

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JERMAINE SIMMONS, ET AL., :

4 Petitioners : No. 15-109

5 v. :

6 WALTER J. HIMMELREICH, :

7 Respondents. :

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9 Washington, D.C.

10 Tuesday, March 22, 2016

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:21 a.m.

15 APPEARANCES:

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18 behalf of Petitioners.

19 CHRISTIAN VERGONIS, ESQ., Washington, D.C.; on behalf of
20 Respondent.

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

2 (10:21 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 15-109, Simmons v.
5 Himmelreich.

6 Mr. Martinez.

7 ORAL ARGUMENT OF ROMAN MARTINEZ

8 ON BEHALF OF THE PETITIONERS

9 MR. MARTINEZ: Mr. Chief Justice, and may it
10 please the Court:

11 When an FTCA action is dismissed under
12 Section 2680, the resulting judgment of dismissal
13 triggers the judgment bar for two basic reasons. First,
14 the bar applies to any FTCA judgment, and a 2680
15 dismissal counts as a judgment under any sensible
16 definition of that term.

17 Second, 2680 dismissals implicate the bar's
18 core purpose, which is to protect the government, its
19 functions, and its employees from the burdens and
20 disruptions associated with multiple lawsuits over the
21 same subject matter --

22 JUSTICE SOTOMAYOR: Can I ask you a
23 question? And that is -- meaning -- the only claims
24 that are exempted under the Act are Bivens claims, which
25 are constitutional violations. Why is it that an

1 employee who has committed a constitutional violation is
2 now immune from suit merely because the plaintiff's
3 lawyer made a mistake and didn't file a Bivens claim
4 first?

5 MR. MARTINEZ: Your Honor, the core purpose
6 of the judgment bar, as this Court recognized in *Will v.*
7 *Hallock*, is to protect the government from having to
8 litigate multiple times over the same claim. And so --

9 JUSTICE SOTOMAYOR: I don't blame you for
10 that, but you didn't litigate multiple times here. The
11 exemption applied immediately, and the case was over.

12 MR. MARTINEZ: Oh, with respect, Your Honor,
13 we did litigate multiple times. The FTCA case was
14 brought; it was pending for over three years.
15 The plaintiff --

16 JUSTICE SOTOMAYOR: The Bivens claim was
17 brought shortly thereafter. They were both
18 simultaneously pending before the court.

19 MR. MARTINEZ: Right.

20 JUSTICE SOTOMAYOR: So if the court had
21 elected to address the Bivens claim first, the bar would
22 have been avoided.

23 MR. MARTINEZ: Well, I think the two cases
24 were brought in two different actions. One was brought
25 several months after the other. And the FTCA action,

1 which is the one that obviously Congress was considering
2 when it enacted the judgment bar, was one that took over
3 three years to conclude, counting the three different
4 appeals that the plaintiff took --

5 JUSTICE SOTOMAYOR: That still doesn't
6 answer my point, which is, if the district court had
7 chosen to answer the Bivens claim first, there would be
8 no bar in place.

9 MR. MARTINEZ: Your Honor, I think that
10 in -- in that case, it's true that the -- if the Bivens
11 claim, in theory, that the court could have addressed
12 that. But in most Bivens cases, and in this Bivens
13 case, although it hasn't yet been litigated, the -- the
14 employee is going to raise defenses like qualified
15 immunity and other defenses on the merits. They're
16 going to take a long time for that claim to get --

17 JUSTICE SOTOMAYOR: That just means that
18 we're -- we're giving district courts the option to
19 foreclose or close the courtroom door, because the work
20 is too hard to get to?

21 MR. MARTINEZ: No, not at all, Your Honor.
22 The -- the -- the courtroom door is never closed to the
23 Bivens claim, and the plaintiff could have brought his
24 Bivens claim at the outset. He could have litigated the
25 Bivens claim without bringing the FTCA claim.

1 I think what's important to realize here is
2 that what Congress did when it enacted the FTCA was
3 essentially create a new remedy and offer a bargain
4 to -- to tort victims, and it said, look, we're going to
5 create a brand new remedy directly against the United
6 States for money damages. It's a great deal for you,
7 but if you accept the deal, if you accept the bargain,
8 and you choose to bring an FTCA case, and then you
9 choose to litigate that case all the way to judgment,
10 you can't turn around and seek relief under a totally
11 separate claim involving the same facts. That's a very
12 sensible and fair bargain.

