No. 19-546

In the Supreme Court of the United States

DOUGLAS BROWNBACK, ET AL., PETITIONERS

v.

JAMES KING

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent fails to overcome the plain meaning of the Federal Tort Claims Act (FTCA) judgment bar, which provides that "[t]he judgment in an action under section 1346(b) of [Title 28] 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 district court entered judgment in respondent's FTCA action, Pet. App. 86a, because it found that he had failed to establish an element of his FTCA claims, *id.* at 76a-80a: he did not show "circumstances where the United States, if a private person, would be liable to [him] in accordance with the law of the place where the [tortious] act or omission occurred." 28 U.S.C. 1346(b)(1). Section 2676 thus precludes respondent's action against the officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*,

403 U.S. 388 (1971), which is based on the very same allegations as his FTCA claims.

Respondent attempts to defend the panel majority's reasoning that (1) when the district court determined on summary judgment that respondent had failed to establish the United States' liability under Michigan law, 28 U.S.C. 1346(b)(1), that was a purely jurisdictional ruling that did not address the merits of the FTCA claims; and (2) such a "jurisdictional" rejection of FTCA claims does not trigger the judgment bar. Respondent and the panel majority are wrong on both points. As our opening brief explained, respondent cannot square his jurisdictional argument with this Court's recognition in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), that an FTCA claim is "actionable under [section] 1346(b)" so long as "it alleges the six elements" specified there, even if the claimant ultimately suffers "a failure of proof" on one of those elements. *Id.* at 477, 479 n.7. Moreover, respondent's theory that the judgment bar *never* applies when the government prevails in an FTCA action is irreconcilable with the statutory text and this Court's precedents. Respondent has no plausible answer to this Court's observation in *Simmons* v. *Himmelreich*, 136 S. Ct. 1843 (2016), that the judgment bar *does* apply "once a plaintiff receives a judgment (favorable or not) in an FTCA suit," including where he "simply failed to prove his claim." *Id.* at 1847, 1849.

Perhaps sensing the weaknesses in the panel majority's reasoning, respondent's lead argument in this Court is one the Sixth Circuit did not adopt: that the judgment bar never applies to an individual action brought together in the same lawsuit with an FTCA action. But that argument too has no footing in the stat-

utory text, which is why the courts of appeals have overwhelmingly rejected it since the judgment bar's earliest years. Rather than adhere to the common-law rule that a judgment "is a bar to a *subsequent* action on the claim," Restatement (First) of Judgments § 45 cmt. b, at 175 (1942) (First Restatement) (emphasis modified), Congress made an FTCA judgment "a complete bar to *any* action" by the claimant against the federal employees at issue, based on the same facts, 28 U.S.C. 2676 (emphasis added).

A. Respondent Fails To Rehabilitate The Court Of Appeals' Rationale

Contrary to the critical premise of respondent's argument (Br. 34-47), the district court rejected his FTCA action for failure to establish an element of his FTCA claims, not because he failed to properly invoke the court's jurisdiction. Ultimately, though, regardless of how the district court's FTCA judgment is characterized, the judgment bar applies here because the court entered "the judgment in an action under section 1346(b)." 28 U.S.C. 2676.

1. The district court's judgment rejected respondent's FTCA action on the merits

a. Respondent erroneously asserts that "six elements must be *satisfied* for a court to have subject-matter jurisdiction" over an FTCA action. Br. 35 (emphasis added). In fact, Section 1346(b)(1) confers "jurisdiction [over] civil actions on *claims*" that its elements are met. 28 U.S.C. 1346(b)(1) (emphasis added). That is why this Court has held that "[a] claim comes within [the FTCA's] jurisdictional grant * * * if it is actionable under [section] 1346(b)," meaning that "it *alleges*

the six elements" specified. *Meyer*, 510 U.S. at 477 (emphasis added). Jurisdiction is lacking under Section 1346(b)(1) only if a claim does "not contain * * * allegation[s]" that all six elements are satisfied. *Id.* at 477-478. That was the case in *Meyer*, where the plaintiff alleged only a "constitutional tort," not a "state law" tort. *Ibid.*

