No. 19-546

In The Supreme Court of the United States

DOUGLAS BROWNBACK, ET AL.,

Petitioners,

v.

JAMES KING,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Through the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, Congress waives the United States' sovereign immunity and accepts vicarious liability for certain torts committed by federal employees when a plaintiff's claim satisfies six jurisdictional elements under Section 1346(b). The FTCA also includes a judgment bar, which provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676.

Where a district court dismisses tort claims against the United States for lack of subject-matter jurisdiction under Section 1346(b) of the FTCA, does that dismissal constitute "[t]he judgment in an action under section 1346(b)" and bar constitutional claims against government employees in the very same lawsuit?

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OTHER AUTHORITIES

STATEMENT

After being misidentified as a fugitive and brutally beaten by unidentified officers of a police task force, innocent college student James King filed this lawsuit against the officers and the United States. King's complaint alleged that the officers committed torts against him for which the United States was vicariously liable under the FTCA and that the officers violated his constitutional rights. J.A. 37–40.

Without even filing an answer, the government persuaded the district court to dismiss King's case because the court lacked jurisdiction over King's tort claims under the FTCA and because the officers were entitled to qualified immunity for King's constitutional claims. The district court dismissed King's case in a single judgment, which King appealed. Pet. App. 86a. On appeal, the Sixth Circuit held that the officers were not entitled to qualified immunity and King's constitutional claims should proceed. *Id.* at 38a.

The government does not challenge that ruling. Instead, the government seeks to deny King a fair chance to recover damages for his beating—by asking this Court to hold that the district court's dismissal of King's tort claims for lack of jurisdiction under the FTCA bars King's constitutional claims in the same lawsuit. But the text of the FTCA and this Court's precedent are clear: When a court dismisses tort claims for lack of subject-matter jurisdiction under Section 1346(b)(1)—as the district court did here—the FTCA's

judgment bar of Section 2676 does not preclude constitutional claims in the same lawsuit.

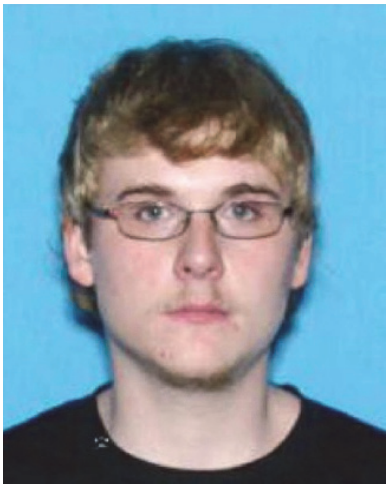
In *Simmons* v. *Himmelreich*, 136 S. Ct. 1843 (2016), and *Will* v. *Hallock*, 546 U.S. 345 (2006), the Court left no doubt that the judgment bar "functions in much the same way" as the common-law doctrine of res judicata. *Simmons*, 136 S. Ct. at 1849 n.5 (quoting *Will*, 546 U.S. at 354). As a result, the judgment bar applies only to a separate lawsuit, once a court has entered "[t]he judgment in an action under section 1346(b)," adjudicating the merits of the tort claims. 28 U.S.C. 2676.

The judgment bar does not bar King's constitutional claims here for three independent reasons: (1) this is the only lawsuit King has ever filed; (2) the district court lacked subject-matter jurisdiction under the FTCA; and, for that reason, (3) the district court could not adjudicate the merits of King's tort claims against the United States.

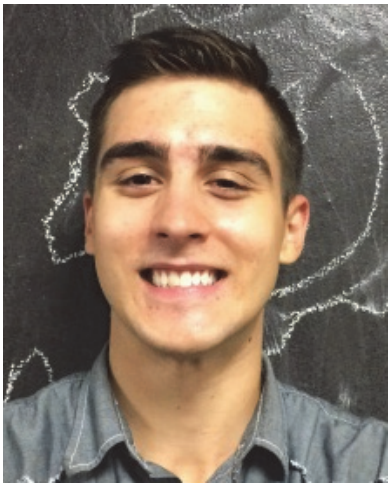
I. Members of a police task force stopped, searched, choked, beat, and arrested James King, an innocent college student.

On July 18, 2014, two plainclothes members of a police task force—Grand Rapids, Michigan Police Detective Todd Allen and FBI Special Agent Douglas Brownback—unreasonably misidentified James King as a fugitive wanted under a Michigan arrest warrant for stealing empty soda cans and liquor. Pet. App. 3a, 16a–23a; D. Ct. Doc. 74-14, at 3.

King was an innocent, 21-year-old college student who looked nothing like the 26-year-old fugitive:



Fugitive



King

Pet. App. 2a–4a, 18a–19a. But because King was a white male with glasses between 5'10" and 6'3" tall, the officers stopped, searched, and—when King believed the unidentified men were mugging him and tried to flee—tackled, choked, beat, and arrested King. Pet. App. 3a–5a.

Though it was clear that King was not the fugitive, Michigan officials jailed him, charged him with several felonies for his resistance of what he believed was a mugging, and put him on trial. Pet. App. 5a; D. Ct. Doc. 74-8. A jury found King not guilty on all charges. Pet. App. 5a.

II. When King filed this lawsuit, the government persuaded the district court to dismiss King's tort claims for lack of subject-matter jurisdiction under Section 1346(b).

Following his acquittal, King filed this single lawsuit against the officers and the United States. J.A. 23–40. King's complaint alleged that the officers committed torts against him for which the United States was vicariously liable under the FTCA, *id.* at 39–40, and that the officers violated King's Fourth Amendment rights, *id.* at 37–39.

The government assumed the joint defense of the United States and the officers. Rather than answer King's complaint, the government immediately moved to stay discovery and dismiss the case "under Rule 12(b)(1) or 12(b)(6)." D. Ct. Doc. 72, at 13. The government argued that because "Michigan law bars King's FTCA claims[, t]hey should be dismissed for lack of subject-matter jurisdiction." *Id.* at 58. The government also maintained that King's constitutional claims failed to establish Fourth Amendment violations or overcome qualified immunity. *Id.* at 16–50.

The district court accepted the government's arguments. Pet. App. 55a, 76a. Asserting exclusive reliance on the facts in King's complaint, Pet. App. 47a, the district court dismissed King's tort claims for lack of subject-matter jurisdiction because King could not satisfy the jurisdictional elements of Section 1346(b)(1), Pet. App. 76a, 79a–80a. Then, after announcing its lack of jurisdiction over the claims, the court added in dicta,

"[e]ven if the United States is not entitled to immunity under the FTCA in this case, Count IV is also properly dismissed for failure to state a claim" because the officers had probable cause to believe King committed a crime and used reasonable force against him. Pet. App. 80a. The district court dismissed King's constitutional claims on the same basis and because the officers were shielded by qualified immunity. *Id.* at 65a, 68a, 69a.

The district court then entered a single judgment, Pet. App. 86a, which King appealed to the Sixth Circuit, see Doc. 17. But in his opening brief, King noted he had "decided not to pursue his [tort] claim[s] against the United States on appeal." Resp. C.A. Br. 18 n.5. Instead, King argued that numerous issues of material fact precluded the district court's dismissal of his constitutional claims and that the officers were not entitled to qualified immunity. See *id.* at 20–21, 53.

The government responded that King's abandonment of his tort claims against the United States triggered the FTCA's judgment bar and precluded King from pursuing his constitutional claims on appeal in the same lawsuit. Gov't C.A. Br. 11–12. In support, the government was vehement that the district court granted dismissal under Rule 12 for both lack of subject-matter jurisdiction *and* failure to state a claim: "The district court entered judgment for the government on two independent grounds: first, that under Michigan law, private parties in the position of Brownback and Allen would not be liable for the torts alleged; and second, that King had failed to state a claim for relief on the merits." *Id.* at 16.

Before deciding the case, the Sixth Circuit ordered supplemental briefing on the judgment bar's application. Doc. 51. In that briefing, the government continued to emphasize the jurisdictional nature of the district court's ruling, arguing that, even where a court dismisses for lack of subject-matter jurisdiction, the judgment bar applies. Gov't Supp. C.A. Br. 3.

III. The Sixth Circuit held that the judgment bar did not preclude King's constitutional claims because the district court's dismissal was not "[t]he judgment in an action under section 1346(b)."