13 JUSTICE GINSBURG: And a claim that could
14 not be brought against the government.

15 I mean, the Bivens claim was specifically
16 saved out of the Westfall Act, so that the employee
17 would have a Bivens claim. The Bivens claim is
18 exclusively against the employee. There's no Bivens
19 liability on the part of the government. So if you
20 follow the ordinary rules of claim preclusion, there
21 would be no preclusion here, because there was no
22 possibility of bringing the Bivens claim against the
23 government, and claim preclusion would apply only to
24 claims that could have been brought. So you couldn't
25 have brought the Bivens claim against the government.

1 It would have to be a separate claim.

2 MR. MARTINEZ: Your Honor, I think that the
3 judgment bar doesn't merely embrace a rule of res
4 judicata, it embraces a different rule that turns on the
5 application of a judgment. Now, with respect to what
6 Congress did in the Westfall Act, there's no question
7 that Congress wanted to preserve the option for the
8 plaintiff to bring a Bivens claim, and there's nothing
9 in our theory of this case that precludes -- that would
10 have precluded the plaintiff from bringing that Bivens
11 claim at the outset.

12 But it's very interesting, and I think it's
13 very telling what Congress did in the Westfall Act,
14 as -- as you adverted to. In Section 2679(b)(2) of the
15 Westfall Act, Congress specifically said that the
16 exclusivity provision that it had enacted in 2679(b)(1)
17 would not apply to Bivens claims. And so it expressly
18 carved out an exception for such claims.

19 But when it did that, it did not carve out a
20 similar exception for Bivens claims to the judgment bar,
21 which is the separate provision in section 2676 that's
22 at issue in this case. And so Congress created an
23 exception to essentially say to plaintiffs, you can
24 still bring your Bivens claim at the outset, but it
25 didn't disrupt the original bargain at the heart of the

1 FTCA, which is that once you bring an FTCA claim, once
2 you litigate that claim all the way to judgment, you
3 can't try to take a second bite of the apple by having a
4 separate claim pending at the same time.

5 JUSTICE ALITO: You would have a nice, clean
6 textual argument if you were willing to argue that
7 "judgment" means "judgment"; it means any judgment. But
8 in your reply brief, you say that perhaps a technical or
9 a procedural judgment is not a judgment under the
10 judgment bar provision. So what does that mean? What
11 is a technical or procedural judgment?

12 MR. MARTINEZ: So I think, first of all, I
13 think our primary position is that judgment does mean
14 judgment in the sense that it's defined. I think we
15 give nine different dictionary definitions at pages 19
16 to 20 of our brief, and I think it -- it's -- we think
17 the -- the most sensible reading of judgment is the way
18 it's ordinarily used in legal parlance.

19 Now, that said, we do acknowledge in our
20 reply brief that a couple of those definitions,
21 including the ones that we -- we reproduced, we weren't
22 trying to cherry pick definitions. We just
23 reproduced -- I think there were six of them from
24 Black's Law Dictionary from 1933 that we reproduced.
25 And I think three of those definitions seem to say that

1 a judgment has to resolve issues of the parties' rights
2 or issues of liabilities. So it's possible -- again, we
3 don't think this is the best reading, but it's possible,
4 if you only applied one of those three definitions, that
5 maybe certain kinds of dismissals that are based on
6 curable procedural defects that really don't get to the
7 liability issue in the case at all, it's possible
8 that -- that those might not count as judgments. But we
9 don't think this case presents that.

10 JUSTICE ALITO: Why wouldn't a dismissal for
11 lack of jurisdiction be a procedural judgment?

12 MR. MARTINEZ: I think in -- in many cases a
13 dismissal for lack of jurisdiction could well be a
14 procedural judgment, but not in this case, because 2680
15 dismissals are special and unique insofar as they are
16 jurisdictional, as both parties agree. But they're also
17 substantive, as this Court has said many, many times
18 over and over again, in cases like Indian Towing and
19 cases like Levin, most recently, just a few terms ago.

20 So when -- when the Court says -- looks at
21 an FTCA case, and the Court says there is no -- there is
22 no liability here for the United States government and
23 gets rid of the case, even if it puts the jurisdictional
24 label on the dismissal, if it adjudicates the case under
25 2680, it's making a substantive determination that

1 there's no liability. And I actually don't think
2 that -- that my -- my friend on the other side would
3 disagree with that.

4 I think in his own brief at pages 11 and 12,
5 he makes clear that a 2680 dismissal means that there is
6 no liability for the --

7 JUSTICE GINSBURG: No liability on the part
8 of the Federal government under the FTCA, but it's --
9 it's no judgment at all with respect to the Bivens claim
10 which depends on the employee's conduct. There's been
11 no adjudication at all of the employee's conduct in the
12 first action.

