No. 15-109

IN THE SUPREME COURT OF THE UNITED STATES

JERMAINE SIMMONS & BRIAN BUTTS,

Petitioners,

v.

WALTER J. HIMMELREICH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Federal Tort Claims Act ("FTCA") provides that, for certain enumerated categories of claims, the Act's provisions—including its jurisdictional grant to the district courts—"shall not apply." 28 U.S.C. § 2680. One of the Act's provisions bars suits against federal employees subsequent to a "judgment" in an action "under" the Act arising from the same subject matter. *Id.* § 2676.

The question presented is: If a claim against the Government is dismissed for lack of subject-matter jurisdiction because it falls within the scope of § 2680, is that a "judgment" in an action "under" the FTCA, so as to trigger the judgment bar, even though the judgment bar does "not apply" to claims encompassed by § 2680 and, in any event, such a jurisdictional dismissal has no claim-preclusive effect?

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STATEMENT

Petitioners are officers at the federal correctional institution in Elkton, Ohio, where Respondent Walter Himmelreich was serving a sentence for the production of child pornography. He filed this action against them (and others) under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that Petitioners violated his Eighth Amendment rights by allowing another inmate, who while in segregated confinement threatened to "smash" a pedophile upon return to the general population, to nonetheless return there four days later. Several hours later on that same day, the inmate violently assaulted Himmelreich, causing serious injuries. In an earlier appeal, a unanimous Sixth Circuit panel held that Himmelreich stated a viable claim based on Petitioners' deliberately indifferent failure to protect him from a "substantial risk of serious harm." Pet. App. 29a–31a.

Petitioners contend, however, that this *Bivens* action is wholly precluded as a threshold matter, based on the dismissal for lack of subject-matter jurisdiction of a negligence suit Himmelreich had previously filed against the United States. Urging a dramatically broader construction of the FTCA's judgment-bar provision, 28 U.S.C. § 2676, than any Court of Appeals has adopted in the nearly seventy years since its enactment, Petitioners argue that because a court found that Himmelreich was categorically unable to sue the Government for this harm, he is also precluded from suing the responsible officials personally, even though Congress expressly excepted *Bivens* actions from the scope of the FTCA's exclusive-remedy provision, *id.* § 2679(b). The Sixth Circuit rejected that expansive view. Pet. App. 5a–10a.

1. The FTCA was enacted as Title IV of the Legislative Reorganization Act of 1946, to provide a new remedy for individuals injured by the negligent or wrongful acts of federal employees acting within the scope of employment. Ch. 753, §§ 401–424, 60 Stat. 812, 842–47. The Act waives the Government's sovereign immunity, subject to certain exceptions, if a private person would face tort liability under state law. It "was the offspring of a feeling that the Government"—not the employees personally—"should assume the obligation to pay damages for the misfeasance of [its] employees." *Dalehite v. United States*, 346 U.S. 15, 24 (1953).

Before the Act, someone injured by a federal employee could either sue that employee in tort or pursue a private bill seeking compensation in Congress. But personal-capacity tort suits represented "a very real attack upon the morale of the services." *United States v. Gilman*, 347 U.S. 507, 511 n.2 (1954) (quoting legislative history). And private bills—which were "notoriously clumsy," *Dalehite*, 346 U.S. at 24–25—were overwhelming Congress. The new FTCA therefore created an "easy and simple" judicial remedy against the Government directly. *Id.* at 25.

Three FTCA provisions are particularly relevant here. *First*, 28 U.S.C. § 1346(b) is the statute's jurisdictional provision, which also functions as the cause of action and waiver of sovereign immunity. It confers subject-matter jurisdiction on federal district courts, subject to the other provisions of the FTCA, over claims

> 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.

Second, "Congress qualified this general waiver of immunity in 28 U.S.C. § 2680 by excepting from the Act claims arising from certain government activity." *United States v. Muniz*, 374 U.S. 150, 153 (1963). That provision makes the FTCA as a whole inapplicable to certain categories of conduct; in the Code's language, the "provisions of this chapter and section 1346(b) of this title shall not apply to" a host of enumerated claims. The exceptions include claims based on the exercise of a "discretionary function," 28 U.S.C. § 2680(a); claims arising from loss or "negligent transmission" of "postal matter," *id.* § 2680(b); claims alleging certain intentional torts, *id.* § 2680(h); and ten other specified categories of claims. Because these are exceptions to the Act's waiver of sovereign immunity and to its jurisdictional grant in § 1346(b), courts have generally agreed with the Government's long-held position that the § 2680 carve-outs are jurisdictional in nature. *See, e.g.*, *Dalehite*, 346 U.S. at 24; Pet. 3–4 & n.2 (collecting cases).

Third, the FTCA contains a so-called "judgment bar," providing 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. That provision, this Court explained in an early case, "makes a judgment against the United States a bar to action against the employee," *Gilman*, 347 U.S. at 511 n.2, so that no double recovery would be permitted, *see id.* (citing legislative history to effect that, once "the Government has satisfied a claim … that should, in our judgment, be the end of it").

Finally, one more recent amendment to the FTCA bears mention. In 1988, Congress enacted the Westfall Act, which among other things makes the FTCA the "exclusive" remedy for any injury arising from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). Claims against employees in their individual capacities, arising out of the "same subject matter," are thus expressly "precluded," even absent any prior judgment in an action against the Government. *Id.* However, Congress carved out claims for constitutional violations, *i.e.*, *Bivens* claims, from that exclusive-remedy provision. *Id.* § 2679(b)(2)(A); *see also Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (noting this *Bivens* exception).

2. At the time of the events at issue, Respondent Himmelreich was incarcerated at FCI Elkton, a federal prison in Ohio, serving a sentence for the production of child pornography. *See* Pet. 4. On October 16, 2008, another inmate, who was then being housed in the prison's Special Housing Unit as the result of a disciplinary violation, told prison officials that he was "not able to live with pedophiles" and that if he were released back to the general compound, he "will smash a pedophile." Decl. of Jason Streeval, Dkt. 31-2, ¶ 5, *Himmelreich v. United States*, No. 4:10-cv-307 (N.D. Ohio Oct. 13, 2010). Four days later, that inmate was nonetheless released back to the general prison population. *Id.* As promised, just hours later on that very same day, he approached Himmelreich, "punched him in the face and then kicked him numerous times." *Id.* Himmelreich suffered serious injuries as a result of this assault and battery.

a. In February 2009, Himmelreich filed an administrative tort claim with the Federal Bureau of Prisons, recounting how he was "severely beaten" by the other inmate, suffering "internal bruising," "external injuries," "permanent ringing in the ears," persistent headaches, and "a pinched nerve." Dkt. 1-1, at 3–5, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Feb. 11, 2010). In August 2009, the Bureau's regional counsel denied the claim, on the basis that there was "no evidence to suggest your assailant ever told staff he was going to assault you or that staff had any prior knowledge you were going to be assaulted." *Id.* at 1. *But see infra* note 1.