This case is very different. Despite respondent's puzzling protestation in this Court (Br. 39 & n.11) that he failed even to allege the elements of his own FTCA claims, the FTCA count of his complaint alleged that the officers' "actions amount[ed] to multiple torts recognized by Michigan law" that "caused personal injury to [him]," such that he was entitled to "money damages against the United States," because the officers were "acting on behalf of a federal agency in an official capacity." J.A. 39-40. The fatal defect in respondent's FTCA action was therefore not that he failed to allege the elements of the claim; it was that the district court determined, based on "the parties' undisputed facts," Pet. App. 79a, that he had not established the liability of the United States under Michigan law. The court gave two independent reasons: respondent had not overcome Michigan's state-law doctrine of governmental immunity, *id.* at 76a-80a; and he had not shown that the officers committed any of the torts alleged, *id.* at 80a.

Each of those was a determination that respondent had failed to establish *the merits* of his FTCA cause of action, as *Meyer* makes clear. 510 U.S. at 477 (Section 1346(b)(1) "provide[s] a cause of action for" a claim alleging the six elements). The Court sharply distinguished a claim like the constitutional tort there, where the allegations did "not fall within the terms of § 1346(b) in the first instance," from a claim like the state-law

torts alleged here, which suffered "a failure of proof on an element of the claim." *Id.* at 479 n.7. The latter "does not lose its cognizability" under Section 1346(b). *Ibid.* Respondent is thus flatly wrong in asserting that "fail[ing] to establish [the FTCA's] elements * * * cannot trigger FTCA jurisdiction" without improperly "uncoupl[ing] jurisdiction and liability." Br. 38, 39. Rejecting that assertion was the very point of *Meyer*'s footnote seven.

Other precedents of this Court confirm that the district court rejected respondent's FTCA action on the merits. In distinguishing between jurisdictional and merits grounds for rejecting a claim, this Court has said that a plaintiff's "[in]ability to prove the defendant bound by the federal law asserted as the predicate for relief [is] a merits-related determination." *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 511 (2006) (citation omitted). And in the claim-preclusion context in particular, this Court has said that the paradigmatic "'on the merits' adjudication is one" that, like the district court's decision below, "actually 'passes directly on the substance of a particular claim' before the court." *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 501-502 (2001) (brackets and citation omitted); see First Restatement § 49 cmt. a, at 193 (judgment is "on the merits" when, based "on rules of substantive law," it "determines that the plaintiff has no cause of action").

b. Respondent objects (Br. 39-40) that those general principles are inapposite because of the "jurisdictional language of Section 1346(b)." But again, the text of Section 1346(b)(1) does not provide that jurisdiction requires a claimant to *establish* all the elements described there—only to *claim* them. Precise statutory language matters to determine what allegations are sufficient to

establish jurisdiction. See *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319, 1322 (2017).

It would be surprising if, as respondent contends, courts have an independent obligation in every FTCA case to ensure that every element of Section 1346(b)(1) is actually satisfied—even ones the government waived or forfeited. See Br. 41 (arguing that "the failure of any jurisdictional element [of Section 1346(b)(1)] *at any point* * * * divests a court of jurisdiction") (emphasis added). That would very likely "waste * * * judicial resources." *Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011). Even more strange, respondent's argument forces him into the conclusion (Br. 41-42) that an FTCA judgment *after trial*, finding that federal employees did not do what was alleged of them, is "necessarily" a "jurisdictional" ruling and not a merits resolution. Far from compelling those results, *Meyer* explains why the FTCA's text forecloses them.

c. Respondent also contends (Br. 4-6, 8 n.1, 37, 40) that both the district court and the government treated the judgment here as "jurisdictional." That is incorrect. It is true that the government initially argued, based on Sixth Circuit precedent, that respondent's failure to establish the United States' liability under state law should prompt judgment for the United States in the FTCA action on any of several grounds, including lack of subject-matter jurisdiction. But the court ruled, based on the "undisputed facts," that the officers would not be liable to respondent "under Michigan law," and that the FTCA action could also be "dismissed for failure to state a claim." Pet. App. 79a-80a. While the court was ambiguous about which civil procedure rule or rules required judgment for the United States, *id.* at 1a n.1,

there was no ambiguity about the *substance* of the judgment: respondent had failed to establish an element of Section 1346(b)(1). That was a determination on the merits of the FTCA claims, as *Meyer* explains.

