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 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are Representatives Jamie Raskin and Mary Gay Scanlon, Members of the House of Representatives ("*Amici* Members").[1] Representative Raskin serves as the Chairman of the House Subcommittee on the Constitution, Civil Rights and Civil Liberties, and as a Member of the United States House Committee on the Judiciary ("House Judiciary Committee"). Representative Scanlon is Vice Chair of the House Judiciary Committee. *Amici* Members have a special interest in the correct interpretation and application of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671 *et seq,* and are uniquely positioned and motivated to curb interpretations that uproot and deform the legislative intent underlying the FTCA in the name of "plain reading," but produce manifestly unfair, illogical and undesired results.

Through the FTCA, the 79th Congress chose to waive the sovereign immunity of the United States in defined circumstances. The FTCA created a right of action for private plaintiffs to pursue state-law tort claims against the United States, for tortious conduct by its employees. So as not to overburden the federal district courts, Congress also enacted section 2676 of the FTCA, known as the judgment bar. The 79th Congress enacted the judgment bar both to prevent successive litigation and guard federal employees

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made such a monetary contribution. The parties have consented to the filing of this brief.

against the prospect of future suit, where a plaintiff had already achieved (or was denied) recovery against the United States on the merits of their claim.

Amici Members urge the Court to uphold the decision below and hold that section 2676, the judgment bar, does not bar claims brought pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), where the district court has dismissed a claimant's FTCA claim in the same action on purely jurisdictional grounds. To hold otherwise would undermine the animating purpose of the FTCA and is contrary to Congressional intent.

SUMMARY OF THE ARGUMENT

When Congress passed the FTCA, it intended to allow a private right of action against the United States for the state law torts of its agents, have those claims decided on their merits in federal court and thereafter protect government employees from subsequent litigation "by reason of the same subject matter." The plain meaning of the FTCA, legislative history surrounding its passage and case law interpreting it compel this Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

The language of section 1346(b) of the FTCA makes clear that its purpose is to abrogate sovereign immunity and provide claimants a forum—United States district courts—where they can bring a private state law tort action against the United States when a specific set of criteria is met. However, when litigants fail to satisfy the jurisdictional prerequisites of the FTCA, the district courts do not have subject matter jurisdiction over these state law tort claims, and

therefore do not have the power to render a judgment on the merits. As a result, the FTCA's judgment bar should only preclude subsequent state law tort claims "by reason of the same subject matter," after a district court has rendered judgment on a plaintiff's claim on its merits, and not on a threshold jurisdictional question.

Congress passed the FTCA in 1946, over twenty-five years prior to this Court's decision in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), which, for the first time, provided plaintiffs a cause of action for the constitutional—and not state law—torts of federal employees. Given these facts, Congress could not have intended the FTCA's judgment bar to preclude *Bivens* actions, as the rights to such actions did not exist at the time. The Court should not lightly extend the preclusive effect of the judgment bar to prevent an individual from seeking recovery for a violation of their fundamental constitutional rights, absent evidence that Congress clearly intended that result.

ARGUMENT

I. IN STATUTORY INTERPRETATION, THE PRIMARY FUNCTION OF THE FEDERAL COURTS IS TO GIVE EFFECT TO LEGISLATIVE INTENT.

Where statutory interpretation is necessary, the function of the federal courts is to construe the language of a statute "so as to give effect to the intent of Congress." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542 (1940); *see also Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction,

our task is to interpret the words of these statutes in light of the purposes Congress sought to serve.").

The most persuasive evidence of legislative purpose are the "words by which the legislature undertook to give expression to its wishes." *American Trucking Ass'ns*, 310 U.S. at 543–44. Where the text is clear and unambiguous, the Court must abide by the plain meaning of the statute. *Id.* at 543. However, where the plain meaning of the statute is likely to produce "unreasonable" results, the Court is empowered to look beyond the literal meaning of the words to the purpose of the legislation as a whole. *Id.* at 543–44 (citing *Ozawa v. United States*, 260 U.S. 178, 194 (1922)); *see also Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 (1934); *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 14 (1904); *Ohio ex rel Popovici v. Agler*, 280 U.S. 379, 383 (1930).