Himmelreich then filed, in February 2010, a one-sentence complaint against the United States, styled as an "appeal" of the denial of his "administrative tort claim," attaching that claim and the letter denying it. Dkt. 1, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Feb. 11, 2010). The civil cover sheet identified the case as a "civil rights" matter and did not cite the FTCA as the operative cause of action. Dkt. 1-2, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Feb. 11, 2010).

The Government moved to dismiss under Federal Rule of Civil Procedure 12(b)(1), telling the district court that it "lack[ed] subject matter jurisdiction …, because Plaintiff's claims fall within the discretionary function exception to the [FTCA]." Dkt. 31, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Oct. 13, 2010). Its brief in support emphasized that, "[b]ecause Congress has not waived the sovereign immunity of the United States for claims that fall within the discretionary function exception, federal courts lack subject matter jurisdiction over such claims." Dkt. 31-1, at 5, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Oct. 13, 2010); *accord id.* at 1, 12.

In the Government's view, Himmelreich's claim fell within the FTCA's discretionary-function exception because prison officials exercise discretion and judgment when they determine how to house and protect inmates. *See id.* at 6–9.[1]

On November 18, 2010, the district court granted the motion to dismiss. Pet. App. 47a. The court noted that Himmelreich's complaint was styled as an appeal from denial of an administrative tort claim, and "[a]ccordingly, he seeks relief under the [FTCA]." Pet. App. 47a–48a. But the court agreed with the Government that it "lacks subject matter jurisdiction over acts falling within the discretionary function exception" to the FTCA, 28 U.S.C. § 2680(a), and then concluded that Himmelreich's claims did fall within the scope of that statutory carve-out. Pet. App. 49a–53a. The court therefore granted the motion and dismissed the suit. *Id.* at 55a.

b. On October 21, 2010—after the Government moved to dismiss Himmelreich's first action, but before the court granted that motion—Himmelreich filed a separate, second action in the same court. This second complaint was styled as a "complaint under *Bivens*"; it alleged that the defendants, including Petitioners sued in their personal capacities, knew about the intended assault and had violated Himmelreich's Eighth Amendment rights by failing to protect him from it. Compl. at 1, D. Ct. Dkt. 1. The complaint also alleged that other defendants had retaliated against him for the filing of his original tort claim. *See id.* at 15, ¶ 66.

[1] Notwithstanding the Bureau's earlier statement that there was "no evidence" that prison staff knew about the threatened assault in advance, the declaration filed in support of the Government's motion to dismiss admitted that the assailant had told prison officials of his intent to "smash" a pedophile four days before he carried out that threat. *See* Dkt. 31-2, ¶ 5, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Oct. 13, 2010).

The district court initially dismissed the *Bivens* suit *sua sponte* under 28 U.S.C. § 1915(e). *See* Pet. App. 34a, 38a. As to the Eighth Amendment claim, the court reasoned that Himmelreich had not alleged that "the prison officials acted with a sufficiently culpable state of mind," only that they were "negligent." *Id.* at 41a–44a. On appeal, however, the Sixth Circuit vacated and remanded in relevant part. *See id.* at 23a–24a. The panel explained that Himmelreich had alleged sufficient facts to show that the prison officers were aware of a "substantial risk" to Himmelreich or to a "class of prisoners" including him, and "disregarded that risk by releasing [the other inmate] back into the general population." *Id.* at 30a–31a. The court also concluded that Himmelreich's complaint, construed liberally, "pled the three elements of a First Amendment retaliation claim" based on events that followed the filing of his administrative tort claim. *Id.* at 29a.

On remand, the district court again dismissed both the Eighth Amendment and First Amendment claims, this time on summary judgment. *See* Pet. App. 13a. *First*, the court found both claims barred under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), because Himmelreich had not exhausted administrative remedies within the Bureau of Prisons. Pet. App. 16a–20a. *Second*, the court held that the FTCA judgment bar precluded the Eighth Amendment claim. Because that claim arose from the same assault and failure to protect as his earlier tort suit against the United States, which was dismissed "because the actions in controversy fell under the discretionary[-function] exception to the FTCA," the court concluded that 28 U.S.C. § 2676 "bars any further action." Pet. App. 21a.

3. Proceeding *pro se*, Himmelreich appealed the district court's final order, and the Sixth Circuit again unanimously vacated and remanded, rejecting both of the district court's grounds. *See* Pet. App. 1a–2a.

As to PLRA exhaustion, the panel invoked the exception for when an official's threats to retaliate make administrative remedies "functionally unavailable." Pet. App. 3a–4a. Because Himmelreich alleged that one defendant had placed him in administrative detention for filing his tort claim and threatened to transfer him if he continued to file grievances, a jury could find that Himmelreich was "improperly prevented" from exhausting administrative remedies. Pet. App. 4a.

Turning to the FTCA judgment bar, the panel reasoned that "dismissal for lack of subject-matter jurisdiction does not trigger" the statutory bar. Pet. App. 6a. "Put bluntly," if a court lacks subject-matter jurisdiction, it cannot enter judgment "on the merits" and must dismiss the action; that is not a "judgment" within the meaning of § 2676. *Id.* (quoting 10A Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3713 (3d ed. 1998)). And, under Sixth Circuit precedent the parties did not dispute, "courts lack subject-matter jurisdiction over an FTCA claim when the discretionary-function exception applies, as it did here." *Id.* at 6a–7a. Hence the dismissal of Himmelreich's tort claim against the Government did not trigger the judgment bar. *See id.* Correcting the district court, the Court of Appeals clarified that its decision in *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005), had not addressed this issue; rather, it held only that the judgment bar is triggered even by a judgment "on the merits" *in favor of* the United States. Pet. App. 7a.

The panel also noted that, while the district court relied on Seventh Circuit caselaw, the Seventh Circuit had actually declined to address the question whether a dismissal for lack of subject-matter jurisdiction triggers the judgment bar. Pet. App. 9a (citing *Williams v. Fleming*, 597 F.3d 820, 822 n.2 (7th Cir. 2010)). That issue is far less relevant in the Seventh Circuit because that court, contrary to every other Circuit, "treats the dismissal of an FTCA action due to the application of the discretionary-function exception as a decision on the merits." *Id.* (citing *Collins v. United States*, 564 F.3d 833, 837–38 (7th Cir. 2009)). In other words, the panel's disagreement with the Seventh Circuit was not over the scope of § 2676, but rather over the nature of dismissals under § 2680. That distinct issue was not disputed by any of the parties here; all *agreed* that § 2680 is jurisdictional.