Accordingly, the government did *not* argue on appeal that the district court had dismissed the FTCA action for "lack of subject-matter jurisdiction." Contra Resp. Br. 5. Rather, the government argued that jurisdictional issues "ha[ve] no applicability here because [respondent's] FTCA suit was dismissed on the merits." Pet. C.A. Supp. Br. 3; see Pet. C.A. Br. 12.[1]

2. The district court's judgment triggered the judgment bar regardless of how the judgment is characterized

Ultimately, whether or not the district court's FTCA judgment had some "jurisdictional" consequences is irrelevant to this case—the judgment bar applies either way. Section 2676 imposes its "complete bar" so long as the district court entered "[t]he judgment in an action under section 1346(b)." 28 U.S.C. 2676. That text leaves no room for an exception for an FTCA judgment that might, in some sense, implicate jurisdiction.

a. Respondent erroneously asserts that, "when an element of Section 1346(b) is absent, 'an action under the FTCA does not exist.'" Resp. Br. 35 (brackets and citation omitted). As a matter of both ordinary English and settled legal principle at the time of the FTCA's enactment, respondent's FTCA action most certainly *existed*; he simply failed to prove his claims. "[A]n

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[1] Contrary to respondent's suggestion (Br. 8-9 & n.2), the questions presented in the officers' petition for a writ of certiorari and their opening brief are substantively identical—as respondent's own comparison demonstrates—and the modest changes in phrasing are permitted by this Court's Rule 24(1)(a).

action under section 1346(b)," 28 U.S.C. 2676, is a demand in court for relief alleging that the elements of Section 1346(b)(1) are met. See *Bouvier's Law Dictionary* 41 (William Edward Baldwin ed., 1934) (defining "action" as "[t]he formal demand of one's right from another person or party, made and insisted on in a court of justice."); Fed. R. Civ. P. 3 (1938) ("A civil action is commenced by filing a complaint with the court."). That is just what respondent filed. See J.A. 39-40. And as demonstrated above, the district court entered "[t]he judgment" in that action when it found that respondent had failed to establish the United States' liability under state law. Even if the court's conclusion meant *both* that respondent's claims for damages failed on the merits *and* that the court lacked jurisdiction to award damages because of overlap between jurisdictional requirements and the elements of liability, see Resp. Br. 35, the court's "judgment in an action under section 1346(b)" is still preclusive by the statute's terms. 28 U.S.C. 2676.

Respondent fares no better (Br. 36) with the FTCA's original text, which conferred "jurisdiction to hear, determine, and render judgment on any claim" alleging the six elements. Act of Aug. 2, 1946, ch. 753, Title IV, § 410(a), 60 Stat. 843-844. That language authorized a district court "hear[ing]" an FTCA claim to "determine" that the plaintiff had failed to establish an element, and "render judgment on [the] claim" on that ground, *ibid.*—just as the district court did here. The original FTCA then provided that "[t]he judgment in such an action shall constitute a complete bar to any action" against the federal employees arising from the same subject matter, § 410(b), 60 Stat. 844, which confirms that a judgment like the district court's here has been preclusive ever since the FTCA was enacted.

b. Respondent protests (Br. 35) that a dismissal for lack of jurisdiction would not trigger "common-law res judicata." Even setting aside that the judgment bar expands beyond common-law preclusion doctrine, see pp. 16-17, *infra*, respondent mischaracterizes that doctrine. The common law withholds preclusion only from "typical 'jurisdictional' dismissals—where, for example, a plaintiff sues in the wrong court." *Rose* v. *Town of Harwich*, 778 F.2d 77, 79 (1st Cir. 1985) (Breyer, J.), cert. denied, 476 U.S. 1159 (1986). That general rule does not apply in the rare circumstance where a merits inquiry and a jurisdictional inquiry turn on the same legal issue, see *id.* at 79-81, as respondent argues is true of the FTCA. "The question for [this Court], therefore, is not about 'jurisdictional' dismissals; rather, it is whether [Congress in 1946] would consider" an FTCA judgment rejecting the liability of the United States under state law to be sufficiently "on the merits" that preclusion is warranted. *Id.* at 80. For all the reasons explained above, Congress would have.

