

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4                                      Petitioner                                      :    No. 11-192

5 v. :

6 JAMES X. BORMES :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, October 2, 2012

10

11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States  
13   at 11:02 a.m.

14      APPEARANCES:

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17 behalf of Petitioner.

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19 Respondent.

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

2 (11:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will now hear  
4 argument in Case 11-192, United States v. Bormes.

5 Mr. Srinivasan.

6 ORAL ARGUMENT OF SRI SRINIVASAN

7 ON BEHALF OF THE PETITIONER

8 MR. SRINIVASAN: Thank you,  
9 Mr. Chief Justice, and may it please the Court:

10 This Court's decisions have long established  
11 that Congress will be deemed to have waived the  
12 Government's sovereign immunity only if it unequivocally  
13 expresses its intent to do so.

14 JUSTICE SOTOMAYOR: Under your view, is  
15 there any situation today where the Tucker Act would be  
16 applied to a statute? Because if we start with the  
17 statute, which always seems to be where you're pointing  
18 us to, and we're only looking for a clear waiver of  
19 sovereign immunity, then there'll never be another  
20 Tucker Act action in the future.

21 MR. SRINIVASAN: There are such statutes,  
22 Justice Sotomayor. Of course --

23 JUSTICE SOTOMAYOR: What would they look  
24 like to be able to get around our clear statement rule?

25 MR. SRINIVASAN: Well, they would have two

1 features consistent with this Court's decisions that  
2 have found the Tucker Act to be applicable. One would  
3 be that the statute does not contain its own remedial  
4 mechanism, and the second would be that the substantive  
5 obligations in the statute run against the United  
6 States, and the United States alone.

7 And an example of that type of statute is  
8 the one that this Court found to be supported by the  
9 Tucker Act in White Mountain Apache Tribe or in Mitchell  
10 II. Those are the kinds of statutes as to which I think  
11 the Tucker Act was meant to apply.

12 JUSTICE SOTOMAYOR: So basically -- I'm not  
13 sure why we're even addressing the issue of Tucker Act  
14 jurisdiction. We should have really just been briefing  
15 the issue of whether the statute at issue here waives  
16 sovereign immunity --

17 MR. SRINIVASAN: Well, of course --

18 JUSTICE SOTOMAYOR: -- because that becomes,  
19 to you, the operative question.

20 MR. SRINIVASAN: It does when they're  
21 dealing with the statute like this.

22 And, of course, the reason that we're  
23 addressing Tucker Act immunity is because Tucker Act  
24 immunity is the basis for jurisdiction in this case  
25 according to the reasoning of the Federal circuit.

1                   And the problem with the reasoning of the  
2   Federal circuit is it allows the litigant to readily  
3   circumvent the Court's strict test for sovereign  
4   immunity waivers by the straightforward device of  
5   adding the Tucker Act as a jurisdictional basis in the  
6   complaint.

7                   And it's not at all clear why a plaintiff  
8   couldn't do that for any claim under any statute,  
9   including a statute as to which this Court would have  
10   already concluded that the unequivocal expression test,  
11   the standard test applied for waivers of sovereign  
12   immunity, was not satisfied.

13                  Now, to give the Court a concrete example of  
14   this, in Lane v. Pena, the court concluded that for  
15   Rehabilitation Act claims under Section 504 of the  
16   Rehabilitation Act, there was no unequivocal expression  
17   of an intent to waive sovereign immunity by Congress for  
18   purposes of damages claims; and, therefore, a  
19   damages claim can't be brought against the United States  
20   under Section 504.

21                  But under the Federal circuit's approach,  
22   there's no apparent reason why a plaintiff couldn't  
23   bring a damages claim against the United States for a  
24   violation of Section 504 of the Rehabilitation Act by  
25   adding the Tucker Act to the jurisdictional bases in the

1 complaint. Because if the plaintiff were able to do  
2 that, notwithstanding this Court's decision in  
3 Lane V. Pena, the result would be that the plaintiff  
4 could say, the Federal circuit, you should look at the  
5 statute and ask the question whether it can be fairly  
6 interpreted to mandate the payment of money by the  
7 Government.

8               There's no unequivocal expression of an  
9 intent to waive sovereign immunity, but that doesn't  
10 detract from the ability of the Federal circuit to  
11 conclude that the statute, nonetheless, can be fairly  
12 interpreted to mandate the payment of money.

13              Now, of course, if that issue were to arise,  
14 we would make the argument that the statute can't be so  
15 read. But the possibility that a plaintiff could make  
16 that argument, notwithstanding this Court's decision in  
17 Lane V. Pena, we think reinforces the need to  
18 conclude -- to conclude that the Tucker Act can't be  
19 applied in the way that the Federal circuit sought to  
20 apply it here.

21              JUSTICE SOTOMAYOR: Could I ask you --

22              JUSTICE GINSBURG: Mr. Srinivasan --

23              JUSTICE SOTOMAYOR: I'm sorry, I was going to  
24 ask -- following up on my question --

1 MR. SRINIVASAN: Sure.

2 JUSTICE SOTOMAYOR: -- many courts have held  
3 that the FLSA has an express waiver of sovereign  
4 immunity. And many of them have recognized, if not all,  
5 a Tucker Act remedy.

6 Under your new approach, that holding is  
7 incorrect, I presume --

8 MR. SRINIVASAN: Well, the --

9 JUSTICE SOTOMAYOR: -- because the FLSA has  
10 its own remedial scheme?

11 MR. SRINIVASAN: I think one -- one way to  
12 look at the FLSA, if we're looking at it in the first  
13 instance, would be to conclude that the FLSA itself has  
14 a waiver of sovereign immunity. And so you wouldn't  
15 look to the Tucker Act as the basis for the waiver of  
16 sovereign immunity, and you would look at FLSA in the  
17 way that we think you should look at FCRA -- excuse me,  
18 the Fair Credit Reporting Act, or FCRA.

19 Now, Your Honor is correct that there is a  
20 body of court of claims jurisprudence that doesn't  
21 necessarily view the statute in that way. But if you  
22 apply the framework that we think is the correct one to  
23 apply, as we set forth in our brief, you might reach the  
24 same conclusion under the Fair Labor Standards Act,  
25 although under a slightly different route.

1 JUSTICE SOTOMAYOR: But then the Federal  
2 circuit has no jurisdiction over those claims, according  
3 to you, because the waiver is in the FLSA, it has its  
4 own judicial remedy. They're not authorized, then, to  
5 go to --

6 MR. SRINIVASAN: Well, it would depend.  
7 There is a little bit of an anomaly in the FLSA because  
8 the FLSA doesn't necessarily point to any particular  
9 court as the basis of jurisdiction.

10 JUSTICE SOTOMAYOR: It has the same language  
11 as here, in -- you can bring your suit in any Federal or  
12 state court of competent jurisdiction.

13 MR. SRINIVASAN: Right. It says: "In any  
14 Federal or state court of competent jurisdiction," but  
15 this statute specifically allows for claims to be  
16 brought in district courts and a court of competent  
17 jurisdiction.

18 So one way --

19 JUSTICE SOTOMAYOR: I don't know -- I don't  
20 see the difference between --

21 MR. SRINIVASAN: Well, I think one way to  
22 potentially see the difference -- and I'm not going to  
23 quibble with -- with what Your Honor's saying, but one  
24 way to potentially see a difference is because the FLSA  
25 only refers to courts of competent jurisdiction -- it



1 doesn't have a free-standing provision that reversed the  
2 district courts -- it's possible to read that statute as  
3 essentially incorporating the Tucker Act as setting  
4 forth what the court of competent jurisdiction would be.

5               Here, 1681(p), which is set forth at 13(a)  
6 and 14(a) of the appendix to the Government's brief,  
7 speaks specifically about actions being brought under  
8 FCRA in any appropriate United States District Court,  
9 and then only, it goes on to talk about, or in any other  
10 court of competent jurisdiction.

11              So that's a potential basis for drawing a  
12 distinction between the two.

13              JUSTICE KAGAN: Mr. Srinivasan, what you say  
14 has a good deal to recommend it, and it's basically, you  
15 know, why should we read the Tucker Act to reverse  
16 everything that we know about sovereign immunity, but  
17 it's really hard to get that from the text of this --  
18 the Tucker Act.

19              In fact -- I mean, I guess my question is:  
20 Do you have any textual argument for the result that you  
21 are asking us to reach?

22              MR. SRINIVASAN: Sure. I do, Your Honor.  
23 The text of the Tucker Act, it's true, if you read the  
24 text to apply to its full potential reach, then the  
25 argument would be more difficult; but, the text of the

1 Tucker Act has never been read that way, including by  
2 this Court itself, starting with Nichols v. United  
3 States --

4 JUSTICE KAGAN: Well, that's not really a  
5 textual argument. That's an argument about how we've  
6 sensibly limited the reach of the Tucker Act. But the  
7 Tucker Act does seem to include what your friend there  
8 says it includes --

9 MR. SRINIVASAN: Well, I guess --

10 JUSTICE KAGAN: -- against any statute. Not  
11 any statute except the ones with remedial provisions,  
12 but just any statute.