Petitioners filed a petition for rehearing en banc, which the Court of Appeals denied without calling for a response, and with no judge requesting a vote. Pet. App. 11a–12a. Petitioners did not move for a stay of the appellate mandate, which issued on March 28, 2015. Since that date, proceedings have resumed in the district court on the remanded claims. *See* D. Ct. Dkts. 69, 71, 72, 73, 74.[2]

[2] The petition asserts that the dismissal of Himmelreich's claims against Defendants Newland and Bunts was affirmed on the first appeal, and that these defendants therefore are no longer parties to the action and are not participating as Petitioners. *See* Pet. II n.1. Respondent disputes that reading of the opinions below. Notably, unlike several original defendants who are no longer parties to the action, Newland and Bunts are not identified as "terminated" parties on the district court's docket; to the contrary, the district court held, with no objection by the Government, that they remained parties on remand, *see* D. Ct. Dkt. 20 (order "not[ing] that based upon the Sixth Circuit's opinion, only a limited number of Defendants"—including "Ms. Bunts, and Ms. Newland"—"remain in this matter"). In any event, Respondent accepts that neither Newland nor Bunts is proceeding as a petitioner in this Court.

REASONS FOR DENYING THE PETITION

The petition does not satisfy any of this Court's traditional criteria for certiorari, and there are good reasons not to grant further review of the decision below.

First, the 2-1 Circuit conflict that Petitioners allege is at best overstated, and at worst non-existent. No Court of Appeals has ever embraced the construction of the judgment bar that Petitioners urge here, and the Sixth Circuit's construction is—at most—in tension with a Ninth Circuit *concurrence* (albeit one that the Ninth Circuit panel confusingly suggested it agreed with). While this Court granted certiorari in *Will v. Hallock*, that case involved a *second* question, about appellate jurisdiction, as to which the Circuits truly *were* divided (and which the Court then resolved).

Second, the issue does not arise often. Only three Circuits are even *alleged* to have weighed in during the nearly seventy years since the law's enactment, with the court below being the first new Circuit to do so since *Will v. Hallock* was granted more than ten years ago. And the judgment bar has diminished in importance since the passage of the Westfall Act in 1988, as federal employees are now completely immunized from most claims, even apart from the judgment bar. The bar matters mainly for *Bivens* claims, which were exempted from the Westfall Act due to their constitutional magnitude, and which rarely succeed in any event.

Third, and relatedly, further percolation is warranted. Given the paltry appellate precedent on point, some of the critical issues surrounding the scope of § 2676—including an argument addressed at oral argument in *Will*—have *never* been considered by *any* court. This Court should not be the first to confront them.

Fourth, even if this Court were inclined to resolve the question presented, this is not a strong vehicle. The petition is interlocutory, which means the judgment bar may not affect the outcome of the case (which has already resumed in the district court and may well be the subject of further dispositive motions). And because Respondent acted *pro se* below, the issues have not necessarily been fully explored.

Fifth, and finally, although the petition is largely devoted to claiming that the court below erred in construing § 2676—which, in any event, is not itself a basis for this Court's review—Petitioners are wrong. Their novel, broad view of the statute ignores critical provisions in its text; overlooks its historical context; undermines its core purposes; and implies absurd results. That is why no Circuit has ever adopted it, and why even Petitioners offer an unprincipled fallback position that belies their aggressive claims about the statute's supposedly "plain" meaning.

I. THERE IS NO GENUINE DISAGREEMENT AMONG THE CIRCUITS OVER THE QUESTION PRESENTED BY THE PETITION

Petitioners do not even allege a Circuit conflict until the final five pages of their petition. Pet. 21–24. There is a reason for that. No Circuit has adopted their legal rule that *any* dismissal of an FTCA claim, whether or not "on the merits," constitutes a "judgment" under § 2676. The Seventh Circuit does disagree with its sister courts—but on a *distinct* issue, as to which Petitioners *agree* with the decision below. That is no basis to grant a petition seeking *reversal* of the decision below. As for the Ninth Circuit, its most recent opinion on § 2676 is so confused that it has been cited as having taken *both sides* of the question presented. In short, there is no genuine, developed Circuit disagreement over the only true legal dispute here.

A. At the outset, Petitioners emphasize that this Court granted review of the same question in *Will v. Hallock*. Pet. 2. But that case also presented a *second* question, as to which there was an undeniable split—namely, whether refusal to dismiss a *Bivens* action under the FTCA judgment bar could be appealed on an interlocutory basis. The Second Circuit had said yes, *Hallock v. Bonner*, 387 F.3d 147, 152–54 (2d Cir. 2004), joining the Tenth Circuit, *Farmer v. Perrill*, 275 F.3d 958, 961 (10th Cir. 2001), but the Third Circuit had ruled otherwise, *Brown v. United States*, 851 F.2d 615, 619 (3d Cir. 1988). The Second Circuit acknowledged that conflict in its opinion. *Hallock*, 387 F.3d at 154. In the certiorari petition, the Solicitor General admitted that this question of jurisdiction "warrants resolution by this Court." Pet. for Cert. at 5 n.2, *Will v. Hallock*, 546 U.S. 345 (2006) (No. 04-1332). Indeed, that question was self-evidently *more* important than the scope of the judgment bar, since it has force in *every* case where a district court allows a *Bivens* suit to proceed over FTCA judgment-bar objections. The Court affirmatively ordered this other question added to its review. *See* 545 U.S. 1103 (2005). And, in the end, that was the only question that the Court reached. *Will*, 546 U.S. 345.

Indeed, that jurisdictional question is likely what induced this Court to grant review in *Will*, because the Circuits were *not* actually divided over the scope of the judgment bar. The *Will* petition alleged a conflict with the Seventh and Ninth Circuits, but neither had addressed the issue. Rather, those courts had confronted a distinct question: whether the judgment bar is triggered by an FTCA judgment *in favor of* the Government, where there is no concern of double recovery.

Thus, in *Hoosier Bancorp v. Rasmussen*, 90 F.3d 180 (7th Cir. 1996), the plaintiffs "argue[d] that Section 2676 should only be applied to prevent double recoveries," and therefore did not apply to bar their claim "because they recovered nothing in their FTCA case." *Id.* at 184. The court rejected that contention: "There is no indication that Congress intended Section 2676 to apply only to favorable FTCA judgments." *Id.* at 185. And the Seventh Circuit subsequently confirmed that the *only* issue in *Hoosier* was "whether a judgment must have been favorable for application of the judgment bar," not "whether a judgment under the FTCA must be 'on the merits' for the judgment bar to apply." *Williams*, 597 F.3d at 823.

