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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, waives the sovereign immunity of the United States and creates a cause of action for damages for certain torts committed by federal employees "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). The FTCA also imposes a judgment bar, which provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676.

The question presented is whether a final judgment in favor of the United States in an action brought under Section 1346(b)(1), on the ground that the claimant failed to establish the liability of the United States on the torts that he alleged, bars claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that are brought by the same claimant, based on the same alleged injuries, and against the same governmental employees involved in the claimant's unsuccessful FTCA action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 917 F.3d 409. The opinion and order of the district court (Pet. App. 46a-81a) are not published in the Federal Supplement but are available at 2017 WL 6508182.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2019 (Pet. App. 84a-85a). A petition for rehearing was denied on May 28, 2019 (Pet. App. 82a-83a). On August 18, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including September 25, 2019. On September 16, Justice Sotomayor further extended the time to and including October 25, 2019, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, provides at 28 U.S.C. 2676:

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

Other pertinent statutory provisions are set forth in the appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

A. Legal Framework

1. The FTCA waives the sovereign immunity of the United States and creates a cause of action for damages for certain torts committed by federal employees. See *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1845 (2016).

Before the FTCA became law, parties injured by federal employees were forced to seek relief through private bills in Congress or by suing the employees in their individual capacity. See *Dalehite* v. *United States*, 346 U.S. 15, 24-25 & n.9 (1953). Such individual-capacity suits presented "a very real attack upon the morale of [governmental] services," because most federal employees were "not in a position to stand or defend large damage suits." *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*) (statement of Assistant Attorney General Francis Shea)).

In 1946, Congress enacted the FTCA out of "a feeling that the Government should assume the obligation

to pay damages for the misfeasance of employees in carrying out its work." *Dalehite*, 346 U.S. at 24; see FTCA, Act of Aug. 2, 1946, ch. 753, Title IV, 60 Stat. 842. At the same time, however, Congress placed limits on the scope of the United States' liability, as well as limits on the ability of plaintiffs to sue governmental employees for injuries arising from official acts. The FTCA therefore does "not assure injured persons damages for all injuries caused by such employees." *Dalehite*, 346 U.S. at 17.

2. Section 1346(b) is the FTCA provision that simultaneously waives sovereign immunity, sets the terms of the FTCA's cause of action, and confers exclusive federal-court jurisdiction for FTCA claims. 28 U.S.C. 1346(b); see *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994). Specifically, Section 1346(b)(1) provides that:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on 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) (brackets added).

Chapter 171 of Title 28 of the United States Code contains various procedural and liability provisions for the FTCA. See *Simmons*, 136 S. Ct. at 1845. For example, Section 2672 provides rules for the administrative settlement of claims, and Section 2675(a) requires

a claimant to exhaust administrative remedies before filing an FTCA action in court. 28 U.S.C. 2672, 2675(a). Section 2680 enumerates several "[e]xceptions" to the FTCA. 28 U.S.C. 2680 ("The provisions of this chapter and section 1346(b) of this title shall not apply to" the excepted claims.). One of the original exceptions provides that the FTCA does not apply to most intentional torts. 28 U.S.C. 2680(h); see § 421(h), 60 Stat. 846. In 1974, however, Congress added a law-enforcement proviso providing that, "with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. 2680(h); see *Millbrook* v. *United States*, 569 U.S. 50, 52-53 (2013).

3. This case turns on the meaning and application of another provision of Chapter 171, the judgment bar in Section 2676. That provision states:

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

28 U.S.C. 2676. The judgment bar establishes that a claimant who "receives a judgment (favorable or not) in an FTCA suit * * * generally cannot proceed with a suit against an individual employee based on the same underlying facts." *Simmons*, 136 S. Ct. at 1847.

The judgment bar has been a feature of the FTCA since its inception. See § 410(b), 60 Stat. 844. The provision is an important part of the FTCA's remedial compromise. By waiving sovereign immunity, the FTCA

created the opportunity for claimants to sue a solvent defendant, subject to the limits and exceptions that Congress placed on the liability of the United States. At the same time, the judgment bar provides that, if a claimant chooses to pursue the FTCA remedy against the United States, then the judgment on that claim will be determinative of the controversy. The judgment bar thus serves both to protect federal employees against the threat and distraction of individual litigation, and to relieve the government of the burden of defending multiple claims arising out of the same incident, once an FTCA claim is resolved. See *Will* v. *Hallock*, 546 U.S. 345, 354 (2006). As this Court has put it, the judgment bar "prevent[s] unnecessarily duplicative litigation" after a claimant's FTCA claim "ha[s] given him a fair chance to recover damages for his" alleged injury. *Simmons*, 136 S. Ct. at 1849.

B. The Present Controversy

1. This case arises from a violent encounter in July 2014 between respondent and petitioners, two law enforcement officers working on a "joint fugitive task force" established by the Federal Bureau of Investigation (FBI) and the City of Grand Rapids, Michigan. Pet. App. 2a (citation omitted). Douglas Brownback was an FBI Special Agent, and Todd Allen was a Grand Rapids Police Department detective assigned full time to the FBI-directed task force as "a federally deputized Special Deputy U.S. Marshal." *Id.* at 54a; see *id.* at 2a, 36a.

The officers' task force was searching for a fugitive named Aaron Davison, who was wanted on an arrest warrant for felony home invasion. Pet. App. 2a. The officers knew that Davison was a 26-year-old white male between 5'10" and 6'3" with glasses, short dark hair,

and a thin build. *Id.* at 2a-3a. The officers had two photographs of Davison, but their usefulness was somewhat limited because one was seven years old and the other showed Davison's face obscured by sunglasses. *Id.* at 3a.

During their investigation, the officers learned that Davison visited a specific gas station in Grand Rapids almost every day between 2 p.m. and 4 p.m., so they went to that neighborhood. Pet. App. 3a. Around 2:30 p.m., the officers saw respondent—a 21-year-old white male between 5'10" and 6'3" with glasses and dark hair—walking down the street in an area near the gas station that Davison frequented. *Ibid.* The officers believed there was a "good possibility" that respondent was the fugitive, so they approached and stopped him. *Ibid.* (citation omitted). They were wearing plain clothes, but had badges on lanyards around their necks that were visible to respondent. *Id.* at 3a-4a. When the officers asked respondent for his name and identification, he gave only his first name, "James," and stated that he did not have identification. *Id.* at 3a. The officers then instructed respondent to put his hands on his head and face their vehicle, and respondent complied. *Ibid.* He did so because, as he later testified, the officers' badges led him to "assume[] [they had] some sort of authority." *Id.* at 3a-4a (citation omitted).

The officers asked respondent if he was carrying any weapons. Pet. App. 4a. Respondent said he had a pocketknife, so Detective Allen removed the knife from respondent's pocket. *Ibid.* Detective Allen also removed respondent's wallet from his pocket. *Ibid.* Respondent then began "swinging his wrist towards Agent Brownback." D. Ct. Doc. 73-4, at 3 (Jan. 17, 2017) (respondent's state-court filing). Respondent also said "are you mugging me?" and attempted to run away, prompting

Detective Allen to tackle him. Pet. App. 4a (brackets and citation omitted). Respondent alleges that Detective Allen put him in a chokehold that caused him to lose consciousness for several seconds. *Ibid.* It is undisputed, however, that respondent thereafter fought with the officers and violently resisted arrest, including by biting Detective Allen's arm. *Ibid.*; see *id.* at 30a-31a, 74a; see also J.A. 28. In an attempt to force respondent to release his bite, Detective Allen began "punching [respondent] in the head and face." Pet. App. 4a.

The officers were able to subdue respondent only with the assistance of a bystander. Pet. App. 31a. Law enforcement took respondent to a hospital, where doctors concluded that he did not require admission for further treatment and released him. *Id.* at 5a. Eventually, law enforcement determined that respondent was not Davison, the fugitive. *Id.* at 49a. The State of Michigan tried respondent on charges of assault and resisting arrest, but a jury acquitted him. *Id.* at 5a, 49a.