13 MR. SRINIVASAN: Sure. I guess you -- you  
14 -- if you read the Tucker Act to its full textual reach,  
15 I think we would have a more difficult case. But our  
16 argument is that when the statute refers to claims  
17 founded on any act of Congress, it was never intended to  
18 apply literally to any conceivable act of Congress.  
19 And, in fact, this Court's own test for money  
20 mandating -- the money mandating test that applies to  
21 the Tucker Act embodies that understanding because --

22 JUSTICE SCALIA: I assume you're appealing  
23 to the textual principle that the specific governs the  
24 general. Isn't that what's going on here?

25 MR. SRINIVASAN: We're appealing --

1 JUSTICE SCALIA: That the Tucker Act is a  
2 more general provision, and you are saying it's -- it's  
3 overcome by a more specific provision that provides for  
4 compensation, but excludes the Federal Government.

5 MR. SRINIVASAN: We're certainly relying on  
6 that, Justice Scalia, when you're asking whether the  
7 Tucker Act can be used as the basis for waiving  
8 sovereign immunity for claims under the Fair Credit  
9 Reporting Act. So when you bring the Fair Credit  
10 Reporting Act into play, yes, we're absolutely relying  
11 on the specific versus the general proposition, as this  
12 Court has relied on in any number of cases.

13 I guess I understood Justice Kagan's  
14 question to be talking about the Tucker Act and the  
15 Tucker Act alone, without bringing into play any other  
16 statute. Now, I take Your Honor's point that it's hard  
17 to conceive of the Tucker Act in that kind of isolated  
18 fashion, because usually you'll be asking a question  
19 whether a claim can be brought against the United States  
20 under some other statutory regime.

21 And so if that statutory regime includes its  
22 own remedial mechanism, as FCRA does, it's hard to avoid  
23 resort to the specific control as a general proposition.

24 But the other point about construing the  
25 text of the Tucker Act alone is that the Tucker Act is a

1 waiver of sovereign immunity. And so the canon that we  
2 construe waivers of sovereign immunity strictly comes  
3 into play when we construe the terms of the Tucker Act  
4 itself. And I think it stands to reason that when you  
5 apply that canon, you wouldn't read the Tucker Act to  
6 encompass fully any act of Congress, because the  
7 implications for waivers of sovereign immunity would be  
8 quite substantial.

9           And so the Court has never construed the  
10 Tucker Act that way, and it shouldn't countenance that  
11 kind of construction now, which is effectively what the  
12 Federal Circuit's interpretation allows, because, rather  
13 than applying the strict standard under which Congress  
14 would have to be seen to have unequivocally expressed an  
15 intent to waive the Government's sovereign immunity in  
16 the terms of FCRA, it allows a plaintiff to avoid that  
17 by simply resorting to the Tucker Act in the  
18 jurisdictional basis of a complaint, and getting the  
19 real act by the Federal Circuit's own description  
20 standard that applies to the Tucker Act.

21           JUSTICE GINSBURG: The United States -- the  
22 United States is governed by the substance of the Credit  
23 Reporting Act. The Act applies to the Government, but  
24 your point is there's no sanction for  
25 noncompliance, even though the United States, a

1 Government system, is supposed to conform to the  
2 standards in the Act.

3 MR. SRINIVASAN: Well, I guess a few  
4 responses, Justice Ginsburg. First, on the question of  
5 whether the United States is subject to the substantive  
6 obligations in FCRA, I don't know that's there's a one  
7 size fits all answer. I think you'd have to go  
8 provision by provision and make an assessment.

9 And the reason I would say that is that,  
10 with respect to certain provisions at least, there are  
11 other statutes that, depending on the provision, have a  
12 specific obligation against the Government. And I'm  
13 thinking in particular of the Debt Collection  
14 Improvements Act, the Privacy Act in certain contexts.  
15 And so you have -- you have to ask the question whether,  
16 with respect to the particular FCRA provision that's  
17 alleged to run against the United States, would the  
18 better basis for finding the United States' obligations  
19 be some other statute that speaks more specifically to  
20 the question.

21 So I'm resisting the notion that the -- the  
22 FCRA's references to "person" in all of its substantive  
23 obligations would necessarily encompass the Government.  
24 Now, there's at least one provision as to which we don't  
25 deny that the Government is covered, and that's

1 1681(b)(b)(b), and that provision is set forth at pages --  
2 at page 7a of the appendix to the Government's brief.

3 And with respect to the particular provision  
4 at issue in this case, the truncation provision, I guess  
5 we don't have to confront the question of whether the  
6 Government is bound by that provision. It might well  
7 be, but we don't have to confront that question, because  
8 the Government acts as if it's in compliance with that  
9 provision because it has to.

10 There's a series of network agreements that  
11 the Government has entered into with credit card  
12 companies that allow the Government to participate in  
13 the credit card system. As a condition --

14 JUSTICE SCALIA: Excuse me. 1681b(b)(b),  
15 you said? Where is that case?

16 MR. SRINIVASAN: 1681(b)(b). If you look  
17 at --

18 JUSTICE SCALIA: You said 7a.

19 MR. SRINIVASAN: Well, I'm sorry. It starts  
20 at 4a. And the -- 4a, permissible purposes of  
21 Government reports; the conditions for furnishing. And  
22 then if you go to 7a -- that's also part of (b)(b) --  
23 b(b)4 has an exception for national security  
24 investigations. And it talks at (b)(b)(4)(A) about "in  
25 the case of an agency or department of the United States

1 Government which seeks to obtain and use." And because  
2 there's a reference to the United States Government in  
3 that provision --

4 JUSTICE SCALIA: Right.

5 MR. SRINIVASAN: -- it stands to reason that  
6 the term "person" in (b)(b) -- which starts at 4a;  
7 excuse me -- encompasses the United States Government.

8 I guess the short answer, Justice Ginsburg,  
9 is I don't think that there is a one size fits all  
10 answer. But the other part of your question is, are we  
11 taking the position that even if substantive obligations  
12 run against the United States, there still wouldn't be a  
13 remedy, at least a remedy in damages against the United  
14 States? And the answer to that is yes.

15 But that's not at all atypical under this  
16 Court's sovereign immunity jurisprudence, and it's not  
17 at all atypical for Congress to have fashioned a scheme  
18 that runs in that way. And the Privacy Act at least is  
19 one example, where in the Privacy Act, which applies to  
20 the Government and the Government alone, there are  
21 certain obligations that the Government has to comply  
22 with in that statute.

23 But Congress is very careful to cabin the  
24 circumstances in which the Government would be subject  
25 to liability and money damages.

1 JUSTICE SCALIA: Still in all, your argument  
2 is -- is not just a straightforward specific governs the  
3 general argument. I mean, that would be the case if --  
4 if the other statute which the plaintiff is trying to  
5 run around through the Tucker Act specifically -- it  
6 clearly prohibits suit against the Government. Then you  
7 would say, you know, the specific governs the general  
8 even though the govern -- the Tucker Act permits it; this  
9 statute prohibits it.

10 But you're saying this other statute here  
11 does not really prohibit it. You're just saying this  
12 other statute does not permit it under our usual rules  
13 about waiver of sovereign immunity being strictly  
14 construed. So, you know, it's a -- it's a -- it's a  
15 difference -- it's an odd sort of a specific governs the  
16 general argument.

17 MR. SRINIVASAN: I think, with respect,  
18 Justice Scalia, I think that's a distinction that  
19 ultimately doesn't make a difference in the context of  
20 this case. In the prior cases in which this Court has  
21 applied the specific over the general canon in related  
22 contexts, it's true that the statutes in some situations  
23 contemplated liability against the United States, but it  
24 had -- that statute would have certain limitations.

25 And I'm thinking, for example, of Hinck, of



1 Erika, of Brown v. General Services Administration,  
2 cases like that, and Sheehan. And what the Court said  
3 was, where a statute provides for liability against the  
4 United States, but in certain situations, you don't look  
5 to a different statute, the Tucker Act, to circumvent  
6 those kinds of limitations.

7 JUSTICE SCALIA: No, but that's -- that's  
8 because the negative implication of that statute is --  
9 affirms that there is no liability of the United States.  
10 Okay? But here, you don't have -- you don't have that  
11 negative implication at all, do you?

