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 OF THE LAW ENFORCEMENT ACTION PARTNERSHIP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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August 2020

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INTEREST OF AMICUS CURIAE

The Law Enforcement Action Partnership ("LEAP") is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just.[1] Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speakers bureau numbers more than 200 criminal justice professionals advising on police-community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

This case arises out of an encounter between Respondent, who was a 21-year old college student at the time, and Petitioners, two law enforcement officers. Respondent filed a civil action, alleging that the officers violated his Fourth Amendment rights and asserting claims against the officers under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Respondent also sued the United States under the Federal Tort Claims Act

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief.

("FTCA"), 28 U.S.C. §§ 1346(b), 2671–2680, seeking to hold the United States liable for the officers' actions. The issue in this case is whether the district court's dismissal of Respondent's FTCA claims for lack of subject matter jurisdiction bars Respondent from pursuing his *Bivens* claims against the officers. LEAP and its members have an interest in resolving this question in a way that avoids unnecessarily duplicative litigation while permitting potentially meritorious claims to be adjudicated on their merits.

SUMMARY OF ARGUMENT

When a court dismisses an FTCA action for lack of subject matter jurisdiction, that dismissal is not a "judgment" for the purposes of the FTCA's judgment bar provision, 28 U.S.C. § 2676.

1. As this Court has recognized, the FTCA's judgment bar provision incorporates principles of res judicata. *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1849 n.5 (2016). In drafting the provision, Congress borrowed well-established terms from the common-law doctrine of res judicata. By doing so, Congress incorporated the legal principles attached to those terms. One of those principles is that claim preclusion applies only to a judgment on the merits. It has long been established that when a court lacks jurisdiction over a case, it does not have the power to render a valid judgment in the matter. *See Ex Parte Terry*, 128 U.S. 289, 305 (1888). Interpreting the dismissal of an FTCA claim for lack of subject matter jurisdiction as a "judgment" for purposes of the FTCA's judgment bar provision is inconsistent with this long-established principle.

2. The Government's interpretation would also undermine two important purposes of the FTCA because it would encourage duplicative litigation and channel claims towards federal employees rather than the Government. The FTCA's judgment bar provision is designed to protect government employees from successive proceedings while also protecting the government from the burden of defending duplicative claims. Under the Government's interpretation, however, plaintiffs would have an incentive to pursue their *Bivens* claims against federal officers first, ahead of their FTCA claims. By subordinating claims against the United States under the FTCA to claims against individual officers under *Bivens*, plaintiffs could avoid the risk that their *Bivens* claims will be barred by an adverse "judgment" on their FTCA claims. The Government's proposed interpretation of the judgment bar provision thus would defeat the purposes of the judgment bar by channeling claims to individual employees and encouraging duplicative proceedings.

3. This Court's recent decision in *Simmons*, 136 S. Ct. 1843, supports an affirmance in this case. In *Simmons*, the Court held that the judgment bar does not apply if a case falls under certain "exceptions" to the FTCA. The Court's opinion in *Simmons* recognized that "the viability of a plaintiff's meritorious suit against an individual employee should [not] turn on the order in which the suits are filed." 136 S. Ct. at 1850. In addition, *Simmons* reaffirmed that "the FTCA's purposes" include "channeling liability away from individual employees and toward the United States." *Id.* (citing *Dalehite v. United States*, 346 U.S.

15, 25 (1953)). In this case, the Government nevertheless argues for an interpretation of the judgment bar provision that would make the viability of a plaintiff's claims turn on the order in which the suits are filed and that would also channel liability towards individual employees and away from the United States.

For these reasons, the Court should affirm the court of appeals' decision and hold that dismissal of a claim under the FTCA for lack of subject matter jurisdiction does not trigger the FTCA's judgment bar.

ARGUMENT

I. The FTCA's Judgment Bar Incorporates Common Law Res Judicata Principles and Does Not Extend to Dismissals for Lack of Jurisdiction.