Likewise, the Ninth Circuit in *Gasho v. United States* confronted the same theory: that § 2676 "applies only to judgments *against* the United States," so as to "prevent more than one satisfaction of a claim." 39 F.3d 1420, 1437 (9th Cir. 1994) (emphasis added). That court too rejected the argument, finding in the statute no such distinction. *Id.* The *Gasho* plaintiffs also argued that dismissal of their "abuse of process" FTCA claim for failure to state a claim was not a judgment "on the merits." *Id.* at 1438 n.17. In a footnote, the court responded that Rule 12(b)(6) dismissals are "on the merits" *because* they are final for purposes of *res judicata*—thus, if anything, *accepting* that § 2676 is triggered only by merits judgments with claim-preclusive effect. *See id.*[3]

[3] As an alternative holding, the Ninth Circuit said that the FTCA claim was also barred by a § 2680 exception, but neither noted that § 2680 dismissals are jurisdictional nor resolved whether § 2676 applies to dismissals for lack of jurisdiction. *See Gasho*, 39 F.3d at1438 n.17. The *Gasho* plaintiffs do not appear to have raised that issue. *See id.* at 1437.

For these reasons, this Court's grant of review in *Will* was evidently driven by the clear split over the jurisdictional issue, not the illusory conflict over the scope of § 2676. The grant in *Will* therefore does not warrant review here, particularly given that the alleged Circuit conflict on the § 2676 question has developed barely, if at all, during the intervening years. *See infra* Parts I.B, I.C & II.A.

B. As in *Will*, Petitioners here claim a conflict with the Seventh Circuit. Pet. 22–23. But, despite one new case in that Circuit since *Will*, there is no conflict between that court and the decision below over the only legal issue in dispute.

Subtly but importantly, the petition conflates two distinct issues: (i) whether the FTCA judgment bar is triggered even by dismissals for lack of subject-matter jurisdiction; and (ii) whether the FTCA's carve-outs in § 2680 are jurisdictional. The first question calls for construction of § 2676; the second for construction of § 2680. And *both* questions matter. For example, the question whether § 2680 is jurisdictional controls whether that section can be waived, which has nothing to do with the judgment bar. *See, e.g.*, *Bolduc v. United States*, 402 F.3d 50, 54, 60–62 (1st Cir. 2005) (addressing "belated" invocation of discretionary-function exception, because jurisdiction "not waivable"). Conversely, the question whether § 2676 is triggered by jurisdictional dismissals bears on *other* jurisdictional dismissals, wholly apart from § 2680. *See, e.g.*, *id.* at 56–59 (dismissing FTCA claim for lack of subject-matter jurisdiction due to issue unrelated to § 2680 exceptions).

The Seventh Circuit has directly addressed only the second of these issues, holding that the § 2680 exceptions are affirmative defenses that do not affect a

court's jurisdiction. *See Collins*, 564 F.3d at 837–38; *Parrott v. United States*, 536 F.3d 629, 634 (7th Cir. 2008) ("The statutory exceptions enumerated in § 2680(a)–(n) … limit the breadth of the Government's waiver of sovereign immunity, but they do not accomplish this task by withdrawing subject-matter jurisdiction ….").

It follows from that premise that, even on the Sixth Circuit's view of § 2676, dismissals under § 2680 are "on the merits," entitled to *res judicata* effect, and thus do trigger the judgment bar. The Seventh Circuit so clarified in *Williams*: Because "the exceptions contained in § 2680 are mandatory rules of decision rather than restrictions on a court's subject matter jurisdiction," dismissal under that section is "on the merits," triggering § 2676 *regardless* of "whether a judgment under the FTCA must be 'on the merits' for the judgment bar to apply." 597 F.3d at 823–24. As such, the Circuit expressly declined to resolve the latter issue. *See id.* at 823.

The Sixth Circuit, by contrast, holds—like every court aside from the Seventh Circuit—that the § 2680 exceptions are jurisdictional in nature. *See Kohl v. United States*, 699 F.3d 935, 939–40 (6th Cir. 2012); *Milligan v. United States*, 670 F.3d 686, 695 (6th Cir. 2012). As such, it was required in the decision below to answer the question that *Williams* did not address: Do jurisdictional dismissals trigger § 2676? And the court below held that they do not. *See* Pet. App. 6a–7a.

In other words, there is no conflict between the Sixth and Seventh Circuits over the legal issue resolved below—*i.e.*, whether § 2676 applies to jurisdictional dismissals—because the Seventh Circuit has never answered that question. There *is* a conflict—between the Seventh Circuit and every other court—over whether

§ 2680's exceptions to FTCA liability are jurisdictional. But that is *not* the question Petitioners want this Court to review. To the contrary, they *agree* with the Sixth Circuit on that point. It is the Government's longstanding, firmly held position that § 2680's exceptions are jurisdictional (and so cannot be waived). *See Collins*, 564 F.3d at 837 (Government contended, "with some vehemence at the oral argument, that it is an issue of jurisdictional moment"); *supra* pp. 5–6 (Government sought dismissal of Himmelreich's FTCA claim under Rule 12(b)(1) on ground that court lacked jurisdiction because claim fell within § 2680 exception). The Government may seek certiorari from an adverse Seventh Circuit decision rejecting its view on that issue, but Petitioners can hardly point to those decisions as justifying this Court's review of a Sixth Circuit decision that *adopts* their "jurisdictional" stance.

Put another way, if this Court grants certiorari, Respondent Himmelreich will contend that § 2680's exceptions are jurisdictional and that § 2676 therefore is not triggered by a dismissal under those exceptions. Petitioners will *agree* that the § 2680 exceptions are jurisdictional, but claim that § 2676 applies to *all* judgments, even jurisdictional dismissals. *See* Pet. 9–12. They will also argue that dismissals under § 2680, while jurisdictional in nature, are not "merely jurisdictional," and are sufficiently "substantive" to trigger the judgment bar. *See id.* at 13–17. But they will *not* argue that § 2680 creates affirmative defenses, as opposed to jurisdictional limits. No party will urge the Seventh Circuit's outlier view. The Seventh Circuit's disagreement with the decision below over the nature of § 2680 is therefore no reason to hear a dispute over the proper construction of § 2676.

C. The only other court that Petitioners allege to be part of the Circuit conflict is the Ninth Circuit, again relying on a new decision since the *Will* petition, *Pesnell v. Arsenault*, 543 F.3d 1038 (9th Cir. 2008). But the Ninth Circuit's position is far from clear. *Pesnell*'s tortured history, including three panel opinions and two en banc petitions, resulted in a final opinion that can only be described as confused.