12 MR. SRINIVASAN: Well, I guess -- I don't  
13 think we need to have that negative implication to that  
14 full extent in order to invoke the specific versus the  
15 general canon, because the question at the end of the  
16 day is what did Congress intend? And where Congress  
17 enacts a specific remedial scheme that sets out the  
18 extent to which liability will be imposed under, in this  
19 case, the Fair Credit Reporting Act, it stands to reason  
20 that Congress would have expected courts to look to the  
21 remedial scheme that it established to determine to  
22 metes and bounds of liability, not to some other general  
23 default provision.

24 JUSTICE KAGAN: Mr. Srinivasan --

25 MR. SRINIVASAN: And therefore in that

1 sense, the specific remedial scheme that's in the  
2 statute should control over some other general scheme  
3 that Congress might well not have had in mind at all  
4 when it set forward the terms under which claims can be  
5 brought under FCRA.

6 JUSTICE KAGAN: How specific does the other  
7 statute have to be? Suppose there were another statute  
8 that just said any party can bring suits to enforce any  
9 rights against any persons under this statute.

10 Would you be making the same argument?

11 MR. SRINIVASAN: If -- if the statute were  
12 that general?

13 JUSTICE KAGAN: Yes. If that's all the  
14 statute says. It just says any party can bring suit to  
15 enforce rights under this statute. So there's not a  
16 lot of hoopla and a lot of detail about a remedial  
17 scheme. Would you still say that -- this controls over  
18 the Tucker Act?

19 MR. SRINIVASAN: I think I would, because I  
20 think in that context, Congress would have made a  
21 determination on the scope of liability for claims under  
22 that statute. It would have given thought to that  
23 issue, and it would have set forth in a very general  
24 provision the metes and bounds of the liability. And  
25 Congress I think in that context wouldn't have expected

1 anyone to look to the Tucker Act, because Congress gave  
2 no indication that it was thinking about the Tucker Act.

3 Now, in Your Honor's hypothetical, if you  
4 had a statute that spoke in those kinds of general  
5 terms, of course, we'd have I think a very good argument  
6 that there would have been no contemplation of a waiver  
7 of sovereign immunity. So we would strongly resist the  
8 notion that the United States might fall within the  
9 compass of that general provision.

10 But on the question of whether you'd look to  
11 that general provision as opposed to the Tucker Act, I  
12 think you would look to that general provision, because  
13 Congress in the context of enacting that statute told  
14 everybody: We're defining the extent to which liability  
15 can be asserted in court by reference to this general  
16 provision; this is where you ought to look, not  
17 somewhere else.

18 Now, one other --

19 JUSTICE SCALIA: Isn't it really -- doesn't  
20 the question come down to as you're putting it  
21 whether -- whether the Tucker Act eliminates for all  
22 other statutes the presumption against liability on the  
23 part of the United States?

24 MR. SRINIVASAN: It does. I think it does.  
25 And I think that's quite a breathtaking proposition, and

1 not one that Congress would have intended by virtue of  
2 the Tucker Act --

3 CHIEF JUSTICE ROBERTS: Well, then it's  
4 really the specific governing the general, but the other  
5 way around, right? The Tucker Act discusses  
6 specifically the liability and the sovereign immunity of  
7 the United States, and if the statute just generally  
8 doesn't address it, then the Tucker Act is the specific  
9 one and the other statute is the general one.

10 MR. SRINIVASAN: Well, it would be hard to  
11 square that understanding with the way -- with the  
12 series of this Court's cases that apply the specific  
13 versus general canon, because I think the same argument  
14 could have been made in Brown v. General Services  
15 Administration, in Erika, in Hinck, that if you thought  
16 that the subject --

17 CHIEF JUSTICE ROBERTS: You'd win under this  
18 argument, too, right?

19 MR. SRINIVASAN: I'm sorry?

20 CHIEF JUSTICE ROBERTS: You win under this  
21 argument, too. It just seems to me that it's not quite  
22 right to say that FCRA -- FCRA does not specifically  
23 address the liability of the United States.

24 MR. SRINIVASAN: Right.

25 CHIEF JUSTICE ROBERTS: The Tucker Act does.

1 So the Tucker Act is the one that's specific, and it  
2 applies instead of the general language in the -- in  
3 FCRA.

4 MR. SRINIVASAN: It -- well, you can look at  
5 it that way, Mr. Chief Justice, but I guess my only  
6 response --

7 JUSTICE SCALIA: In which case you would  
8 lose, not win.

9 MR. SRINIVASAN: Well, that's the question  
10 because it depends on --

11 JUSTICE SCALIA: Yes - you better resist it.

12 MR. SRINIVASAN: -- it depends on how you  
13 construe the Tucker Act.

14 I mean, I think Your Honor is correctly  
15 construing the Tucker Act's waiver of sovereign immunity  
16 only to apply to a certain limited subset of acts of  
17 Congress. And if you construed it in a sufficiently  
18 limited way, I suppose we could live with that result.

19 But I think the better way to approach the  
20 question is to look at the particular remedial scheme  
21 that Congress enacted in the scope of the statute  
22 itself. And for purposes of questions of sovereign  
23 immunity, you'd look to that particular remedial scheme  
24 and ask the age-old question, countenanced by this

1 Court's decisions, of whether there is an unequivocal --  
2 unequivocal expression of an intent to waive sovereign  
3 immunity in the scope of that statute itself.

4 JUSTICE SCALIA: So what is covered by the  
5 Tucker Act? I mean, every -- every basis for suit  
6 against the Government, every claim that the Government  
7 owes you money rests upon some statutory text, doesn't  
8 it?

9 MR. SRINIVASAN: There -- well --

10 JUSTICE SCALIA: So what --

11 MR. SRINIVASAN: -- not claims in contract,  
12 for example. Obviously, if there is an expressed  
13 contract with the United States, I don't know that that  
14 comes under a statute, necessarily, but --

15 JUSTICE SCALIA: Okay. Express contracts  
16 with the United States. Anything else?

17 MR. SRINIVASAN: The just compensation  
18 clause. That doesn't come under a statute, it comes  
19 under the Constitution, but the Tucker Act can be used.

20 JUSTICE SCALIA: Okay. But anything that  
21 comes under a statute, you would look to the other  
22 statute to see whether there is sovereign immunity under  
23 that statute; and, if there is under that statute, then  
24 the Tucker Act does not overcome it.

25 MR. SRINIVASAN: If that statute -- at least

1 if that statute has its own remedial scheme, then you'd  
2 look to the remedial scheme in that statute.

3 But I think this is where I started off with  
4 Justice Sotomayor.

5 JUSTICE SOTOMAYOR: That's exactly what I  
6 started with. That's what I started with: Is there  
7 anything left to the Tucker Act?

8 MR. SRINIVASAN: Right. And I think there  
9 is. I think the -- statutes like the one that this  
10 Court had before it in White Mountain Apache Tribe are  
11 ones.

12 Another example that I could give the Court  
13 is there is a statute that dealt with payment of  
14 compensation to prisoners of war. This was the statute  
15 that was at issue in Bell v. The United States. I think  
16 it's cited in footnote 42 of the Court's opinion in  
17 Bowen v. Massachusetts.

18 But that statute specifically set forth that  
19 compensation would be owed to prison -- prisoners of war  
20 held in captivity. That statute did not have its own  
21 remedial scheme. Its substantive obligation ran against  
22 the United States, and the United States alone, by  
23 nature.

24 And the Tucker Act, I think, in that context  
25 would step in to supply a waiver of sovereign immunity

1 and jurisdiction in the Court of Federal Claims. And  
2 the reason is that that statute has the two predicate  
3 conditions that we think have to be met in order to even  
4 raise the question whether the Tucker Act steps in.

5 JUSTICE SOTOMAYOR: So the new rule is if a  
6 statute is written to impose obligations only on the  
7 Government, then the Tucker Act is implicated  
8 immediately. If the rule says the Government and any  
9 party who contracts with it -- a Medicaid provider --  
10 must do X, Y, and Z, and the Government and the Medicaid  
11 provider have the burdens of accomplishing Y, unless  
12 there is an express waiver of sovereign immunity, the  
13 Tucker Act doesn't come into play.

14 MR. SRINIVASAN: I think that's --

15 JUSTICE SOTOMAYOR: That's your position.

16 MR. SRINIVASAN: I think that's right, Your  
17 Honor, but I'd qualify it in one respect, which is that  
18 if -- if the statute contains its own remedial scheme,  
19 that's an independent reason for not looking at the  
20 Tucker Act.

21 JUSTICE SOTOMAYOR: Well, you are not going  
22 to suggest that if the scheme I just described says X,  
23 Y, and Z, have to do all these things, and someone to  
24 whom they owe that obligation can sue the Medicaid  
25 provider, for example, for breach of that obligation,



1     presumably -- I'm putting in a lot of hypotheticals  
2     given our case law -- but you're saying they can't sue  
3     the Government under the Tucker Act --

4                     MR. SRINIVASAN:   Right.

5                     JUSTICE SOTOMAYOR:  -- unless there is an  
6     express waiver.

7                     MR. SRINIVASAN:   That's right.  I think you  
8     would look to the question of whether there's been a  
9     sufficiently expressed waiver in the terms of the  
10    statute itself, which is the traditional test that this  
11    Court has applied.