Contrary to respondents' suggestion, that conclusion is also consistent with the general principle that a federal court must confirm its jurisdiction before resolving the merits of a claim. Br. 44-47 (citing cases). On respondent's view, the FTCA is an unusual statute whose elements to establish liability are coterminous with the requirements to establish subject-matter jurisdiction. In that circumstance, if a court makes a single determination—here, that respondent failed to establish the United States' liability under Michigan law—that both "answer[s] the jurisdictional question" and "inevitably decide[s] some, or all, of the merits issues, so be it." *Helmerich*, 137 S. Ct. at 1319.

c. Perhaps most fatally, respondent fails (Br. 23-24, 41-43) to rebut the direct conflict between his position and this Court's decision in *Simmons* v. *Himmelreich*, *supra*. As our opening brief explained, *Simmons* reaffirmed that the judgment bar applies "once a plaintiff receives a judgment *(favorable or not)* in an FTCA suit," including "because the [government] employees were not negligent, because [the claimant] was not harmed, or because [the claimant] simply failed to prove his claim." 136 S. Ct. at 1847, 1849 (emphasis added); accord *Will* v. *Hallock*, 546 U.S. 345, 354 (2006) (noting that "the judgment bar can be raised" after an FTCA action "has been resolved in the Government's favor"). That conclusion is compelled by the statutory text, which "speaks of 'judgment' and suggests no distinction between judgments favorable and unfavorable to the government." *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995).

Although the panel majority stated that its decision was consistent with *Simmons*, Pet. App. 11a-12a, respondent now concedes (Br. 41-42) that the two irreconcilably conflict, "because any judgment in favor of the United States would necessarily fail to establish one or more of the FTCA's jurisdictional elements" on his theory. Respondent's only answer (Br. 43) is the implausible suggestion that *Simmons* simply overlooked "the jurisdictional implications of Section 1346(b)."

Unsurprisingly, then, respondent also fails in his efforts to draw support from *Simmons*. He observes (Br. 42) that *Simmons* held that the judgment bar is not triggered by an FTCA judgment in the United States' favor based on one of the statutory exceptions in 28 U.S.C. 2680. But that conclusion followed from "the language" of Section 2680, Resp. Br. 23; it in no way

"hinged on" the absence of jurisdiction under Section 1346(b)(1), contra *ibid.* See Pet. Br. 23.

Respondent also invokes *Simmons*'s observation that one of Congress's purposes for the judgment bar—though not its only purpose—was to close a "gap" in the common law of res judicata. Br. 14 (quoting 136 S. Ct. at 1849 n.5). But that only further undermines respondent's argument, because one instance of the disfavored gap occurred where a plaintiff sued an employer first *and lost*, and then attempted to sue the employee. See First Restatement § 96 cmt. j & illus. 9, at 481-483. Congress's intent to close that gap confirms that it wanted the judgment bar to apply to an FTCA judgment in the United States' favor. And that conclusion is bolstered, not diminished (contra Resp. Br. 17-18) by the title of Section 2676: "Judgment as bar." 28 U.S.C. 2676. When the FTCA was enacted, the common law typically used "bar" to refer to claim preclusion where the defendant had prevailed, and "merge[r]" where the plaintiff had prevailed. See, *e.g.*, First Restatement § 45 cmts. a and b, at 175.

This Court in *Simmons* went on to explain why respondent's construction of Section 2676 contradicts the judgment bar's purpose: where, as here, a plaintiff had a fair chance to pursue damages through the FTCA, he should not be permitted to pursue duplicative individual claims against the same federal employees based on the same facts. 136 S. Ct. at 1849. Respondent failed to recover in his FTCA action not because he lacked a fair chance, contra Resp. Br. 47-48, but because he did not establish liability for the torts alleged, even with discovery. See Pet. Br. 28. Yet respondent's position would permit claimants to litigate FTCA claims against the United States through summary judgment or even trial

unsuccessfully, and then force individual governmental employees to face the same allegations. That result would dramatically curtail the judgment bar as a means of "prevent[ing] unnecessarily duplicative litigation," *Simmons*, 136 S. Ct. at 1849, and reducing the burdens on federal resources and morale that attend individual claims against the government's employees, see *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. 9 (1942) (*1942 Hearing*)).