In *United States v. American Trucking Ass'ns*, on direct appeal from the district court, this Court considered the proper interpretation of the word "employees," as it was used in sections 204(a)(1), (2) of the Motor Carrier Act, 49 Stat. 543 (1935). *American Trucking Ass'ns,* 310 U.S. at 534. The Court's interpretation determined the breadth of the regulatory authority of the Interstate Commerce Commission under the Motor Carrier Act, which the Court acknowledged Congress passed "to adjust a new and growing transportation service to the needs of the public." *Id.* at 542. The Court, while noting that the term "employee" appeared, superficially, to have a clear and plain meaning, held that Congress intended the Motor Carrier Act to apply only to employees whose duties included safety operations. *Id.* at 543-45; 553. The Court reasoned that finding otherwise would

frustrate Congress' purpose to only grant the Commission customary power to secure safety and not "broad and unusual powers over all employees[,]" in light of the lack of legislative history suggesting a broad construction of the term. *Id*. at 546–47.

Similarly, to reach the appropriate conclusion in this case, this Court should consider not only the text, but also Congress' reasons for including the judgment bar in the first place. Congress passed the FTCA in 1946 to provide a limited waiver of sovereign immunity and replace the prior system of private claim bills, under which citizens had to petition Congress for a private law that would grant them recovery on their claims against the government. *See generally* James E. Pfander & Neil Aggarwal, *Bivens, The Judgment Bar, and The Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 424-427 (2011). Congress' purpose in enacting the FTCA was to afford private plaintiffs their day in court, granting the courts authority to adjudicate tort claims against the United States on the merits, and relieving Congress of the onerous task of hearing individual petitions. Congress enacted section 2676, the judgment bar, to prevent litigants from getting "two bites at the apple," by litigating and obtaining a judgment first against the United States, and subsequently against the individual federal employee whose tortious conduct occasioned the underlying suit. *See* Hearings Before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 9 (1942).

If this Court finds that a plaintiff is precluded from bringing a claim under *Bivens* after their FTCA claim is dismissed by a district court for lack of subject matter jurisdiction, the Court would undermine the

animating purpose of the FTCA in two significant ways. First, such a ruling would prevent a plaintiff with valid *Bivens* claims from having their day in court after a jurisdictional dismissal of that plaintiff's state law FTCA claim. Second, multiple lawsuits could result because plaintiffs will be forced to initiate their *Bivens* claims against federal employees *first*, withholding their (potentially meritorious) FTCA claims until after their *Bivens* claims are finally litigated. These results would undermine Congress' intent by drastically increasing the number of cases burdening district courts. Furthermore, under petitioners' reading of the statute, individual federal employees will bear the financial burden and liability of these claims despite Congress' express statutory language providing a mechanism for governmental liability. Such a result perverts the intent of Congress when it passed the FTCA.

II. DISMISSALS FOR LACK OF SUBJECT-MATTER JURISDICTION UNDER SECTION 1346(b) OF THE ACT DO NOT TRIGGER THE JUDGMENT BAR.

The 79th Congress did not intend the judgment bar to preclude a *Bivens* claim against a federal employee following dismissal of an FTCA claim against the federal government on jurisdictional grounds in the same action. The text of the FTCA demonstrates that Congress designed section 1346(b) to operate as a jurisdictional instrument. Section 1346(b) merely confers jurisdiction over FTCA claims to the district courts, meaning that judgments under 1346(b) constitute dismissals for lack of subject-matter jurisdiction, rather than judgments on the merits. Modeling on the common-law doctrine of *res judicata*,

Congress intended the judgment bar to prevent parties from re-litigating claims previously decided on the merits. However, the preclusive effect of *res judicata* does not—and has never—extended to purely jurisdictional judgments. Though Congress intended to supplement the doctrine of *res judicata* by passage of the judgment bar, Congress did not intend to reinvent the doctrine entirely. The text and history of the judgment bar instead suggest that it is only triggered by judgments on the merits, and not by dismissals for lack of subject-matter jurisdiction under 1346(b).

II.A. SECTION 1346(b) OF THE ACT CONFERS JURISDICTION OVER FTCA CLAIMS TO THE DISTRICT COURTS, MEANING JUDGMENTS UNDER 1346(b) ARE FUNDAMENTALLY JURISDICTIONAL IN NATURE.

As several federal courts have correctly observed, Congress intended 28 U.S.C. § 1346 to serve as a jurisdictional instrument. *See, e.g.*, *Muhammad v. United States*, 884 F. Supp. 2d 306, 314 (E.D. Pa. 2012) (finding 28 U.S.C. § 1346(b)(1) does not create an independent cause of action, but merely creates a jurisdictional vehicle for bringing state law tort claims against the United States); *see also Duarte v. United States*, 532 F.2d 850, 851-52 n.2 (2d Cir. 1976) (citing *United States v. Testan*, 424 U.S. 392, 398 (1976)) (observing that 28 U.S.C. § 1346(a), the language of which closely conforms to that of section 1346(b)(1), is "itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages"); *Weiss v. Lehman*, 642 F.2d 265, 267 (9th Cir. 1981) (reversed and remanded

on other grounds) (finding 28 U.S.C. § 1346(a) is "jurisdictional only; the source of a substantive right enforceable against the United States for money damages must be found elsewhere"); *Doe v. Alexander*, 510 F. Supp. 900, 902 (D. Minn. 1981) (same).