In the initial *Pesnell* panel opinion, authored by Judge Hug and joined by Judge Pregerson, the court held—much like the Sixth Circuit below—that "the FTCA claims were dismissed for lack of jurisdiction and that the subsequent claims against the federal employees are not barred." 490 F.3d 1158, 1160 (9th Cir. 2007). Its analysis of the judgment bar noted that the parties—including the defendants represented by the U.S. Attorney's Office—"agree" that "for the judgment bar rule to apply the judgment *must be on the merits, not based on lack of jurisdiction*." *Id.* at 1161 (emphasis added). "The parties are correct." *Id.* "Because we conclude that the judgment in [the FTCA action] was based on lack of jurisdiction, the FTCA's judgment bar rule does not preclude Pesnell from bringing his current *Bivens* and RICO claims arising out of the same subject matter." *Id.* In partial dissent, Judge Clifton argued that "[n]ot all dismissals for lack of jurisdiction should be treated alike." *Id.* at 1171 (Clifton, J., concurring in part and dissenting in part). He took the view that dismissals based on *exceptions* to FTCA liability, like under § 2680, "constitute judgments for § 2676," whereas dismissals for "failure to conform to the conditions placed on an existent waiver of sovereign immunity," such as for failure to exhaust or based on statutes of limitations, "do not" trigger the judgment bar. *Id.*

The defendants then filed a rehearing petition. The Ninth Circuit denied the petition, but the panel issued an amended opinion and withdrew the original one. *See* 531 F.3d 993, 995 (9th Cir. 2008). The amended opinion, still written by Judge Hug and joined by Judge Pregerson, again reversed and remanded, but on different grounds. This time, it ruled that the plaintiff's *Bivens* claims "are not foreclosed by the statutory bar of § 2676 because those claims could not have been brought under [the FTCA]," which creates a remedy for state-law tort claims but not constitutional torts. *Id.* at 996. Nor were his RICO claims barred, because they too could not have been "brought in the FTCA action," with the caveat that the plaintiff could not rely "on the same allegations of misrepresentation" involved in the FTCA suit. *Id.* at 997. At the same time, however, the panel noted that the "concurring opinion," by Judge Clifton, "analyzes in greater detail the application of the judgment bar rule," and said: "We agree with the concurring opinion." *Id.* The concurrence repeated Judge Clifton's original partial dissent, again pressing the novel distinction between jurisdictional dismissals due to "permanent problem[s]" and those based on "failure to conform to the [required] conditions." *Id.* at 1001 (Clifton, J.).

Yet again, the Justice Department filed a rehearing petition, this time asking for the panel "to clarify confusing language" in the amended opinion, specifically its statement that the *Bivens* claims were not barred because they were not cognizable under the FTCA. *See* Pet. at 1, *Pesnell*, 531 F.3d 993 (No. 04-56721), Dkt. 35. The panel did not change that language, but amended its opinion again to add a footnote further cross-referencing the concurrence. 543 F.3d at 1040, 1041 n.3.

The bottom line is thus the following: None of the *Pesnell* judges accepted Petitioners' broad theory here, that *any* FTCA dismissal constitutes a "judgment" for purposes of § 2676. Even Judge Clifton agreed that some such dismissals do not. *See* 543 F.3d at 1046 (Clifton, J., concurring). As for the panel itself, its views are obscure. On one hand, it did state its agreement with the concurrence. *Id.* at 1042. But for whatever reason, the panel declined to directly state the concurrence's rule in its own opinion. *See id.* And, on the other hand, it seemed to suggest that *Bivens* actions are *never* barred by § 2676, because they are not cognizable under the FTCA, which is an even more plaintiff-friendly rule than the decision below. *Id.* at 1041.

Given these conflicting signals, it is no surprise that lower courts have cited *Pesnell* as taking *both sides* of the question presented here. *Compare Donahue v. Connolly*, 890 F. Supp. 2d 173, 184 (D. Mass. 2012) ("[i]n [*Pesnell*], the Ninth Circuit held that the FTCA judgment bar did not bar *Bivens* actions where the FTCA action was dismissed for lack of jurisdiction"), *and Williams v. FDIC*, No. 07-C-4672, 2009 WL 1209029, at *2 (N.D. Ill. Apr. 30, 2009) (citing *Pesnell* as holding that § 2676 "did not bar constitutional claims dismissed for lack of jurisdiction under the FTCA"), *with Winnemem Wintu Tribe v. U.S. Dep't of Interior*, 725 F. Supp. 2d 1119, 1150 (E.D. Cal. 2010) ("the Ninth Circuit has interpreted the FTCA's judgment bar to preclude *Bivens* claims where a dismissal of a previous FTCA claim was upheld based on lack of subject matter jurisdiction"). The messy and ambiguous *Pesnell* decisions are manifestly in need of further clarification by the Ninth Circuit. This is thin ground on which to base an alleged Circuit split.

II. THE QUESTION PRESENTED HERE IS NOT IMPORTANT OR RECURRING ENOUGH TO WARRANT THIS COURT'S ATTENTION

The opinion below reflects the first new Court of Appeals to address the question presented since *Will* was granted over ten years ago—and only the third to do so since the FTCA judgment bar was enacted in 1946. That lack of doctrinal development is strong indication that this issue is simply not as important or oft-recurring as Petitioners claim, and does not warrant this Court's attention. If anything, since the Westfall Act rendered the FTCA the *exclusive* remedy for most claims based on acts of federal employees, the preclusive effect of FTCA judgments has become far less consequential (because most other remedies are *wholly barred*).

A. The Petitioners in *Will* alleged—incorrectly, *see supra* Part I.A—that the Second Circuit's decision there conflicted with decisions of the Seventh and Ninth Circuits. *See* Pet. for Cert. at 14–15, *Will*, 546 U.S. 345 (No. 04-1332). Petitioners here allege a conflict with the *same* two Circuits (and again overstate the conflict and gloss over important distinctions in those courts' decisions). *See* Pet. 21–24. In other words, the Sixth Circuit is the first new Court of Appeals to address this issue *in a decade*. The Second Circuit, for its part, has not revisited the question since its *Hallock* opinion was vacated on other grounds by this Court, a further indication of the limited practical significance of the issue.

Further, there are only three Courts of Appeals in total—four if you count the vacated decision in *Hallock*—that are even *alleged* to have spoken to the question presented. (And as noted, the Seventh Circuit has not actually done so, and the Ninth Circuit's treatment was largely by a concurring judge.) That scarcity of

appellate precedent is striking, given that the disputed statutory language was part of the original FTCA as originally enacted nearly seventy years ago. *See* Legislative Reorganization Act of 1946, ch. 753, § 410(b), 60 Stat. 812, 844 (1946). This issue, evidently, does not frequently arise or practically matter.