2. a. Respondent filed an administrative claim with the FBI based on his encounter with the officers. See Pet. App. 75a; see also 28 U.S.C. 2675(a). When the administrative claim was not resolved within the statutory period, respondent brought this lawsuit against the United States under the FTCA and against the officers individually under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See Pet. App. 49a-50a.[1]

Respondent's FTCA claims alleged that the government was liable for damages under 28 U.S.C. 1346(b)(1)

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[1] Respondent also sued the officers, plus another police officer who assisted at the scene of his arrest, under 42 U.S.C. 1983, but those claims were dismissed and they are no longer at issue in this case. See Pet. App. 54a-58a, 69a-75a.

because the officers, "while acting on behalf of a federal agency," allegedly committed six torts under Michigan law: assault, battery, false arrest, false imprisonment, malicious prosecution, and intentional infliction of emotional distress. J.A. 39.[2] Respondent's *Bivens* claims against the officers alleged four violations of the Fourth Amendment: an unreasonable seizure when the officers stopped him; an unreasonable search when Detective Allen removed his wallet; use of excessive force; and "malicious prosecution." J.A. 37. In the operative complaint (the First Amended Complaint), respondent drew on evidence and testimony that had been given during his criminal trial and presented in his administrative claim to the FBI. See J.A. 24-36.

Pursuant to the district court's case-management order, the defendants responded to discovery requests. See J.A. 43, 44-45. All defendants then moved to dismiss the complaint for failure to state a claim upon which relief can be granted, or in the alternative, for summary judgment. See Pet. App. 50a-51a.[3]

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[2] The FTCA covers Detective Allen's actions in this case while working on the federally directed task force as a Special Deputy U.S. Marshal, because the statute defines "[e]mployee of the government" to include "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States." 28 U.S.C. 2671.

[3] The United States additionally argued that respondent's FTCA claims based on Detective Allen's conduct should be dismissed for lack of subject-matter jurisdiction, because respondent's administrative claim to the FBI had failed to properly exhaust his administrative remedies on those claims under 28 U.S.C. 2675(a). See Pet. App. 50a-51a, 75a. The district court assumed without deciding that respondent had properly exhausted his administrative remedies on all claims. See *id.* at 79a.

b. The district court granted the defendants' dispositive motion, Pet. App. 46a-81a, and it entered a final judgment in the defendants' favor on all claims, *id.* at 86a. The court stated that, in resolving the motion, it would "'accept as true'" all of respondent's factual allegations and would "consider the evidence and all reasonable inferences" in respondent's favor. *Id.* at 52a-53a (citation omitted).

On respondent's *Bivens* claims, the district court rejected each of his alleged constitutional violations. Pet. App. 59a-69a. The court found that, judged from the perspective of a reasonable officer on the scene, the officers did not violate respondent's "right to be free from an unreasonable search and seizure," *id.* at 65a, and their use of force was reasonable under the circumstances, *id.* at 68a. The court rejected respondent's claim for malicious prosecution because it found that his allegations were "so non-specific as to make it impossible to discern the basis for [his] claim." *Id.* at 69a.

Turning to respondent's FTCA claims, the district court entered judgment for the United States. See Pet. App. 75a-80a. The court found that respondent's allegations and evidence failed to show that the officers' actions could support "liab[ility] to [him] in accordance with the law of the place where the act or omission occurred," 28 U.S.C. 1346(b)(1). The court gave two distinct reasons why respondent had failed to establish any violation of state law.

First, the district court determined that, under Michigan law, the officers if sued individually would be entitled to governmental immunity against respondent's tort claims, because all of their actions were "within the scope of their authority"; "were undertaken in good faith, or were not undertaken with malice"; and

"were discretionary, as opposed to ministerial." Pet. App. 79a-80a (citing *Odom* v. *Wayne Cnty.*, 760 N.W.2d 217, 228 (Mich. 2008)); see *id.* at 76a-80a. In the alternative, irrespective of any governmental immunity, the district court determined that respondent had failed as a matter of law to show any of the Michigan common-law torts that he alleged. *Id.* at 80a. The court held that respondent's claims for assault and battery should be dismissed because the officers had "used reasonable force in subduing [him]"; that respondent's claims for false imprisonment, false arrest, and malicious prosecution should be dismissed because "probable cause existed" to arrest and charge him; and that respondent's claim for intentional infliction of emotional distress should be dismissed because the officers had "acted within their authority" throughout the encounter. *Ibid.*

3. The court of appeals reversed in a partially divided opinion. Pet. App. 1a-45a. At the outset, the court stated that, because the district court had not specified the Federal Rule of Civil Procedure on which it had based its judgment in favor of the defendants, and because the district court appeared to have considered at least some facts beyond the complaint, the court of appeals would treat the district court's ruling as a grant of summary judgment to the defendants. *Id.* at 1a n.1.

a. Respondent's opening brief in the court of appeals stated that he had "decided not to pursue his [FTCA] claim against the United States on appeal." Resp. C.A. Br. 18 n.5. The officers therefore argued that respondent's remaining *Bivens* claims were precluded by the FTCA judgment bar, because those claims arose from "the same subject matter" as his FTCA claims and were pleaded against the same governmental employees

"whose act or omission gave rise to the [FTCA] claim[s]." 28 U.S.C. 2676.

The panel majority rejected the officers' argument that the judgment bar foreclosed respondent's *Bivens* claims. Pet. App. 6a-12a. The majority observed that the FTCA enacts a limited waiver of the United States' sovereign immunity, and "[s]overeign immunity is jurisdictional in nature." *Id.* at 6a (citing *Meyer*, 510 U.S. at 475). The majority then reasoned that, if a plaintiff's FTCA claim "fails to satisfy the[] six elements" set forth in 28 U.S.C. 1346(b)(1), then it "does not fall within the FTCA's 'jurisdictional grant.'" Pet. App. 7a (citation omitted). In the panel majority's view, therefore, because respondent "failed to satisfy the sixth element" of his FTCA claim, the district court must have "lacked subject-matter jurisdiction over [his] FTCA claim," and the court's judgment "was not a disposition on the merits." *Id.* at 8a-10a. The majority then invoked *Himmelreich* v. *Federal Bureau of Prisons*, 766 F.3d 576 (6th Cir. 2014) (per curiam)—which this Court affirmed on different reasoning in *Simmons*, 136 S. Ct. at 1843—for the proposition that "[a] dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar," because "in the absence of jurisdiction, the court lacks the power to enter judgment." Pet. App. 7a (quoting 766 F.3d at 579). Applying that reasoning, the panel majority concluded that "the district court's dismissal of [respondent's] FTCA claim 'does not trigger the § 2676 judgment bar.'" *Id.* at 9a (citation omitted).

The panel majority additionally reasoned that this Court's decision in *Simmons* supported its refusal to apply the judgment bar in this case, because *Simmons* stated that the "'judgment bar provision functions in much the same way' as the 'common-law doctrine of

claim preclusion.'" Pet. App. 11a (quoting 136 S. Ct. at 1849 n.5). The majority repeated its labeling of the district court's judgment here as a dismissal for lack of jurisdiction, and then reasoned that it is "well-established that 'a dismissal for a lack of subject-matter jurisdiction carries no preclusive effect.'" *Id.* at 11a-12a (quoting *Himmelreich*, 766 F.3d at 580).

Having found that respondent's individual claims against the officers were not precluded by the judgment bar, the panel majority went on to conclude, viewing the record in the light most favorable to respondent, that the officers were not shielded by qualified immunity and were not entitled to summary judgment on some of respondent's *Bivens* claims. Pet. App. 13a-34a. The court therefore reversed the district court's judgment in favor of the officers on those claims and remanded for further proceedings. *Id.* at 38a.

b. Judge Rogers dissented on the ground that respondent's *Bivens* claims were precluded by the FTCA judgment bar. Pet. App. 39a-45a. He reasoned that, although "merits determinations under the FTCA are jurisdictional in that they implicate the sovereign immunity of the United States," a court's dismissal of an FTCA claim for failure to establish the liability of the United States is still a "'judgment'" within the meaning of 28 U.S.C. 2676. Pet. App. 40a. Judge Rogers observed that, in this case, "[t]he district court's dismissal of [respondent's] FTCA claims was based on an assessment of their merits under Michigan law." *Id.* at 41a. And this Court in *Simmons*, Judge Rogers explained, stated that when an FTCA claim is dismissed "because [the plaintiff] simply failed to prove his claim," the judgment bar *does* apply. *Id.* at 40a (quoting 136 S. Ct. at 1849) (brackets in original).