12                    JUSTICE KAGAN:   How about if a statute has  
13    no remedial provision at all; it just lists a set of  
14    legal obligations, but it's a generally applicable  
15    statute, it doesn't concern only the United States?  
16    Would your argument still apply that the Tucker Act has  
17    no force?

18                    MR. SRINIVASAN:   Yes, it would.  I think  
19    it's easier where you have a remedial scheme, obviously,  
20    but I think it's also the case that where the  
21    substantive obligation is a generally applicable one and  
22    doesn't run against the United States alone, you'd  
23    still, I think, want to --

24                    JUSTICE KAGAN:   So then your argument really  
25    isn't about another statute having a remedial scheme.

1 In the briefs, you present it as another statute has a  
2 remedial scheme, of course you should look to that more  
3 particular remedial scheme. But you would take the  
4 argument and say, even if the other statute doesn't have  
5 a remedial scheme, we don't look to the Tucker Act; we  
6 just think of the Tucker Act as having a limitation that  
7 is not in the Tucker Act's test -- text in order to make  
8 the Tucker Act consistent with everything we thought we  
9 knew about principles of sovereign immunity?

10 MR. SRINIVASAN: That's true. I mean, but I  
11 guess -- you don't have to reach the question of whether  
12 the Tucker Act applies or the statute doesn't have its  
13 own remedial scheme, obviously, in this case, because  
14 FCRA does have its own remedial scheme. Our argument  
15 would still apply.

16 And on the question of whether we're reading  
17 the Tucker Act in one particular way to a subsets of  
18 acts of Congress, I guess one point I'd make is that the  
19 money mandating test that this Court has always applied  
20 where the Tucker Act does apply already presupposes that  
21 it doesn't apply to just any act of Congress, because  
22 the act of Congress has to be a money-mandating one.

23 JUSTICE SCALIA: Say it again. I lost it.  
24 Give me the last sentence again.

25 MR. SRINIVASAN: The last sentence, the last

1 thought at least -- maybe I should try to rephrase it,  
2 but the last thought is that this Court's jurisprudence  
3 already presupposes that the Tucker Act doesn't apply to  
4 every act of Congress because the Court's jurisprudence  
5 requires that the act of Congress be money-mandated.

6 So we're already in a zone in which the  
7 Tucker Act's reference to acts of Congress doesn't  
8 literally extend to every conceivable act of Congress.  
9 It only extends to certain acts of Congress. And I --

10 JUSTICE KENNEDY: But is this a  
11 money-mandated statute?

12 MR. SRINIVASAN: I -- if you didn't  
13 have -- that's -- that's -- I guess -- if you didn't  
14 have the remedial scheme.

15 We don't get to that question,  
16 Justice Kennedy, because you only get to the  
17 money-mandating question if there is not a remedial  
18 scheme in the text of the statute itself and the  
19 substantive obligation runs against the United States,  
20 and the United States alone, which this one doesn't  
21 because it's generally applicable.

22 And it's hard to conceive of that question  
23 in the abstract because the question is whether the  
24 statute is money-mandating in that it specifically  
25 contemplates the payment of money by the United States;

1 and, precisely because the statute is generally  
2 applicable, I think we would say that under this statute  
3 it's not money-mandating, because it's not  
4 money-mandating in that it doesn't contemplate payment  
5 by the United States with relevant specificity because  
6 the substantive obligation is generally applicable.

7           You only get to that question in a context  
8 like White Mountain Apache Tribe or Mitchell II, where  
9 the substantive obligation runs against the United  
10 States, and the United States alone, and where there's  
11 no remedial scheme embedded within the statute itself.  
12 And then you ask the question whether is that kind of  
13 substantive obligation that runs against the United  
14 States, is that one that's naturally conceived as a  
15 money-mandating.

16           And on that, I think you would look at a  
17 couple of considerations consistent with this Court's  
18 decisions. One is, is the obligation one that  
19 necessarily deals with compensation? So, for example,  
20 the statute I was referring to earlier that has to do  
21 with compensation for -- for imprisoned prisoners of  
22 war, that one naturally has to do with compensation, so  
23 it might be money-mandating.

24           In White Mountain Apache Tribe and the other  
25 trust cases that arise under the Indian Tucker Act, the

1 Court concluded that because background principles of  
2 trust law would necessarily contemplate the payment of  
3 money, that those statutes are money-mandating.

4 But the principal point here --

5 JUSTICE SOTOMAYOR: Counsel, this sort of  
6 begs the question --

7 MR. SRINIVASAN: -- is you only get to that  
8 question if you get past that hurdle.

9 JUSTICE SOTOMAYOR: -- the statute awards  
10 damages for breach of the obligation, so it's  
11 money-mandating. The issue is not whether it's  
12 money-mandating; the question is who's it mandating.

13 MR. SRINIVASAN: Well, right, but --

14 JUSTICE SOTOMAYOR: But there is not an  
15 issue of whether it contemplates the payment of damages.  
16 It expressly awards --

17 MR. SRINIVASAN: But I think the  
18 money-mandating test, Justice Sotomayor, is whether it  
19 contemplates the payment of damages by the  
20 United States. And I guess that's why I'm having a hard  
21 time addressing that question in the abstract, because  
22 there's a predicate condition that hasn't been  
23 satisfied.

24 That question only naturally arises where  
25 the substantive obligation runs against the

1 United States and the United States alone. I think  
2 precisely for the reason that Your Honor says, where the  
3 substantive obligation is generally applicable in that  
4 it applies to parties beyond the United States, it's  
5 hard to ask the question whether the statute is  
6 money-mandating in the relevant sense.

7 JUSTICE SOTOMAYOR: I -- it is -- there is  
8 some difficulty with your argument, which is, going back  
9 to my simplified hypothetical, Government and  
10 Medicaid -- X providers have to do X, Y, and Z; if those  
11 persons, being defined as Government and providers,  
12 doesn't do what they have to do, they have to pay these  
13 damages.

14 MR. SRINIVASAN: That -- I will grant --

15 JUSTICE SOTOMAYOR: I mean, that's pretty  
16 clear.

17 MR. SRINIVASAN: Well, I will grant you,  
18 Justice Sotomayor, that that hypo is more difficult than  
19 this case because, although I would construe that to be  
20 generally applicable, it does talk about the Government.  
21 It specifically references the Government, and I think,  
22 by Your Honor's hypothetical, the United States alone.  
23 It's not an undifferentiated reference to persons, which  
24 is what you have in FCRA.

25 I still think I would call that generally

1 applicable such that the Tucker Act wouldn't come into  
2 play, but I don't deny that it would be a closer case  
3 than what you have here.

4 If the Court has no further questions, I  
5 would like to reserve the balance of my time.

6 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
7 Mr. Jacobs.

8 ORAL ARGUMENT OF JOHN G. JACOBS

9 ON BEHALF OF THE RESPONDENT

10 MR. JACOBS: Mr. Chief Justice and may it  
11 please the Court:

12 If I may, I should like to begin with  
13 Justice Kennedy's question: Is this a money-mandating  
14 statute?

15 Section 1681(a) defines "persons" and it  
16 defines "persons" as, inter alia, "any Government or  
17 Government body or agency." That, it would seem to me,  
18 would be extraordinarily clear that the Government is  
19 subject to this act and subject to money-mandating.

20 JUSTICE SCALIA: Well, you wouldn't -- you  
21 wouldn't need the Tucker Act now, would you?

22 MR. JACOBS: We --

23 JUSTICE SCALIA: Just sue under the statute.

24 MR. JACOBS: We could. We believe we should  
25 be able to recover simply under FCRA itself, yes, Your

1 Honor. But if there were any question as to whether the  
2 Government is in fact covered, that would seem to me to  
3 be answered by 1681b(b)(4).

4 JUSTICE SCALIA: So are you splitting your  
5 claim? I mean, if you have both a cause of action under  
6 FCRA and under the Tucker Act, the one has to go to the  
7 Federal Circuit and the other elsewhere, or the Court of  
8 Claims and then the Federal Circuit? What do you do?

9 MR. JACOBS: Your Honor, that was -- that  
10 was the subject of some debate in the court below. We  
11 took the appeal to the Federal Circuit because the claim  
12 was based in whole or in part on the Tucker Act.

