the judgment bar applies just to
9 judgments of the merits, or is that somewhat different
10 from your argument?

11 MR. VERGONIS: That's one of our arguments,
12 Your Honor. We get to the same result --

13 JUSTICE KENNEDY: Isn't that the same as the
14 argument you just made? Because I'm curious to know,
15 if -- if we think Smith was an interpretation of -- of
16 2680, and you had to get around Smith and it's awkward
17 to do it, what's your second argument? Is that the
18 argument you're now making to Justice Breyer, or is it
19 different from saying that what we're talking about is
20 judgment on the merits?

21 MR. VERGONIS: Well, as I -- as I
22 understood, Justice Breyer's question was the
23 consequences of our argument, and our three arguments
24 lead to the same consequences. But, yes, Your Honor, we
25 take the position that "judgment" means a judgment that

1 would, under the common law, have preclusive effect.

2 So if you move away from the "shall not
3 apply" language, which we think is the most
4 straightforward way of resolving this case, and to the
5 language of the judgment bar itself, we have two
6 arguments under the judgment bar.

7 One is that the judgment bar is only
8 triggered by an action under Section 1346(b). And,
9 again, the "shall not apply" language says 1346(b) shall
10 not apply to the excepted claims. Therefore, this is
11 not a judgment -- a 2680 dismissal is not a judgment
12 under the FTCA.

13 JUSTICE GINSBURG: What of the government's
14 argument that once you get wind that a 2680 exception is
15 going to get the government off the hook, before a
16 judgment is entered, which might raise the judgment bar,
17 you can voluntarily -- voluntarily dismiss your case
18 against the government so you won't face a judgment?
19 You can amend your complaint, if -- if you sued them
20 both originally, to drop the government, or you can take
21 a voluntary dismissal.

22 What -- how do you answer that?

23 MR. VERGONIS: I think once you've -- once
24 they've answered the complaint, Your Honor, I don't
25 think the plaintiff can just dismiss or amend the

1 complaint without seeking leave from the Court, which
2 may result in a judgment of dismissal. Even a judgment
3 of voluntary dismissal, as I understand their view, that
4 "judgment" means any judgment would trigger the judgment
5 bar, under that reading.

6 So to return to Justice Kennedy's question,
7 on judgment in particular, we think it incorporates
8 principles of res judicata. And the Court has looked to
9 principles of res judicata to inform the word "judgment"
10 in other contexts.

11 In the relitigation exception to the
12 Anti-Injunction Act, the Federal courts are empowered to
13 enjoin State court proceedings to protect or effectuate
14 judgments of the Federal courts, and this Court has
15 viewed that as -- viewed judgment errors incorporating
16 principles of res judicata, and only judgments with res
17 judicata effect can be enjoined under that relitigation
18 provision. I think that's a great analogy to this case.

19 JUSTICE KAGAN: Could I take you back to the
20 "shall not apply" language for a second? When -- when
21 you were speaking to the Chief Justice, you said, well,
22 the definitional section will continue to apply because
23 definitions apply to terms and not to claims.

24 But then Mr. Martinez said something very
25 similar to that. He said the judgment bar applies to

1 judgments, not claims. So if you're right as to that,
2 why isn't he right as well? And the consequence of his
3 being right was -- is that he would have taken the
4 judgment bar out of that sweeping "shall not apply"
5 language as well.

6 MR. VERGONIS: The judgment bar actually
7 uses the language of claims. It says, "The judgment
8 shall constitute a complete bar to any action by the
9 claimant by reason of the same subject matter against
10 the employee whose act or omission gave rise to the
11 claim."

12 So the judgment bar is talking about barring
13 a claim. A claim -- a claim under the FTCA can be
14 brought vicariously against the government as employer.
15 It's agreed to subject itself to respondeat superior
16 liability on the claim. Where these claims are
17 accepted, you know, the -- you know, ordinarily the
18 judgment bar would then say if you have a judgment, the
19 claim can't be brought against the employee.

20 2680 says it shall not apply to these sorts
21 of claims. So when you have an intentional tort claim
22 for which the government has not accepted respondeat
23 superior liability, the bar on bringing that claim
24 against the employee does not apply.

25 So it's -- it's not the context of where you

1 need to read a definition in order to sensibly apply the
2 words of the provision. It's -- it's actually an
3 operative provision that operates on a claim. And it's,
4 in this context, purporting to operate on a claim that's
5 been excluded by the "shall not apply" language.

6 JUSTICE ALITO: To go back to the point you
7 were making before, under your interpretation, does the
8 judgment bar add anything to principles of claim
9 preclusion?

10 MR. VERGONIS: We think so, Your Honor. We
11 think that's -- understanding the principles of claim
12 preclusion that were in existence in 1946 --

13 JUSTICE ALITO: It was in existence in 1946,
14 but today would -- it would be superfluous.

15 MR. VERGONIS: Today it may be superfluous
16 with modern principles of res judicata, where we've
17 developed nonmutuality and defendants are able to assert
18 defense uses of res judicata. But at the time -- and I
19 think this is a strong contextual clue of what Congress
20 was trying to accomplish with this provision -- a
21 judgment against an employee would be preclusive against
22 a claim against the employer on the same subject matter.
23 And that's because of reasons of potential
24 indemnification by the employee owed to the employer so
25 that the employee could potentially be sued twice on the

1 same claim, once by the plaintiff and once by the
2 employer seeking indemnification. But it did not
3 operate the other way.