B. Moreover, the question presented has only become *less* important over time. When the FTCA was originally enacted, the typical course for those injured by federal employees was to sue the employees personally on state tort-law theories. *E.g.*, *Brann v. McBurnett*, 29 F. Supp. 188 (E.D. Ark. 1939) (negligence claim against federal deputy marshals based on car accident); *Jones v. McGill*, 46 F.2d 334 (D.N.H. 1931) (negligence claim against federal prison official based on injuries sustained by prisoner); *Wynn v. Baker*, 23 F.2d 530 (M.D. Ala. 1927) (tort claim against federal prohibition agent based on injuries sustained in course of raid). While these suits could be removed by the defendant employee to federal court, *see* 28 U.S.C. § 1442, they were not foreclosed by federal law. As this Court reiterated in *Westfall v. Erwin*, 484 U.S. 292 (1988), no categorical absolute immunity shields those employees or officials from state tort liability. *See id.* at 295–300. The FTCA's judgment bar therefore served an important function, by foreclosing these state-law tort actions in cases where the plaintiff had already recovered from the United States itself or failed to prove his case in such an action.

Congress, however, swiftly responded to the *Westfall* decision by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, which is "commonly known as the Westfall Act." *Osborn v. Haley*, 549 U.S. 225, 229 (2007).

That Act, which was codified in the same portions of the U.S. Code as the FTCA, "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn*, 549 U.S. at 229. Subject to only two narrow exceptions, the Act makes "exclusive" the FTCA's remedy against the United States for the wrongful or negligent acts of its employees acting within the scope of their employment, and "preclude[s]" any other damages action against the federal employee personally. 28 U.S.C. § 2679(b)(1).

Thus, the vast majority of tort claims against federal employees are, by virtue of the Westfall Act, *entirely precluded*—even if the plaintiff does not first sue the United States and reach judgment in that action. As to all those claims, the FTCA judgment bar is now redundant due to the broader preclusion under the Westfall Act. The *sole* remaining function of § 2676 is thus with respect to the two categories of claims exempted from the Westfall Act's exclusive-remedy provision—namely, claims "for a violation of the Constitution" and claims for violation of a federal statute under which an action against the employee personally is "authorized." *Id.* § 2679(b)(2). The answer to the question presented therefore matters mainly for *Bivens* suits pursued after jurisdictional dismissal of FTCA claims arising from the same conduct. *See Hui*, 559 U.S. at 810 (noting Westfall Act's *Bivens* exception).

That is a very narrow set of cases. And it is a set of cases that, even apart from the FTCA judgment bar, faces a series of difficult threshold hurdles. Among other things, defendants in *Bivens* actions are entitled to the qualified immunity defense, *see Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982), and the courts are very

hesitant to recognize *Bivens* actions at all beyond the limited contexts in which this Court has already done so, *see Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2012). As a practical matter, accordingly, the FTCA judgment bar is simply not very important.[4]

C. The Westfall Act is also illustrative in another respect. After Congress enacted it in 1988, a debate arose over whether the new exclusive-remedy provision bars claims against employees for conduct that could not support an FTCA action because of the exceptions in § 2680. That is, if a claim falls within one of the § 2680 exceptions and thus outside the FTCA, is a claim against the employee himself still "precluded" under § 2679(b)(1)? Or may such a claim be pursued given that there is no FTCA remedy otherwise available? Within just *three years* of the Westfall Act's enactment, this Court granted certiorari to resolve a 3-2 conflict among the Circuits over that question. *United States v. Smith*, 499 U.S. 160, 165 & n.7 (1991).

In other words, *five* Circuits squarely addressed and resolved the issue in the few years immediately following the statute's enactment. That is strong evidence of an important, recurring question. The contrast to this petition—which presents, *at best*, a 2-1 split nearly seven decades after the FTCA's enactment—is telling.

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[4] Petitioners emphasize that *Bivens* suits threaten "[p]ersonal [l]iability" for federal officers and employees and are therefore especially worthy of this Court's attention. Pet. 24. But, as this case illustrates, federal employees—while named in their personal capacities—are typically represented in litigation by the Justice Department. And, "[i]n cases in which the United States has provided representation to the individual defendant, it has *not once* failed to reimburse a federal employee for the costs of a *Bivens* settlement or judgment." Cornelia Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L. J. 65, 78 n.61 (1999) (emphasis added).

III. AT MINIMUM, FURTHER PERCOLATION IS WARRANTED SO AS TO FURTHER DEVELOP THE COMPETING ARGUMENTS

Even apart from what it signifies about the importance of the question, the relative sparseness of on-point appellate caselaw counsels against granting this petition. To the extent that review would ever be warranted, it is still premature. Further percolation would be prudent.

There are not more than a handful of Circuit opinions, at most, grappling with the arguments on both sides of the issue here. The decision below, Judge Clifton's concurrence in *Pesnell*, and the vacated Second Circuit decision in *Hallock* are the only three that include any sustained analysis—and even they are fairly cursory. As a result, a number of significant arguments and angles have *never* been raised, much less addressed, by any Court of Appeals. If this Court were to grant the petition, however, Respondent would be free to raise any argument in favor of the judgment below. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court."). This Court would therefore undoubtedly be confronted by arguments that have not been developed *at all* in the caselaw. Yet this is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

For example, at oral argument in *Will v. Hallock*, Justice Stevens raised a point that had not been directly argued by the respondent in that case. He observed that, under § 2680, the provisions of the FTCA "*shall not apply*" to claims falling within its enumerated exceptions. *See* 28 U.S.C. § 2680 ("The provisions of this

chapter and section 1346(b) of this title shall not apply to ….”). Then why, Justice Stevens asked, would the FTCA judgment-bar provision, § 2676—which falls within the “chapter” referenced in § 2680—apply at all to claims embraced by § 2680? *See* Tr. of Oral Arg. at 11–12, *Will*, 546 U.S. 345 (No. 04-1332). Counsel and the Justices engaged with that issue at some length. *Id.* at 11–15; *id.* at 21 (“JUSTICE STEVENS: I’d like to pursue the question I asked you earlier because I really didn’t fully understand your answer.”); *id.* at 37 (“CHIEF JUSTICE ROBERTS: Did you—did you make the argument or the point that Justice Stevens articulated earlier about the—the provisions of this chapter not applying and that including 2676?”); *see also id.* at 22–24, 37–42 (further discussion of this argument).

Over the decade since *Will*, however, no court appears to have considered or addressed Justice Stevens’ question—and Petitioners just ignore it. Himmelreich intends to press this argument if the Court grants certiorari, *see infra* Part V.A, but the Court would then be required to resolve the proper reading of § 2680’s “shall not apply” language, and how it interacts with § 2676, absent any development by any lower courts, much less Courts of Appeals. That is not the way that complex statutory-construction disputes ought to be presented to this Court.