An individual seeking to assert a civil claim based on the actions of a federal law enforcement officer or other federal employee may assert certain constitutional claims directly against the officer in a *Bivens* action. *Bivens*, 403 U.S. at 391–92. In specified circumstances, the individual also may sue the United States under the FTCA. *See* 28 U.S.C. §§ 1346(b), 2671–2680. The FTCA waives the Government's sovereign immunity from suits resulting from the negligent or wrongful actions of the Government's employees while working within the scope of their employment.[2] *FDIC v. Meyer*, 510 U.S. 471, 475–76

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[2] Specifically, the FTCA waives the sovereign immunity of the United States and grants federal courts jurisdiction over:

(1994). As this Court has recognized, *Bivens* claims and FTCA claims are complementary remedies. *Carlson v. Green*, 446 U.S. 14, 20 (1980).

The "judgment bar" provision of the FTCA states 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. The court of appeals correctly concluded that a dismissal for lack of subject matter jurisdiction under the FTCA under state law is not a "judgment in an action under § 1346(b) of this title." *Id.*

This Court has recognized that "the judgment bar provision 'functions in much the same way' as th[e] doctrine[of res judicata]." *Simmons*, 136 S. Ct. at 1849 n.5 (citation omitted); *see also Will v. Hallock*, 546 U.S. 345, 354 (2006). That conclusion is supported by the text of the judgment bar provision, which uses legal terms borrowed from the common-

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> claims [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] 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.

28 U.S.C. § 1346(b)(1); *see generally FDIC v. Meyer*, 510 U.S. at 477.

law doctrine of res judicata, also known as claim preclusion.[3] That doctrine provides that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153, (1979); *see also Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 502–05 (2001).

In the judgment bar provision, Congress used the phrases "judgment in an action under section 1346(b)," "complete bar," and "by reason of the same subject matter." Those terms directly invoke common law principles of claim preclusion: "judgment in an action under section 1346(b)" mirrors the required final judgment on the merits by a court having jurisdiction, *see Semtek*, 531 U.S. at 505; a "complete bar" is a longstanding synonym for claim preclusion, *see id.* at 502; and "by reason of the same subject matter" reflects that claim preclusion applies to cases arising out of the same underlying facts, *see, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

"[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the

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[3] The term "res judicata" is sometimes used to refer solely to the doctrine of claim preclusion, and is sometimes used to refer more broadly to both claim preclusion and issue preclusion (also known as collateral estoppel). *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 94 n.5 (1980) ("The Restatement of Judgments now speaks of res judicata as 'claim preclusion' and collateral estoppel as 'issue preclusion.' Restatement (Second) of Judgments § 74 (Tent. Draft No. 3, Apr. 15, 1976). Some courts and commentators use 'res judicata' as generally meaning both forms of preclusion.").

established meaning of these terms." *Neder v. United States*, 527 U.S. 1, 21 (1999) (citation omitted) (second alteration in original); *see also Astoria Fed. Sav. & Loan v. Solimino*, 501 U.S. 104, 108 (1991). Similarly, "[i]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it." *Moskal v. United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

When Congress enacted the judgment bar provision, it "clos[ed] a narrow gap" by ensuring that claim preclusion would apply not only where a plaintiff first sues the federal employee and then sues the United States, but would *also* "appl[y] where a plaintiff first sues the United States and then sues an employee" after a final merits judgment—a situation that arguably would not have been covered under common-law claim preclusion at the time. *Simmons*, 136 S. Ct. at 1849 n.5. In closing that "narrow gap," Congress did not repudiate the well-settled elements of claim preclusion.

One of those well-settled elements is that a dismissal for lack of subject matter jurisdiction is not a decision on the merits, and therefore does not foreclose subsequent suits. *See, e.g.*, *Costello v. United States*, 365 U.S. 265, 285–88 (1961); *Restatement (Second) of Judgments* §§ 13 cmt. d, 20(1)(a) (1982). This limitation on claim preclusion is in accordance with the long-established principle that a court's power to render a valid judgment with the force of law necessarily turns on whether the court has jurisdiction to

decide the case. *See Ex Parte Terry*, 128 U.S. at 305 ("A judgment which lies without the jurisdiction of a court, even one of superior jurisdiction and general authority, is, upon reason and authority, a nullity."). Under this principle, a court is permitted to "render judgment in an action when the court has jurisdiction of the subject matter of the action," but not otherwise. *Restatement (Second) of Judgments* § 1. As a leading treatise explains, "it is improper for a district court to enter a judgment under Rule 56 for defendant because of a lack of jurisdiction. . . . If the court has no jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action." Charles A. Wright et al., 10A *Federal Practice & Proc. Civ.* § 2713 (4th ed. 2020). This principle was well established at common law when Congress enacted the FTCA.[4]