B. The Court Of Appeals' Decision Cannot Be Affirmed On Alternative Grounds

Respondent leads in this Court (Br. 24-34) with an alternative argument: that the judgment bar does not apply to an individual action brought together in the same lawsuit with an FTCA action. Like the panel majority's reasoning, that argument conflicts directly with the text of the statute. So too does yet another alternative argument, this one advanced by some amici, that the judgment bar does not apply to individual claims based on a different legal theory than the FTCA claims.[2]

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[2] There is likewise no merit to respondent's footnoted suggestion (Br. 49 n.12) that the judgment bar does not shield Detective Allen because the government argued to the district court that respondent had failed to preserve an FTCA claim involving Allen. Estoppel does not apply because the court assumed the preservation issue in *respondent's* favor, and based its FTCA judgment on his failure to establish the United States' liability under state law. Pet. App. 79a-80a; see *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001). Respondent did not appeal the district court's FTCA reasoning, and he cannot "[a]lternatively" challenge it in this Court. Br. 49 n.12.

1. The judgment bar precludes individual claims brought in the same lawsuit with FTCA claims

Respondent's contention that the judgment bar does not apply to an individual action brought together with an FTCA action is at war with the ordinary meaning of the statutory text. It also disregards Congress's stark departure from the common law when setting the preclusive force of an FTCA judgment, by replacing the traditional bar against a "successive" or "separate" action with a bar on "any action" against the federal employees involved in the FTCA claims.

a. Section 2676 makes the judgment in an FTCA action "a complete bar to *any action* by the claimant" against the federal employees whose conduct was at issue in the FTCA action. 28 U.S.C. 2676 (emphasis added). Congress's decision to use that sweeping language in the judgment bar makes it "inconsequential" that a plaintiff has brought individual and FTCA actions "together in the same suit." *Serra* v. *Pichardo*, 786 F.2d 237, 241 (6th Cir.), cert. denied, 479 U.S. 826 (1986); accord Pet. Br. 43 (citing six circuit-court decisions). This Court has more than once observed the breadth of the word "any," including in the context of the FTCA. See, *e.g.*, *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 218-219 (2008); *United States* v. *Smith*, 499 U.S. 160, 173 (1991) ("No language in * * * the statute purports to restrict the phrase[] 'any employee of the Government'" in Section 2679(b)(1).). Congress in the FTCA presumably "says what it means and means what it says." *Simmons*, 136 S. Ct. at 1848. In Section 2676, Congress completely barred *any* individual action against the federal employees following the judgment in an FTCA action, including an individual action brought together with that FTCA action.

Respondent observes (Br. 27) that Section 2676 refers to "[t]he judgment" in an FTCA action, rather than "a judgment," which he says shows that the judgment bar is not triggered by the "dismissal of any single claim." But it was perfectly natural for Congress to describe a judgment that conclusively resolves the claimant's FTCA cause of action as "[t]he judgment in an action under section 1346(b)," 28 U.S.C. 2676, even if *other* causes of action in the lawsuit remain outstanding. And in any event, respondent's objection regarding less-than-full judgments is not presented here, because the district court's judgment rejected all the claims in his complaint. See Pet. App. 54a-80a, 86a.

Respondent next asserts (Br. 27-28) that, to avoid "circular[ity]," Section 2676's bar against "any action" should not be read "to include the action in which the [FTCA] judgment was entered." But that is just what the statute's words mean: by using the term "action" and adding the modifier "any," Congress precluded all individual claims in *this or any other judicial proceeding* against the federal employees, once the FTCA action goes to judgment. See *California Pub. Emps. Retirement Sys.* v. *Anz Secs., Inc.*, 137 S. Ct. 2042, 2054 (2017) ("The term 'action' * * * refers to a judicial 'proceeding,' or perhaps to a 'suit.'") (citing *Black's Law Dictionary* 41 (3d ed. 1933)); *Citizens' Bank* v. *Parker*, 192 U.S. 73, 81 (1904) ("The word *any* excludes selection or distinction. It declares the [subject] without limitation."); 1 *Oxford English Dictionary* 378 (1933) (defining "any" as "no matter which"); *Webster's New International Dictionary of the English Language* 121 (2d ed. 1934) (defining "any" as "[o]ne indifferently out of a number"; "one * * * indiscriminately, of whatever kind"). Congress's formulation was not "circular"; it

was just unmistakably broad. Cf. *Ex parte Collett*, 337 U.S. 55, 58 (1949) ("The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded.") (footnote omitted).