Judge Rogers further observed that, in "[e]very case" where a district court determines that a plaintiff failed to establish the elements of his FTCA claim, including even cases where judgment is entered against the plaintiff "after trial," the panel majority's reasoning would require the conclusion that the judgment bar does not apply because the court lacked jurisdiction. Pet. App. 42a. Therefore, the majority's reasoning "would effectively nullify the judgment bar" in all cases "where the FTCA judgment was in favor of the government"—a result that this Court expressly rejected in *Simmons*. *Ibid.*

c. A majority of the panel denied the officers' petition for rehearing, and the court of appeals denied a petition for rehearing en banc. Pet. App. 82a-83a.

SUMMARY OF ARGUMENT

The FTCA provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. Once the district court here entered judgment for the United States on respondent's FTCA claims, finding that he had failed to establish the torts that he alleged, Section 2676 precluded respondent from proceeding on individual claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the same involved officers, arising from the same facts.

A. The FTCA's text, history, structure, and purposes, as well as this Court's precedents, all establish that the judgment bar forecloses respondent's *Bivens* claims.

The district court entered a final judgment on respondent's FTCA claims that resolved the substantive liability of the United States. Respondent's *Bivens* claims involve the same officers as his dismissed FTCA claims, and the same subject matter—they are "based on the same underlying facts." *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1847 (2016). The statutory text therefore enacts a "complete bar" to respondent's individual claims. 28 U.S.C. 2676. That result accords with *Simmons*, which held that the judgment bar applies when FTCA claims are dismissed because the involved federal employees did not commit the torts alleged or "because [the plaintiff] simply failed to prove his claim." 136 S. Ct. at 1849.

Other FTCA provisions reinforce that the judgment bar applies here. Section 2680(h) provides that "the provisions of [Chapter 171]"—including the judgment bar in Section 2676—"shall apply to any claim" alleging most intentional torts by federal law enforcement officers. 28 U.S.C. 2680(h). And Section 2679(b) shows Congress's understanding that the statutory phrase "by reason of the same subject matter" in the FTCA naturally includes *Bivens* claims arising from the same facts as FTCA claims. 28 U.S.C. 2679(b)(1); see *Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010).

Congress's purposes for Section 2676—including preventing unnecessarily duplicative litigation, see *Simmons*, 136 S. Ct. at 1849—also support applying the judgment bar here. Respondent litigated his FTCA claims through summary judgment, and he now seeks to use the same factual allegations to litigate similar theories of liability against the officers.

B. The Sixth Circuit's reasons for declining to apply the judgment bar in this case do not withstand scrutiny.

This Court's precedents foreclose the panel majority's reasoning that, when the district court considered and rejected the merits of respondent's FTCA claims, the court was deprived of subject-matter jurisdiction such that the judgment bar does not apply. This Court expressly stated in *Simmons* that, when an FTCA case is dismissed "because [the plaintiff] simply failed to prove his claim," the judgment bar *does* apply. 136 S. Ct. at 1849. The panel majority also reasoned that whether the judgment bar applies depends on which side prevails on the FTCA claims, whereas this Court has stated that the judgment bar applies "once a plaintiff receives a judgment (*favorable or not*) in an FTCA suit." *Id.* at 1847 (emphasis added). Moreover, this Court's decision in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), shows that, contrary to the Sixth Circuit's reasoning, the district court in this case had subject-matter jurisdiction to enter a preclusive judgment on respondent's FTCA claims based on his failure to prove the liability of the United States. *Id.* at 479.

The common law of claim preclusion reinforces that the district court's judgment here should have preclusive force. This Court has held that claim preclusion is triggered where a judgment, like the district court's summary judgment here in favor of the United States, "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).

Every other court of appeals to consider the issue has rejected the Sixth Circuit's reasoning and held instead that a judgment resolving the merits of FTCA claims in favor of the United States precludes *Bivens* claims arising from the same facts.

C. Respondent advances two alternative arguments for declining to apply the judgment bar here that were not adopted by the court of appeals. Neither has merit.

1. Respondent contends that the phrase "by reason of the same subject matter" in Section 2676 is a term of art from the law of preclusion that, at the time Congress enacted the judgment bar, referred only to the specific common-law tort theories asserted in an FTCA case. Therefore, respondent contends, the judgment bar can never apply at all to *Bivens* claims. Respondent's argument conflicts with this Court's interpretation of the same statutory phrase in *Simmons* and *Hui*. Every court of appeals to consider the issue has rejected respondent's contention that *Bivens* claims are exempt from the judgment bar. And respondent's historical analysis is faulty: at the time of the original FTCA, this Court and the Restatement (First) of Judgments (1942) (First Restatement) both used the phrase "same subject matter" in the law of preclusion to refer to the same factual transaction or occurrence at issue in a prior suit, not the legal theories asserted.

2. Respondent also contends that he should be permitted to bring FTCA and *Bivens* claims simultaneously without the judgment bar's ever coming into play (as opposed to holding back *Bivens* claims until his FTCA action is resolved). But the breadth of the statutory text leaves no room for respondent's suggested limitation on the judgment bar, which is why the courts of appeals have overwhelmingly rejected it. Respondent protests that, if the judgment bar applies here, then it will affect some plaintiffs' choices about which claims to bring and in what order. But that is the inevitable result of the judgment bar, which provides that the plaintiff's choice of remedy in a case like this one comes

with consequences. Respondent's FTCA claims gave him "a fair chance to recover damages," and once respondent failed to establish his FTCA claims, it would "make little sense to give [him] a second bite at the money-damages apple by allowing suit against the employees." *Simmons*, 136 S. Ct. at 1849.

ARGUMENT

AN FTCA CLAIMANT WHO FAILS TO ESTABLISH THE LIABILITY OF THE UNITED STATES IS BARRED FROM PURSUING INDIVIDUAL *BIVENS* CLAIMS AGAINST THE SAME INVOLVED EMPLOYEES, BASED ON THE SAME FACTUAL ALLEGATIONS

The FTCA provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. Respondent here pleaded an "action under" Section 1346(b)(1) arising from the officers' encounter with him; the district court entered final "judgment" on those FTCA claims in favor of the United States because respondent had failed to establish that the officers committed any of the torts he alleged; and respondent declined to appeal that judgment. *Ibid.* Respondent is therefore "complete[ly] bar[red]" from pursuing "any" claims against the officers arising from the same subject matter. *Ibid.* Yet the Sixth Circuit's decision below allowed respondent to pursue claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the same officers, based on the very same factual allegations. That result does not comport with the judgment bar.

A. The Judgment Bar Applies When An FTCA Plaintiff Fails To Establish The Torts That He Alleges

The FTCA's text, history, structure, and purposes all establish that the judgment bar forecloses *Bivens* claims arising from the same facts as a plaintiff's unsuccessful FTCA claims.

1. The judgment bar is an important part of the FTCA's remedial compromise

a. The judgment bar has been an important feature of the FTCA's remedial compromise from the statute's beginning. See pp. 4-5, *supra*. Congress waived sovereign immunity for certain tort claims and created the opportunity for a claimant like respondent to pursue a solvent defendant (the United States). But Congress also provided in Section 2676 that, if a claimant elects to pursue the FTCA remedy and "receives a judgment" on those claims, whether the judgment is "favorable or not," then that judgment will be determinative of the controversy. *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1847 (2016). The claimant thereafter "cannot proceed with" any other claims against the same governmental employees "based on the same underlying facts." *Ibid.*

The judgment bar means that a district court's dismissal of FTCA claims against the United States can foreclose a plaintiff from asserting the same or similar claims against individual federal employees. As this Court explained in *Simmons*, if a district court "dismiss[es]" a plaintiff's FTCA suit "because the [federal employees involved] were not negligent, because [the plaintiff] was not harmed, or because [the plaintiff] simply failed to prove his claim, it would make little sense to give [the plaintiff] a second bite at the money-damages apple by allowing suit against the employees: [the plaintiff's] first suit would have given him a fair

chance to recover damages for his [injuries]." 136 S. Ct. at 1849.

b. At the time Congress enacted the FTCA, the judgment bar's main function was to bar common-law tort claims against federal employees. In 1971, this Court decided *Bivens*, which recognized a federal common-law cause of action against federal law enforcement officers in their personal capacity for certain constitutional violations. 403 U.S. at 390-397. Then in 1974, partly in response to *Bivens*, Congress amended the FTCA's intentional-tort exception in Section 2680(h) to add the law-enforcement proviso, which extended the FTCA for the first time to claims alleging specific intentional torts by federal law enforcement officers. See *Carlson* v. *Green*, 446 U.S. 14, 19-20 (1980); p. 4, *supra*.