The Sixth Circuit rejected the government's interpretation of the judgment bar. Pet. App. 6a–12a (citing, *inter alia*, *Himmelreich* v. *Federal Bureau of Prisons*, 766 F.3d 576 (6th Cir. 2014), aff'd *sub nom. Simmons*). The court held that "[t]he FTCA does not bar [King] from maintaining his claims against [the officers] because the district court lacked subject-matter jurisdiction over [King]'s FTCA claim." Pet. App. 9a. The court further explained:

> [King] failed to satisfy the sixth element of [Section 1346(b)(1)]—he failed to allege a claim "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Because [King] failed to state a FTCA claim, his claim did not fall within the FTCA's "jurisdictional grant." And because the district court

> lacked subject-matter jurisdiction over [King]'s FTCA claim, the district court's dismissal of his FTCA claim "does not trigger the § 2676 judgment bar."

Ibid (citing *FDIC v. Meyer*, 510 U.S. 471, 477 (1994); *Himmelreich*, 766 F.3d at 579).

The Sixth Circuit also rejected the officers' reliance on the district court's dicta purporting to address King's tort claims against the United States. It explained that the district court's conclusion that Michigan governmental immunity shielded the United States from liability under Section 1346(b)(1) "*precluded* the district court from exercising subject matter jurisdiction over the FTCA claim and *prevented* the district court from reaching a decision on the merits." Pet. App. 10a–11a.

The Sixth Circuit then held that King had alleged meritorious constitutional claims for which the officers were not entitled to qualified immunity. See Pet. App. 13a–34a. The court then remanded the case to proceed on King's constitutional claims. *Id.* at 37a–38a.

Judge Rogers dissented based on the judgment bar. Although he agreed that "the district court's order established that the district court lacked subject matter jurisdiction" under the FTCA, he argued that the "dismissal still amounted to a 'judgment' under 28 U.S.C. § 2676." Pet. App. 40a.

After unsuccessfully seeking rehearing en banc, Pet. App. 82a, the government petitioned for a writ of

certiorari. It asked this Court to consider only one aspect of the Sixth Circuit's ruling: whether a dismissal of tort claims against the United States for lack of subject-matter jurisdiction under Section 1346(b)(1) "on the ground that a private person would not be liable to the claimant under state tort law" bars constitutional claims "against the same governmental employees whose acts gave rise to the claimant's FTCA claim." Gov't Pet. I. This Court granted certiorari on that question.

In its merits briefing, however, the government attempts to recast the district court's dismissal for lack of subject-matter jurisdiction under Rule 12(b)(1) as a judgment on the merits. It does this by, among other things, removing references to subject-matter jurisdiction[1] and substantively changing its question presented to recharacterize the district court's dismissal as one holding that King failed to prove the torts he

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[1] Compare, for example:

Gov't Pet. 7: "All defendants moved to dismiss the complaint on two grounds: *lack of subject-matter jurisdiction and* failure to state a claim upon which relief can be granted. In the alternative, the defendants moved for summary judgment" (citations omitted; emphasis added).

Gov't Br. 8: "All defendants then moved to dismiss the complaint for failure to state a claim upon which relief can be granted, or in the alternative, for summary judgment."

alleged, rather than one holding that King failed to satisfy the jurisdiction elements of Section 1346(b)(1).[2]

SUMMARY OF ARGUMENT

The FTCA operates as a limited waiver of sovereign immunity. Under the Act's jurisdictional provision, courts are granted subject-matter jurisdiction to adjudicate a specific class of tort claims against the United States that satisfy six jurisdictional elements. 28 U.S.C. 1346(b)(1). To prevent duplicative litigation that could arise from its acceptance of vicarious liability, Congress included a "judgment bar" in the FTCA, which the Court has said operates like common-law res judicata after a court has entered "[t]he judgment in an action under section 1346(b)." 28 U.S.C. 2676; see *Simmons*, 136 S. Ct. at 1849 n.5.

Consistent with the FTCA's text and the language it borrows from the common law, the judgment bar only

[2] Compare Gov't Pet. I to Gov't Br. I (deletions in strikethrough; additions in underline):

> [W]hether a final judgment in favor of the United States in an action brought under Section 1346(b)(1), on the ground that ~~a private person would not be liable to the claimant under state tort law for the injuries alleged~~ the claimant failed to establish the liability of the United States on the torts that he alleged, bars ~~a~~ claims under *Bivens* * * * that ~~is~~ are brought by the same claimant, based on the same injuries, and against the same governmental employees ~~whose acts gave rise to the claimant's FTCA claim~~ involved in the claimant's unsuccessful FTCA action.

applies to: (1) a separate lawsuit; after (2) a court with FTCA jurisdiction under Section 1346(b) enters a final judgment; that is (3) on the merits. Through these elements—which all must be independently satisfied—the judgment bar prevents duplicative litigation, while still providing "a fair chance to recover damages." *Simmons*, 136 S. Ct. at 1849; see also *Will*, 546 U.S. at 354 (noting that Congress designed the judgment bar to "avoid[] duplicative litigation" without permitting a defendant to escape "scot free of any liability").

Because King brought all of his claims in a single lawsuit and the district court dismissed his tort claims for lack of jurisdiction under Section 1346(b)(1), the judgment bar does not apply to preclude King's constitutional claims against the officers in the same lawsuit.

The government's contrary interpretation of the judgment bar disregards the text of Section 2676, the jurisdictional requirements of Section 1346(b)(1), and the balance identified by *Simmons* and *Will*. In their place, the government provides a theory of the judgment bar as an election of remedies—which the government calls a "remedial compromise." Gov't Br. 18–21. But the government's theory would, in the words of *Simmons*, "encourage litigants to file suit against individual employees before suing the United States to avoid being foreclosed from recovery altogether," 136 S. Ct. at 1850, a result at odds with the FTCA and this Court's decisions. See *ibid.* (rejecting the "strange result" in which "the viability of a plaintiff's meritorious suit against an individual employee should turn on the

order in which * * * the district court chooses to address motions"); *Carlson* v. *Green*, 446 U.S. 14, 19–20 (1980) (concluding that it is "crystal clear that Congress views the FTCA and *Bivens* as parallel, complementary causes of action").

The government's "remedial compromise" framework discards common-law res judicata and its foundational importance to the text of Section 2676. Gov't Br. 20, 43 (citing *Manning* v. *United States*, 546 F.3d 430, 431, 437 (7th Cir. 2008)). Compare *Manning*, 546 F.3d at 435 ("Congress did not import common law res judicata into [the judgment bar]."), with *Simmons*, 136 S. Ct. 1849 n.5 (citation and internal quotation marks omitted) ("[T]he judgment bar provision functions in much the same way as that doctrine."). Dispensing with statutory context, the government relies on the broadest possible definition of the words "judgment," "complete bar," and "any action" in Section 2676 to argue that the judgment bar accords preclusive force to *any* judgment—including one that disclaims subject-matter jurisdiction—and applies that preclusive force to *any* action—including the same lawsuit. See, *e.g.*, Gov't Br. 19.

Contrary to the government's interpretation, the text of the FTCA makes plain that "complete bar" refers to common-law res judicata, "any action" does not include the same action in which the judgment is entered, and "judgment" does not mean a dismissal for lack of subject-matter jurisdiction. The judgment bar applies only to a separate lawsuit after a court has entered "[t]he judgment in an action under section

1346(b)," meaning the final judgment in a lawsuit where the FTCA's jurisdictional elements are satisfied and the court disposes of all claims.

Now that King has overcome qualified immunity, this Court should not read the FTCA to create another special protection to shield the officers from constitutional accountability.

ARGUMENT

I. Through the FTCA, Congress conferred subject-matter jurisdiction on courts to adjudicate a limited class of tort claims and adopted a version of common-law res judicata to prevent duplicative litigation.

The FTCA waives sovereign immunity, accepts vicarious liability, and provides "district courts * * * exclusive jurisdiction of civil actions" for tort claims that satisfy the six jurisdictional elements of 28 U.S.C. 1346(b)(1) but do not fall within the thirteen exceptions of 28 U.S.C. 2680. To prevent duplicative litigation that could arise from its acceptance of vicarious liability, Congress included the judgment bar in the FTCA:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. 2676.

In enacting the judgment bar, Congress accomplished two things. First, it affirmatively incorporated the principles of common-law res judicata into the FTCA by borrowing common-law language like "complete bar" and "same subject matter." Second, it selected between two competing understandings of res judicata that existed in common law at the time of the FTCA's passage to ensure that a judgment against the United States under the FTCA would preclude a duplicative lawsuit against the government employee "whose act or omission gave rise to the claim." See *Simmons*, 136 S. Ct. 1849 & n.5.

Reading Section 2676 in its statutory context reveals three independent requirements that must be satisfied before the judgment bar applies: (1) a separate lawsuit against the employee; (2) an earlier judgment by a court with jurisdiction under the FTCA; and (3) an adjudication of the merits in that FTCA judgment.