13 MR. MARTINEZ: Right. The first action
14 often will not even often involve a Bivens claim, but I
15 think the question -- the reason we're discussing this
16 particular point is because we're trying to figure out
17 what the meaning of the word "judgment" is in Section 26
18 of the FTCA. So we're trying to figure out whether the
19 adjudication of a particular FTCA case would qualify as
20 a judgment, and I think there's no question that when an
21 FTCA case is adjudicated and is conclusively resolved in
22 favor of the government on the basis of one of the 2680
23 exceptions, it's true that that's jurisdictional, but
24 it's also a substantive adjudication of the claim.

25 JUSTICE ALITO: But what --

1 JUSTICE KAGAN: Mr. Martinez --

2 JUSTICE ALITO: Go ahead.

3 JUSTICE KAGAN: If I could ask you about
4 the -- what I take to be the Respondent's primary
5 argument in the case now, which is the meaning of this
6 phrase "the provisions of this chapter in Section
7 1346(b) shall not apply" --

8 MR. MARTINEZ: Yes.

9 JUSTICE KAGAN: -- and of course, that would
10 include the judgment bar. So if you take that provision
11 for all it's worth, it says that the judgment bar shall
12 not apply. So what is your response to that?

13 MR. MARTINEZ: Well, I think we have two --
14 two responses. Our main response -- and this is the one
15 that we developed the most fully in our reply brief --
16 is that that language does not mean what he say it --
17 what he says it means. We think that that language
18 means what this Court has essentially said in a number
19 of cases, most clearly in the Dolan case involving the
20 Postal Service about ten years ago, and what -- what the
21 Court said there was that the 2680 exceptions, that
22 whole provision, set forth exceptions to the
23 government's -- to the United States waiver of sovereign
24 immunity. And it identified that waiver of sovereign
25 immunity as being effected in two different provisions

1 of the FTCA. That's 1346(b), the jurisdictional
2 provision, and 2674, the liability provision.

3 So we interpret that introductory language,
4 the way this Court has interpreted it in cases like
5 Dolan, and said the same thing --

6 JUSTICE KAGAN: That really does make the --
7 the language something it's not. Instead of the
8 provisions of this chapter in 1346(b), that's what the
9 provision says, you're essentially reading it to say
10 Section 2674 of this chapter and Section 1346(b). So
11 that's a real shift in what the language actually says.

12 MR. MARTINEZ: Well, I think I would say two
13 things to that, Your Honor. First of all, we think
14 that's consistent with the way that the Court has
15 interpreted 2680 in the prior cases like Dolan and Levin
16 that I just mentioned. But more fundamentally, I think
17 the Court already considered and rejected this exact
18 argument about the introductory language, the "shall not
19 apply" language, and it rejected that argument in the
20 Smith case, United States v. Smith. Now, that case --

21 JUSTICE SOTOMAYOR: Could you point out
22 where, in that case, we explicitly addressed that
23 language and rejected it?

24 MR. MARTINEZ: You didn't explicitly discuss
25 that language, but the holding of the case was that one

1 of the provisions of this Chapter 2679(b) did apply to a
2 2680 claim. And so that's -- that's obviously
3 inconsistent with the idea -- the argument that
4 Respondent makes, which is that none of the other
5 provisions of this chapter --

6 JUSTICE SOTOMAYOR: Let me just --

7 MR. MARTINEZ: -- apply.

8 JUSTICE KAGAN: That's a --

9 MR. MARTINEZ: And if I could -- if I could
10 just -- sorry, Justice Kagan.

11 JUSTICE KAGAN: No, no, no.

12 MR. MARTINEZ: I just wanted to emphasize.

13 JUSTICE KAGAN: We're all being so polite
14 today.

15 MR. MARTINEZ: In response to Justice
16 Sotomayor's point, Justice Sotomayor suggested that
17 maybe the Court didn't address it explicitly, and that's
18 true, but I want to emphasize that the parties did raise
19 this argument, and we briefed this argument at some
20 length in our merits brief, so --

21 JUSTICE KAGAN: 2679 is different, though,
22 right? Because 2679, the text of it, says that the
23 exceptions shall be applicable to FTCA actions. So
24 although the Court didn't directly confront this issue,
25 what it might have said, if it had confronted the issue,

1 was something like, well, 2679, which comes along later,
2 and says all the exceptions are applicable to FTCA
3 actions, essentially says -- creates an exception to the
4 general rule of inapplicability.

5 MR. MARTINEZ: I think -- I -- I think that
6 that would not be the best reading of Smith, because I
7 think that would suggest that the Court saw some sort of
8 conflict between the umbrella language, the introductory
9 clause, and Section 2679(b)(4), which is what you're
10 talking about.

11 I actually think 2679(b)(4) helps us,
12 because what it shows is that Congress shared our
13 understanding of what the "shall not apply" language
14 means. Congress enacted Section 2679(b)(4), which is
15 the one that says the exceptions do apply to Section
16 2679(b) cases.