Since then, every court of appeals to consider the question has held that the judgment bar forecloses *Bivens* claims that are based on the same facts as a final FTCA judgment. See *White* v. *United States*, 959 F.3d 328, 333 (8th Cir. 2020) ("join[ing]" the circuit courts' consensus); *Unus* v. *Kane*, 565 F.3d 103, 121-122 (4th Cir. 2009), cert. denied, 558 U.S. 1147 (2010); *Manning* v. *United States*, 546 F.3d 430, 437 (7th Cir. 2008), cert. denied, 558 U.S. 1011 (2009); *Harris* v. *United States*, 422 F.3d 322, 337 (6th Cir. 2005); *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 858-859 (10th Cir. 2005); *Gasho* v. *United States*, 39 F.3d 1420, 1436-1438 (9th Cir. 1994). Courts have based that conclusion on the judgment bar's plain text, which provides that an FTCA judgment is "a *complete* bar to *any* action" arising from the "same subject matter." 28 U.S.C. 2676 (emphases added). "Language that broad easily accommodates * * * causes of action" "both known and

unknown" at the time Congress enacted it. *Hui* v. *Castaneda*, 559 U.S. 799, 806 (2010).

In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act. The Westfall Act makes the FTCA "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter" against a federal employee individually for "negligent or wrongful" conduct while performing his duties, 28 U.S.C. 2679(b)(1), and it provides for the substitution of the United States as the defendant in the employee's place on such claims, 28 U.S.C. 2679(d). Congress also provided, however, that the Westfall Act's exclusive-remedy limitation "does not extend or apply to a civil action against" a federal employee "which is brought for a violation of the Constitution of the United States" (*i.e.*, *Bivens* claims) or under other federal statutes apart from the FTCA that authorize an individual action against a federal employee. 28 U.S.C. 2679(b)(2). In light of the Westfall Act's restriction on state-law tort suits directly against federal employees, the judgment bar now primarily functions as a bar to *Bivens* actions.

The upshot of the law-enforcement proviso and the Westfall Act in combination is that, when a person alleges that federal law enforcement agents committed both state-law torts listed in Section 2680(h) and federal constitutional violations, the FTCA permits the plaintiff to choose whether to plead an FTCA claim against the United States, *Bivens* claims against the agents individually, or both. See, *e.g.*, *Manning*, 546 F.3d at 431. But the judgment bar means that the plaintiff's choice "come[s] with[] consequence[s]." *Unus*, 565 F.3d at 122. If the plaintiff elects to bring an FTCA claim, either by

itself or in combination with *Bivens* claims, and the FTCA claim ends in a judgment resolving the liability of the United States, then the judgment bar precludes the plaintiff from taking "a second bite at the money-damages apple" by pursuing claims against the individual officers under *Bivens*. *Simmons*, 136 S. Ct. at 1849.

2. The text and context of the judgment bar, and this Court's decision in* Simmons, *foreclose* Bivens *claims after a plaintiff's unsuccessful FTCA claims

a. The judgment bar is triggered by "[t]he judgment in an action under section 1346(b)." 28 U.S.C. 2676. Here, respondent pleaded FTCA claims under Section 1346(b)(1) arising from the officers' encounter with him. 28 U.S.C. 2676; see J.A. 39-40. Those claims indisputably went to judgment. The district court granted summary judgment for the United States, see Pet. App. 1a n.1, because the court found that, even giving respondent the benefit of every disputed fact in the case, *id.* at 52a-53a, his evidence and allegations failed to establish each of the state-law torts that he alleged the officers committed, *id.* at 75a-80a. That is, respondent failed to 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 act or omission occurred." 28 U.S.C. 1346(b)(1). The district court then entered a final judgment resolving the case. Pet. App. 86a ("It is hereby ordered that Judgment is entered in favor of Defendants and against Plaintiff.") (capitalization and emphasis omitted).

The district court's judgment on respondent's FTCA claims fits the ordinary meaning of the term "judgment" in Section 2676, both at the time of the FTCA's enactment and now. The court's judgment gave "[t]he conclusion of law upon facts found, or admitted by the

parties, * * * in the course of the suit." *Bouvier's Law Dictionary* 606 (William Edward Baldwin ed., 1934) (defining "judgment"); accord *Webster's New International Dictionary of the English Language* 1343 (2d ed. 1934) (defining "judgment" as "the determination, decision, decree, or sentence of a court"); *Black's Law Dictionary* 1007 (11th ed. 2019) (defining "judgment" as "[a] court's final determination of the rights and obligations of the parties in a case"). The district court's judgment in this case was also appealable—the defining feature of a judgment under the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 54(a) (1938) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies."); Fed. R. Civ. P. 54(a) (2009) (same).[4]

In addition, the district court's judgment in this case was the kind of judgment that Congress intended to be preclusive. This Court has observed that, when Congress adopted the judgment bar, it drew in a rough way on concepts of common-law claim preclusion, and expanded them. See *Simmons*, 136 S. Ct. at 1849 n.5; see also *Will* v. *Hallock*, 546 U.S. 345, 354 (2006) (analogizing the judgment bar to common-law claim preclusion, though recognizing that "the statutory judgment bar is arguably broader than traditional res judicata"). Whereas claim preclusion traditionally is limited to successive actions involving "the same parties," *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594 (2020), the judgment bar relaxes that mutuality requirement and extends the preclusive force of an FTCA judgment to bar any claims against individual employees, even though the employees were

[4] The FTCA as originally enacted expressly incorporated the Federal Rules of Civil Procedure. See § 411, 60 Stat. 844.

not parties to the plaintiff's FTCA action against the United States. Both at the time Congress enacted the FTCA and now, common-law claim preclusion applies where a court enters "a judgment upon the merits." *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620, 623 (1933); see 18A Charles Alan Wright, et al., *Federal Practice and Procedure* § 4427 (3d ed. 2017) (res judicata applies where a judgment is "valid, final, and on the merits"). Thus, the text and context of Section 2676 indicate that the judgment bar generally applies where a district court enters a final judgment in an FTCA action that would preclude further litigation against the United States—such as the district court's judgment here resolving the merits of respondent's FTCA claims.

This Court's decision in *Simmons* confirms that the judgment bar applies here. The specific holding in *Simmons* was that a dismissal based on the FTCA's exception for federal employees' discretionary functions, 28 U.S.C. 2680(a), does not trigger the judgment bar, because Section 2680 provides that "[t]he provisions of [Chapter 171] * * * shall not apply to" claims covered by an FTCA exception, 28 U.S.C. 2680, and "[t]he judgment bar is a provision of Chapter 171." 136 S. Ct. at 1847-1848. In reaching that holding, however, this Court reasoned that the judgment bar *would* be triggered where a district court "issue[s] a judgment dismissing [the plaintiff's FTCA suit] because the [federal] employees were not negligent * * * or because [the plaintiff] simply failed to prove his claim." *Id.* at 1849. That description of the judgment bar fits this case exactly. The district court resolved the substantive liability of the United States on respondent's FTCA claims, by finding that respondent had failed to show that a private

person in analogous circumstances would be liable for the torts that respondent alleged.

b. Because the judgment bar was triggered in respondent's case, the FTCA judgment "shall constitute a complete bar to any action by [respondent], by reason of the same subject matter, against the employee[s] of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. That statutory text plainly covers respondent's *Bivens* claims against the officers in this case.

Respondent has never disputed that his *Bivens* claims involve the same governmental employees whose conduct gave rise to his FTCA claims. And those *Bivens* claims involve "the same subject matter" as his dismissed FTCA claims, 28 U.S.C. 2676, because they are "based on the same underlying facts," *Simmons*, 136 S. Ct. at 1847. See J.A. 39 (respondent's operative complaint). Indeed, as the district court observed, respondent's *Bivens* claims are founded largely on the same legal theories as his FTCA claims—both sets of claims allege that the officers acted without reasonable suspicion or probable cause, and used excessive force. Pet. App. 80a. The district court rejected those theories as a matter of law in adjudicating respondent's FTCA claims after considering all of respondent's allegations and evidence. See *ibid.*; see also *id.* at 61a-69a.