Similarly, academics have exhaustively researched the history of the FTCA and concluded, among other things, that the judgment bar does not apply to *Bivens* claims *at all*—only to state tort claims identical to those that could be filed against the United States, under the FTCA, on a vicarious-liability theory. *See generally* James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of*

Dynamic Textualism, 8 U. St. Thomas L.J. 417 (2011). Yet that theory, too—while reminiscent of the Ninth Circuit's statement in *Pesnell* that the plaintiffs' *Bivens* claims were "not foreclosed by the statutory bar of § 2676 because those claims could not have been brought under [the FTCA]," 543 F.3d at 1042—has never been aired in the federal courts. Again, this Court should not be the first to consider it.

If this issue is as frequently recurring as Petitioners claim, other parties will raise these arguments in future cases; the courts will weigh in; and the issue will be better primed for this Court's review. Further percolation is thus appropriate, and granting certiorari here would be both premature and imprudent.

IV. THIS CASE IS A POOR VEHICLE TO RESOLVE THE QUESTION PRESENTED

For two reasons, this case is not a strong vehicle through which to resolve the question presented, even if the issue were otherwise worthy of this Court's attention. *First*, because of the interlocutory posture of the case, it is entirely possible that the scope of the judgment bar will be irrelevant to the ultimate disposition of the claims. *Second*, because Himmelreich represented himself in both the district court and the Sixth Circuit, the petition presents higher risks of vehicle problems than one arising from litigation in which counsel has fully and consistently participated.

A. While the district court entered a final judgment against Himmelreich, the Sixth Circuit reversed and remanded for further proceedings on both the First Amendment claim (which is unaffected by the judgment-bar issue) and the Eighth Amendment claim (which is implicated by that dispute). *See* Pet. App. 2a, 5a–6a. This petition is therefore interlocutory. And, because Petitioners did not seek to

stay the Sixth Circuit's mandate pending disposition of their petition, proceedings in the district court have already resumed. *See* D. Ct. Dkts. 69, 71, 72, 73, 74.

It is thus far from clear that the question presented, concerning the scope of the judgment bar, will have any actual effect on any final judgment. Petitioners may well prevail on other grounds either before or after a trial. On the other hand, if Himmelreich is able to obtain judgment in his favor on the Eighth Amendment *Bivens* claims, Petitioners would be free to seek this Court's review of the § 2676 issue at that juncture, on appeal from that final judgment. But there is no need to enter the fray at this early stage, when it remains unclear whether the scope of § 2676 even matters. *Cf. Will*, 546 U.S. at 355 (judgment bar does not "protect values so great that only immediate appeal can effectively vindicate them").

B. The other vehicle concern is that Himmelreich represented himself, while incarcerated, in both lower courts (and in the predecessor case). *See* Pet. App. 2a, 23a, 34a, 62a. While he prevailed on appeal despite the lack of professional counsel and with limited access to research materials and other resources, the undeniable consequence of his *pro se* representation is that his arguments were not as fully developed as they might have been. More troubling is the fear that, because no counsel was involved until very recently, there is a heightened risk of unknown vehicle issues or other potential barriers to reaching the issue presented.

The point bears repeating: If this issue recurs as frequently as Petitioners claim, there is no need to take a case suffering from these vehicle deficiencies.

V. THE OPINION BELOW IS CORRECT ON THE MERITS

Ignoring all the above, Petitioners lead—and spend most of their petition—arguing the merits of the question presented. This Court does not, of course, sit to correct errors. In any event, the Sixth Circuit did not err. It is Petitioners' position that is truly untenable—which is why *no Court of Appeals* has adopted it. The text, history, and purposes of the FTCA all confirm that mere jurisdictional dismissals, including dismissals under § 2680, do not trigger the judgment bar.

A. The Judgment Bar Is Inapplicable to Claims Within the FTCA Exceptions, Because the FTCA "Shall Not Apply" to Them

At the threshold, regardless of whether the judgment bar is triggered even by jurisdictional dismissals that lack any preclusive effect, that bar is independently inapplicable to dismissals under § 2680 for an entirely different reason.

1. As Justice Stevens suggested in *Will*, § 2680's plain text precludes application of the judgment bar based on FTCA actions that fall within its scope. Section 2680 is entitled: "Exceptions." It provides that "[t]he provisions of this chapter and section 1346(b) of this title *shall not apply to*" over a dozen enumerated types of claims that are exempt from operation of the FTCA. 28 U.S.C. § 2680 (emphasis added). The "chapter" to which § 2680 refers spans from § 2671 through § 2680—and includes § 2676, the judgment bar. Thus, due to § 2680, the judgment bar "shall not apply to" any claim within the discretionary-function exception, § 2680(a). And "shall" reflects "language of command." *Anderson v. Yungkau*, 392 U.S. 482, 485 (1947). Himmelreich's original claim against the United States fell within that exception (Pet. App. 48a–53a); the judgment-bar provision thus does

"not apply" with respect to that claim, and dismissal of that claim cannot trigger it.

Thus, while Petitioners repeatedly claim to champion the "plain meaning" and "plain text" of the FTCA judgment bar's "simple" words (Pet. 9, 10, 11, 12, 17), the equally simple words of § 2680 plainly foreclose Petitioners' reliance on § 2676 in the first place. Congress could have written § 2680 more narrowly—for example, by providing that there shall be no *liability* for the enumerated claims, or no *jurisdiction* over actions asserting them. But Congress wrote broadly, providing that the FTCA *as a whole* "shall not apply" to these types of claims. On its face, that language sweeps in the judgment-bar provision—and always has. *Accord* Tr. of Oral Arg. at 15, *Will*, 546 U.S. 345 (No. 04-1332) (Justice Breyer agreeing, as to this point, that "the language does seem to say it"). And, as Petitioners correctly note, "where the statutory language provides a clear answer," that is the end of the matter. Pet. 12 (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)).

Nor is it remotely surprising that Congress would construct the scheme this way: If the claims listed in § 2680 cannot result in liability against the Government, then an action asserting such a claim should not preclude a later effort to sue the *correct* defendant—namely, the federal employee himself. Indeed, if anything, it is Petitioners' broad reading of § 2676 that would lead to bizarre or absurd results without any evidence that Congress so intended. *See infra* Part V.C.

2. Petitioners do not even acknowledge this argument, much less address it, even though it was discussed at some length during the *Will* oral argument. The Government attorney in *Will* did offer a response, but it is utterly unpersuasive.

