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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: But you're saying any

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

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

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

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

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

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

would, under the common law, have preclusive effect.

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

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

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

What -- how do you answer that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If Your Honors have no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. VERGONIS: Thank you.

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

REBUTTAL ARGUMENT OF ROMAN MARTINEZ

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

sued under State torts.

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

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

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

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