13 JUSTICE SCALIA: You also claimed under  
14 FCRA, under the statute, right?

15 MR. JACOBS: Yes, we do, Your Honor.

16 JUSTICE SCALIA: Okay.

17 JUSTICE BREYER: So why do you care? I  
18 mean, you're in the Northern District of Illinois, you  
19 bring a case under this Act. I guess you lost because  
20 you wanted to appeal. And so -- so what is the big  
21 deal? Appeal to the Seventh Circuit. Who cares. Why  
22 do you care which circuit you go to? You said you  
23 think -- well, why do you care?

24 MR. JACOBS: We don't particularly care,  
25 Your Honor, but we believe that we are required by the



1 statute to appeal to the Federal Circuit if the claim is  
2 based in whole or in part on the Tucker Act.

3 JUSTICE BREYER: I guess you and the  
4 Government could have stipulated, we agree it goes to  
5 the Seventh Circuit, and nobody would have opposed you  
6 on that.

7 MR. JACOBS: I -- I -- I do not know, Your  
8 Honor.

9 JUSTICE BREYER: This case is about you want  
10 to go to -- you want to go the Federal Circuit, they  
11 want you to go to the Seventh Circuit?

12 MR. JACOBS: Right.

13 JUSTICE BREYER: Okay.

14 MR. JACOBS: And in 1681(b)(b)(4), the  
15 statute said --

16 CHIEF JUSTICE ROBERTS: I'm sorry. Before  
17 you get --

18 MR. JACOBS: Yes.

19 CHIEF JUSTICE ROBERTS: But if you -- their  
20 argument is if you go to the Seventh Circuit, you don't  
21 get any money, right? Because if you're getting money  
22 from the United States, don't you have to go to the  
23 Court of Claims in a case like this?

24 MR. JACOBS: I don't believe so, Your Honor.

25 CHIEF JUSTICE ROBERTS: No?

1                   MR. JACOBS: I mean, 1681(p) says you can  
2   sue either in district court or any other court of  
3   competent jurisdiction. And in that regard, there's  
4   been a lot of talk about the remedial scheme, and with  
5   respect, Your Honor, I would submit that this is -- this  
6   is not some reticulated, remedial scheme where you have  
7   to file a claim and have a hearing and those kinds of  
8   things where this Court has enforced that against  
9   people.

10                  Here, it's just a typical statute that says  
11   you have to do A, B, and C, and if you don't you can be  
12   sued in Federal court.

13                  JUSTICE SCALIA: Do you know any other  
14   statutes offhand -- I can't think of any, but maybe you  
15   know some -- in which you can get money out of the  
16   United States but don't have to go through the Court of  
17   Claims and the Federal circuit? What other statutes are  
18   there? And if there are none, the reason I ask the  
19   question, it becomes less and less plausible that FCRA  
20   was meant to allow suit against the Federal Government.

21                  MR. JACOBS: The Privacy Act, Your Honor,  
22   allows you to sue the Government in the district court.

23                  JUSTICE SCALIA: For money damages.

24                  MR. JACOBS: I believe so, Your Honor.

25                  JUSTICE BREYER: Not in tort. This seems an

1     awful lot like a tort, or tell me why it isn't. I mean,  
2     what you are saying is there's a statute that says you  
3     can't print more than the last five digits of a card or  
4     the date, the expiration date, and they did both and you  
5     want to say "or" means one or the other, it doesn't mean  
6     and/or. That's what the case is about fundamentally,  
7     right?

8                     MR. JACOBS: The case is about printing the  
9     expiration date, Your Honor.

10                    JUSTICE BREYER: Yes, can you do and/or or  
11     or. All right, got it. Now, if you print -- in your  
12     view of it, they printed too much about a person's  
13     credit card.

14                    MR. JACOBS: Yes.

15                    JUSTICE BREYER: It sounds like an -- sort  
16     of like an invasion of privacy, which is normally a  
17     tort.

18                    MR. JACOBS: It is like it, but I believe  
19     this Court's jurisprudence has been for a long while  
20     now, at least since Jacobs and I would submit even  
21     earlier, Dooley onward, that it doesn't make any  
22     difference whether -- if you're suing under a statute of  
23     the United States or a contract or anything else, if  
24     there's any element of tort in it, it doesn't matter.

25                    JUSTICE BREYER: What do you mean? You can

1     sue for -- in other words, if the statute were to say,  
2     if Smith, a Government employee, assaults a person, he  
3     gets damages. Federal statute. Now he brings a  
4     claim -- I don't know this law; I'm asking, I'm not  
5     arguing. The plaintiff sues the United States for  
6     assault. And you're saying that they can bring that in  
7     the Court of Claims because it's a statute.

8                 I don't know how this law works. I just  
9     read that and I know the language doesn't totally tell  
10    you. It's about liquid, illiquid. I didn't get that  
11    part exactly. But as I've understood it, you can't  
12    bring a tort suit in the Court of Claims. Now, that's  
13    what I would like you to elaborate, because this sounds  
14    rather like a tort suit, not sort of. That's why I am  
15    asking.

16                MR. JACOBS: As no doubt intended, Your  
17    Honor posed a very difficult question. I would submit  
18    that if the statute says that you may not do A, B, and  
19    C, that you could then sue in the Court of Claims.

20                JUSTICE BREYER: Even if it says you may not  
21    assault someone.

22                MR. JACOBS: Yes. Even though  
23    traditionally, you could think of that as a tort, I  
24    believe that's this Court's jurisprudence.

25                JUSTICE BREYER: And the case I should look

1 at to show that is what? That's all right if you don't  
2 have it.

3 MR. JACOBS: I think Daly -- Dooley, I  
4 think, Your Honor, in 1901 said: "Regardless of whether  
5 the exactions of taxes were tortious or not, we think  
6 this case is within one of the first class of cases  
7 specified in the Tucker Act of claims based upon a law  
8 of Congress."

9 CHIEF JUSTICE ROBERTS: But your argument --  
10 your answer is a little more complicated, because the  
11 statute doesn't say tort claims, it says claims sounding  
12 in tort, which means cases that aren't torts, but are  
13 like torts. And it seems to me the case you -- you --  
14 you have here is like tort, an invasion of privacy or  
15 something like that.

16 MR. JACOBS: Your Honor, I believe, again,  
17 that this Court has not interpreted the cases that way.  
18 There is a debate as to whether a breach of fiduciary  
19 duty is a tort or something else, and yet this Court in  
20 White Mountain and other cases has -- has not found that  
21 to be a bar.

22 CHIEF JUSTICE ROBERTS: Well, your friend  
23 says that that's a fiduciary -- that's a trust breach,  
24 which has been regarded as different than a tort.

25 MR. JACOBS: That's what the Government

1 says, but it is also a breach of fiduciary duty, and  
2 that is often regarded as a tort, Your Honor. 16 --

3 JUSTICE GINSBURG: May I ask you, Mr.  
4 Jacobs --

5 MR. JACOBS: I'm sorry.

6 JUSTICE GINSBURG: -- whether you think  
7 Congress ever honed in on the issue whether the United  
8 States, given the multitude of financial transactions in  
9 which it engages, ever thought that sovereign immunity  
10 would be waived? I mean, if you're right about this,  
11 the consequences are enormous for the Federal fisc. And  
12 we -- the -- the statute developed in a peculiar way.

13 First, there was the definition of person  
14 when there was no civil liability, and then some years  
15 later the prohibition of having both the credit card  
16 number and the expiration date. In all of it, is there  
17 any hint that Congress envisioned a waiver of sovereign  
18 immunity in the Fair Credit Reporting Act?

19 MR. JACOBS: Your Honor, I would submit yes,  
20 there is no explicit -- to my knowledge, there is no  
21 explicit reference in the Congressional Record to  
22 whether this was going to impact the Government or not.  
23 However, what they talked about was the almost epidemic  
24 proportion of identity theft going on, and in response  
25 to that this bill was passed.

1           Knowing that the Government is one of the  
2   largest issuers of credit card receipts, one would have  
3   to wonder why they would want to exclude the Government  
4   in terms of protecting the public. That would not make  
5   sense. It doesn't make any difference where the  
6   credit --

7           JUSTICE SCALIA: For the same reason that  
8   you have the principle of sovereign immunity. They're  
9   -- they are perfectly willing to subject corporations to  
10  immense liability, but they are not willing to subject  
11  the Federal Government to immense liability. That's  
12  what the doctrine of sovereign immunity is all about,  
13  isn't it?

14          MR. JACOBS: That's exactly correct,  
15  Your Honor. But that's why I said in terms of  
16  protecting the public, you wouldn't want to exclude such  
17  a large -- such a large thing.

18          And when they wanted to protect the  
19  Government, as they did in 1681(b)(b)(4), when they  
20  wanted to exclude them, they explicitly did so --

21          JUSTICE KAGAN: Mr. Jacobs --

22          MR. JACOBS: -- the next year.

23          JUSTICE KAGAN: -- the -- the import of the  
24  Government's argument is that if your interpretation  
25  governed, we would be facing, really, a quite massive

1 change in the law of sovereign immunity as we've known  
2 it until this time.