4 A judgment in -- in 1946, under the
5 restatement against the employer, didn't bar the
6 plaintiff from then suing the employee. So the judgment
7 bar fills this gap and explains that you need
8 directionality of the statute, explains why Congress
9 enacted a bar that bars suits against the employee, but
10 didn't enact a bar the other way that bars suits against
11 the government's --

12 JUSTICE GINSBURG: But it is obsolete in the
13 sense that modern res judicata law would take care of
14 the -- it wouldn't matter whether you sued the
15 government first or the employee case first. It would
16 be preclusive, because you've adjudicated the grounds of
17 liability.

18 MR. VERGONIS: That's right. A -- a case
19 that's tried on the merits would be preclusive against
20 either, under my understanding of modern preclusion
21 principles. It would not have then.

22 And -- and this case, this type of case
23 where a claim is dismissed on a jurisdictional ground
24 that the government hasn't accepted respondeat superior
25 liability, doesn't involve any adjudication of the

1 substantive merits of the singular tort claim that the
2 plaintiffs -- you know, the injury the plaintiffs
3 suffered.

4 He tried to bring the case against the
5 government, but it fell outside of the bargain. The
6 government, at the threshold, has found not to have
7 accepted respondeat superior liability on this claim.

8 JUSTICE ALITO: So you want us to decide
9 this case based on a literal reading of 2680. But the
10 Sixth Circuit did not decide the case on that ground,
11 and we don't have to address that, do we?

12 So why should we not decide whether the
13 Sixth Circuit was correct in its reasoning and apply the
14 same literal reading approach that you recommend to --
15 with respect to 2680 to the judgment bar, and hold that
16 a judgment is a judgment, and not necessarily a judgment
17 on the merits? And then -- because the issue under 2680
18 is, as I think the argument has shown, is very
19 complicated.

20 MR. VERGONIS: Two points, Your Honor:
21 First, I don't think the argument was waived. This is
22 not a separate ground for relief. It's a separate
23 argument.

24 JUSTICE ALITO: It's a separate -- it's --
25 it's another ground for affirmance, correct? It's an

1 alternative grounds for affirmance, which we have
2 discretion to decide whether we want to reach or not.

3 MR. VERGONIS: I think it's an alternative
4 argument for the same ground for affirmance. The
5 question presented was whether a 2680 dismissal triggers
6 the judgment bar. This case is about the interaction of
7 two provisions, and it would be very artificial for the
8 Court to ignore the text of one of those provisions and
9 focus solely on the text of the other provision.

10 Substantively, I think the term "judgment"
11 is an ambiguous term whereas the term "shall not apply"
12 is not an ambiguous term. "Judgment" can mean different
13 things in different contexts. It can mean different
14 things within the different provisions of the Act. And
15 some of the provisions of the Act, it seems to me, mean
16 a ward against the government. They talk about the fee
17 as a percent of the judgment. They talk about how the
18 judgment is to be paid. That's 2672.

19 So "judgment" is an inherently ambiguous
20 word, and the Court would need to grapple with that
21 ambiguity if it tries to resolve the case that way.

22 And again, I think the issue was raised in
23 our bio. It's logically intertwined with the question,
24 so I think the Court really, in order to answer the
25 second part of the question intelligently, the Court

1 needs to address the first part of the question as well.

2 If Your Honors have no further questions.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. VERGONIS: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Martinez, you
6 have two minutes remaining.

7 REBUTTAL ARGUMENT OF ROMAN MARTINEZ

8 ON BEHALF OF THE PETITIONERS

9 MR. RAMIREZ: Thank you, Mr. Chief Justice.

10 I have two main points that I'd like to
11 make.

12 First, with respect to the Postal Service,
13 it's true that the Postal Reorganization Act says that
14 the FTCA applies to torts that involve the Postal
15 Service. But Respondent's whole argument is that the
16 FTCA's protections of sue-and-be-sued agencies doesn't
17 protect sue-and-be-sued agencies from claims that
18 involve the exceptions within 2680. And so by his own
19 argument, the -- the postal -- the postal service,
20 because -- because if it's faced with a claim involving
21 the negligent transmission of mail, the Postal Service
22 would not be able to take advantage of 2679(a)'s
23 protections.

24 I think the Court might want to look to the
25 First Circuit's decision in the Davric case, where it

1 addressed this issue. It rejected Respondent's
2 "shall not apply" argument, and it said that it would
3 lead to results that Congress could not have conceivably
4 intended, and we agree with that.

5 The second point I'd like to make is just
6 about the -- the purpose of the FTCA. We think that
7 Congress very clearly wanted to give victims a choice
8 between suing the government and suing the responsible
9 employee directly, but it didn't want to force the
10 government to litigate over the same facts twice.

11 That purpose is squarely implicated. It's
12 not superfluous. The judgment bar is not superfluous
13 under modern rules because, even today, if the -- if the
14 government has to defend indirectly against a Bivens
15 action and also has to defend against an FTCA action,
16 the same concerns about alleviating the burdens and
17 disruptions appear today as -- just as they would have
18 in 1946.

19 JUSTICE GINSBURG: That's the government's
20 choice. They're not obliged to defend the Bivens
21 action.

22 MR. RAMIREZ: That's true. But I think when
23 Congress enacted the FTCA, it recognized, as a practical
24 matter, that the government, when -- when -- was
25 typically stepping into conduct the defense of employees

1 sued under State torts.

2 So for all of these reasons, Your Honor, we
3 ask you to restore the bargain at the heart of the
4 original FTCA. We ask you to enforce the judgment bar,
5 and we ask you to reverse the decision below.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 The case is submitted.

8 (Whereupon, at 11:10 a.m., the case in the
9 above-entitled matter was submitted.)

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