Despite these established principles, the Government argues that when a court determines that it lacks subject matter jurisdiction under the FTCA, that jurisdictional determination triggers the FTCA's judgment bar provision, even in cases such as this one, in which the district court did not reach the merits of

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[4] *See* 1 Henry C. Black, *A Treatise on the Law of Judgments and the Doctrine of Res Judicata* 2 n.1, 5 (1891) (defining "judgment" as "final consideration and determination of a court of competent jurisdiction upon the matters submitted to it"); John C. Wells, *A Treatise on the Doctrines of Res Judicata and Stare Decisis* § 422, at 336 (1878) ("[A] judgment to be conclusive . . . must be pronounced by a court of competent jurisdiction."). *See also* Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 Yale L.J. 164, 164 (1977) ("For over three centuries it has been black-letter law that the judgment of a court without jurisdiction over the subject matter of the action before it is null and void in its entirety.").

King's FTCA claim and the defendants never even filed an answer. U.S. Br. 28.

Indeed, the Government goes so far as to suggest that the FTCA incorporates the definition of "judgment" from Rule 54 of the Federal Rules of Civil Procedure. *See* Pet. Br. 22; Fed. R. Civ. P. 54(a) (defining judgment "as used in these rules" as "any order from which an appeal lies"). The Government's approach is inconsistent with the language Congress employed in the FTCA, which is borrowed directly from the common law of res judicata, not from federal rules governing appealability. Moreover, importing the Rule 54 definition of "judgment" into the FTCA would trigger the FTCA's judgment bar when complaints are dismissed for reasons such as improper venue or inadequate service, both of which are "order[s] from which an appeal lies,"[5] Fed. R. Civ. P. 54(a), even though such orders would have no preclusive effect for another FTCA complaint, let alone a lawsuit alleging a different cause of action against different defendants. As these examples demonstrate, such a broad interpretation of "judgment" would cause the FTCA's judgment bar to be triggered by non-merits decisions that did not afford the plaintiff a single "bite at the . . . apple." *Simmons*, 136 S. Ct. at 1849.[6]

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[5] *See, e.g.*, *Stafford v. Briggs*, 444 U.S. 527, 531–32 (1980) (reviewing, on appeal, dismissal for improper venue); *Herrley v. Volkswagen of Am., Inc.*, 957 F.2d 216, 217–18 (5th Cir. 1992) (reviewing, on appeal, dismissal for inadequate service).

[6] In *Simmons*, the petitioner's FTCA claim had been dismissed on summary judgment in an order that was appealable under Rule 54. *See Simmons*, 136 S. Ct. at 1846 (noting that neither

As the Government recognizes, the FTCA grants a limited waiver of the sovereign immunity of the United States, permitting plaintiffs to sue the Government for the actions of government officers, employees, and agents in specified conditions. U.S. Br. 11 (citing Pet. App. 6a–11a). These conditions are jurisdictional, because federal courts are authorized to adjudicate these suits only if the claim meets the specific requirements set out in the FTCA. *See, e.g.*, *Simmons*, 136 S. Ct. at 1846 ("[Section 1346(b)] gives federal district courts . . . jurisdiction over tort claims against the United States."). One such requirement is that "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." 28 U.S.C. § 1346(b)(1).