17 CHIEF JUSTICE ROBERTS: You -- you
18 mentioned -- I'm sorry.

19 MR. MARTINEZ: Sorry. No, please.

20 CHIEF JUSTICE ROBERTS: You mentioned a
21 moment ago that you extensively briefed this question.
22 Did you mean in Smith?

23 MR. MARTINEZ: We briefed it in Smith, Your
24 Honor. And so --

25 CHIEF JUSTICE ROBERTS: So you briefed it

1 extensively in Smith, and the Court said nothing about
2 it.

3 MR. MARTINEZ: No, the -- the Court -- the
4 Court's holding was --

5 CHIEF JUSTICE ROBERTS: Oh, no. I know the
6 Court's holding. But in terms of the analysis of it,
7 the -- the Court did nothing along those lines.

8 MR. MARTINEZ: Right. Just to step back and
9 let me set the stage.

10 So in -- in Smith, the plaintiff in that
11 case, had made the "shall not apply" language argument
12 that Respondent makes here. It made it in its brief in
13 opposition to certiorari. It was made at page 21.

14 The government then devoted a significant
15 chunk of its brief at pages 19 to 24 to refute that
16 argument, and I think probably because the argument --
17 the government made a fairly compelling case, the
18 plaintiff then asserted that argument only in one page
19 of his response brief at page 44, and then he raised it
20 at oral argument on page 35. And if Respondent's theory
21 were correct, that would have meant that Smith would
22 have had had to come out the other way.

23 JUSTICE BREYER: Why? I thought -- I don't
24 understand that. I thought the question in Smith, it
25 was a suit against something happened abroad; isn't that

1 right?

2 MR. MARTINEZ: Yes.

3 JUSTICE BREYER: All right. And -- and they
4 said that the employee -- did they hold -- end up
5 holding that the employee could not bring the suit?

6 MR. MARTINEZ: That's right. And it said
7 that -- that -- so the suit happened abroad.

8 JUSTICE BREYER: The employee could not
9 bring the suit. And one of the reasons is because the
10 Bivens action, which that was, is excepted from the
11 Westfall Act, or is excepted -- there's an exception
12 from the -- there's a preface of some kind.

13 MR. MARTINEZ: As I recall, Your Honor,
14 the -- the --

15 JUSTICE BREYER: Why would it have had to
16 come out the other way? If the Act didn't apply, if the
17 whole thing didn't apply, if the Chapter didn't apply,
18 if the FTCA didn't apply, including the exceptions from
19 the FTCA, then how could the employee have -- why would
20 it have come out the other way?

21 MR. MARTINEZ: I -- I don't recall exactly
22 whether it was a Bivens claim. I don't believe it was a
23 Bivens claim. I think essentially what happened was the
24 case was a case under 2680, because it -- it involved a
25 tort that happened overseas. And the question in the

1 case was whether the substitution provisions -- I think
2 it was a State tort or some other cause of action. The
3 question was whether 2679(b), (c), and (d) substitutions
4 provisions would apply to that claim.

5 JUSTICE BREYER: What I'll do is I'll read
6 that five times. I mean, this is a very complicated --
7 it's like Abbott and Costello and so forth --

8 (Laughter.)

9 JUSTICE BREYER: -- but by the time you get
10 through these statutes -- okay. I read it. I'll read
11 it several times. I will absolutely take it in.

12 Suppose I come to the conclusion that Smith,
13 like so many of our cases, deals with a certain number
14 of issues, and maybe there were alternative grounds and
15 we didn't get to them, and I conclude that Smith, in
16 fact, is not a bar to the argument that the other side
17 is making. On that assumption --

18 MR. MARTINEZ: Yes.

19 MR. BREYER: -- is the case over, and they
20 win?

21 MR. MARTINEZ: No.

22 JUSTICE BREYER: Because?

23 MR. MARTINEZ: No. And -- and just -- I --
24 just to tie off the point, I -- I think that it's --
25 this was not an issue of whether there were maybe

1 alternative grounds. This was the -- the square issue
2 in the case. The case could not have come out --

3 JUSTICE BREYER: I understand you think
4 Smith is the end of it, and all I am saying is one of
5 the things I'm paid to do it is read those cases, and
6 then I have to reach a conclusion of whether Smith is
7 the end of it. If it's the end of it, you win.