Even the Ninth Circuit—the only court of appeals to accept a rule similar to the one respondent advocates, Pet. Br. 43—has held that the judgment bar *does* preclude individual claims in the same lawsuit when an FTCA judgment is entered for the *plaintiff*. See, *e.g.*, *Fazaga* v. *FBI*, 965 F.3d 1015, 1064 (9th Cir. 2020); *Arevalo* v. *Woods*, 811 F.2d 487, 490 (9th Cir. 1987). The circuit courts are therefore unanimous in their rejection of petitioner's argument that the phrase "complete bar to any action" never applies to individual claims brought in the same lawsuit as FTCA claims. And that consensus dates back to the FTCA's beginning. See, *e.g.*, *United States* v. *Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952) (holding that the judgment bar "explicit[ly]" precludes entry of "judgment against [the federal employee] in favor of [the plaintiff] *in the same action*" after the district court has issued judgment for the plaintiff on FTCA claims) (emphasis added).[3]

b. Respondent contends (Br. 15, 26-27) that the judgment bar "codified common-law res judicata," which generally does not preclude claims within the same lawsuit. But this Court has said only that Section 2676 is "roughly analogous" to common-law res judicata, not that it incorporates the common law wholesale. *Simmons*, 136 S. Ct. at 1849 n.5; see *Will*, 546 U.S. at

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[3] The Ninth Circuit's position is flawed for a different reason: it makes the judgment bar turn on which party prevails in the FTCA action, contrary to both *Simmons*, 136 S. Ct. at 1847, 1849, and the statutory text, p. 10, *supra*.

354. Indeed, the Court has observed that Section 2676 *expands* on traditional res judicata. See *Simmons*, 136 S. Ct. at 1849 n.5.

Respondent's own citations demonstrate that Congress "explicit[ly] * * * depart[ed] from the common law" when it set the preclusive force of an FTCA judgment. Br. 15. As respondent points out, common-law res judicata generally applied where "subsequently a second action is brought," Br. 17 (quoting First Restatement 239); see Br. 27 n.7 (citing cases), but Congress in Section 2676 made an FTCA judgment "a complete bar to *any action*" by the claimant against the federal employees based on the same facts, 28 U.S.C. 2676 (emphasis added). If, as respondent contends (Br. 21), Congress had wanted to maintain "the traditional boundaries of res judicata" by limiting preclusion to "[a] separate lawsuit," then it would have drawn on a formulation in the First Restatement or this Court's cases, instead of barring "any" individual action. See, *e.g.*, First Restatement § 45 cmt. b, at 175; *Cromwell* v. *County of Sac.*, 94 U.S. 351, 352 (1877); cf. *Millbrook* v. *United States*, 569 U.S. 50, 57 (2013) ("Had Congress intended to further narrow" the FTCA's law-enforcement proviso, it could have copied "similar limitations in neighboring provisions.").

Respondent concedes (Br. 19), as he must, that the judgment bar does more than "accord FTCA judgments res judicata effect." But he argues (Br. 20-21) that Congress set out merely to reject the "strict mutuality" view of res judicata, so that an FTCA judgment could be preclusive in a subsequent lawsuit against the federal employees even though the two cases technically involve different parties. That argument commits the interpretive sin of focusing on Congress's "ultimate

purposes" instead of "the means [Congress] has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp.* v. *AT&T*, 512 U.S. 218, 231 n.4 (1994). Whatever Congress's motivation for developing the judgment bar, Congress deemed it appropriate to abrogate both the same-party *and* successive-action requirements of common-law res judicata, by precluding "any action" against "the employee[s] of the government" after an FTCA judgment. 28 U.S.C. 2676.

c. Respondent next contends (Br. 26) that *Simmons* and *Will* show that Congress's purpose for the judgment bar was limited to preventing separate lawsuits. He notes that this Court has observed that Section 2676 would preclude a "second bite" against federal employees after a "first suit" pleading FTCA claims. *Simmons*, 136 S. Ct. at 1849; see *Will*, 546 U.S. at 354 (observing that the judgment bar would prevent "multiple suits") (citation omitted). But both of those sentences simply identified one exemplary application of the judgment bar; neither purported to describe Section 2676's full preclusive scope.