Prior to reaching the merits of King's FTCA claim, the district court determined that Michigan law gave qualified immunity to the officers. This resulted in "[a] dismissal for lack of subject-matter jurisdiction," Pet. App. 7a, not in a decision on the merits. Because the claim failed to meet the requirements under the statute, it did "not fall within FTCA's 'jurisdictional grant.'" *Id.* at 9a (quoting *Meyer*, 510 U.S. at 477). Therefore, the claim was "not 'cognizable' under § 1346(b) because . . . § 1346(b) does not provide a

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party chose to challenge the dismissal of the initial suit). The question of appealability played no role in the Court's analysis, which explained that dismissal of a claim under the "Exceptions" section "signals merely that the United States cannot be held liable for a particular claim; it has no logical bearing on whether an employee can be held liable instead." *Id.* at 1849.

cause of action for such a claim." *Meyer*, 510 U.S. at 477.[7]

II. The Government's Proposed Interpretation Would Undermine Key Purposes of the FTCA by Channeling Litigation to Federal Employees and Encouraging Duplicative Litigation.

In addition to disregarding well-settled legal principles, accepting the Government's proposed interpretation of the FTCA's judgment bar would undermine two basic purposes of the FTCA: channeling litigation away from government employees and avoiding duplicative litigation.

As this Court has noted, the FTCA was designed to encourage plaintiffs to bring suit against the federal government, rather than its individual employees. *Simmons*, 136 S. Ct. at 1850. Congress enacted the judgment bar provision to prevent a dual

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[7] The government argues that applying established principles of res judicata will lead to unacceptable results because every judgment in favor of the Government in an FTCA action amounts to a dismissal for lack of subject matter jurisdiction, even if it is entered following a jury trial. In this case, of course, there was no jury trial, and Petitioners never even answered Respondent's complaint. Moreover, the Government's parade of horribles overlooks principles of issue preclusion, which typically apply to issues that were actually litigated and necessarily decided in a prior action. *See, e.g. Sturgell*, 553 U.S. at 892 (explaining that claim preclusion applies to final judgments on the merits and issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment'" (citation omitted)). Thus, principles of issue preclusion may be applicable when an issue is actually litigated on the merits and decided in an FTCA case.

recovery from both the federal government and federal employees, and to avoid wasting government resources on defending against repetitive lawsuits. *See Hallock v. Bonner*, 387 F.3d 147, 154 (2d Cir. 2004). As Assistant Attorney General, Francis M. Shea explained in his testimony to Congress concerning the FTCA:

> It has been found that the Government, through the Department of Justice, is constantly being called on by the heads of the various agencies to go in and defend, we will say, a person who is driving a mail truck when suit is brought against him for damage or injuries caused while he was operating the truck within the scope of his duties. Allegations of negligence are usually made. *It has been found, over long years of experience, that unless the Government is willing to go in and defend such persons the consequence is a very real attack upon the morale of the services.* Most of these persons are not in a position to stand or defend large damage suits, and they are of course not generally in a position to secure the kind of insurance which one would if one were driving himself.

United States v. Gilman, 347 U.S. 507, 511 n.2 (1954) (emphasis added) (citing Tort Claims: H.R. 5373 and H.R. 6463 Hearings Before the Comm. on the Judiciary, 77th Cong. 9 (1942)). In short, "the point of the [FTCA] provisions was to protect the employee from a successive proceeding and the government from the burden of defending duplicative claims." James E. Pfander & Neil Aggarwal, Bivens*, the Judgment Bar,*

and the Perils of Dynamic Textualism, 8 U. St. Thomas L.J. 417, 428 (2011).

The Government's proposed interpretation would undermine these purposes. Rather than minimizing duplicative litigation, the Government's approach would give plaintiffs an incentive to pursue *Bivens* claims against federal employees first, to avoid the risk that an adverse ruling on their FTCA claims will bar their *Bivens* claims.

Under the Government's construction, a plaintiff who began with a FTCA claim (or filed both *Bivens* and FTCA claims in a single action) would run the risk that a court would enter an adverse ruling on the FTCA claim before adjudicating the *Bivens* claim. In that situation, under the Government's view, the plaintiff would be barred from pursuing the *Bivens* claim even if the district court's ruling on the FTCA claim had nothing to do with the merits of the *Bivens* claim. To avoid this risk, plaintiffs would have an incentive to pursue their *Bivens* claims against the officers first and delay pursuing their FTCA claims against the Government. By proceeding in this way, a plaintiff would have a fallback option if the *Bivens* claims do not fare well.[8]