A. The FTCA waived sovereign immunity to accept vicarious liability for certain common-law torts.

Congress did not reinvent the vicarious-liability wheel when it enacted the FTCA. The Act "was not patterned to operate with complete independence from the principles of law developed in the common law and refined by statute and judicial decision in the various States." *Richards* v. *United States*, 369 U.S. 1, 6–7 (1962). The FTCA merely opened the United States to

common-law vicarious liability for certain torts under certain circumstances. See *Dalehite* v. *United States*, 346 U.S. 15, 24–25 (1953). As Congress later explained, "[t]he United States, through the [FTCA], is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized." Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, § 2(a)(2), 102 Stat. 4563.

The Court has treated the FTCA accordingly, relying on common-law principles to guide the Act's interpretation and application. See, *e.g.*, *Molzof* v. *United States*, 502 U.S. 301, 307–308 (1992); *United States* v. *Aetna Cas. & Sur. Co.*, 338 U.S. 366, 370 (1949). Similarly, in *Simmons* and *Will*, the Court looked to common-law res judicata to interpret Section 2676.

B. As the Court explained in *Simmons* and *Will*, the judgment bar adopted an application of common-law res judicata to prevent duplicative litigation.

Congress enacted the judgment bar of Section 2676 to both codify and "supplement[] common-law claim preclusion by closing a narrow gap" in vicarious liability. *Simmons*, 136 S. Ct. 1849 n.5. "At the time that the FTCA was passed, common-law claim preclusion would have barred a plaintiff from suing the United States after having sued an employee but not vice versa." *Ibid.* As a result, the judgment bar is only triggered by the essential prerequisites of res judicata:

(1) a separate lawsuit; (2) a final judgment by a court with jurisdiction; and (3) a decision on the merits of the claims.

That interpretation flows directly from the language and structure of Section 2676, both of which incorporate common-law res judicata. It is further demonstrated by Congress's use of explicit language when departing from the common law. Accordingly, the Court has consistently held that the judgment bar operates like res judicata.

1. *Section 2676 borrows three phrases from the common law that prove the judgment bar operates like res judicata.*

Through Section 2676, Congress codified common-law res judicata. *Simmons*, 136 S. Ct. at 1849 n.5. That is evident from the judgment bar's structure and three distinct common-law phrases Congress borrowed: "complete bar," "same subject matter," and "[j]udgment as [a] bar." 28 U.S.C. 2676.

When Congress borrows terms from the common law, it adopts the "cluster of ideas" attached to those terms. *Molzof*, 502 U.S. at 307 (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320 (2012) ("The age-old principle is that words undefined in a statute are to be interpreted and applied according to their common-law meanings."). In drafting Section 2676, Congress borrowed common-law language in three ways.

First, the judgment bar's designation as a "complete bar" is shorthand for res judicata. This Court has repeatedly called res judicata an "absolute" or "complete bar."[3] So too have the state supreme courts.[4] And despite the broad sound of the phrase "complete bar," res judicata is not a "complete bar"—or any bar at all—unless a court of competent jurisdiction has entered a final judgment on the merits in a separate lawsuit. See, *e.g.*, *Cromwell v. County of Sac*, 94 U.S. 351, 365 (1876) ("Unless the court * * * was called upon to determine the merits, the judgment is never a complete bar; and it is safe to add, that, if * * * the court had not jurisdiction * * * the judgment will be no bar to a future action.").

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[3] See, *e.g.*, *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001) (quoting *Goddard* v. *Security Title Ins. & Guar. Co.*, 92 P.2d 804, 806 (Cal. 1939)) ("complete bar"); *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 319 (1927) ("absolute bar"); *Montgomery* v. *Samory*, 99 U.S. 482, 490 (1878) ("complete bar"); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352, 365 (1876) ("absolute bar" and "complete bar"); *Aspden* v. *Nixon*, 45 U.S. (4 How.) 467, 472 (1846) ("complete bar").

[4] See, *e.g.*, *City of Elmhurst* v. *Kegerreis*, 64 N.E.2d 450, 456 (Ill. 1945) ("complete bar"); *Lauderdale* v. *Industrial Comm'n*, 139 P.2d 449, 451 (Ariz. 1943) (same); *Goddard*, 92 P.2d at 806 (same); *Stringer* v. *Conway Cty. Bridge Dist.*, 65 S.W.2d 1071, 1072–1073 (Ark. 1933) (same); *Zastrow* v. *Milwaukee Elec. Ry. & Light Co.*, 198 N.W. 275, 276 (Wis. 1924) (same); *North St. Louis Gymnastic Soc'y* v. *Hagerman*, 135 S.W. 42, 45 (Mo. 1911) (same); *Furneaux* v. *First Nat'l Bank*, 17 P. 854, 855 (Kan. 1888) (same); *Sewell* v. *Watson*, 31 La. Ann. 589, 591 (1879) (same).

Second, the judgment bar's reference to the "same subject matter" incorporates a universal restriction of res judicata—that it applies only "where a judgment is rendered in one action and subsequently a second action is brought upon the same claim or cause of action as that upon which the first action was based." Restatement (First) of Judgments, ch. 3, topic 2, tit. D., intro. note (1942). Courts have consistently used identical or substantially similar language when discussing res judicata.[5]

Third, the FTCA called the judgment bar "[j]udgment as bar" in a marginal note to the original enactment in 1946, see App. 1a, which Congress later promoted to the judgment bar's title in 1948, where it remains today. 28 U.S.C. 2676; Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 410, 60 Stat. 812, 844; Judicial Code and Judiciary, Pub. L. No. 80-773, § 2676, 62 Stat. 869, 984 (1948); see also *Simmons*, 136 S. Ct. at 1845–1850 (repeatedly citing the title of 28

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[5] See, *e.g.*, *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 76 (1939) ("same subject matter"); *Grubb* v. *Public Utils. Comm'n*, 281 U.S. 470, 479 (1930) ("subject-matter [is] the same"); *Cromwell*, 94 U.S. at 366 ("same subject"); *Beloit* v. *Morgan*, 74 U.S. (7 Wall.) 619, 623 (1868) ("same subject matter"); *Aurora City* v. *West*, 74 U.S. (7 Wall.) 82, 97 (1868) (same); *Hughes* v. *United States*, 71 U.S. (4 Wall.) 232, 237 (1866) ("point of controversy must be the same"); *Aspden*, 45 U.S. at 498 ("same subject-matter"); *Darling Stores Corp.* v. *Beatus*, 33 S.E.2d 701, 701–702 (Ga. 1945) (same); *Baxter* v. *Central W. Cas. Co.*, 58 P.2d 835, 836 (Wash. 1936) (same); *State* v. *School Dist. No. 1*, 50 P.2d 252, 253 (Mont. 1935) (same); *Howe* v. *Farmers' & Merchs.' Bank*, 264 P. 210, 212 (Okla. 1928) (same); *Little* v. *Barlow*, 20 So. 240, 240 (Fla. 1896) (same).

U.S.C. 2680, "Exceptions"); *Georgia* v. *Rachel*, 384 U.S. 780, 790 (1966) (citing a marginal note). Like the other two phrases in Section 2676, the Court has used "judgment as a bar" to refer to common-law res judicata many times.[6]

2. *Section 2676's structure proves the judgment bar operates like res judicata.*

Congress's intent that the judgment bar operate like res judicata is also reflected by the fact that Section 2676 mirrors the elements of res judicata. Under res judicata, "a final judgment, rendered upon the merits by a court having jurisdiction of the cause, is conclusive of the rights of the parties and those in privity with them, and is a complete bar to a new suit between

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[6] *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 511 (1940); *Myers* v. *International Tr. Co.*, 263 U.S. 64, 70 (1923); *United Shoe Mach. Corp.* v. *United States*, 258 U.S. 451, 458 (1922); *Hartford Life Ins. Co.* v. *Blincoe*, 255 U.S. 129, 136 (1921); *Postal Tel. Cable Co.* v. *City of Newport*, 247 U.S. 464, 470 (1918); *Spokane & Inland Empire R.R. Co.* v. *Whitley*, 237 U.S. 487, 496 (1915); *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 139 (1912); *Chantangco* v. *Abaroa*, 218 U.S. 476, 481 (1910); *Corbett* v. *Craven*, 215 U.S. 125, 127 (1909); *Northern Pac. Ry. Co.* v. *Slaght*, 205 U.S. 122, 131 (1907); *Fayerweather* v. *Ritch*, 195 U.S. 276, 300 (1904); *Bank of Iron Gate* v. *Brady*, 184 U.S. 665, 669 (1902); *Roberts* v. *Northern Pac. R.R. Co.*, 158 U.S. 1, 27 (1895); *Blitz* v. *United States*, 153 U.S. 308, 315 (1894); *Keokuk & W. R.R. Co.* v. *Missouri*, 152 U.S. 301, 315 (1894); *Johnson Steel St. Rail Co.* v. *William Wharton, Jr. & Co.*, 152 U.S. 252, 258 (1894); *Bissell* v. *Township of Spring Valley*, 124 U.S. 225, 231 (1888); *Milne* v. *Deen*, 121 U.S. 525, 532 (1887); *Cromwell*, 94 U.S. at 352; *Aurora*, 74 U.S. at 82.

them on the same cause of action." *Goddard* v. *Security Title Ins. & Guar. Co.*, 92 P.2d 804, 806 (Cal. 1939) (quoted in *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001)); see also, *e.g.*, *Postal Tel. Cable Co.* v. *City of Newport*, 247 U.S. 464, 476 (1918); *Aspden* v. *Nixon*, 45 U.S. (4 How.) 467, 497–498 (1846).