The statutory text and *Simmons* thus make clear that the district court's FTCA judgment in this case is the type of "judgment" that Congress intended to have preclusive effect through Section 2676, and that respondent's *Bivens* claims are the sort of claims that Congress sought to preclude.

3. The FTCA's structure and history confirm that the judgment bar applies to the Bivens *claims here*

Beyond the text of Section 2676 itself, other provisions of the FTCA and the history of Congress's amendments to the statute confirm that the judgment bar applies here.

First, the text of the law-enforcement proviso by its terms makes the judgment bar applicable in this case. Section 2680(h) provides that "the provisions of [Chapter 171] and section 1346(b) of this title shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" committed by "investigative or law enforcement officers of the United States Government." 28 U.S.C. 2680(h). Respondent's FTCA claims alleged several of the named intentional torts by federal law enforcement officers. See pp. 7-8, *supra*. And as this Court observed in *Simmons*, "[t]he judgment bar is a provision of Chapter 171." 136 S. Ct. at 1847-1848. "Absent persuasive indications to the contrary, [this Court] presume[s] Congress says what it means and means what it says." *Id.* at 1848.

The law-enforcement proviso is especially strong evidence that Congress intended that the judgment bar would apply in this case, because Congress enacted that proviso with suits like respondent's in mind. As explained earlier, p. 19, *supra*, Congress added the proviso in 1974 in the wake of this Court's decision in *Bivens*, and Congress specifically contemplated that some plaintiffs would bring FTCA claims and *Bivens* claims in "parallel," as respondent did here. *Carlson*, 446 U.S. at 19-20. The text of Section 2680(h) shows that, when Congress extended the FTCA to claims like

respondent's alleging intentional torts by law enforcement officers, Congress incorporated the whole of the FTCA's remedial compromise—both the waiver of sovereign immunity and the other limitations and restrictions that come with it in Chapter 171. The judgment bar is one of those restrictions, and it advances Congress's objective of using the FTCA to conclusively resolve alleged torts by federal employees.

In addition, the Westfall Act provides yet further indication that the judgment bar precludes respondent's *Bivens* claims. In the Westfall Act, Congress made the FTCA's remedy exclusive of any other civil action against individual federal employees "by reason of the same subject matter." 28 U.S.C. 2679(b)(1). But Congress also added a specific exception in Section 2679(b)(2)(A) so that the exclusive-remedy limitation would not apply to *Bivens* claims against federal employees. See p. 20, *supra*. That "explicit exception for *Bivens* claims is powerful evidence" that Congress understood, were it not for the exception, the phrase "by reason of the same subject matter" in Section 2679(b)(1) would naturally have covered *Bivens* claims that are based on the same underlying facts as the plaintiff's potential FTCA claims. *Hui*, 559 U.S. at 807.

The judgment bar contains exactly the same language —"by reason of the same subject matter"—that appears in Section 2679(b)(1) and that was at issue in *Hui*. There, the Court recognized that the phrase "by reason of the same subject matter" applies to *Bivens* claims arising from the same facts as FTCA claims. See *Hui*, 559 U.S. at 805-807. This Court should interpret the identical phrase in Section 2676 to have the same meaning that it has in Section 2679(b)(1). See *Robers* v. *United States*, 572 U.S. 639, 643 (2014) ("Generally,

'identical words used in different parts of the same statute are . . . presumed to have the same meaning.'") (citations omitted). And as just explained, p. 24, *supra*, that construction of the judgment bar precludes respondent's *Bivens* claims here, which indisputably were based on the same facts as his dismissed FTCA claims.

4. The purposes of the judgment bar are served by applying it here

This Court's decisions have also explained why Congress's purposes for the judgment bar support applying it in this case. Congress enacted the judgment bar in part to relax the same-party requirement of common-law claim preclusion, so that the resolution of a plaintiff's FTCA claim would preclude any further litigation against the involved federal employees. See *Simmons*, 136 S. Ct. at 1849 n.5. Congress determined that a plaintiff who has had "a fair chance" through the FTCA "to recover damages for" his alleged injuries at the hands of federal employees should not be permitted to continue seeking individual remedies against those same employees. *Id.* at 1849. The judgment bar thus prevents burdening the government with "unnecessarily duplicative litigation." *Ibid.* It also alleviates the strains on federal resources and employee morale that arise from individual claims against governmental employees, by cutting off all individual claims once the FTCA action goes to judgment. See *Will*, 546 U.S. at 354; *United States* v. *Gilman*, 347 U.S. 507, 512 n.2 (1954) (quoting *1942 Hearing* 9).

Respondent had a fair chance to recover damages for the wrongdoing that he alleged. He litigated his FTCA claims through summary judgment, and the district court finally resolved the substantive liability of the United States by finding that respondent had failed to

establish any of the torts that he claimed. Pet. App. 75a-80a; see *id.* at 61a-69a. Yet according to the reasoning of the court of appeals below, the FTCA judgment in the United States' favor carries no preclusive force, and the litigation must restart with the same federal employees facing trial personally based on the same facts. Congress did not permit that result.

Respondent contends (Br. in Opp. 19) that his particular *Bivens* claims against the officers do not create the prospect of duplicative litigation, because his case "has hardly begun." That is incorrect. Although the officers did not file an answer in district court, *ibid.*, that is because respondent's complaint incorporated a body of evidence from his earlier state-court proceeding, including photographs and witness testimony, that established the facts of the case. See p. 8, *supra.* Respondent then took discovery in this litigation, see J.A. 43, 44-45, and he did not request additional discovery to respond to the government's dispositive motion on his FTCA claims. See Fed. R. Civ. P. 56(d). Both sides prepared lengthy briefs on the government's dispositive motion that included several evidentiary exhibits. See J.A. 11-18. The district court considered all of that evidence and argument, and gave respondent the benefit of every disputed fact in the case, Pet. App. 52a-53a, before determining that respondent had failed as a matter of law to establish circumstances where a private person would be liable to him under state law. See *id.* at 75a-80a. Respondent offers no plausible reason why Congress would have wanted to permit him to force the government to start the case again defending the officers against the very same factual allegations.

B. The Court Of Appeals Erred In Refusing To Apply The Judgment Bar In This Case

The Sixth Circuit panel majority acknowledged that the district court dismissed respondent's FTCA claims because it determined that he had "failed to satisfy the sixth element of" Section 1346(b)(1)—*i.e.*, he failed to show conduct that would constitute a violation of state law if committed by a private person. Pet. App. 9a; see *id.* at 10a (acknowledging that the district court's ruling was based on its "analy[sis] [of] Michigan law"). The majority also observed that Section 1346(b)(1) waives the sovereign immunity of the United States on the same terms as the elements of the FTCA cause of action. *Id.* at 6a-7a; see *FDIC* v. *Meyer*, 510 U.S. 471, 479 (1994) (Section 1346(b) "describes the scope of jurisdiction by reference to claims for which the United States has waived its immunity and rendered itself liable."). The majority then reasoned backward that, when respondent failed on the merits to establish the liability of the United States on his FTCA claims, he must also have failed to satisfy the terms of the FTCA's immunity waiver. And because sovereign immunity is jurisdictional, the majority concluded that the district court lacked subject-matter jurisdiction over respondent's FTCA claims—and furthermore that a dismissal for lack of jurisdiction does not trigger the judgment bar. Pet. App. 8a-11a. The panel majority's reasoning is flawed in multiple respects.

1. The panel majority's reasoning is contrary to this Court's precedents

a. This Court in *Simmons* stated that the judgment bar is triggered when a district court "issue[s] a judgment dismissing" the plaintiff's FTCA suit "because the [federal] employees" did not commit the torts alleged,

"or because [the plaintiff] simply failed to prove his claim." 136 S. Ct. at 1849. Yet according to the reasoning of the Sixth Circuit panel majority, a decision dismissing a plaintiff's FTCA claims on those grounds would necessarily mean that the district court lacked subject-matter jurisdiction over the claim, and that the judgment bar does not apply. See Pet. App. 7a ("If a claim fails to satisfy the[ ] six elements, it is not 'cognizable' under § 1346(b) and does not fall within the FTCA's 'jurisdictional grant.'") (citation omitted). Indeed, as Judge Rogers observed in his dissent below, by the panel majority's logic, *any* ruling that a plaintiff has failed to prove his FTCA claim must be understood as a dismissal for lack of jurisdiction that cannot trigger the judgment bar—a result that *Simmons* expressly rejected. *Id.* at 42a.