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[8] That is so because the judgment bar provision applies only to judgments in FTCA cases, and a *Bivens* judgment may not foreclose an FTCA action under ordinary preclusion principles. *See, e.g., Sterling v. United States*, 85 F.3d 1225, 1229 (7th Cir. 1996) (Easterbrook, J.) ("[A] decision in the employee's favor is not automatically preclusive in the United States' favor. A party who wants to raise different legal theories of liability against the same defendant must present all in a single case. . . . But when

This Court has warned against such a result. In *Simmons*, the Court explained that "the viability of a plaintiff's meritorious suit against an individual employee should [not] turn on the order in which the suits are filed," and that such a result would be "at odds with one of the FTCA's purposes, channeling liability away from individual employees and toward the United States." *Simmons*, 136 S. Ct. at 1850 (citing *Dalehite*, 346 U.S. at 25). As the Court noted in *Dalehite*, enactment of the FTCA was prompted by the "feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work. . . . [The FTCA] was Congress' solution, affording instead easy and simple access to the federal courts for torts within its scope." *Dalehite*, 346 U.S. at 24–25.

Rather than channeling liability away from individual employees, the Government's position would place individual employees first in line to be sued by plaintiffs. And, rather than having the Government assume the obligation to pay damages for employees carrying out its work, the obligation would instead be channeled to employees in the first instance. Far from advancing a "complementary" scheme for FTCA and *Bivens* claims, the Government's interpretation encourages plaintiffs to make strategic decisions to "either bring 'a *Bivens* action alone' or else keep his

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sequential suits name different parties, only issues actually and necessarily decided in the first case carry over to the second under the doctrine of issue preclusion." (citation omitted)); *Ting v. United States*, 927 F.2d 1504, 1513 n.10 (9th Cir. 1991) (recognizing that a "judgment against individual federal officers in a *Bivens* action does not preclude a later action against the United States under the FTCA").

Bivens and FTCA claims 'pending simultaneously.'" U.S. Br. 46 (citation omitted). In short, the Government's position is inconsistent with more than sixty years of federal policy.

In most *Bivens* cases, the Government elects to provide representation to the individual defendants and to pay judgments entered against federal employees.[9] Thus, the Government's position is likely to increase its own litigation costs. But even when the Government exercises its discretion to assume the costs of litigating *Bivens* actions, those actions impose significant burdens on the individual defendants. After testifying in a *Bivens* case, the officers may have to return to court a second time to testify in a follow-up FTCA case. *See Sterling*, 85 F.3d at 1227 ("Public liability under the FTCA does not depend on the employee's liability under *Bivens*."). And the possibility of a second action following the conclusion of the *Bivens* action is an avoidable source of worry for government employees, who could spend months or years under the threatening shadow of duplicative litigation.

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[9] *See* Jessica Marder-Spiro, *Special Factors Counselling Action: Why Courts Should Allow People Detained Pretrial to Bring Fifth Amendment* Bivens *Claims*, 120 Colum. L. Rev. 1295, 1330 (2020) ("[I]ndividual defendants rarely, if ever, pay their own judgements [*sic*] because they are indemnified by the federal government."); Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 76 n.51 (1999) (reporting that the federal government provides representation in about 98% of the cases for which representation is requested (citing Memorandum for Heads of Dep't Components from Stephen R. Colgate, Assistant Att'y Gen. for Admin. (June 15, 1998))).

In sum, the Government's proposed interpretation of the FTCA's judgment bar would undermine important goals of the statute by encouraging duplicative litigation and channeling litigation away from the Government and toward government employees.

III. This Court's Decision in *Simmons* Supports Affirmance.

In *Simmons*, the Court held that the FTCA's judgment bar does not apply when a case falls within one of the specified "exceptions" to the FTCA. The Court relied on principles of claim preclusion to support its conclusion. *See id.* at 1849 n.5. As explained above, see pp. 4–11 *supra*, principles of claim preclusion also apply here, just as in *Simmons*, and support an affirmance in this case.