The language of the judgment bar tracks the elements of res judicata. Both are triggered by the entry of a judgment. 28 U.S.C. 2676 (requiring "[t]he judgment"). Both require that judgment to have been entered by a court of competent jurisdiction. *Id.* (requiring "[t]he judgment" to be one "in an action under [the FTCA's jurisdictional provision] Section 1346(b)"). Both require a merits determination. *Id.* (incorporating the elements of Section 1346(b)(1) and requiring a judgment to have been entered by "reason of the same subject matter"). And both bar a separate lawsuit, not claims in the same lawsuit. *Id.* (applying the judgment bar to "any action" after a court has entered "[t]he judgment in an action under section 1346(b)").

3. *Section 2676 explicitly supplements common-law res judicata by extending the judgment bar to government employees who are not parties to an FTCA lawsuit.*

Congress did not enact the judgment bar solely to accord FTCA judgments res judicata effect, which they likely would have had without Section 2676. See, *e.g.*,

Allen v. *McCurry*, 449 U.S. 90, 96 (1980). The need for the judgment bar sprung from a split in the common law at the time of the FTCA's enactment over whether a judgment against a vicariously liable employer was res judicata in a separate lawsuit against its employee. *Simmons*, 136 S. Ct. at 1849 n.5.

To ensure that the employee was afforded res judicata protection, Congress adopted the common-law iteration of res judicata that extended beyond the traditional requirement of parties and their privies—also called "mutuality"—to reach separate lawsuits "against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. That way, "[a]fter the claimant has obtained satisfaction of his claim from the Government, * * * he [can]not * * * turn around and sue" the government employee. *United States* v. *Gilman*, 347 U.S. 507, 512 n.2 (1954) (quoting *Tort Claims: Hearings before the House Comm. on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess., p. 9 (1942) (*1942 Hearing*)).

Under the common law prevailing in some states and the Restatement of Judgments at the time of the FTCA's enactment, res judicata required strict mutuality—restricting the bar to parties and their privies. See, *e.g.*, *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 131 (1912); Restatement (First) of Judgments § 96 (1942). Applied to vicarious liability, that meant that the entry of a judgment in an action by an injured person against an employee would be res judicata in a separate lawsuit against the employer. Restatement (First) of Judgments §§ 96(1), 99;

Elder v. *New York & Pa. Motor Express*, 31 N.E.2d 188, 189 (N.Y. 1940). But a judgment against the employer would not be res judicata in a separate lawsuit against the employee. Restatement (First) of Judgments § 96(2); *Myers' Adm'x* v. *Brown*, 61 S.W.2d 1052, 1054 (Ky. 1933).

Other states rejected the requirement of strict mutuality. See, *e.g.*, *Bernhard* v. *Bank of Am. Nat'l Tr. & Sav. Ass'n*, 122 P.2d 892, 894 (Cal. 1942). In those jurisdictions, the entry of a judgment in an action against the employee was res judicata in a separate lawsuit against the employer and vice versa. *Giedrewicz* v. *Donovan*, 179 N.E. 246, 247–248 (Mass. 1932).

Congress enacted Section 2676 to adopt the latter approach and "supplement[] common-law claim preclusion by closing [that] narrow gap" in vicarious liability. *Simmons*, 136 S. Ct. at 1849 n.5. But by ensuring a two-way preclusion, Congress did not otherwise expand the judgment bar beyond the traditional boundaries of res judicata. A separate lawsuit, jurisdiction, and consideration of the merits were all still required for the judgment bar's application under Section 2676.

4. *The Court has repeatedly treated Section 2676 like res judicata and limited its application to shield government employees from duplicative litigation.*

When Congress enacted the judgment bar, it created a shield, not a sword. If a merits judgment was

entered in an FTCA lawsuit against the United States, the judgment bar ensured that it would also shield the government employee whose act or omission gave rise to the original FTCA claim, even if he was not a party to the first judgment. But just as res judicata is only a "complete bar" when its prerequisites are met, that is true of the judgment bar as well. See, *e.g.*, *Hughes* v. *United States*, 71 U.S. (4 Wall.) 232, 237 (1866) ("If the first suit was dismissed for * * * the want of jurisdiction * * * the judgment rendered will prove no bar to another suit."). Consistent with the shared elements of the doctrines, the Court has explained that the judgment bar only shields government employees from duplicative litigation after a court with jurisdiction under the FTCA enters a judgment on the merits. See *Simmons*, 136 S. Ct. at 1849 n.5; *Will*, 546 U.S. at 354–355.

In *Will*, the Court unanimously explained that the judgment bar is analogous to "the defense of claim preclusion, or res judicata," and "[a]lthough the statutory judgment bar is arguably broader than traditional res judicata, it functions in much the same way, with both rules depending on a prior judgment as a condition precedent and neither reflecting a policy that a defendant should be scot free of liability." *Will*, 546 U.S. at 354. Both rules, *Will* explained, are concerned with "avoiding duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" *Ibid.* (citation omitted). For that reason, "there will be no possibility of a judgment bar * * * so long as a *Bivens* action against officials and a Tort Claims Act

[action] against the government are pending simultaneously." *Ibid*.

The Court unanimously confirmed those conclusions in *Simmons*, 136 S. Ct. at 1849 (explaining that the judgment bar does not cut off a plaintiff's "first suit" or "a fair chance to recover damages"). *Simmons* reinforced Section 2676's requirements: a separate lawsuit, a final judgment by a court with FTCA jurisdiction, and a merits decision.

In *Simmons*, a prisoner filed two separate lawsuits related to his beating—one under *Bivens* and the other under the FTCA—and the Sixth Circuit rejected the judgment bar's application because the district court's dismissal of the prisoner's tort claims was jurisdictional. *Himmelreich*, 766 F.3d at 577, 579–580. Concluding that the discretionary-function exception deprived the court of subject-matter jurisdiction, see 28 U.S.C. 2680(a), the Sixth Circuit held that, "in the absence of jurisdiction, the court lacks the power to enter judgment" or address the merits of a claim. *Id*. at 579 (citations omitted).

On certiorari, the Court affirmed *Himmelreich*, 136 S. Ct. at 1850, but focused its analysis on the language of 28 U.S.C. 2680, which provides that "[t]he provisions of this chapter and Section 1346(b) of this title shall not apply to" claims that fall within the exceptions of Section 2680. *Simmons*, 136 S. Ct. at 1846–1850. Still, the Court's reasoning hinged on jurisdiction. Explaining that Section 1346(b) "is the provision giving district courts FTCA jurisdiction" and noting

that "[b]oth parties agree that district courts do not have jurisdiction over claims that fall into one of the 13 categories of 'Exceptions,'" *id.* at 1847, *Simmons* rejected the government's argument that the judgment bar applies absent jurisdiction. *Ibid.*

Simmons also clarified that "the judgment bar provision prevents unnecessarily duplicative litigation"; that Congress adopted Section 2676 to codify non-mutual res judicata; and that the judgment bar does not apply to claims in the same lawsuit. *Simmons*, 136 S. Ct. at 1849 & n.5 ("The judgment bar provision applies where a plaintiff first sues the United States and then sues an employee."). And because common-law res judicata would not have applied under similar circumstances, "the roughly analogous judgment bar should not foreclose a second suit against individual employees." *Ibid.*

II. The government's interpretation of the judgment bar violates the text of the FTCA and presumes jurisdiction where Congress says none exists.