The text of 28 U.S.C. § 1346(b)(1) demonstrates that section 1346(b) is fundamentally jurisdictional in nature. Section 1346(b)(1) states:

> [T]he district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, 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.

Deciphering the plain meaning of section 1346(b)(1) requires a close reading of its independent and dependent clauses. An independent clause expresses a complete thought, and can be thought of as a standalone sentence. Purdue University, *Identifying Independent and Dependent Clauses*, PURDUE OWL, https://owl.purdue.edu/owl/general_writing/punctuation/independent_and_dependent_clauses/index.html. By contrast, a dependent clause is, as the name suggests, dependent on the independent clause: the

dependent clause gives additional context to the independent clause, but does not drive the meaning of the sentence. *See id.*

Here, the independent clause states, "the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction."[2] The essence of the independent clause is a simple jurisdictional grant, specifically, "district courts . . . have . . . jurisdiction." The dependent clause, states as follows:

> [O]f civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, 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.

The dependent clause merely explains the preconditions for the district court's jurisdiction. Put another way, the dependent clause conveys that "district courts . . . have . . . jurisdiction" only of actions where certain elements are met. The existence of the dependent clause is not necessary to understand the

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[2] Each independent clause contains a subject (the person or thing doing the action), a verb (the action) and an object (the person or thing having the action done to them). Here, the subject is the "district courts," the verb is "has" and the object is "jurisdiction."

fundamental purpose of section 1346(b)(1), which is to grant jurisdiction to the district courts.[3]

Therefore, according to the plain and unambiguous meaning of section 1346(b)(1), dismissals based on the plaintiff's failure to prove the existence of one or more elements listed in the dependent clause are jurisdictional, and not merits-based, in nature. Where a statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

II.B. THE TEXT AND HISTORY OF THE JUDGMENT BAR SUGGEST THAT IT WAS ONLY INTENDED TO APPLY TO JUDGMENTS ON THE MERITS, AND NOT TO DISMISSALS FOR LACK OF SUBJECT-MATTER JURISDICTION.

When interpreting statutes, Courts first look to the text, and then to the intent of the drafters. The text

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[3] Importantly, nowhere does section 1346(b)(1) contain a clause stating that "a plaintiff shall have a valid claim under this Act" where certain elements are met, or other similar language indicating that 1346(b)(1) creates a substantive right enforceable against the United States for money damages. The Court should assume that Congress omitted any such language deliberately, and, accordingly, construe section 1346(b)(1) as a jurisdictional instrument rather than an independent cause of action. *See Hartford Underwriters Ins. Co. v. Union Planters Bank,* N.A., 530 U.S. 1, 6 (2000) ("In answering this question [of statutory interpretation], we begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says.'") (quoting *Connecticut Nat'l Bank v. German*, 503 U.S. 249, 254 (1992)).

and legislative history of the FTCA demonstrate that the 79th Congress intended the judgment bar to apply to judgments on the merits only, and not to dismissals for want of subject-matter jurisdiction. In other words, the judgment bar only prevents claims against federal employees where the underlying claim against the United States was actually "litigated and submitted for determination." *See Donahue v. Connolly*, 890 F. Supp. 2d 173, 179–80 (D. Mass. 2012).

This Court has consistently held that "[s]tatutory interpretation . . . begins with the text." *See Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (citing *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 251 (2010)). If the text is plain and unambiguous, taking into consideration "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," then the inquiry ends. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). However, if the text elicits two reasonable interpretations, the Court should examine the intent of the statute's drafters. *Id.*

The text of the judgment bar states, "[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." *See* discussion *supra* Part I.A, on the jurisdictional quality of judgments under section 1346(b). Here, the key inquiry is the meaning of the word "judgment," which the FTCA does not define. *See* 28 U.S.C. § 2671 (setting forth definitions). The Court should not look to the dictionary definition of the word "judgment" as it is understood in 2020; instead, the Court must look to

the meaning of the word as it would have been understood when the FTCA was passed in 1946. *See Saint Francis College v. Khazraji*, 481 U.S. 604, 610 (1987). The Fourth Edition of Black's Law Dictionary, published in 1951, defines "judgment" as "[t]he official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit *therein litigated and submitted to its determination*." Judgment, Black's Law Dictionary (4th ed. 1951) (emphasis added). By this definition, actions dismissed for lack of subject-matter jurisdiction under section 1346(b) *cannot* be considered literally "litigated and submitted to [the court's] determination," as a court that lacks subject-matter jurisdiction over a case likewise lacks the power to *hear* a case, much less reach a determination "upon the respective rights and claims of the parties." *See Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998) ("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*.") (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1869)) (emphasis added).