According to the panel majority, moreover, the judgment bar depends on which side prevails on the FTCA claims: an FTCA judgment in the plaintiff's favor triggers the judgment bar, but if judgment is entered for the United States because the plaintiff fails to establish an element of his FTCA claim, then the district court must necessarily enter a "dismissal for lack of subject-matter jurisdiction [that] does not have any preclusive effect." Pet. App. 10a-11a. That reasoning cannot be reconciled with this Court's statement that the judgment bar is triggered "once a plaintiff receives a judgment (*favorable or not*) in an FTCA suit." *Simmons*, 136 S. Ct. at 1847 (emphasis added).

Rather than engage with this Court's explanation of the judgment bar in *Simmons*, the panel majority simply stated that *Simmons* "does not conflict with" its own decision in *Himmelreich* v. *Federal Bureau of Prisons*, 766 F.3d 576 (2014) (per curiam), aff'd on other

grounds, *Simmons*, 136 S. Ct. 1843. Pet. App. 11a. That is not correct. As explained above, p. 23, *supra*, that case presented the question whether the judgment bar applies when an FTCA case is dismissed under the discretionary-function exception, 28 U.S.C. 2680(a). The Sixth Circuit held that the answer was no, stating that "district courts lack subject-matter jurisdiction over an FTCA claim when the discretionary-function exception applies," and that "[a] dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar." *Himmelreich*, 766 F.3d at 579. This Court affirmed, but it notably did *not* adopt that rationale: the Court instead rested on the "plain text" of Section 2680. *Simmons*, 136 S. Ct. at 1847-1848. The decision below thus resurrects the very reasoning in *Himmelreich* that this Court did not embrace in *Simmons*, and it refuses to apply the portions of *Simmons* explaining that the judgment bar should apply here.

Moreover, *Simmons*'s explanation for declining to give preclusive effect to a judgment applying an FTCA exception in Section 2680 cuts in favor of applying the judgment bar in this case. A dismissal under an FTCA exception signals "that the United States cannot be held liable for a particular claim," but "has no logical bearing on whether an employee can be held liable instead." *Simmons*, 136 S. Ct. at 1849. By contrast, 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." *Ibid.* The district court here did not find that respondent's suit fell outside the FTCA altogether; the court rejected the substantive liability of the United States *under* the FTCA because

respondent's factual allegations and evidence failed to establish that a private person would be liable to him under state law for the torts alleged. The court's judgment rejecting respondent's FTCA claims therefore bears directly on whether he should be permitted to use the same factual allegations to pursue similar theories of wrongdoing against the same officers under *Bivens*.

b. In addition to *Simmons*, this Court's decision in *Meyer* shows that, contrary to the reasoning of the panel majority, the district court here *did* have subject-matter jurisdiction to enter a preclusive judgment on respondent's FTCA claims. In *Meyer*, in the course of interpreting an FTCA provision other than the judgment bar, this Court explained that "[a] claim comes within [the FTCA's] jurisdictional grant * * * if it is actionable under [the FTCA]." 510 U.S. at 477. "And a claim is actionable under § 1346(b) if it *alleges* the six elements outlined" in Section 1346(b)(1). *Ibid.* (emphasis added). Respondent alleged the six elements of his claim under Section 1346(b)(1); he simply failed to introduce factual allegations and evidence to establish that, under Michigan state law, a private person would be liable to him for analogous conduct.

Meyer thus leads to the conclusion that, for a statute like the FTCA where immunity and the cause of action overlap, alleging the elements under Section 1346(b)(1) confers subject-matter jurisdiction that enables a district court to enter a judgment on the merits of the plaintiff's FTCA claims. And as a corollary, a district court's order resolving the merits of the FTCA claims against the plaintiff does not retroactively strip the court of jurisdiction. See *Meyer*, 510 U.S. at 479 n.7 ("[An FTCA] claim does not lose its cognizability simply because there has been a failure of proof on an element

of the claim."); cf. 14AA *Federal Practice and Procedure* § 3702.4 (4th. ed. 2011) ("[E]ven if part of the plaintiff's claim is dismissed, for example, on a motion for summary judgment, thereby reducing the plaintiff's remaining claim below the requisite amount in controversy [for federal subject-matter jurisdiction under 28 U.S.C. 1332(a)], the district court retains jurisdiction to adjudicate the balance of the claim.").

c. The panel majority attempted to justify its refusal to give preclusive effect to the district court's judgment here by invoking the general principle that "[s]ubject-matter jurisdiction determines only whether a court has the power to entertain a particular claim—a condition precedent to reaching the merits of a legal dispute." Pet. App. 11a (quoting *Haywood* v. *Drown*, 556 U.S. 729, 755 (2009) (Thomas, J., dissenting)). But this case is the converse. The district court did not dismiss respondent's case in jurisdictional, non-merits terms; the court rejected his FTCA claims for failure of proof: respondent's factual allegations and evidence failed to establish the liability of the United States as a matter of law. See Pet. App. 75a-80a.

Neither *Haywood* nor the other decisions of this Court cited by the panel majority involved a statute with a structure similar to that of Section 1346(b)(1). Nor did those cases determine whether claim preclusion applies to a district court decision that, like the judgment in this case, adjudicated the substance of the plaintiff's cause of action. And even if a judgment dismissing an FTCA claim for failure to prove the torts alleged were thought to have some jurisdictional consequences, the structure of Section 1346(b)(1)—by tying the waiver of immunity to claims that satisfy the elements of the FTCA cause of action—demonstrates that

the FTCA would be an exception to the general principle that jurisdiction must be resolved before the merits. Cf. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017) ("recogniz[ing] that merits and jurisdiction will sometimes come intertwined," and holding that, if a court resolving a "jurisdictional question * * * must inevitably decide some, or all, of the merits issues, so be it").

At bottom, it blinks reality to say, as the panel majority did, that "the district court did not reach the merits of [respondent's] FTCA claim[s]." Pet. App. 8a. The district court expressly held that respondent's FTCA claims failed on the merits. Even if the structure of the FTCA means that the district court's dismissal *also* implicates jurisdiction, the dismissal remains a judgment that resolves the substantive liability of the United States on respondent's FTCA claims. It is therefore just the sort of "judgment" that Congress intended to carry preclusive force. 28 U.S.C. 2676.

2. The panel majority's reasoning is contrary to common-law claim-preclusion principles

The panel majority also erred in reasoning (Pet. App. 11a-12a) that the judgment bar should not apply here because, in *Simmons*, this Court observed that Section 2676 functions in a manner "roughly analogous" to the "common-law doctrine of claim preclusion." 136 S. Ct. at 1849 n.5. Because the panel majority characterized the district court's dismissal as a "jurisdictional" decision, it concluded that the FTCA judgment would not have preclusive effect under general claim-preclusion principles. Pet. App. 11a-12a. As just explained, however, the panel majority's critical premise was mistaken: the district court had jurisdiction to resolve the merits of the tort claims that respondent pleaded under

the FTCA in this case. Without that premise, the panel majority's reasoning entirely collapses.

Moreover, the common law of preclusion actually confirms that the judgment bar should apply in this case. Under the common law (as modified by the judgment bar to relax the same-party requirement, *Simmons*, 136 S. Ct. at 1849 n.5), a judgment like the district court's here—which ruled on the substance of respondent's alleged torts and found that the officers acted with probable cause, with reasonable force, and within their authority, Pet. App. 80a—would support precluding respondent from attempting to litigate claims against the officers arising from the same facts. This Court has held that a judgment is "on the merits" and triggers claim preclusion if, like the district court's judgment here, the judgment "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).

This is therefore not a case where, as some courts have held, a judgment is non-preclusive under res judicata principles because the "jurisdictional" judgment "rest[s] upon * * * defects of a technical or procedural nature which, if cured, normally ought not to bar a plaintiff from bringing the action again." *Rose* v. *Town of Harwich*, 778 F.2d 77, 79-80 (1st Cir. 1985) (Breyer, J.), cert. denied, 476 U.S. 1159 (1986); see *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, J.) (describing the jurisdictional-dismissal exception to claim preclusion as covering "curable defect[s]," when a precondition absent from the first lawsuit can be and is remedied before the second lawsuit). Here, the dismissal was not based on any procedural defect that respondent could have cured; it was

based on respondent's inability to establish the elements of his FTCA cause of action.