When properly interpreted to give meaning to all of the statutory text, the FTCA instructs that Section 2676 only applies when three independent requirements are met: (1) there is a separate lawsuit; brought after (2) a court with FTCA jurisdiction has entered a final judgment; (3) addressing the merits of the claims. The failure of any one of those requirements precludes the judgment bar's application. Because all three fail

here, the judgment bar does not stop King from continuing this lawsuit against the officers.

The government urges the Court to adopt a contrary interpretation of Section 2676. The government reads the words "judgment," "complete bar," and "any action" to the exclusion of the rest of the FTCA's text and its common-law roots. It then argues: "[T]he district court's FTCA 'judgment' rejecting the tort claims that respondent alleged constitutes 'a complete bar' to 'any' attempt by [King] to restart the case against the same officers using the same factual allegations." Gov't Br. at 43; see also Gov't Br. 19, 21–22, 44.

The government's selective approach to statutory interpretation must be rejected. Section 2676's reference to "judgment," "complete bar," and "any action" do not "extend to the outer limits of [their] definitional possibilities," divorced from the context of Section 2676 and the FTCA more broadly. *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 486 (2006). Those phrases must be read together with "the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Ibid.* That includes the common law, which supplies the "cluster of ideas" surrounding the words Congress borrowed for Section 2676. *Molzof*, 502 U.S. at 307.

A. The judgment bar does not apply to a dismissal of claims in the same lawsuit.

The text of Section 2676 and the Court's decisions in *Simmons* and *Will* show that the judgment bar does not operate against claims brought together in the same lawsuit. *Simmons*, 136 S. Ct. at 1849 (stating as a prerequisite to the judgment bar that a "first suit" give a plaintiff "a fair chance to recover damages" and preclude a "second bite at the money-damages apple."). If a plaintiff brings claims together in a single lawsuit, there is no chance of duplicative litigation. *Will*, 546 U.S. at 354.

Simmons and *Will* are supported by res judicata principles. As Wright and Miller explain:

> Claim preclusion * * * is not appropriate within a single lawsuit so long as it continues to be managed as a single action. Failure to advance all parts of a single claim, or surrender of some part of a single claim as the action progresses, do not defeat the right to pursue the parts that are advanced.

18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4401 (3d ed. 2020); *id.* at § 4401 n.3 (citing *Amadeo* v. *Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1158–1161 (9th Cir. 2002)). *G. & C. Merriam Co.* v. *Saalfield*, 241 U.S. 22, 29 (1916) ("Obviously, [res judicata] applies only when the subsequent action has been brought."); *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1597 n.3 (2020) (citation omitted) ("[A]lthough

claim preclusion does apply to a later, standalone suit seeking relief that could have been obtained in the first—it 'is not applicable to . . . efforts to obtain supplemental relief in the original action, or direct attacks on the judgment.' ").[7]

The text of Section 2676 demonstrates that the judgment bar does not apply to claims in the same lawsuit in two ways. First, it provides, "[t]he judgment in an action * * * shall constitute a complete bar to any action * * * against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. The use of the phrase "the judgment"—not "a judgment"—shows that Congress expected the judgment bar to be triggered only by the final, conclusive judgment addressing all claims in an action, not the dismissal of any single claim. Second, a natural reading of Section 2676 is incompatible with the conclusion that "an action" and "any action" are the very same lawsuit. And reading "any action" to include the action

[7] See also, *e.g.*, *Bravo-Fernandez* v. *United States*, 137 S. Ct. 352, 357 (2016) (res judicata bars "successive litigation" and "multiple suits"); *United States* v. *Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011) (res judicata bars "repetitious suits"); *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (res judicata bars "successive litigation" and "relitigation" of claims raised in an "earlier suit"); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979) (res judicata bars "a second suit"); *Costello* v. *United States*, 365 U.S. 265, 285 (1961) (res judicata bars "a subsequent action"); *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 597 (1948) (res judicata bars "repetitious suits"); *Baltimore S.S. Co.*, 274 U.S. at 319 (res judicata bars "the second action or suit"); *Cromwell*, 94 U.S. at 352 ("In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action.").

in which the judgment was entered would render Section 2676 circular: The judgment in an action would bar the same action, which would bar the judgment in that action.

The government claims this natural reading of the text "strains the plain language of the statute by suggesting that the term 'action' does not include claims within that action." Gov't Br. 44 (citation and internal quotation marks omitted). But the argument is not that claims are not components of actions; it is that Section 2676's reference to "an action" and "any action" cannot be read to cover the same lawsuit, including any claims in that lawsuit.

To circumvent the meaning of the statutory text, the government advances two arguments, neither of which can overcome the FTCA's language and incorporation of common-law principles. First, the government argues that Section 2676's use of the phrase "by reason of the same subject matter" can include *Bivens* claims. Even if true, that does not mean that the judgment bar can reach *Bivens* claims brought together with FTCA claims in the same lawsuit. Second, the government urges the Court to treat Section 2676 as an election of remedies. That argument finds no support in the FTCA or Congress's unequivocal intention that FTCA claims and *Bivens* claims complement one another. *Carlson*, 446 U.S. at 19–20.

1. *Even if the phrase "by reason of the same subject matter" can reach* Bivens *claims, that has no effect in a lawsuit when a plaintiff brings FTCA and* Bivens *claims together.*

Avoiding the fact that the judgment bar does not apply to claims in the same lawsuit, the government argues that the phrase "by reason of the same subject matter" *can* include *Bivens* claims. Gov't Br. 19. From there, the government leaps to the conclusion that the judgment bar can preclude *Bivens* claims brought in the same lawsuit as FTCA claims. Gov't Br. 43–46. That conclusion does not follow, even if the government's premise is correct.

Although there are strong arguments that the judgment bar only applies to claims based on the same theory of tort liability and not constitutional claims,[8] that question has no relevance in lawsuits where a plaintiff raises FTCA and *Bivens* claims together. See *Cromwell*, 94 U.S. at 352 (explaining that when persons are parties to a lawsuit, a judgment in that action "is a finality as to the claim or demand in controversy * * * not only as to every matter which was offered * * * but as to any other admissible matter"); Restatement (First) of Judgments §§ 63, 79 (1942) (same). Thus, whether Section 2676 bars a *Bivens* claim in a separate

[8] See generally James E. Pfander & Neil Aggarwal, Bivens*, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417 (2011).

lawsuit, although important, is not at issue when the claims are brought together in the same lawsuit.

This argument highlights how far the government seeks to stretch the language of the judgment bar. The parties agree that the judgment bar's purpose is to prevent unnecessarily duplicative litigation. Gov't Br. 14; see, *e.g.*, *Gasho* v. *United States*, 39 F.3d 1420, 1438 (9th Cir. 1994) ("Our interpretation of § 2676 [barring a subsequent *Bivens* action] serves the interests of judicial economy. Plaintiffs contemplating both a *Bivens* claim and an FTCA claim will be encouraged to pursue their claims concurrently in the same action, instead of in separate actions."); see also *Hoosier Bancorp of Ind., Inc.* v. *Rasmussen*, 90 F.3d 180, 184–185 (7th Cir. 1996) (citing judicial economy). But the government contends that the judgment bar precludes claims that involve no duplicative litigation at all.

For instance, under the government's theory, if a plaintiff brings *Bivens* and multiple FTCA tort claims in the same lawsuit, the failure of *any* single tort claim would instantly bar all *Bivens* claims. So if a court were to hold that a plaintiff could sustain a claim of battery, but not intentional infliction of emotional distress, and grant a motion to dismiss in part on that single claim, Section 2676 would bar the plaintiff's concurrently proceeding *Bivens* claims. This Court has already rejected that outcome, *Simmons*, 136 S. Ct. at 1850, and it contradicts principles of res judicata. See, *e.g.*, note 7, *supra*.

2. *The government's election-of-remedies theory promotes the "strange result"* Simmons *cautioned against and violates res-judicata principles.*

The government insists that the "strange result" rejected in *Simmons*, 136 S. Ct. at 1850, is "the inevitable result of the judgment bar," which operates as an election of remedies. Gov't Br. 45; *ibid.* ("Congress * * * gave tort claimants a choice among potential remedies."). The government urges this Court to allow that result here. Under the government's theory, the "FTCA permits the plaintiff to choose whether to plead an FTCA claim against the United States, *Bivens* claims against the agents individually, or both." Gov't Br. 20. But that choice—as the government puts it—"comes with consequences." *Ibid.* (citation and internal brackets omitted).