Here again, respondent's construction of Section 2676 would undermine Congress's purposes for the FTCA overall. Respondent acknowledges (Br. 20) that one of Congress's objectives was to limit individual suits against federal employees, which Congress found burden the government. See *Gilman*, 347 U.S. at 512 n.2 (quoting *1942 Hearing* 9). As Assistant Attorney General Shea advocated to Congress, if "the claimant has obtained satisfaction of his claim from the Government," including "by a judgment," then "that should, in our judgment, be the end of it." *Ibid.* Congress would

have been concerned with prohibiting duplicative litigation against the government's employees (and potentially double recovery) regardless of whether the plaintiff pleaded individual claims in the same lawsuit or a separate or successive lawsuit. The FTCA's similarly worded release bar cuts off *any* individual claims once an FTCA claim is resolved by settlement, 28 U.S.C. 2672; see Pet. Br. 39-40, and respondent does not explain why Congress would have wanted broader preclusion for an FTCA settlement than for a court judgment.

Respondent also invokes *Simmons* to assert that Section 2676 should not be interpreted so that claimants have incentive to bring individual claims before suing the United States. Br. 31 (citing 136 S. Ct. at 1850). But even where this Court was clear that the judgment bar "applies"—"where a plaintiff first sues the United States and then sues an employee," *Simmons*, 136 S. Ct. at 1849 n.5—the plaintiff's inability to pursue his individual claims will turn on the order in which the suits were filed or addressed. That is why this Court in *Will* observed that a plaintiff who wants to avoid the judgment bar must bring "a *Bivens* action alone," or else ensure that his *Bivens* and FTCA claims remain "pending simultaneously," 546 U.S. at 354—though respondent did not take either option. It is *other* provisions that incentivize claimants to timely pursue the FTCA remedy: prevailing claimants can collect from the judgment fund, 28 U.S.C. 2414; 31 U.S.C. 1304(a)(3)(A), and the FTCA's two-year statute of limitations typically prevents claimants from holding claims against the government in reserve, 28 U.S.C. 2401. The judgment bar serves a different purpose than channeling liability away from individual employees and toward the United States: it provides that the judgment in an FTCA action

will "be the end of" the entire controversy. *Gilman*, 347 U.S. at 512 n.2 (citation omitted).

d. Last of all, respondent argues (Br. 31-33) that, because Congress "view[ed] FTCA and *Bivens* as parallel, complementary causes of action" once *Bivens* was decided in 1971, *Carlson* v. *Green*, 446 U.S. 14, 20 (1980), the judgment bar—first enacted in 1946—must not restrict a *Bivens* action brought together with an FTCA action. That conclusion does not follow, and the statutory history shows the opposite.

After this Court decided *Bivens*, Congress amended the FTCA to permit a plaintiff like respondent to pursue parallel causes of action under the FTCA and *Bivens* for specific intentional torts by federal law-enforcement officers. See Pet. Br. 4, 19. But at the same moment that Congress opened the FTCA to claims like respondent's here, it provided that "the provisions of [Chapter 171] * * * shall apply to" such claims, 28 U.S.C. 2680(h), and "[t]he judgment bar is a provision of Chapter 171," *Simmons*, 136 S. Ct. at 1847. Congress thus confirmed its intention that a plaintiff like respondent who elects to bring FTCA claims cannot pursue any individual claims once the FTCA action goes to judgment.

Congress would not have thought in 1974 that the judgment bar would exempt *Bivens* claims in the same lawsuit: by then, the courts of appeals had already recognized that Section 2676 "explicit[ly]" precludes individual claims "in the same action" after a judgment on FTCA claims. *Lushbough*, 200 F.2d at 721; see, *e.g.*, *Gilman* v. *United States*, 206 F.2d 846, 848 (9th Cir. 1953) ("[T]he moment judgment was entered against the Government [in the FTCA action], then by virtue of [Section 2676], the employee * * * was not answerable

at all" to the claimant.), aff'd, 347 U.S. 507 (1954). Since then, Congress has never disturbed the circuit courts' consensus that Section 2676 unambiguously precludes individual claims even when brought in the same lawsuit as FTCA claims. See p. 15, *supra*.