8 MR. MARTINEZ: Right.

9 JUSTICE BREYER: Now, if it's not the end of
10 it, do you lose?

11 MR. MARTINEZ: No. We don't lose for a
12 number of reasons. First of all, the arguments that we
13 made in Smith -- so even if Smith were not on the table,
14 that's the hypothesis. I think the arguments about
15 2679(b)(1) that were at issue in Smith, I think the
16 government's briefs in Smith was absolutely correct, and
17 2679(b)(1) clearly applies to cases involving claims
18 that fall into the 2680 exceptions. We think that's
19 true as a matter of the text of the FTCA. But even
20 leaving 2679(b) aside --

21 JUSTICE BREYER: This is the language that's
22 sort of hanging me up. "The provisions of this chapter
23 shall not apply to cases that are based on the exercise
24 of performance of the failure to exercise and perform a
25 discretionary function." "Shall not apply to." Okay.

1 Looks pretty good for you.

2 But over here it says, "The judgment bar
3 shall constitute a complete bar." That's very good for
4 you, but just said it didn't apply. It says this --
5 this chapter does not apply.

6 MR. MARTINEZ: I think it says the chapter
7 doesn't apply --

8 JUSTICE BREYER: That's in the chapter.

9 MR. MARTINEZ: A couple of responses, Your
10 Honor. First of all, just as a textual matter, we think
11 that the -- what -- what 2680, what that language says
12 is the provisions of the chapter don't apply to
13 categories of potential claims. So the word is they
14 don't apply to claims.

15 The judgment bar doesn't operate on the
16 basis of claims; it operates on the basis of judgments.
17 It talks about an FTCA judgment.

18 A judgment and a claim are obviously
19 different. A claim is an assertion of a legal right
20 before it's been adjudicated or while it's being
21 adjudicated --

22 JUSTICE KAGAN: That's slicing the bologna
23 pretty thin.

24 (Laughter.)

25 JUSTICE KAGAN: I mean, you know, they're

1 trying to set up language that applies to a whole bunch
2 of different provisions and saying, you know, all of
3 these provisions don't apply in the context of lawsuits,
4 basically.

5 MR. MARTINEZ: I think that -- I think that
6 if -- even if you think that that's slicing the bologna
7 too thin, I don't think you need to resolve the case on
8 the basis of that argument because I think there are two
9 additional very strong reasons to reject their reading
10 of the introductory clause in addition to Smith, which
11 we've already talked about.

12 The -- the next reason is that it's -- that
13 that reading of Smith is inconsistent with numerous
14 other provisions of the original FTCA.

15 Justice Kagan, you just said that, you know,
16 the plain text seems to say that they wanted to exempt
17 2680 claims from all of the provisions of the FTCA, and
18 arguably, that's what the literal language seems to say.
19 But if you look at the original FTCA, that -- that
20 cannot possibly be what -- what that language means.
21 And so let me point you just to four different
22 provisions of the original FTCA that don't seem to make
23 sense under that reading.

24 The first of those provisions is Section 402
25 of the original FTCA, and we've reproduced that at

1 page 10a of the appendix to our brief. Section 402 is
2 the definitional provision which defines certain key
3 terms for use throughout in the -- throughout the FTCA,
4 and it defines several terms that are used in multiple
5 places within 2680.

6 So if Respondent's theory were correct that
7 the other provisions of -- every other provision of the
8 FTCA doesn't apply to 2680 claims, those definitions
9 wouldn't apply to 2680 claims --

10 JUSTICE KAGAN: Now that's where the
11 Respondents use an argument very much like the one you
12 just used. They say definitions don't apply to claims;
13 isn't that right?

14 MR. MARTINEZ: Well, I -- I think if it's
15 slicing the bologna thin for us, it's slicing the
16 bologna thin for them. And --

17 JUSTICE KAGAN: It's a wash.

18 MR. MARTINEZ: The good news for us is that
19 we have three other provisions that I think also don't
20 make any sense based on their reading. And so if you
21 look at Section 411 of the original FTCA, and that's at
22 page 12a of our brief, Section 411 is the one that
23 applies the Federal Rules of Civil Procedure.

24 Now obviously, the Federal Rules of Civil
25 Procedure are supposed to be used to adjudicate claims

1 that fall within 2680. But in their reading of the
2 statute, the Federal Rules of Civil Procedure would
3 appear not to apply.

4 If you look to the very next page and the
5 very next provision --

6 JUSTICE ALITO: Wouldn't they apply anyway?
7 Do you need a provision?

8 MR. MARTINEZ: Congress --

9 JUSTICE ALITO: Specifically saying that
10 they would apply?

11 MR. MARTINEZ: I think you probably didn't,
12 but Congress seemed to think that you did. And in all
13 the other statutes, like the Tucker Act and like the
14 Suits and Admiralty Act where the -- where Congress is
15 waiving the sovereign immunity of the United States, it
16 thought it needed to set forth a specific provision in
17 the statute waiving sovereign immunity applying the
18 civil rules.