The government's theory conflicts with the Court's holding in *Carlson* v. *Green*, that it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." 446 U.S. at 19–20. To get around *Carlson* and Congress and convert the FTCA and *Bivens* from parallel remedies to exclusive remedies, the government employs an election-of-remedies theory crafted by the Seventh Circuit in *Manning*, which the government rebrands a "remedial compromise." Gov't Br. 18–21.

In *Manning*, the Seventh Circuit wrongly approved the application of Section 2676 to invalidate a jury's verdict under *Bivens* based on a court's later

FTCA judgment in the same lawsuit. 546 F.3d at 431. The court's argument—like the government's here—began with the faulty premise that "Congress did not import common law res judicata into § 2676." *Id.* at 435. From there, *Manning*, as the government does here, cited selective language from Section 2676 and concluded that the phrase "a *complete* bar to *any* action" "must be read to include claims brought within the same action." *Id.* at 433–434; see also Gov't Br. 19 (using *Manning*'s emphasis).

Then, to evade *Carlson*'s holding that *Bivens* and FTCA claims are complementary, *Carlson*, 446 U.S. at 19–20, *Manning* constructed a novel election-of-remedies argument that the government presents as its "remedial compromise" here: A "plaintiff may still bring both parallel claims as remedies * * * and the remedies complement each other." *Manning*, 546 F.3d at 434–435. But the plaintiff "must make strategic choices in pursuing the remedies," including by "decid[ing] whether or not it makes sense to voluntarily withdraw a contemporaneous FTCA claim." *Ibid*.[9]

The government's remedial compromise defies *Carlson* and the Congressional statements on which it

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[9] The government contends this theory is supported by *Will* because the Court "acknowledged in *Will* that plaintiffs face * * * a choice. * * * [E]ither bring 'a *Bivens* action alone' or else keep * * * *Bivens* and FTCA claims 'pending simultaneously.'" Gov't Br. 45–46. The government mischaracterizes *Will*, however, which spoke of separate "action[s]," not separate claims in the same action. *Will*, 546 U.S. at 354. Thus, *Will* undercuts the government's attempt to apply the judgment bar to claims pending in the same action.

relied. 446 U.S. at 20 (citation omitted) ("[I]nnocent individuals * * * will have a cause of action against the individual Federal agents *and* the Federal Government."). It is also directly at odds with the judgment bar's incorporation of common-law principles, which have consistently limited the "complete bar" of res judicata to separate lawsuits. See, *e.g.*, *Semtek*, 531 U.S. at 502 (quoting *Goddard*, 92 P.2d at 806 (calling res judicata a "complete bar to a new suit")); see also note 7, *supra*.

Furthermore, the "remedial compromise" the government presents not only invites gamesmanship but requires it. If the government is correct, a plaintiff's attorney owes his client a duty to file both *Bivens* and FTCA claims (regardless of their strength), litigate them through trial, if possible, and, then—on the eve of judgment—dismiss one or the other depending on their predicted chances of success or amount of recovery. In *Manning*, for example, the plaintiff should have—after a full bench trial—dismissed his FTCA claim moments before the court entered judgment. See 546 F.3d at 438. The government can only urge that result by ignoring the text of Section 2676 and perverting the principle—endorsed by Congress and this Court—that *Bivens* and the FTCA are complementary causes of action.

The government correctly states that a handful of circuits have concluded that Section 2676 bars claims in the same lawsuit. Gov't Br. 43. But of the decisions the government cites, one is *Manning*, and the rest reach the same incorrect conclusion because they rely

on *Manning*, ignore the language of Sections 2676, or both. See *White* v. *United States*, 959 F.3d 328, 333 (8th Cir. 2020) (citing *Manning*); *Unus* v. *Kane*, 565 F.3d 103, 121–122 (4th Cir. 2009) (citing *Manning*); *Estate of Trentadue* v. *United States*, 397 F.3d 840, 858–859 (10th Cir. 2005) (relying on the phrase "*any* action"); *Harris* v. *United States*, 422 F.3d 322, 334 (6th Cir. 2005) (surveying caselaw without analysis); see also *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (relying on the "broad sweeping phrases" of Section 2676); but see *Fazaga* v. *FBI*, 965 F.3d 1015, 1064 (9th Cir. 2020). None of the cases cited by the government grapple with the common-law language of Section 2676 or the gamesmanship their holdings invite.

As shown by *Will*, *Simmons*, *Carlson*, and the text of Section 2676, the judgment bar does not apply to claims in the same lawsuit.

B. The judgment bar does not apply to a dismissal for failure to establish all six jurisdictional elements of Section 1346(b).

Even if the judgment bar could be applied to claims brought together in a single lawsuit, a court's holding that it lacks subject-matter jurisdiction under Section 1346(b)(1) is not "[t]he judgment in an action under section 1346(b)" that triggers the judgment bar. See 28 U.S.C. 2676. It is a holding that the court cannot enter such a judgment.

Inconsistent with this principle, the government argues that a court's dismissal for lack of jurisdiction

has preclusive effect under Section 2676. See Gov't Br. 33–34. That argument ignores the phrase "under section 1346(b)" in Section 2676 and contradicts this Court's decisions addressing jurisdiction.

1. *The government's argument that Section 2676 applies absent jurisdiction under Section 1346(b)(1) conflicts with the statutory text.*

Section 2676 requires FTCA jurisdiction to trigger the judgment bar. "Absent persuasive indications to the contrary, * * * Congress says what it means and means what it says." *Simmons*, 136 S. Ct. at 1848. In Section 1346(b)(1), Congress says that six elements must be satisfied for a court to have subject-matter jurisdiction under the FTCA. 28 U.S.C. 1346(b)(1); see also *Meyer*, 510 U.S. at 477. That means that when an element of Section 1346(b) is absent, "an action under [the] FTCA [does not] exist[]." *Carlson*, 446 U.S. at 23. And in Section 2676, Congress says that the judgment bar only applies when a court has entered "[t]he judgment *in an action under section 1346(b)*." 28 U.S.C. 2676 (emphasis added). That means that a court without Section 1346(b)(1) jurisdiction cannot enter "[t]he judgment" that triggers the judgment bar.

That interpretation aligns with common-law res judicata. See *Cromwell*, 94 U.S. at 365; *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (observing that "principles of

estoppel do not apply" without subject-matter jurisdiction).

It finds more support in the FTCA's original jurisdictional language. § 410, 60 Stat. at 843–844; App. 1a. Whereas Section 1346(b)(1) now speaks more generally to jurisdiction "of civil actions on claims" that satisfy the FTCA's jurisdictional elements, the original language more specifically provided jurisdiction "to hear, determine, *and render judgment* on any claim" that satisfied the jurisdictional elements. § 410(a), 60 Stat. 844 (emphasis added); App. 1a. Although Congress's 1948 language change did not alter the substance of the FTCA, *Feres* v. *United States*, 340 U.S. 135, 140 n.9 (1950) ("We attribute to this change of language no substantive change of law."), it informs Congress's use of the word "judgment" in Section 2676. Through the more specific original language, Congress made clear a court could not "render judgment on any claim" that does not satisfy the six elements of Section 1346(b). When a court lacks the power to "render judgment on any claim" under Section 1346(b), it certainly lacks the power to render "[t]he judgment in an action under section 1346(b)." See 28 U.S.C. 2676.

Avoiding the plain language of Section 2676, the government points to dictionary definitions of "judgment" and asserts that the district court's dismissal of King's tort claims because he could not satisfy the jurisdictional elements of Section 1346(b)(1) "fits the ordinary meaning of the term 'judgment.'" Gov't Br. 21–22. But Section 2676 does not simply refer to a "judgment." It refers to "[t]he judgment in an action

under section 1346(b)." 28 U.S.C. 2676. The ordinary meaning of the whole phrase, not just one word, is dispositive. See *Dolan*, 546 U.S. at 486 ("Interpretation of a word or phrase depends upon reading the whole statutory text.").[10] When the language of Section 2676 is interpreted together with Section 1346(b)(1), a court can only enter a judgment under Section 1346(b)(1) when the FTCA's jurisdictional elements are satisfied.