3 So I will give you an -- Congress decides to  
4 pass a statute, and the statute has a cause of action in  
5 it. And the drafters say to each other, do we have to  
6 say that the Government retains sovereign immunity? And  
7 everybody says, no, the rules are that if we say nothing  
8 at all, the Government does retain sovereign immunity.

9 Now, under your world, the next time  
10 Congress passes such a statute and that question comes  
11 up, you would say, oh, we have to say that the  
12 Government waives -- retains its sovereign immunity,  
13 because if we don't say that, somebody's going to bring  
14 an action under the Tucker Act.

15 So for every statute, both the ones that  
16 have been written under the old rules and the new ones  
17 to come, we have completely flipped the presumption.  
18 Now, Congress is going to have to say when it wants to  
19 retain sovereign immunity, and if it doesn't -- if it  
20 doesn't, the Tucker Act applies, and you get to be in  
21 court.

22 MR. JACOBS: With respect, Justice Kagan, I  
23 don't think that's true at all. They went out of their  
24 way to define person to include the Government. And  
25 that's significant in this respect, Your Honor. We cite



1 the Moore case, Moore v. The Department of Agriculture,  
2 an almost identically worded statute, where it said, a  
3 Government --

4 JUSTICE KAGAN: I don't think that quite  
5 answers the question. That's a -- that's a question  
6 about what FCRA means and whether under any standard,  
7 whether the fairly arguable standard or the express  
8 standard, you should win. And that's a different  
9 question.

10 The question is what standard are we going  
11 to hold you to. Are we going to say, all you need to  
12 show is that it's fairly arguable, or are we going to  
13 say, no, unless there's an express statement that the  
14 Government has waived its sovereign immunity, the  
15 Government retains it?

16 And as to that, you're asking us to flip the  
17 presumption from now on.

18 MR. JACOBS: I don't believe so, Your Honor.  
19 I think they went out of their way to say this applies.  
20 It's not some general statute that says if a credit card  
21 is printed improperly.

22 JUSTICE GINSBURG: When the definition of  
23 persons was put into the statute, there was no civil  
24 liability; isn't that right? So they didn't -- they  
25 could not have been thinking about civil liability.

1           MR. JACOBS: Well, when they amended FCRA in  
2   1996 to add the -- to change the word from credit  
3   reporting agency to person, I would submit that had to  
4   be a conscious step.

5           And proof of that is found, I think, in two  
6   subsequent amendments. One, the next year,  
7   1681(b)(b)(4), saying, but this does not apply to the  
8   Government if there is a national security issue. And  
9   then the Government pointed to 1681(u)(i), that talked  
10  about if the FBI improperly disclosed information, what  
11  liability it would have.

12           Now, in the appendix to the Government's  
13  brief, it stops there. But in the Government's petition  
14  for cert at page 78a, it also has 1681(u)(l) which says  
15  any other provision of this section notwithstanding,  
16  people are limited to this remedy against the  
17  Government. Why would Congress say that if there were  
18  not other liability for Congress -- for the  
19  United States?

20           So, I believe the -- Congress was about as  
21  clear as it could be that it knew this applied to the  
22  United States, and when it wanted to carve something  
23  out, it did so, twice.

24           Now --

25           JUSTICE SCALIA: I -- I really have -- I

1 haven't followed this argument. You say (1) --

2 MR. JACOBS: (1).

3 JUSTICE SCALIA: -- shows that they had  
4 liability by the Government in mind?

5 MR. JACOBS: Yes, Your Honor. I believe  
6 that --

7 JUSTICE SCALIA: I mean, why anybody --  
8 notwithstanding any other provision, the remedies and  
9 sanctions set forth in this section shall be the only  
10 judicial remedies and sanctions for violation of this  
11 section.

12 MR. JACOBS: I believe, Your Honor, that --

13 JUSTICE SCALIA: Why -- why does that bear  
14 upon whether the United States is liable or not?

15 MR. JACOBS: This (u) only applies to  
16 United States, the FBI. 1681(u) is explicitly passed  
17 with regard to the FBI getting information and  
18 improperly disclosing it.

19 JUSTICE SCALIA: I see.

20 MR. JACOBS: And this would say,  
21 notwithstanding any other provisions, and it wouldn't do  
22 that if there weren't other provisions applicable.

23 And that, Your Honor, takes me back to the  
24 Moore case, which we discussed many times in our brief,  
25 a similarly, almost identical statute, the Equal Credit

1 Opportunity Act.

2           The Truth in Lending Act, the equal  
3 opportunity -- the Equal Credit Opportunity Act and FCRA  
4 were all part of the Consumer Credit Protection Act,  
5 different parts of it. And the Equal Credit Opportunity  
6 Act had the same, almost the same definition with one  
7 word different of importance.

8           And then the -- the Fifth Circuit said,  
9 there is no exception in here, once it says that, for  
10 any person -- it doesn't have an exception for the  
11 United States, unlike the Truth in Lending Act which had  
12 a specific provision exempting the United States.

13           This is identical except for one word  
14 different. This says any, the most emphatic word it  
15 could use. The other two statutes say, a Government or  
16 Government entity. This statute says, any Government or  
17 Government entity.

18           And the United States makes no response to  
19 that interpretation that is throughout our judicial  
20 system. And, indeed, it would be difficult to because  
21 throughout the United States now, the -- the United  
22 States no longer even attempts to argue that ECOA does  
23 not provide for waiver of sovereign immunity.

24           JUSTICE SCALIA: Well, if you are right  
25 about that, I guess we could write a very narrow opinion

1 saying the Tucker Act applies where there is a cause of  
2 action under the original statute anyway, in which case  
3 we would not have made much new law, would we?

4 MR. JACOBS: Well, I'm hoping we won't make  
5 much new law, Your Honor --

6 JUSTICE SCALIA: Yes.

7 MR. JACOBS: -- because I believe this is  
8 consistent with this Court's longstanding jurisprudence.

9 And, indeed, the -- the cases where the  
10 Court says, no, we're not going to let you bring this  
11 under the Tucker Act, is where the party is trying to  
12 escape, to get around a limitation in the substantive  
13 act, where they're trying to avoid a statute of  
14 limitations, avoid the requirement to file a -- a claim,  
15 as in Elkhorn Mining, as -- to get around -- get away  
16 from a court as in Hinck, where it says the tax court  
17 will have jurisdiction of this. And then they are  
18 trying to get around --

19 That's not going on here. We're -- the  
20 Plaintiff in this case is not trying to evade any  
21 Congressional intent or statutory provision of FCRA.  
22 And the Government points to nothing -- no violence that  
23 would be done to the FCRA by allowing this.

24 The -- the reason that this statute was  
25 passed was to protect consumers. The Congress was clear

1     that if any Government violates the statute, it has this  
2     liability. I do not know how you could have a clearer  
3     money-mandating statute.

4                     And, Justice Scalia, you asked, well, would  
5     we just win under the -- under the statute? My answer  
6     to that would be unequivocally yes, we should. It's an  
7     unequivocal waiver.

8                     And that's the irony here. I think you have  
9     a -- a more unequivocal waiver in this statute than you  
10    do almost any other where the Court has found that yeah,  
11    that's a fair inference of a money-mandating situation.

12                    JUSTICE BREYER: Well, I mean, the -- a lot  
13    of these provisions are technical, like the one I think  
14    is fairly technical, the one you are talking about, the  
15    Government -- it provides for treble damages -- treble  
16    damages, does it?

17                    MR. JACOBS: Yeah.

18                    JUSTICE BREYER: Minimum damage, punitive  
19    damages, a fairly lengthy statute of limitations  
20    compared to the court of claims.

21                    MR. JACOBS: 2 years.

22                    JUSTICE BREYER: 2 years. And they have 6  
23    in the other?

24                    MR. JACOBS: 2 years or 5 years -- 2 years  
25    from discovery, 5 years --

1 JUSTICE BREYER: My -- my impression was  
2 there are several differences. And normally, these  
3 things you, at least arguably, are not appropriate  
4 against the Government, because the Government when it  
5 knows the law will follow it, we hope. And, therefore,  
6 you don't need brow-beating mechanisms to make sure they  
7 follow it once it's clarified. So, therefore, it -- I  
8 mean, I can imagine arguments.

9 At the same time, there are differences  
10 between the relief scheme in this statute and the normal  
11 one you have in the Court of Claims. And they're  
12 arguing that that means that they didn't want this  
13 Tucker Act and these other things to apply.