Common sense would dictate that the inquiry ends here. However, because judicial opinions differ on the meaning of the word "judgment" in this context, this Court may find support for this common-sense conclusion by examining the minds of the drafters. *See, e.g.*, *Donahue*, 890 F. Supp. 2d at 179 (citing cases). Importantly, the FTCA is not the product of a spontaneous legislative effort; instead, it has its genesis in more than two decades of legislative proposals. Between 1921 and 1946—when the FTCA

was ultimately enacted as Title IV of the Legislative Reorganization Act of 1946—members of Congress introduced more than 30 bills designed to provide an avenue of relief for individuals harmed by the tortious conduct of federal employees and thereby relieve the legislature of the onerous task of hearing individual petitions in private bills.[4] Of these, perhaps the most useful in divining the meaning of a "judgment" under section 2676 is H.R. 5373 (as amended by H.R. 6463) ("Bills to Provide for the Adjustment of Certain Tort Claims Against the United States").

The text of the judgment bar introduced in H.R. 5373 (as amended) is virtually indistinguishable from that ultimately passed in 1946, stating, "[t]he judgment in such an action 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." The phrase "in such an action" should be understood to modify the preceding sentence in H.R. 5373, providing, "the United States shall be liable in respect to such claims to the same claimants, in the same manner and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for punitive damages, interest, or costs." *See Donahue*, 890 F. Supp. 2d at 180. In other words, the judgment bar—as originally conceived—was intended to preclude only a

[4] 1 Jayson & Longstreth, Handling Federal Tort Claims § 2.09. Prior to the FTCA's passage, the sovereign immunity of the United States was absolute with respect to tort claims against the government, meaning that the only recourse for individuals harmed by tortious conduct by a federal employee was to petition Congress for private relief. Congress heard an estimated 2,000–3,000 claims on private bills per year.

subsequent action against a federal employee, where the court had already determined the liability (or lack thereof) of the United States for a suit arising from the same subject-matter. *Id.*

The record of a hearing before the House of Representatives Committee on the Judiciary on January 29, 1942 (the "January 1942 Hearing"), on H.R. 5373 and 6463, supports this reading of the judgment bar. At the January 1942 Hearing, Assistant Attorney General Francis Shea presented H.R. 5373 (as amended by H.R. 6463) to the Congressional Committee, exploring the text of the Act and of proposed judgment bar. One of the early questions put to Shea centered on the preclusive effect of administrative settlement of claims in excess of $1,000. [5] Congressman Raymond S. Springer questioned, "[w]hy do you provide this acceptance of the award as constituting a bar to the claim against the employee? Is that the intention of the provision, and what is the ultimate purpose of it?" Shea explained at length:

> 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 damages or injuries caused while he was operating the truck within the scope of his

[5] According to H.R. 5373, by accepting an administrative settlement from the government, the Plaintiff agrees to release his claim against the United States and against the federal employee "whose negligence or wrongful conduct gave rise to the claim."

> duties . . . If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. If he could sue the driver of the truck, we would have to go in and defend the driver in the suit against him, and there will thus be continued a very substantial burden which the Government has had to bear in conducting the defense of post-office drivers and other Government employees.

Chairman Hatton W. Sumners further pressed Shea, asking, "Mr. Shea, you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government, and the Government satisfied that claim, that is the end of the claim against anybody?" Shea responded, "[t]hat is right." *Id*. at 9–10.