2. *The government's argument that a court's dismissal of a claim for lack of subject-matter jurisdiction can trigger the judgment bar contradicts the Court's decisions addressing jurisdiction.*

At the government's urging, the district court held that it lacked jurisdiction to hear King's tort claims because "the United States is * * * entitled to immunity under the FTCA in this case." Pet. App. 80a. By its own terms, the district court did not enter "[t]he judgment in an action under section 1346(b)." 28 U.S.C. 2676. Instead, the court found that King's complaint failed to establish the sixth jurisdictional element of Section 1346(b)(1)—that the "United States, if a private

[10] Even if Section 2676 did not include the phrase "in an action under section 1346(b)," the government fails to follow its own "judgment means *any* judgment" analysis by creating exceptions for certain judgments. For instance, the government identifies numerous "judgments" that a court could enter that would not implicate the judgment bar. See, *e.g.*, Gov't Br. 22–23 (requiring a judgment to be "appealable" or "final"), 35 (excluding judgments for technical or procedural reasons).

person, would be liable" to King under Michigan law—because the United States was entitled to Michigan governmental immunity. Pet. App. 79a–80a.

Retreating from the jurisdictional consequences of the holding it requested, the government now contends that the scope of jurisdiction under Section 1346(b)(1) is broader than the scope of liability under the same provision. Gov't Br. 32 ("Respondent alleged the six elements of his claim under Section 1346(b)(1); he simply failed to introduce factual allegations * * * to establish" one of those elements). The government's argument fails for two reasons.

First, the Court explicitly rejected that argument in *FDIC* v. *Meyer*. There, the government sought "to uncouple the scope of jurisdiction under § 1346(b) from the scope of waiver of sovereign immunity under § 1346(b)." *Meyer*, 510 U.S. at 479. According to the government, "the jurisdictional grant would be broad (covering all claims sounding in tort), but the waiver of sovereign immunity would be narrow (covering only those claims for which a private person would be held liable under state law)." *Ibid.* But *Meyer* rejected that interpretation because "[t]here simply is no basis in the statutory language for the parsing" the government suggested. *Ibid*. Thus, the government's attempt here to uncouple jurisdiction and liability also fails. See Gov't Br. 32.

Meyer further explained that "[a] claim comes within [Section 1346(b)'s] jurisdictional grant * * * if it is actionable under § 1346(b). And a claim is actionable

under § 1346(b) if it alleges the six elements outlined" in Section 1346(b)(1). *Meyer*, 510 U.S. at 477. An allegation that fails to establish those elements, however, cannot trigger FTCA jurisdiction because such a "claim does not fall within the terms of § 1346(b) in the first instance." *Id.* at 479 n.7; see also *id.* at 477–478.[11]

Second, the government's interpretation discards the jurisdictional language of Section 1346(b). This Court has instructed that when Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional," it is. *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515 (2006). Section 1346(b)(1) provides such a statement of jurisdictional elements. See *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 411–412 (2015). And jurisdictional elements are jurisdictional, even when entwined with facts and merits. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017) ("[M]erits and jurisdiction will sometimes come intertwined," but "the court must still answer the jurisdictional question."); see also Gregory C. Sisk, *Litigation with the Federal Government* § 3.5(a) (2016).

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[11] Even if simply writing the six elements of Section 1346(b)(1) into a complaint were enough to trigger FTCA jurisdiction—no matter if they fail as a matter of law or fact—King did not do that here. To the contrary, the FTCA count in his complaint, J.A. 39–40, ¶¶ 91–98, does not "allege, *inter alia*, that the United States 'would be liable to the claimant' as 'a private person,' " *Meyer*, 510 U.S. at 477 (quoting 28 U.S.C. 1346(b)(1)). More to the point, the district court held that it lacked subject-matter jurisdiction because King could not make that claim thanks to Michigan governmental immunity. Pet. App. 79a–80a.

Importantly, both *Arbaugh* and *Helmerich* distinguished between jurisdictional provisions like Section 1346(b)(1) and the "basic statutory grants" of jurisdiction under 28 U.S.C. 1331 and 1332. *Arbaugh*, 546 U.S. at 513, 515 & n.11; *Helmerich*, 137 S. Ct. at 1322. Under Sections 1331 and 1332, pleading a claim that ultimately fails is usually enough to trigger jurisdiction. *Helmerich*, 137 S. Ct. at 1322 (citing *Bell* v. *Hood*, 327 U.S. 678 (1946)). But under provisions like Section 1346(b)(1), "a party's nonfrivolous, but ultimately incorrect argument * * * [that it can satisfy the jurisdictional elements] is insufficient to confer jurisdiction." *Helmerich*, 137 S. Ct. at 1316; *ibid.* (observing that "the relevant factual allegations must make out a legally valid claim" and "[a] good argument to that effect is not sufficient.").

Whether the jurisdictional reach of Section 1346(b)(1) is given its narrowest or broadest possible effect, the district court lacked jurisdiction to enter "[t]he judgment in an action under section 1346(b)" in this case. Per the district court's own holding, it lacked subject-matter jurisdiction. Pet. App. 79a–80a. Per *Meyer*, the district court lacked subject-matter jurisdiction because it held that King's complaint failed to "allege * * * that the United States 'would be liable to the claimant' as 'a private person.'" 510 U.S. at 477 (quoting 28 U.S.C. 1346(b)(1)); accord J.A. 39–40, ¶¶ 91–98. And per *Arbaugh*, *Kwai Fun Wong*, and *Helmerich*, the district court lacked subject-matter jurisdiction because Section 1346(b)(1) "clearly states that a threshold limitation on a statute's scope shall

count as jurisdictional," *Arbaugh*, 546 U.S. at 515, and the failure of any jurisdictional element at any point therefore divests a court of jurisdiction, see *Henderson* v. *Shinseki*, 562 U.S. 428, 434–435 (2011). Thus, under any possible understanding of subject-matter jurisdiction, the district court lacked competence under the FTCA to enter the judgment that could trigger the judgment bar and preclude King's constitutional claims.

3. *The government's argument that the jurisdictional language of Section 1346(b)(1) should be ignored contradicts* Simmons.

To circumvent the jurisdictional limits Congress imposed in the FTCA, the government also adopts Judge Rogers's argument that the FTCA does not mean what it says. Pet. App. 41a–42a ("It is true that a merits-based dismissal under the limits of § 1346(b) is jurisdictional * * * But that cannot be sufficient to preclude application of the FTCA judgment bar because that would effectively nullify the judgment bar with respect to cases where the FTCA judgment was in favor of the government."); Gov't Br. 30 (restating the same argument). But requiring jurisdiction before a dismissal is granted preclusive effect nullifies nothing.

It is true that, if the broadest understanding of jurisdiction is applied to Section 1346(b), the judgment bar would only apply to judgments *against* the United States (because any judgment in favor of the United

States would necessarily fail to establish one or more of the FTCA's jurisdictional elements). See pp. 39–41, *supra*. Even then, the judgment bar would still operate to prevent duplicative litigation and "supplement[] common-law claim preclusion by closing a narrow gap." *Simmons*, 136 S. Ct. at 1849 n.5. A judgment against the United States would still bar a separate lawsuit against its employees "by reason of the same subject matter." 28 U.S.C. 2676; accord *Gilman*, 347 U.S. at 511 n.2 (1954) (quoting *1942 Hearing* 9) ("After the claimant has obtained satisfaction of his claim from the Government, * * * he [can]not * * * turn around and sue" the government employee.).

Simmons itself supports this analysis. As the Court explained, Section 1346(b) provides FTCA jurisdiction, and the Exceptions provision of Section 2680 takes it away. 136 S. Ct. at 1847. Considering the latter, the Court concluded that Section 2676 does not apply when an FTCA claim is decided in favor of the United States under Section 2680. *Id.* at 1845. Thus, the same nullification argument the government advances here would have applied with equal force in *Simmons* because the Court's reading of Section 2680 "effectively nullified the judgment bar where the FTCA judgment was in favor of the government." See Pet. App. 42a.

For similar reasons, the government's repeated citation to the Court's statement in *Simmons* that the judgment bar applies when a plaintiff "receives a judgment (*favorable or not*) in an FTCA suit" is misplaced. Gov't Br. 30 (quoting *Simmons*, 136 S. Ct. at 1847).

Because *Simmons* was concerned with an FTCA exception under Section 2680, the Court did not specifically address the jurisdictional implications of Section 1346(b). Cf. *Arbaugh*, 546 U.S. at 512 (declining to follow the jurisdictional implications of an earlier case where the "decision did not turn on that characterization, and the parties did not cross swords over it.").