14 I just want to know what your reply is to  
15 that. They are different.

16 MR. JACOBS: They -- they are different,  
17 Your Honor, but, with respect, I see nothing about  
18 saying, this is what you must do, and if you don't do,  
19 this is what you have to pay -- I see nothing unusual  
20 about saying that can be in the Court of Claims; that  
21 that's a Tucker Act claim. That doesn't seem -- that's  
22 not some reticulated statute unlike the Civil Service  
23 Review Act or something like that, where you have to do  
24 all these steps, have this hearing first, have that  
25 hearing --

1 JUSTICE SOTOMAYOR: So are you happy with  
2 the circuit's suggestion that the specific does govern  
3 the general insofar as it will adopt whatever FCRA's  
4 limitations are?

5 MR. JACOBS: Yes. And that's --

6 JUSTICE SOTOMAYOR: And into its own  
7 processes?

8 MR. JACOBS: Yes.

9 JUSTICE SOTOMAYOR: Your position is that's  
10 perfectly okay.

11 MR. JACOBS: Yes. And I think that is  
12 consistent with this Court's jurisprudence.

13 CHIEF JUSTICE ROBERTS: Now, it does seem --  
14 I mean, Justice Breyer's point. It does seem a little  
15 ad hoc. In other words, they don't fit quite together,  
16 and your answer is: Well, we'll just take whatever, you  
17 know, whatever we have to, to make it fit. It would go  
18 under the least imposing on the Government.

19 It suggests that Congress did not expect the  
20 Tucker Act to apply if you've got to change the remedial  
21 provisions in FCRA to get it to fit under the Tucker  
22 Act.

23 MR. JACOBS: Well, Your Honor, if I  
24 understand your question correctly, I -- I don't believe  
25 I agree with the premise.



1           This Court has consistently said, as Your  
2 Honor said, that the Tucker Act only provides an outer  
3 limit for filing, but we'll use the shorter time period.  
4 In Ruckelshaus v. Monsanto, the Court said: No, no, no,  
5 you've got -- because Monsanto didn't want there to be a  
6 Tucker Act claim. It wanted to be able to argue: We  
7 have no relief available to us for having to disclose  
8 the components of our insecticides. And they wanted to  
9 argue: There is no relief available to us.

10           And this Court said: No, you've got a --  
11 you've got a Tucker Act claim. You do have relief  
12 available to you. And the Court said: Yeah, you didn't  
13 file a claim. There is a procedure where you could file  
14 a -- a claim saying: This is a trade secret, and the --  
15 you then would have arbitration. And the Court said:  
16 You haven't done that; go ahead and do that and then  
17 let's see what happens. But you've got a Tucker Act  
18 claim.

19           And incidentally, in that regard, in  
20 Ruckelshaus v. Monsanto, the Court discussed extensively  
21 the Restatement of Torts as to whether a trade secret --  
22 a listed trade secret under the Restatement of Torts,  
23 and then went ahead and said: No. You've got a Tucker  
24 Act claim here.

25           JUSTICE BREYER: Right. So is -- are you

1 also saying, FCRA, the underlying statute, clearly  
2 waives sovereign immunity, so we don't have to worry  
3 about whether the standard is a weak standard or a tough  
4 standard, doesn't matter. We win anyway.

5 MR. JACOBS: Absolutely.

6 JUSTICE BREYER: So what you want us to say  
7 is, okay. We will apply the tough standard. There's  
8 still -- there's still -- sovereign immunity is waived  
9 in FCRA. And since sovereign immunity is clearly waived  
10 there, then you can bring this under the Tucker Act, and  
11 the only differences are the remedial schemes are  
12 slightly different, but that doesn't matter.

13 Am I correctly stating what you are now  
14 telling us?

15 MR. JACOBS: I'm telling Your Honor that we  
16 win under such a test. We don't believe such a test is  
17 called for, but if -- if such a test were used, we still  
18 win because you do have such a clear waiver.

19 JUSTICE SOTOMAYOR: One of the purposes of  
20 the Tucker Act was to provide a remedy, where none  
21 existed, to get rid of the private bills. What's wrong  
22 with the Government's basic proposition which is where  
23 you have a remedy you have to pursue that remedy. And I  
24 think that, at bottom, that's their argument.

25 What's wrong with that scheme? Instead of

1 permitting two remedies with potentially conflicting  
2 commands, whether it's on the amount of damages or the  
3 nature of the recovery or the statute of limitations,  
4 why isn't their vision of what the Tucker Act -- the  
5 role the Tucker Act should play one that should be given  
6 voice? One that should be followed?

7 MR. JACOBS: Your Honor, I would submit that  
8 that would be a substantial change in this Court's  
9 jurisprudence. Congress passed the Tucker Act, and this  
10 court, for years now, has said, "If you meet these  
11 requirements, you may sue under the Tucker Act."

12 JUSTICE SCALIA: The Government doesn't  
13 concede that you have a cause of action under FCRA at  
14 all.

15 MR. JACOBS: No.

16 JUSTICE SCALIA: They say -- they say just  
17 the opposite. And so what I find peculiar is that there  
18 should be two causes of action for the same thing. You  
19 can proceed either under FCRA or under the Tucker Act or  
20 both. I mean, that's very strange to me. It seems to  
21 me, one or the other, and it would normally be the  
22 specific governing the general.

23 So if you say there is one under FCRA, why  
24 do we need the Tucker Act?

25 MR. JACOBS: Your Honor, the Tucker Act,

1 made available by Congress, could we proceed only under  
2 FCRA? Yes, we could, but the Tucker Act is available,  
3 the statute 1295 says what it says, and we have appealed  
4 to the Court of Appeals. But there is --

5 JUSTICE SCALIA: Do you have any other case  
6 where -- where you -- somebody's been allowed to proceed  
7 under the Tucker Act where there is clear ability to  
8 proceed under some other statute?

9 MR. JACOBS: Your Honor, I cannot name you a  
10 case off the top of my head. As I said, I believe the  
11 Privacy Act allows you to do either. The -- all --

12 JUSTICE SOTOMAYOR: The FSLA as well.

13 MR. JACOBS: I'm sorry?

14 JUSTICE SOTOMAYOR: The FSLA as well.

15 MR. JACOBS: Yes. The FSLA -- I was going  
16 to say, as Your Honor said earlier. But the cases  
17 where a Tucker Act remedy has been denied, as I've said,  
18 are where a person was trying to evade a limitation of  
19 the substantive act. That's not this case. This case  
20 is four-square within the court's jurisprudence. The  
21 Government argues now for a new -- and it's not clear to  
22 me exactly what test, but it's a limiting one. It  
23 would -- it would cut back the Tucker Act.

24 JUSTICE KAGAN: But Mr. Jacobs, you are  
25 trying to evade a certain kind of limitation. The

1 limitation that you are trying to evade is the rule that  
2 waivers of sovereign immunity have to be express. And  
3 that's the rule you are trying to evade by going under  
4 the Tucker Act.

5 MR. JACOBS: No, Your Honor. We believe,  
6 and we've maintained throughout, that we do have an  
7 express waiver, 1681(a) --

8 JUSTICE KAGAN: But then you wouldn't need  
9 to go under the Tucker Act. The difference between  
10 going under the Tucker Act and going under the statute  
11 is the difference between, you know, what -- what  
12 standard is a court going to hold you to, to decide  
13 whether there has been a waiver of sovereign immunity.

14 MR. JACOBS: The standard, I would submit,  
15 Your Honor, is that the Tucker Act is always available  
16 unless a -- the substantive statute provides a  
17 limitation on that ability; either saying it shall be --  
18 shall be litigated in the Tax Court, it can only be  
19 litigated if it is preceded by a claim, an  
20 administrative claim, some limitation like that. If --  
21 if there's something that says it has to be in another  
22 forum, then you would be evading it. But otherwise, the  
23 Tucker Act remedy is available and it's appropriate and  
24 it's precisely, I would submit, that what do you do --

25 CHIEF JUSTICE ROBERTS: You can finish your

1 sentence.

2 MR. JACOBS: -- what do you do when you say,  
3 eh, we think this is -- you know, is this express  
4 enough? And that's the Tucker Act saying, well, it's  
5 clearly a fair inference.

6 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

7 MR. JACOBS: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Srinivasan, you  
9 have three minutes left.

10 REBUTTAL ARGUMENT OF SRI SRINIVASAN

11 ON BEHALF OF THE RESPONDENT

12 JUSTICE SCALIA: Mr. Srinivasan, I hate to  
13 eat up any of your time, but do you acknowledge that  
14 there are other statutes under which a person can  
15 proceed, either under the statute or under the Tucker  
16 Act?

17 MR. SRINIVASAN: No, I'm not aware of that  
18 situation, and I think that's why you look to this  
19 remedial provision that Congress enacted to determine  
20 the metes and bounds.