3. The panel majority's reasoning is contrary to every other federal appellate decision on this question

Every other court of appeals to consider the issue in this case has rejected the Sixth Circuit's reasoning. See *White*, 959 F.3d at 333 (8th Cir.) ("[T]he district court's entry of judgment for the United States on [the plaintiff's] FTCA action bars the [related] *Bivens* action."); *Unus*, 565 F.3d at 121-122 (4th Cir.) (summary judgment for the United States on FTCA claims was preclusive); *Manning*, 546 F.3d at 437 (7th Cir.) (FTCA judgment in the United States' favor after trial was preclusive); *Farmer* v. *Perrill*, 275 F.3d 958, 960-965 (10th Cir. 2001) (judgment dismissing FTCA claims for failure to prosecute them was preclusive). Each of those courts has determined that a district court's judgment in favor of the United States on an FTCA claim precludes *Bivens* claims arising from the same facts; none has concluded that such a judgment does not trigger the judgment bar because of a failure of subject-matter jurisdiction.[5]

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[5] The Sixth Circuit stated (Pet. App. 9a) that the D.C. Circuit agreed with its understanding of the judgment bar in *Atherton* v. *Jewell*, 689 Fed. Appx. 643, 644 (2017) (per curiam). But *Atherton* was an unpublished order on a motion for summary disposition that merely applied this Court's decision in *Simmons* to a case involving the FTCA's discretionary-function exception, see *id.* at 643-644, so it provides no support for the Sixth Circuit's reasoning here. See pp. 23, 31, *supra*. The Sixth Circuit also cited with partial approval (Pet. App. 10a) the Ninth Circuit's decision in *Pesnell* v. *Arsenault*, 543 F.3d 1038 (2008), but that case too is inapposite because it involved the discretionary-function exception.

Before the decision below, even the Sixth Circuit had interpreted Section 2676 the same way as the other courts of appeals. In *Harris*, with Judge Sutton writing for the panel, the court affirmed an FTCA judgment in favor of the United States that had been entered after a trial, and then held that the judgment bar precluded the plaintiff's related *Bivens* claims. 422 F.3d at 333-337. That decision cannot be reconciled with the panel majority's reasoning here, as Judge Rogers explained in his dissent. Pet. App. 39a, 42a.

The panel majority attempted to distinguish *Harris* on the ground that the district court there had "rejected the plaintiff's FTCA claim on the merits after a bench trial." Pet. App. 12a. But that procedural difference is no distinction at all. Nothing in the text or structure of Section 2676—or the law of preclusion more generally—supports a distinction between the preclusive effect of an FTCA judgment for the United States entered after trial versus a summary judgment for the United States on the ground that respondent's allegations, even if true, would not show liability on the torts alleged. See, *e.g.*, *Ashbourne* v. *Hansberry*, 894 F.3d 298, 302 (D.C. Cir. 2018) ("Summary judgment and dismissal for failure to state a claim both constitute final judgments on the merits" that trigger res judicata.), cert. denied, 140 S. Ct. 305 (2019). Indeed, the panel majority's suggested distinction between summary judgments and judgments after trial would make especially little sense for the FTCA, which requires bench trials on FTCA claims. See 28 U.S.C. 2402. Thus, when the panel majority acknowledged that the judgment bar *would* apply if respondent's FTCA claims had been rejected after a trial, the court exposed the flaw in its own core

premise that the FTCA judgment based on respondent's failure to establish an element of his claim under Section 1346(b)(1) was "jurisdictional" and for that reason non-preclusive.

C. Respondent's Alternative Arguments Lack Merit

As an alternative to the court of appeals' rationale, respondent offers two arguments for declining to apply the judgment bar here. Neither has merit.

1. The judgment bar is not limited to individual claims alleging torts identical to those at issue in the plaintiff's FTCA action

Respondent contends (Br. in Opp. 12-14) that, when the judgment bar precludes "any action * * * by reason of the same subject matter," 28 U.S.C. 2676, it actually precludes pursuing only "the identical theory of liability" against individual federal employees. Relying on a law review article, respondent argues that "Congress borrowed the term of art 'by reason of the same subject matter' from the [First] Restatement [of Judgments], where it was used to describe a narrow subset of claims that rested on exactly the same theory of liability." Br. in Opp. 13-14 (citing James E. Pfander & Neil Aggarwal, Bivens*, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417, 421 (2011) (*Dynamic Textualism*)). Therefore, respondent contends, the judgment bar precludes suing federal employees for the same common-law torts that were at issue in a completed FTCA action, but it never applies at all to *Bivens* claims. *Id.* at 14.

Respondent's position is incorrect. It is squarely at odds with this Court's decisions as well as with the text and history of Section 2676.

First, this Court in *Simmons* construed the phrase "by reason of the same subject matter" in Section 2676 to have its natural meaning: claims against federal employees that are "based on the same underlying facts" as completed FTCA claims. 136 S. Ct. at 1847. The Court in *Hui* construed the same phrase in 42 U.S.C. 233(a) the same way—to include *Bivens* claims arising from the same set of facts as a plaintiff's potential FTCA claims. 559 U.S. at 805-807; cf. *Dynamic Textualism* 451 n.174 (arguing that the Court's unanimous decision in "*Hui* was wrongly decided"). Respondent has not explained why this Court should overturn its statutory analysis in *Simmons* and *Hui*. He has not shown that those decisions were incorrect, much less that they have proven unworkable. See *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) ("[*S*]*tare decisis* carries enhanced force when a decision * * * interprets a statute.").

Second, even if this Court were writing on a blank slate, the broad text of Section 2676, and the structure of the FTCA overall—including the law-enforcement proviso and the Westfall Act—show that Congress did not exempt *Bivens* claims from the judgment bar. See pp. 19-20, 21-27, *supra*. Respondent's contention that the phrase "by reason of the same subject matter" in the FTCA means only the particular legal theories litigated would make a hash of the exclusive-remedy provision in Section 2679(b)(1), which restricts the claims available to the plaintiff *before* litigation begins.

Respondent's argument also conflicts with Congress's use of the phrase "by reason of the same subject matter" in the release bar in Section 2672, which is worded very similarly to the judgment bar and was also part of the original FTCA, see § 403(d), 60 Stat. 843.

Section 2672 provides that an administrative settlement accepted by a claimant "shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." 28 U.S.C. 2672. The broad text and legislative history of the release bar would not support the contention that the statute required a claimant to release only the specific tort theory administratively asserted, as opposed to releasing all potential claims, on whatever theory of liability, arising from the same occurrence. See *Serra* v. *Pichardo*, 786 F.2d 237, 240 (6th Cir.) ("[I]t is clear that the words 'by reason of the same subject matter' were not intended to limit the scope of the release to the very claim that was settled. If that were Congress's intent, it surely would not have used the words 'any claim.'"), cert. denied, 479 U.S. 826 (1986). Assistant Attorney General Shea advocated the release bar to Congress on the ground that, "[i]f the Government has satisfied a claim * * * , that should, in our judgment, be the end of it"; the claimant "should not be able to turn around and sue the [employee]." *Gilman*, 347 U.S. at 512 n.2 (quoting *1942 Hearing* 9).

Third, respondent's argument relies on a faulty historical analysis. Before Congress enacted the judgment bar, this Court repeatedly used the phrase "same subject matter" in the law of preclusion to refer to the factual transaction or occurrence at issue in a dispute, not the legal theories asserted. See, *e.g.*, *Grubb* v. *Public Utils. Comm'n*, 281 U.S. 470, 479 (1930) ("[A] judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain

or defeat the right asserted, but also as respects any other available matter which might have been presented to that end."); *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 297 (1917) (res judicata will apply in a successive case where there is "identity of the subject-matter and the claims and * * * privity of the parties"); *United States* v. *California & Or. Land Co.*, 192 U.S. 355, 358 (1904) (holding that the judgment in a prior suit barred a subsequent suit raising the validity of the same land patents because "[t]he parties, the subject matter[,] and the relief sought all were the same").