19 And in fact, the Fifth Circuit in the case,
20 just five -- five or six years before the FTCA was
21 passed, had said that the rules would not apply to a
22 Tucker Act claim. So I think Congress was -- clearly
23 had this problem in mind and was trying to address that.

24 JUSTICE BREYER: Why is that bad? So -- I
25 mean, look, as I read it simply, if I can, you look at

1 the top of 2680, "The provisions of this chapter shall
2 not apply to." And then we have a long list. One of
3 them is an action rising a claim based on a foreign
4 country.

5 So I bring a lawsuit. I was hurt in Mexico.
6 This says the FTCA doesn't apply. And so you say, you
7 know, if it doesn't apply, that means the definitions
8 don't apply. So I say fine. It doesn't apply.

9 MR. MARTINEZ: But if you would --

10 JUSTICE BREYER: And if I say -- you say the
11 Rules of Civil Procedure don't apply. Fine. Nothing
12 applies.

13 MR. MARTINEZ: Right.

14 JUSTICE BREYER: You don't have an action.

15 MR. MARTINEZ: But if you file the action
16 anyway, and then the Court is adjudicating the action,
17 and at issue in the action is whether, for example,
18 the -- the action involves a Federal agency, which is a
19 defined term, or an employee of the government, which is
20 a defined term, then you would have to -- ordinarily you
21 would -- you would think that the definitional
22 provisions would shed light on that question.

23 And so if you are correct, though, that --
24 that the definitional provision doesn't apply, then you
25 wouldn't know where to look for the definitions. And if

1 you were to lose that case, and -- and if the government
2 were to win and you wanted to take an appeal, your right
3 to appeal is also one of the provisions of this chapter,
4 and that's Section 412(a) of the original FTCA, and
5 that's reproduced at page 13a of our brief.

6 And so there's a -- the FTCA created a
7 special appellate review provision that essentially gave
8 parties an option to take an appeal either to the -- the
9 circuit courts or to the court of claims. So it's a
10 special FTCA-specific provision.

11 But under Respondent's theory, that appeal
12 provision wouldn't apply because it's one of the other
13 provisions of this -- of this chapter.

14 And then the final provision I want to point
15 to --

16 JUSTICE KAGAN: But presumably just then the
17 normal appeals provisions would apply. You would still
18 be able to appeal a case; you just wouldn't have this
19 special court of claims option.

20 MR. MARTINEZ: Right. But -- but that's
21 what Respondent says. And he says that -- that this, of
22 course, makes perfect sense because Congress didn't want
23 the court of claims to be adjudicating the -- the
24 applicability of the 2680 exceptions.

25 But that argument doesn't make sense for two

1 reasons. First of all, if the government were to lose
2 with respect to 2680, the case would go forward and be
3 resolved on the merits, and maybe government loses that
4 too. It could then take an appeal to the court of
5 claims, at which point the court of claims would be
6 confronted if the government appealed the 2680
7 determination with exactly the kind of 2680 issue that
8 Respondent says the court of claims wasn't supposed to
9 be considering.

10 Moreover, when -- when Congress recodified
11 the FTCA's appellate review provisions in 1948, just two
12 years later, it sent the provision allowing appeals
13 going to the court of claims to 28 U.S.C. 1504, which is
14 a different provision. It's -- it's not a provision
15 within Chapter 171. But there, when it said the -- what
16 the court of claims' jurisdiction was, it said that the
17 court had jurisdiction over any action brought under the
18 FTCA; in other words, actions that were -- that -- that
19 potentially implicated 2680.

20 Now, we agree with Respondents that the
21 recodification didn't change the meaning of the original
22 FTCA, but what that means is that Congress -- Congress
23 contemplated both before and after the recodification,
24 that all of these issues would be able to go to the
25 court of claims if the parties agreed.

1 JUSTICE BREYER: Can you say the other two
2 before you -- I'm sorry.

3 MR. MARTINEZ: Yes. I --

4 JUSTICE BREYER: Because I broke into what
5 you were saying before.

6 MR. MARTINEZ: So -- so just to -- just to
7 recap: The definitional provision, Section 402, the
8 Rules of Civil Procedure provision, Section 411, the
9 appellate review provision, Section 412(a), and then the
10 final one -- and this is the one that is both true -- a
11 problem as of the original FTCA, and it creates
12 massively disruptive consequences with respect to, in
13 practical terms today, that Section 423 of the original
14 FTCA, and it's the provision that's now codified at
15 Section 2679(a) of the current FTCA.

16 So let me say a word about this provision.

17 CHIEF JUSTICE ROBERTS: That's the one on
18 16a of your --

19 MR. MARTINEZ: That's -- that's the one on
20 16a. If you want to look at the original version, it
21 hasn't really changed. You can also look at the -- at
22 the current version. And I apologize for the confusion,
23 you know. There are a lot of statutory provisions in
24 this case. The current version of 2679(a) is at page
25 3a.