21 JUSTICE SCALIA: What about the Privacy Act?

22 MR. SRINIVASAN: The Privacy Act has its own  
23 remedial mechanism within it typically.

24 JUSTICE SCALIA: So -- so you'd say you  
25 either proceed under the Privacy Act and you're covered

1     there, or you don't --

2                   MR. SRINIVASAN:   Or you don't proceed at  
3     all, yeah.

4                   JUSTICE SCALIA:   And what about -- what is  
5     it?   FSLA was the other one?

6                   MR. SRINIVASAN:   Well, FLSA is a bit  
7     complicated, for the reasons I was adverting to earlier.  
8     It's -- this Court has never confronted the question of  
9     how exactly you go forward under the FLSA.   And I think,  
10    because of the ambiguity in the courts to which the FLSA  
11    refers, for the reasons I was discussing with Justice  
12    Sotomayor earlier, I think you could see that statute as  
13    incorporating the Tucker Act itself, but that would be  
14    something that Congress did.

15                  JUSTICE SCALIA:   What about (u)(1), that  
16    your friend raised?

17                  MR. SRINIVASAN:   (u)(i).   I think there's  
18    several answers to (u)(i).   First of all, I'm not sure  
19    which way that cuts because the fact -- it may be  
20    (u)(1), it may be (u)(i), but (u) -- I'm not sure which  
21    way that cuts because, on one hand, the fact that  
22    Congress specifically provided for the United States to  
23    be liable in certain situations I think cuts in favor of  
24    our understanding, not against it.

25                  But there's a more fundamental point about

1 the argument that my friend makes on the other side,  
2 which is that that statute was enacted, I think, before  
3 the civil remedies provisions were expanded to encompass  
4 all persons. So it's hard to conclude that that  
5 notwithstanding any other provision would have referred  
6 to something that came along later.

7 Now, I have two points that I'd like to make  
8 in rebuttal, one of which, there's been some questions  
9 today about which is the specific statute and which is  
10 the general statute.

11 Now, one, I think, clear indication that the  
12 specific statute for present purposes should be FCRA is  
13 to look at what the Plaintiffs allege.

14 The Plaintiffs are bringing a FCRA claim,  
15 and there's no mistake about that, because the  
16 Plaintiffs seek the FCRA advantage of statutory damages  
17 of at least \$100. And so they're grounding their claim  
18 in the FCRA cause of action. And I think, therefore,  
19 you should look at FCRA to determine whether the  
20 Government is liable.

21 And you don't have a situation in which you  
22 can mix and match under both; you should look to FCRA to  
23 determine whether there's been a clear and express  
24 waiver of sovereign immunity.

25 The other point I would like to discuss is



1 something that -- references something Justice Breyer  
2 was adverting to earlier, which is even if there was  
3 some universe in which you could contemplate a  
4 hybridization where you apply the Tucker Act, even  
5 though there's a cause of action already in the statute,  
6 you wouldn't do so in the context of this case because  
7 there are clear indications that Congress wouldn't have  
8 contemplated a resort to the Tucker Act.

9           The Tucker Act doesn't apply to torts. This  
10 claim is a tort claim. We know this because the Court  
11 in *Safeco* a few terms ago -- this is at 551 U.S. 69 --  
12 specifically referred to the Restatement of Torts as a  
13 means of -- interpreting the term willfulness, which is  
14 the linchpin for the claim here.

15           I see my time has expired.

16           CHIEF JUSTICE ROBERTS: Thank you, Counsel.

17           The case is submitted.

18           (Whereupon, at 12:03 p.m., the case in the  
19 above-entitled matter was submitted.)

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<b>ability</b> 6:10 52:7 53:17 <b>able</b> 3:24 6:1 31:25 49:6 <b>above-entitled</b> 1:11 57:19 <b>absolutely</b> 11:10 50:5 <b>abstract</b> 27:23 29:21 <b>accomplishing</b> 24:11 <b>acknowledge</b> 54:13 <b>act</b> 3:15,20 4:2,9 4:11,13,23,23 5:5,15,16,24 5:25 6:18 7:5 7:15,18,24 9:3 9:15,18,23 10:1,6,7,14,17 10:18,21 11:1 11:7,9,10,14 11:15,17,25,25 12:3,5,6,10,17 12:19,20,23,23 13:2,14,14 15:18,19 16:5 16:8 17:5,19 18:18 19:1,2 19:11,21 20:2 20:5,8,25 21:1 21:13 22:5,19 22:24 23:7,24 24:4,7,13,20 25:3,16 26:5,6 26:8,12,17,20 26:21,22 27:3 27:4,5,8 28:25 31:1,19,21 32:6,12,19 33:2 34:21 37:7 38:18 40:14,20 44:1 44:2,3,4,6,11 45:1,11,13	47:13,21,23 48:20,22 49:2 49:6,11,17,24 50:10,20 51:4 51:5,9,11,19 51:24,25 52:2 52:7,11,17,19 52:23 53:4,9 53:10,15,23 54:4,16,21,22 54:25 55:13 57:4,8,9 <b>action</b> 3:20 32:5 40:4,14 45:2 51:13,18 56:18 57:5 <b>actions</b> 9:7 <b>acts</b> 14:8 21:16 26:18 27:7,9 <b>Act's</b> 21:15 26:7 27:7 <b>ad</b> 48:15 <b>add</b> 42:2 <b>adding</b> 5:5,25 <b>address</b> 20:8,23 <b>addressing</b> 4:13 4:23 29:21 <b>Administration</b> 17:1 20:15 <b>administrative</b> 53:20 <b>adopt</b> 48:3 <b>advantage</b> 56:16 <b>advertising</b> 55:7 57:2 <b>affirms</b> 17:9 <b>agency</b> 14:25 31:17 42:3 <b>age-old</b> 21:24 <b>ago</b> 57:11 <b>agree</b> 33:4 48:25 <b>agreements</b> 14:10 <b>Agriculture</b> 41:1 <b>ahead</b> 49:16,23 <b>alia</b> 31:16	<b>allege</b> 56:13 <b>alleged</b> 13:17 <b>allow</b> 14:12 34:20 <b>allowed</b> 52:6 <b>allowing</b> 45:23 <b>allows</b> 5:2 8:15 12:12,16 34:22 52:11 <b>ambiguity</b> 55:10 <b>amended</b> 42:1 <b>amendments</b> 42:6 <b>amount</b> 51:2 <b>and/or</b> 35:6,10 <b>anomaly</b> 8:7 <b>answer</b> 13:7 15:8,10,14 37:10 46:5 48:16 <b>answered</b> 32:3 <b>answers</b> 41:5 55:18 <b>anybody</b> 43:7 <b>anyway</b> 45:2 50:4 <b>Apache</b> 4:9 23:10 28:8,24 <b>apparent</b> 5:22 <b>appeal</b> 32:11,20 32:21 33:1 <b>appealed</b> 52:3 <b>appealing</b> 10:22 10:25 <b>Appeals</b> 52:4 <b>APPEARAN...</b> 1:14 <b>appendix</b> 9:6 14:2 42:12 <b>applicable</b> 4:2 25:14,21 27:21 28:2,6 30:3,20 31:1 43:22 <b>applied</b> 3:16 5:11 6:19 16:21 25:11 26:19 42:21	<b>applies</b> 10:20 12:20,23 15:19 21:2 26:12 30:4 40:20 41:19 43:15 45:1 <b>apply</b> 4:11 6:20 7:22,23 9:24 10:18 12:5 20:12 21:16 25:16 26:15,20 26:21 27:3 42:7 47:13 48:20 50:7 57:4,9 <b>applying</b> 12:13 <b>approach</b> 5:21 7:6 21:19 <b>appropriate</b> 9:8 47:3 53:23 <b>arbitration</b> 49:15 <b>arguable</b> 41:7 41:12 <b>arguably</b> 47:3 <b>argue</b> 44:22 49:6,9 <b>argues</b> 52:21 <b>arguing</b> 36:5 47:12 <b>argument</b> 1:12 2:2,5,8 3:4,6 6:14,16 9:20 9:25 10:5,5,16 16:1,3,16 18:10 19:5 20:13,18,21 25:16,24 26:4 26:14 30:8 31:8 33:20 37:9 39:24 43:1 50:24 54:10 56:1 <b>arguments</b> 47:8 <b>arises</b> 29:24 <b>asked</b> 46:4 <b>asking</b> 9:21 11:6	11:18 36:4,15 41:16 <b>assault</b> 36:6,21 <b>assaults</b> 36:2 <b>asserted</b> 19:15 <b>assessment</b> 13:8 <b>assume</b> 10:22 <b>attempts</b> 44:22 <b>atypical</b> 15:15 15:17 <b>authorized</b> 8:4 <b>available</b> 49:7,9 49:12 52:1,2 53:15,23 <b>avoid</b> 11:22 12:16 45:13,14 <b>awards</b> 29:9,16 <b>aware</b> 54:17 <b>awful</b> 35:1 <b>a.m</b> 1:13 3:2
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