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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner : No. 11-192

v. :

JAMES X. BORMES :

- - - - - x

Washington, D.C.

Tuesday, October 2, 2012

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

APPEARANCES:

SRI SRINIVASAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

JOHN G. JACOBS, ESQ., Chicago, Illinois; on behalf of Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

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

Mr. Srinivasan.

ORAL ARGUMENT OF SRI SRINIVASAN

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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)(1) 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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