If the jurisdictional implications of Section 1346(b)(1) had been at issue in *Simmons*, the holdings in *Arbaugh*, *Kwai Fun Wong*, and *Helmerich* suggest that the Court would have rejected the government's attempt to evade Congress's jurisdictional limits. See *Arbaugh*, 546 U.S. at 511; *Kwai Fun Wong*, 575 U.S. at 419; *Helmerich*, 137 S. Ct. at 1319. Under the government's interpretation, Congress can set jurisdictional limits that a party cannot satisfy, but a party can create jurisdiction by pleading around those limits, thereby "confer[ring] subject-matter jurisdiction that enables a district court to enter a judgment on the merits." Gov't Br. 32. The Court has consistently rejected that possibility. *Insurance Corp. of Ir.*, 456 U.S. at 702 (observing that "no action of the parties can confer subject-matter jurisdiction upon a federal court"); *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940) (holding that "[t]he failure of [a party] to seek review cannot give force to [the] exercise of judicial power" where the court lacks jurisdiction).

C. When a court dismisses a claim for lack of jurisdiction under Section 1346(b), it cannot adjudicate the merits of that claim as required to trigger the judgment bar.

As explained above and agreed by the government, Section 2676 only applies to judgments on the merits. See Gov't Br. 23, 42, 45. The parties disagree, however, on whether a court without subject-matter jurisdiction has the power to adjudicate the merits of a claim. The government contends that it does: "[E]ven if a judgment dismissing an FTCA claim * * * were thought to have some jurisdictional consequences, * * * the FTCA would be an exception to the general principle that jurisdiction must be resolved before the merits." *Id.* at 33–34. But this Court has firmly stated that the "limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must neither be disregarded nor evaded." *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978); see also *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 160–161 (2010) (similar).

Separation of powers demands jurisdiction before a court can adjudicate the merits of a claim. "Subject-matter jurisdiction * * * is an Art[icle] III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this." *Insurance Corp. of Ir.*, 456 U.S. at 702. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function

remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868); see also *Mansfield, C. & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 382 (1884) ("[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception.").

Since its earliest FTCA decisions, the Court held that jurisdiction is a prerequisite to a court's consideration of the merits. *Feres*, 340 U.S. at 140–141 ("[Section 1346(b)] confers jurisdiction to render judgment upon all such claims. * * * Jurisdiction is necessary to deny a claim on its merits as a matter of law as much as to adjudge that liability exists."). And, as the government notes, "[t]he FTCA as originally enacted expressly incorporated the Federal Rules of Civil Procedure," Gov't Br. 22 n.4 (citing § 411, 60 Stat. 844), which provided that a dismissal for lack of jurisdiction does not "operate[ ] as an adjudication upon the merits," see Advisory Comm. on Rules for Civ. P., Report of Proposed Amendments to Rules of Civ. P. for the District Courts of the U.S. 56–57 (1946). That is true today as well. Fed. R. Civ. P. 41(b) ("[A] dismissal * * * except one for lack of jurisdiction * * * operates as an adjudication of the merits.").

Still, the government contends that the district court could and did give "two distinct reasons why" it dismissed King's tort claims: first, that it lacked subject-matter jurisdiction under Section 1346(b), and, second, "irrespective of any governmental immunity, the district court determined that respondent had

failed as a matter of law to show any of the Michigan common law torts that he alleged." Gov't Br. 9–10. The first reason precluded the second.

The government wrongly argues that *Semtek International Inc. v. Lockheed Martin Corp.* supports its extraordinary position that a court can reach the merits of a claim over which it lacks jurisdiction. Gov't Br. 35. *Semtek* held no such thing. Instead, it explained that jurisdiction is necessary, but not sufficient, for a court's entry of a preclusive judgment. *Semtek*, 531 U.S. at 501–502; see also *id.* at 503 ("[I]t is no longer true that a judgment 'on the merits' is necessarily a judgment entitled to claim-preclusive effect."). *Semtek* did not hold that a judgment entered without subject-matter jurisdiction can, nevertheless, adjudicate the merits of that subject matter. Without jurisdiction, a court cannot reach the merits. *Vermont Agency of Nat. Res.* v. *United States*, 529 U.S. 765, 778 (2000) ("[I]f there is no jurisdiction there is no authority to sit in judgment of anything else.").

The government alternatively proposes that the district court could exercise hypothetical jurisdiction over King's tort claims. Compare Gov't Br. 34 ("Even if the structure of the FTCA means that the district court's dismissal *also* implicates jurisdiction, the dismissal remains a judgment that resolves the substantive liability of the United States on respondent's FTCA claims."), with *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93–94 (1998) (declining to endorse the concept of "hypothetical jurisdiction"). This Court has flatly rejected the exercise of hypothetical

jurisdiction "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Steel Co.*, 523 U.S. at 94.

For these reasons, the Sixth Circuit correctly held below that the district court's conclusion that King failed to establish the elements of Section 1346(b) "was not a disposition on the merits. In fact, it was the opposite—it *precluded* the district court from exercising subject-matter jurisdiction over the FTCA claim and *prevented* the district court from reaching a decision on the merits." Pet. App. 10a–11a.

III. The government's interpretation of the judgment bar embodies the "strange result" the Court rejected in *Simmons*.

The government's efforts to deny a day in court to an innocent college student, whom the officers unconstitutionally stopped, searched, choked, beat, and arrested, underscores the destructiveness of the government's interpretation of Section 2676. The government never answered King's complaint nor provided a single witness for deposition and—even after King overcame qualified immunity—the government has fought tooth and nail for another special protection that would prevent King from confronting the officers in court with his constitutional claims.

Simmons rejected the strange result the government demands here. After noting that Congress enacted the judgment bar to "prevent[] unnecessarily

duplicative litigation," the Court in *Simmons* explained that it would make little sense to interpret the judgment bar in a manner that prevents a victim from having a "fair chance to recover damages for his beating." 136 S. Ct. at 1849. By attempting on appeal to cut off King's first and only lawsuit to recover damages for the officers' constitutional violations, the government demands an interpretation of the judgment bar even more peculiar than the one advanced in *Simmons*. See, *e.g.*, *Hallock* v. *Bonner*, 281 F. Supp. 2d 425, 428 (N.D.N.Y. 2003) (describing a hypothetical procedural history identical to this case to illustrate, *reductio ad absurdum*, the "destructive" effect of applying the judgment bar absent FTCA jurisdiction); accord *Manning*, 546 F.3d at 438 (noting that its interpretation of the judgment bar—which the government presses here—had been characterized as "nonsensical" and "harsh, if not Kafka-esque").

The government's actions here have delayed King his day in court by years, and now the government urges this Court to deny it altogether. While the government bemoans the possibility that "the litigation must restart," Gov't Br. 28, that is only true because the government refused to answer King's complaint and has, instead, spent years fighting over whether it even needs to justify the actions of its employees. It did so first by claiming qualified immunity and, after that failed, urging the novel application of the judgment bar it advances here. See, *e.g.*, D. Ct. Doc. 106 (staying

proceedings on remand pending resolution of the government's petition for certiorari).[12]

Had the government simply defended this case on its substance, rather than looking for ever more ways to avoid doing so, King would have had his day in court, the officers could have defended their actions (if they are defensible), and this case would have concluded long ago. Instead, the government comes to the Court with a theory that Section 2676 does not incorporate common-law principles but embodies a judicial trap that exists outside the statutory text, common law, and common sense.

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[12] The government also urged the district court to dismiss King's FTCA claim as to officer Allen "because Plaintiff failed to exhaust his administrative remedies [under 28 U.S.C. 2675(a)] for this claim where Plaintiff's administrative claim only sought relief under the FTCA based on Agent Brownback's actions." Pet. App. 75a. The district court held that "argument has merit." *Id*. at 76a; see also D. Ct. Doc. 72, at 58–59 ("[T]he SF-95 [form King submitted to the FBI] clearly identifies King and his counsel's deliberate choice to pursue liability for Officer Allen's conduct under § 1983 and *Bivens* only."); Gov't Br. 8 n.3. So regardless of this Court's disposition of the judgment bar issue as to Brownback, the government should be judicially estopped from applying it to Allen. See *New Hampshire* v. *Maine*, 532 U.S. 742, 749–751 (2001).

Alternatively, because Section 2675(a) precludes the "institut[ion]" of "an action" under the FTCA, the Court should consider it an alternative basis for declining to apply the judgment bar to King's *Bivens* claims against Allen. See D. Ct. Doc. 72, at 59–60 ("A plaintiff cannot file an FTCA suit until he has exhausted his administrative remedies. This requirement is jurisdictional. * * * [A]ny FTCA claim related to Officer Allen's conduct is now barred.").

The district court's lack of jurisdiction under the FTCA cannot bar King's meritorious constitutional claims against the officers in the same lawsuit. Although the United States cannot be held liable for the officers' torts, that has "no logical bearing on whether" the officers can be held liable for violating the Constitution. *Simmons*, 136 S. Ct. at 1849. They can be, and they must be.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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