Shea's responses to the Committee's questioning borrow from the common law doctrine of preclusion, in that he suggests that the purpose underlying H.R. 5373's judgment bar is to avoid duplicative litigation. Indeed, the language of the judgment bar borrows directly from then-existing rules of *res judicata*, according to which a "valid *judgment* on the merits and not based on a personal defense *bars* a subsequent action." *See Restatement (First) of Judgments* § 99 (1942) (emphasis added). It is well-settled that purely

procedural or jurisdictional judgments do *not* have a preclusive effect—this understanding would have been present in the minds of the Congressional drafters, and is reflected in their discussions of H.R. 5373. *See Hughes v. United States*, 71 U.S. 232, 237 (1866) ("In order that a judgment may constitute a bar to another suit, it must be . . . determined on the merits. If the first suit was dismissed for . . . want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."); *see also Will v. Hallock*, 546 U.S. 345, 354 (2006) (observing that the judgment bar has an "essential procedural element," akin to the doctrine of *res judicata*).

To be sure, the judgment bar operates more broadly than *res judicata*. Brief for Respondent, *Simmons v. Himmelreich*, 136 S. Ct. 1843, at 32 (No. 15-109) (observing that otherwise, the judgment bar "would have served no purpose"). When Congress enacted the FTCA, a judgment in a suit against a federal employee would, under ordinary rules, have precluded a subsequent *respondeat superior* claim against the government. However, ordinary rules of preclusion did not prevent the converse: that is, *res judicata* would not operate to bar a suit against a federal employee, where the plaintiff first sued the government on a theory of *respondeat superior*. Congress enacted the judgment bar to ensure symmetry in *res judicata* treatment of tort claims against the government and its employees; in other words, it merely intended to *supplement* existing rules of preclusion, not *reinvent* ordinary rules of preclusion entirely by granting preclusive effect to purely jurisdictional judgments. *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); *see also* Note, *Government Recovery of Indemnity from Negligent Employees: A New Federal Policy,* 63 Yale L.J. 570, 575 n.30 (1954) (explaining that the judgment bar "alters the common law rule that a claimant may obtain judgment against all persons liable for the same tort").

III. STATE LAW CLAIMS BROUGHT UNDER THE FTCA AND CONSTITUTIONAL TORTS CLAIMS BROUGHT UNDER *BIVENS* ARE NOT THE SAME SUBJECT MATTER FOR THE PURPOSES OF THE JUDGMENT BAR.

According to the FTCA's text, the judgment bar only applies to subsequent actions against employees of the government brought "by reason of the same subject matter" as the prior judgment against the United States under the FTCA. Because they have failed to consider Congress's contemporaneous understanding of the term "by reason of the same subject matter," some courts have erroneously concluded that this language bars all subsequent claims of any kind against individuals regardless of whether these claims arise under state law or as a constitutional tort under *Bivens*.

However, a *Bivens* constitutional tort claim does not arise from the same "subject matter" as a state law tort claim. Indeed, this Court held in *Carlson v. Green*, 446 U.S. 14, 20, 100 S. Ct. 1468, 1472 (1980) that "Congress views FTCA and Bivens as parallel, complementary causes of action." When courts deny a claim arising under the FTCA, it does not follow that

a plaintiff necessarily would not have grounds to bring a completely separate cause of action for constitutional tort under *Bivens*. Concluding otherwise has led to absurd results in the Circuit courts, like the case of *Williams v. Fleming*, 597 F.3d 820, 823 (7th Cir. 2010), where dismissal of a state law slander claim under the FTCA was found to have precluded a totally unrelated *Bivens* claim for racial discrimination, which did not even arguably arise from the same "subject matter." This Court can and should remedy this confusion by concluding state law FTCA claims and constitutional tort claims under *Bivens* are distinct legal theories of recovery, and do not arise under the same "subject matter" for purposes of section 2676's judgment bar.

CONCLUSION

Section 1346(b)(1) is, first and foremost, a jurisdictional instrument. Because dismissals under 1346(b)(1) are jurisdictional in character, they lack the preclusive effect of judgments based on the merits. According to the text and history of section 2676, Congress intended the judgment bar to operate in a similar fashion to the common law doctrine of *res judicata*, suggesting that Congress did not intend the judgment bar to trigger upon purely jurisdictional dismissals under 1346(b)(1), but only to preclude judgments on the merits of a plaintiff's FTCA claim.

To the extent the judgment bar is triggered by 1346(b)(1) judgments that are jurisdictional in nature, Congress did not intend the preclusive effect of the judgment bar to reach claims sounding in causes of action other than the state-law tort claims envisioned by the FTCA. Instead, because constitutional claims arising under *Bivens* are of a different character than

state-law tort claims, *Bivens* claims should be interpreted as arising from a different "subject-matter" for purposes of the FTCA. Interpreting the judgment bar otherwise would produce absurd and unintended results.

For the foregoing reasons and those stated by Respondent, the judgment below should be affirmed.

Respectfully submitted,

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