1 Now, this is --

2 JUSTICE KAGAN: Before -- if I could just
3 interrupt very quickly.

4 MR. MARTINEZ: Yes.

5 JUSTICE KAGAN: Of the other three, which
6 ones are still current today?

7 MR. MARTINEZ: So the definitional provision
8 is still there. The Federal Rule of Civil Procedure
9 provision is not there. The appellate review provision,
10 interestingly, has been -- or has been sent to a
11 different provision -- has been sent outside -- outside
12 of Chapter 171.

13 The one that matters the most is -- is
14 Section 2679(a), and that's the provision that says that
15 the FTCA is the exclusive remedy and precludes State
16 tort suits against agencies that would otherwise have
17 been suable understand there sue-and-be-sued authority.
18 And the idea behind that provision is to put,
19 essentially, all Federal agencies on the same footing,
20 whether or not they have independent authority to sue
21 and be sued when it comes to tort claims.

22 If -- if -- under Respondent's theory,
23 Section 2679(a)'s protections did not apply to 2680
24 claims. And what that means is that agencies that have
25 sue-and-be-sued authority are now subject to such

1 claims.

2 Now, that -- that would, in very practical
3 terms, would massively expand the United States
4 government direct liability for -- for -- in tort. And
5 I think the biggest problem, and the most concrete
6 example I can give you is with respect to the Postal
7 Service.

8 Now, we know from Section 2680(b) of the
9 FTCA that Congress wanted to eliminate the possibility
10 that the government would be liable for the loss of mail
11 or for the negligent transmission of -- of mail. But
12 the Postal Service has independent sue-and-be-sued
13 authority. So if 2679(a), as Respondent says, doesn't
14 apply, then what that means, essentially, is that the
15 Postal Service can now be sued under his theory for
16 negligently transmitting the mail.

17 JUSTICE SOTOMAYOR: I'm sorry. How does any
18 of this save you from an individual suit? Meaning under
19 any reading you give this provision, an individual who
20 chooses not to go under 1346 and simply sue the
21 individuals involved could do that --

22 MR. MARTINEZ: Right.

23 JUSTICE SOTOMAYOR: -- either under a Bivens
24 claim or under the Administrative Act, et cetera.

25 MR. MARTINEZ: Yeah.

1 JUSTICE SOTOMAYOR: What you're saying is,
2 you have the opportunity, as the United States, to step
3 in if you choose. Is that it?

4 MR. MARTINEZ: If -- if -- if a Bivens claim
5 is brought, then the judgment bar would have no
6 operation. But that is consistent with the purpose of
7 the judgment bar, which -- which is to ensure that --
8 that a suit is only brought once. And I think --

9 JUSTICE SOTOMAYOR: Putting that aside, how
10 does your reading save you from all of this definitional
11 discussion we've had for the last five minutes? It's
12 still going to happen, or can happen. Why does the
13 reading being proposed by the other side create a
14 difficulty?

15 MR. MARTINEZ: Well, I think if the Bivens
16 claim can be brought, then the Bivens claim is brought
17 against the individual employee, so the United States
18 government is not liable for -- you know, to take the
19 example we said, for the negligent transmission of mail.

20 And if the Court's -- unless the Court has
21 questions, I'll reserve my time for rebuttal.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Mr. Vergonis.

24 ORAL ARGUMENT OF CHRISTIAN VERGONIS
25 ON BEHALF OF THE RESPONDENT

1 MR. VERGONIS: Mr. Chief Justice, and may it
2 please the Court:

3 Through Section 2680 and the judgment bar,
4 Congress has established a fair and sensible statutory
5 scheme where the government accepts derivative superior
6 liability for the torts of its employees, a plaintiff
7 who tries his claim against the government may not seek
8 a second bite at the apple or duplicative recovery by
9 suing the employee personally. That's the fair bargain.

10 But where the United States has not waived
11 derivative liability, the judgment bar is not a gotcha
12 provision that prevents a plaintiff who sued the wrong
13 defendant from thereafter suing the correct defendant,
14 the primarily liable employee. Those claims are outside
15 of the bargain. And the "shall not apply" directive of
16 Section 2680 makes this perfectly clear.

17 As some of the Justices recognized during
18 counsel's presentation, that language says that the
19 other provisions of the Act shall not apply. This
20 unambiguously includes the judgment bar.

21 And there's no inconsistency between that
22 understanding of the "shall not apply" language and any
23 of the other clauses or any of this Court's cases.