2. The judgment bar precludes individual claims based on the same facts but different legal theories

Respondent has abandoned the argument (Br. 29) that the judgment bar never applies to *Bivens* claims at all because the phrase "by reason of the same subject matter," 28 U.S.C. 2676, covers only individual claims asserting the identical state-law tort theories that were litigated under the FTCA. Although some amici take up that position, see Pfander et al. Br., they fail to rebut our showing (Pet. Br. 38-43) that this Court in *Simmons* correctly construed Section 2676 to preclude any individual claims "based on the same underlying facts," 136 S. Ct. at 1847—which indisputably describes respondent's *Bivens* claims.

Amici's position contradicts a tide of precedent from this Court and others. In addition to *Simmons*, amici concede (Pfander Br. 29) that this Court in *Hui* v. *Castaneda*, 559 U.S. 799 (2010), unanimously explained that their proposed construction of "same subject matter" is "powerful[ly]" rebutted by the text of the Westfall Act, 28 U.S.C. 2679(b)(1) and (2). 559 U.S. at 807; see Pet. Br. 26-27. And before the FTCA was enacted, this Court's res judicata decisions did not consistently use "same subject matter" to mean, as amici contend, the same cause of action as in another case. See Pet. Br. 40-41 (quoting multiple cases); accord *United States* v. *Southern Pac. Co.*, 259 U.S. 214, 240 (1922) (reasoning that two cases "do not relate to the same subject-

matter" because "[t]he issues and questions" are distinct) (cited at Pfander Br. 23).[4]

Against all of that, amici invoke (Pfander Br. 24-25) *Amell* v. *United States*, 384 U.S. 158 (1966). That case held only that the Suits in Admiralty Act—which made its remedy "exclusive of any other action arising out of the same subject matter against" the employee involved, 46 U.S.C. 30904—did not preclude wage claims *against the government* in the court of claims, *Amell*, 384 U.S. at 161-162; the majority did not even mention the phrase "same subject matter." Amici also note (Pfander Br. 14) that this Court in *Will* stated that Section 2676 prevents "multiple suits on identical entitlements." 546 U.S. at 354 (citation omitted). But as explained above, that sentence simply described one core concern of the judgment bar. See p. 17, *supra*.

Beyond this Court, amici's construction of Section 2676 has been rejected by every court of appeals to consider it. See Pfander Br. 3. Amici favorably cite (Pfander Br. 13) two "early" circuit-court FTCA decisions, but neither said anything at all about the meaning of "same subject matter" in the judgment bar.

Amici also survey (Pfander Br. 18-22) various historical sources using the phrase "subject matter." But several did not involve res judicata, and the most amici can say is that different writers used "subject matter" to mean different things at different times. That does not come close to the special justification that this Court

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[4] Amici invoke (Pfander Br. 23) *Goodrich* v. *The City*, 72 U.S. (5 Wall.) 566 (1867), but they quote the reporter's description of counsel's argument—not this Court's opinion, which did not mention "same subject matter." Amici also cite (Pfander Br. 22-23) *Cooper* v. *Reynolds*, 77 U.S. (10 Wall.) 308 (1870), but that case did not involve res judicata.

would require to overturn its statutory interpretations in *Simmons* and *Hui*. The First Restatement—adopted just a few years before the FTCA—rejected amici's construction of "same subject matter" and used that phrase consistent with this Court's later interpretation in *Simmons*. See Pet. Br. 41 (quoting Restatement provisions). The point is not that the Restatement equated "subject matter" with "transaction," contra Pfander Br. 17-18; the point is that the Restatement distinguished cases' "subject matter" from their "causes of action," and explained that cases have different subject matter when they involve different factual events. See, *e.g.*, First Restatement § 70 cmt. e, at 322-324 (using the examples of separate incidents of slander or distinct automobile collisions).

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

SEPTEMBER 2020