Respondent contends (Br. in Opp. 13-14) that the phrase "by reason of the same subject matter" in the original FTCA was a term of art from the First Restatement. But the First Restatement rejected respondent's narrow understanding of that phrase. Instead, like this Court, the First Restatement used "same subject matter" to refer to the same underlying facts of the parties' dispute, as distinguished from the legal claims or issues. See First Restatement § 70, at 318-319 ("Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is * * * conclusive between the parties in a subsequent action on a different cause of action * * * where both causes of action arose out of the same subject matter or transaction."); *id.* § 84, at 390 ("A person who is not a party but who controls an action * * * is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction.").

In addition, the First Restatement described the general rule of preclusion that a judgment in one action

bars the plaintiff from pursuing other legal claims arising from the same factual event, even if the plaintiff did not plead the other claims in the original action. See First Restatement § 62 cmt. e, at 247 ("Where one act causes a number of harms or invades a number of different interests of the same person, a judgment based upon the act normally prevents him from maintaining another action for one of the harms alleged although no claim for it was made in the first proceeding."); *id.* § 62 cmt. f, at 248 ("[W]here in a series of rapidly successive acts a person breaks into the house of another, beats him and takes his chattels, a judgment based upon a claim for any one of these harms is a bar to a subsequent action."); accord *Lucky Brand*, 140 S. Ct. at 1594-1595 (claim preclusion applies when a second action 'aris[es] from the same transaction'" as the first action or "involve[s] a 'common nucleus of operative facts'") (citations omitted). That rule supports the courts of appeals' unanimous conclusion that Section 2676 precludes *Bivens* claims that arise out of the same set of facts as an FTCA judgment on the merits.

Ultimately, the law review article that respondent endorses criticizes "textualism" for producing results "at odds with the expectations of the Congress that adopted the relevant language." *Dynamic Textualism* 424. For all the reasons just described, respondent and the article's authors are mistaken about Congress's expectations for the judgment bar. But in any event, this Court has long held in construing the FTCA that "the legislative purpose is expressed by the ordinary meaning of the words used." *Kosak* v. *United States*, 465 U.S. 848, 853 (1984) (citations omitted); see *Richards* v. *United States*, 369 U.S. 1, 10 (1962) ("[W]e are bound to operate within the framework of the words chosen by

Congress."). Applying the ordinary meaning of the statutory text, the district court's FTCA "judgment" rejecting the tort claims that respondent alleged constitutes "a complete bar" to "any" attempt by respondent to restart the case against the same officers using the same factual allegations. 28 U.S.C. 2676.

2. The judgment bar does not exempt individual claims brought together with FTCA claims

a. Respondent also contends (Br. in Opp. 7, 18-20) that the duplicative litigation that the judgment bar exists to prevent occurs only when a plaintiff initially brings an FTCA action by itself, and then later attempts to bring *Bivens* claims based on the same facts. Therefore, respondent says, because he brought FTCA and *Bivens* claims together in this case, the judgment bar should not apply. The Ninth Circuit has adopted a similar rule, holding that the judgment bar is triggered if the plaintiff prevails on FTCA claims, but not if the United States prevails and the plaintiff brought *Bivens* claims in the same lawsuit. See *Fazaga* v. *FBI*, 916 F.3d 1202, 1250 (2019).

Respondent and the Ninth Circuit are incorrect. Every other court of appeals to consider respondent's argument has rejected it, and held instead that Section 2676 "precludes a *Bivens* claim regarding the same subject matter, even if the claims arose within the same suit." *White*, 959 F.3d at 333 (8th Cir.); see *Unus*, 565 F.3d at 121-122 (4th Cir.); *Manning*, 546 F.3d at 437 (7th Cir.); *Harris*, 422 F.3d at 335 (6th Cir.); *Estate of Trentadue*, 397 F.3d at 858-859 (10th Cir.); accord *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (holding that the judgment bar precluded common-law claims against federal employees individually that were brought in the same lawsuit as FTCA claims).

Courts have reached that conclusion because respondent's proposed limitation on the judgment bar "finds [no] support in the text of the statute." *Millbrook* v. *United States*, 569 U.S. 50, 56 (2013). Section 2676 imposes a "complete bar" to "any action" arising from "the same subject matter" as an FTCA judgment. Those statutory terms naturally "suggest[] a broad meaning." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 218-219 (2008); see *Hui*, 559 U.S. at 806 (noting "[t]he breadth of the word[] * * * 'any'" and the "inclusive" nature of the phrase "the same subject-matter" in 42 U.S.C. 233(a)). Respondent's interpretation "strains the plain language of the statute by suggesting that the term 'action' does not include claims within that action." *Manning*, 546 F.3d at 434. "A claim is part of the broader term action," and Section 2676 cannot plausibly "be read to preclude the whole while preserving its parts." *Ibid.* Congress did not limit the judgment bar by precluding only "successive" or "separate" actions, which it could easily have done if it had wanted to allow claimants to bring FTCA and individual-capacity claims simultaneously without the judgment bar's coming into play. Cf. *Millbrook*, 569 U.S. at 57 (declining to read in exceptions to the FTCA's unambiguous language).

Nor does respondent's proposed limitation on the judgment bar make practical sense. Respondent appears to concede (Br. in Opp. 19) that his *Bivens* claims would be barred if he had waited to bring them until his FTCA action had been resolved. At that point, the district court's dismissal of respondent's FTCA action plainly would have prevented a subsequent *Bivens* suit. It should make no difference that respondent brought his FTCA and *Bivens* claims together, and the court issued judgment against him on the FTCA claims while the

Bivens claims were also pending. In the face of an FTCA judgment on the merits of the torts that respondent alleged, there is no apparent reason why he should be permitted to continue litigating *Bivens* claims simply because of the manner in which he initially brought them. The further litigation that respondent seeks to pursue in this case *would* be "duplicative," *Simmons*, 136 S. Ct. at 1849, because the government would be required to defend *Bivens* claims after having litigated the very same factual allegations to judgment on respondent's FTCA claims.

b. Finally, respondent protests (Br. in Opp. 10-11) that, if the judgment bar applies here, then Section 2676 will affect some plaintiffs' choices about which claims to bring and in what order. See *Simmons*, 136 S. Ct. at 1850 (expressing a similar concern). But to some extent that is the inevitable result of the judgment bar, and minimizing litigation against individual employees was not Congress's only goal for the FTCA. As originally designed, the FTCA "afforded tort victims a remedy against the United States, but did not preclude lawsuits against individual tortfeasors." *Levin* v. *United States*, 568 U.S. 503, 507 (2013). Congress thus gave tort claimants a choice among potential remedies. The FTCA provided the prospect of a deeper pocket, and thereby channeled some litigation away from federal employees. But Congress also provided in the judgment bar that, if a plaintiff elects to use the FTCA remedy to pursue damages from the United States, then the outcome of those FTCA claims—whoever prevails—will resolve the entire controversy. See *Harris*, 422 F.3d at 324.

This Court already acknowledged in *Will* that plaintiffs face such a choice. As the Court explained there, a plaintiff who wants to avoid the judgment bar must

either bring "a *Bivens* action alone" or else keep his *Bivens* and FTCA claims "pending simultaneously." 546 U.S. at 354. Respondent did not do either: he litigated his FTCA claims through summary judgment, and then declined to appeal the final judgment on those claims. See p. 10, *supra*; Br. in Opp. 4. The judgment bar reflects Congress's decision that, in the face of respondent's "simpl[e] fail[ure] to prove his [FTCA] claim[s]," it makes "little sense" to afford him "a second bite at the money-damages apple by allowing suit against the employees." *Simmons*, 136 S. Ct. at 1849.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1346 provides in pertinent part:

United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, 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 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.

2. 28 U.S.C. 2402 provides:

Jury trial in actions against United States

Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

3. 28 U.S.C. 2671 provides:

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

4. 28 U.S.C. 2672 provides:

Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States 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 agency 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: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

5. 28 U.S.C. 2674 provides in pertinent part:

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * * * *

6. 28 U.S.C. 2675 provides:

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

7. 28 U.S.C. 2679 provides in pertinent part:

Exclusiveness of remedy

* * * * *

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out

of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4)[1] of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines

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[1] So in original. Probably should be a reference to Rule 4(i).

that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

* * * * *

8. 28 U.S.C. 2680 provides in pertinent part:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such

statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

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