24 JUSTICE ALITO: It can't be read in a
25 strictly literal sense because then 2680 itself wouldn't

1 apply.

2 MR. VERGONIS: Well, that's somewhat
3 circular, Justice Alito.

4 JUSTICE ALITO: All right. That's one way
5 that we're out of a purely literal reading of this.

6 MR. VERGONIS: I think it says the FTCA
7 shall not apply to these provisions. It has to apply to
8 itself. No other -- it's -- the literal interpretation
9 is not inconsistent with any of the other provisions not
10 applying, and it's not inconsistent with this Court's
11 decision in Smith. In Smith, this Court focused on the
12 language of 2679(b), which said Westfall Act claims
13 shall be subject to the exceptions. That language,
14 combined with legislative history that Smith examined,
15 where Congress said if a claim is barred against the --
16 against the government, it's also barred against the
17 employee, was sufficient to resolve Smith.

18 JUSTICE BREYER: What about --

19 JUSTICE ALITO: Smith -- Smith could be
20 explained on the absurdity rule, could it not?

21 MR. VERGONIS: Smith -- Smith doesn't need
22 to be explained on the absurdity rule. Smith has plain
23 language later enacted, language that governs over the
24 earlier --

25 JUSTICE ALITO: Well, the whole point of the

1 Westfall Act was to allow substitution, so if that
2 didn't apply, then there wouldn't be substitution and
3 there would be no point in having the Westfall Act.
4 Correct?

5 MR. VERGONIS: Well, certainly you could
6 look at it that way, so yes.

7 I mean, for a provision to overcome the
8 literal language of the "shall not apply" directive, you
9 would need an absurd result from following it to -- to
10 overcome the language. And maybe you had that absurd
11 result in Westfall or any of these other provisions that
12 could justify it, but there's no -- they point to no
13 absurd result that can overcome the import of the plain
14 language in this case.

15 CHIEF JUSTICE ROBERTS: What if you look at
16 the definitional provisions? Okay, 2680 has a lot of
17 terms that would be subject to some litigation or
18 confusing -- who's -- who's -- confusion. Who's an
19 employee of the government? Is the provision construed
20 to include a contractor? Those are all spelled out in
21 the definitional provision.

22 Now, under your argument, those definitions
23 are off the table and you can litigate for days on end
24 about, does this cover a contractor of the United
25 States? And you're saying, well, normally, you'd say

1 let's look at the definition, and it says -- well, yeah,
2 it says that right there. But under your argument, no,
3 the definitions are not included.

4 MR. VERGONIS: No, we think the definitions
5 are included, because definitions govern statutory
6 terms, they don't govern claims. And I don't think,
7 with all due respect, that that's slicing the bologna
8 thin at all. The definitions apply to the terms, and
9 the 2680 --

10 CHIEF JUSTICE ROBERTS: Well, it's a --

11 MR. VERGONIS: -- excepts claims.

12 CHIEF JUSTICE ROBERTS: It's a provision of
13 the chapter --

14 MR. VERGONIS: And it doesn't --

15 CHIEF JUSTICE ROBERTS: -- under your
16 reading, which is a strict literal one, that it shall
17 not apply. Those provisions shall not apply to any
18 claims. Okay. Well, somebody brings a claim against a
19 contractor of the United States, and again, you're
20 saying, well, we don't look to the definitions in the
21 Act to determine who's a contractor of the United
22 States, because that provision doesn't apply.

23 MR. VERGONIS: Well, you can look to the
24 definitions to understand what 2680 says. And then once
25 you have that understanding, the other -- the

1 substantive provisions don't apply. And I'll give an
2 example. Federal Rule of Evidences 1101 states that
3 these rules do not apply to a certain category of cases,
4 including preliminary proceedings in a criminal case.
5 Federal Rule of Evidence 101 defines what a criminal
6 case is.

7 Nobody would say it's inconsistent with the
8 "do not apply" directive of Federal Rule 1101 to read
9 the definition of a criminal case to figure out when the
10 Federal Rules of Evidence don't apply, or that that
11 somehow gives license to courts to then decide which
12 other rules do and do not apply. None of the rules
13 apply to certain aspects of a criminal case, but you can
14 refer to the definitional rule to understand what a
15 criminal case is.

16 CHIEF JUSTICE ROBERTS: What about the
17 review provisions? Those seem to be a particular --
18 particularly problematic aspect. The review provisions,
19 I take it, don't apply either.

20 MR. VERGONIS: They don't. And are you
21 talking about the appellate review provisions?

22 CHIEF JUSTICE ROBERTS: 13(a), Section 412.

23 MR. VERGONIS: Yeah, 412 is the appellate
24 review provisions. The decisions were appealable to the
25 circuit courts through the predecessor to 28 USC 1291,

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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