In *Simmons*, the Government was able to point to authority from this Court that arguably offered support for its position in that case. Here, the Government cites no authority for the proposition that a court without jurisdiction may nevertheless render judgments. As this Court explained in *Simmons*, "[t]he dismissal of a claim in the 'Exceptions' section signals *merely that the United States cannot be held liable for a particular claim*; it has no logical bearing on whether an employee can be held liable instead." *Simmons*, 136 S. Ct. at 1849 (emphasis added). Likewise, a dismissal for lack of subject matter jurisdiction signals "merely that the United States cannot be held liable for" state tort claims.

The Government argues that "when a plaintiff has had 'a fair chance to recover damages for' his alleged injuries through an FTCA claim against the United States, 'it would make little sense to give [him] a second bite at the money-damages apple by allowing suit against the employees.'" Pet. Br. 31 (citing *Simmons*, 136 S. Ct. at 1849) (alteration in original). But the Government's argument misses the mark. Claim preclusion principles and the FTCA's judgment bar both promote judicial economy, but they do not require plaintiffs to lose any chance of recovery if their case is dismissed for lack of jurisdiction. In this case, Respondent never received such a "fair chance" to recover damages; the defendants never even filed an answer.

Further, contrary to the Government's assertion, the Court's decision in *Simmons* does not "confirm[] that the judgment bar applies here." U.S. Br. 23. In *Simmons*, the Court noted that the FTCA's judgment bar would apply "[i]f the District Court in this case had issued a judgment dismissing [the plaintiff's] first suit because the [federal] employees were not negligent, because [the plaintiff] was not harmed, or because [the plaintiff] simply failed to prove his claim." *Simmons*, 136 S. Ct. at 1849. This case does not present the situation described in *Simmons*, for two reasons.

First, as noted above, the absence of subject matter jurisdiction rendered the district court powerless to issue a judgment, regardless of how the court's order is styled. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("[T]his court cannot proceed to pronounce judgment in this case, for it has no longer

jurisdiction."). "[A] judgment or decree, in order that it may be set up as a bar, must have been rendered by a court of competent jurisdiction upon the same subject-matter." *City of Aurora v. West*, 74 U.S. (7 Wall.) 82, 102 (1868). *Second*, in the situation discussed in *Simmons*, the FTCA claims were dismissed on the merits—that is, after the plaintiff litigated, and failed to prove, a state law claim.

That is not the case here. For example, among his FTCA claims, Respondent asserted a claim for false imprisonment. Respondent never had an opportunity to establish the elements of false imprisonment under Michigan law: "[1] an act committed with the intention of confining another, [2] the act directly or indirectly results in such confinement, and [3] the person confined is conscious of his confinement." *Moore v. City of Detroit*, 652 N.W.2d 688, 691 (Mich. Ct. App. 2002) (citation omitted). Instead, the court never reached the merits because it concluded that Respondent's state law claims were blocked by the Michigan doctrine of governmental immunity. Thus, "[t]he merits of the claim were never addressed, for the District Court granted the Government's motion to dismiss" on the basis that the Act's waiver of sovereign immunity did not apply. *Will*, 546 U.S. at 348. In short, Respondent did not get even a single bite at the money-damages apple, let alone a second bite at that apple.

Finally, the Government's interpretation would have the "strange result" that "the viability of a plaintiff's meritorious suit against an individual employee should turn on the order in which the suits are filed

(or the order in which the district court chooses to address motions)." *Simmons*, 136 S. Ct. at 1850. Rather than interpreting the judgment bar to comport with the principles of claim preclusion and Congress's intention to make *Bivens* and the FTCA parallel causes of action, *see Carlson*, 446 U.S. at 19–20 (1980), the Government's interpretation pits the two remedies against each other. In doing so, it prevents plaintiffs with potentially meritorious claims—such as Respondent—from having an opportunity to litigate those claims purely because of the timing of the claims and the court's rulings.

If this Court were to adopt the Government's proposed interpretation of the judgment bar provision, the consequences would not be limited to the Respondent in this case. Under the Government's proposed interpretation, courts will become a less effective mechanism for holding the federal government and its officers and agents accountable for constitutional violations. The question presented by this case thus bears on the level of public trust in both the courts and law enforcement officers. If that level of trust is eroded, it will become harder for law enforcement officers to do their jobs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 2020

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