In *Will*, the Government lawyer's exclusive rebuttal to § 2680's "shall not apply" language is that those words cannot mean what they literally say. *See* Tr. of Oral Arg. at 12–15, *Will*, 546 U.S. 345 (No. 04-1332). If they did, he asserted, this Court's decision in *Smith*, 499 U.S. 160, would have been wrong. *See id.* In *Smith*, this Court held that the exclusive-remedy provision enacted by the Westfall Act and codified at 28 U.S.C. § 2679(b) applies even to claims that fall within the § 2680 exceptions. If the rest of the FTCA really did "not apply" to claims within § 2680's scope, argued the Government lawyer in *Will*, then the exclusive-remedy provision in § 2679(b) should not apply—which would mean, contrary to *Smith*, that state-law remedies would remain available for claims excepted by § 2680. *See id.*

The flaw in that argument is that the Westfall Act and its exclusive-remedy provision were enacted forty years *after* § 2680's "shall not apply" language and, as *Smith* reasoned, the Westfall Act made pellucidly clear that state-law tort claims against federal employees, even for conduct within § 2680's exceptions, are wholly precluded. For example, the Westfall Act provided that, whenever the Attorney General certifies that a federal employee named as a defendant was acting in the scope of his employment, the United States shall be substituted as defendant and the suit "shall proceed in the same manner" as any FTCA action "and shall be subject to the *limitations and exceptions* applicable to those actions." 28 U.S.C. § 2679(d)(4) (emphasis added). The "exceptions" are those expressly "designated as such under § 2680." *Smith*, 499 U.S. at 166. Thus, as *Smith* concluded, Congress plainly contemplated that its new provisions *would* govern actions falling within the

§ 2680 "exceptions"—notwithstanding that section's longstanding "shall not apply" formulation. After all, a "later enactment governs" over an earlier one. *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring).

By contrast, the judgment bar was part of the FTCA as originally enacted, when Congress provided that its provisions would simply "not apply" to the types of claims described in § 2680. And there is *no* evidence from any other aspect of the scheme that Congress wanted or expected the judgment bar to apply, nonetheless, to claims falling within § 2680. *Smith* therefore does not write "shall not apply" out of § 2680: While those words do not overcome plain congressional intent with respect to application of the subsequently enacted exclusive-remedy provision of the Westfall Act, they do directly foreclose application of § 2676 in cases like this one.

B. Jurisdictional Dismissals Are Not "Judgments" "Under" the FTCA, Within the Meaning of the FTCA Judgment Bar

Even if § 2676 were applicable in the first place, it is not triggered when a putative FTCA claim is dismissed for lack of jurisdiction. Such a dismissal is not a "judgment" entitled to *any* preclusive effect, much less the special preclusive effect afforded by § 2676. Nor is it a judgment in an action "under" the FTCA; if the court lacks jurisdiction, the action by definition does *not* arise under that Act. Petitioners' contrary arguments ignore the Act's context and defy basic *res judicata* principles.

1. Section 2676 creates a "bar" to subsequent litigation where there has already been a "judgment" in an action "under" the FTCA's jurisdictional provision, 28 U.S.C. § 1346(b). The critical question is therefore what constitutes a "judgment" "under" § 1346(b). To answer, it is necessary to understand the provision's context.

After all, as this Court has often reiterated, the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). A "fundamental canon of statutory construction" is thus "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

The context of § 2676 is preclusion and *res judicata*. As *Will* recognized, the closest "analogy to the judgment bar" is "claim preclusion, or res judicata," because the § 2676 bar "functions in much the same way" and was motivated by the same "concern"—"avoiding duplicative litigation." 546 U.S. at 354. To be sure, § 2676 "is arguably broader than traditional *res judicata*"; otherwise it would have served no purpose. *Id.* To be precise, when Congress enacted the FTCA, a judgment in a suit against a federal employee would—under ordinary preclusion rules—have barred a subsequent *respondeat superior* claim against the Government. *See Restatement of Judgments* § 99 (1942) ("valid judgment on the merits … in favor of a person charged with the commission of a tort … bars a subsequent action … against another responsible for the conduct of such person"); *see also id.* § 96(1)(a) & cmt. 2 (applying same rule in master-servant scenario, where servant is sued first). But if a plaintiff were to assert *respondeat superior* liability against the employer *first*, the Restatement took the view that the unsuccessful plaintiff *could* sue the employee. *Id.* § 96(2) cmt. j ("Where an action is brought first against the one secondarily liable there is ordinarily no reason for an exception to the ordinary rules of

mutuality and hence … there is ordinarily no reason for binding the unsuccessful claimant in the subsequent action."). A number of state courts disagreed with the Restatement, holding that a judgment in a suit against a master "is a bar" to a subsequent suit against the servant. *E.g.*, *Wolf v. Kenyon*, 273 N.Y.S. 170, 173 (N.Y. App. Div. 1934); *Jones v. Valisi*, 18 A.2d 179, 181 (Vt. 1941). Congress in § 2676 embraced the latter position, even using the same *res judicata* language of a "bar" to suit against the employee. *Cf. Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008) ("[c]laim preclusion describes the rules formerly known as 'merger' and 'bar'"). The judgment bar was thus designed to ensure symmetry in *res judicata* treatment of tort claims against the Government and its employees; traditional preclusion rules protected the Government if the employee was sued first, and § 2676 would protect employees if the Government were sued first. *See* Pfander, *supra*, at 427–45.

Given that context, the word "judgment" used in § 2676 must be understood, against the backdrop of *res judicata*, as referring to judgments capable of having some preclusive effect in the first place. The section's purpose was to *expand* that preclusive effect to *non-parties*—not to grant such effect to judgments that *never* would have had preclusive force *even against the original litigants*. Section 2676 clarified and supplemented preclusion rules, but did not wholly reinvent them. *Cf. Badaracco v. Comm'r*, 464 U.S. 386, 403 n.3 (1984) ("[i]t is axiomatic that statutes in derogation of the common law should be narrowly construed").

Dismissals for lack of jurisdiction *never* have claim-preclusive effect; they did not at the time the FTCA was enacted, and they still do not. *See Restatement of*

Judgments § 49 & cmt. a (1942) (no claim-preclusive effect "where the judgment is based on the lack of jurisdiction"); *Restatement (Second) of Judgments* § 20(1)(a) (1982) (no bar to "another action" when "the judgment is one of dismissal for lack of jurisdiction" or "improper venue"); *Hughes v. United States*, 71 U.S. 232, 237 (1866) (where "first suit was dismissed for … want of jurisdiction," dismissal "will prove no bar to another suit"). After all, "[i]f there were no jurisdiction, there was no power to do anything but to strike the case from the docket." *Mayor v. Cooper*, 73 U.S. 247, 250 (1867). Such a dismissal is therefore not a "judgment" within the meaning of § 2676. A dismissal for lack of jurisdiction would not even preclude the plaintiff from suing the *original defendant* on a claim arising from the same events, so why would it preclude suing a *non-party* based on those events? On Petitioners' counter-contextual construction, § 2676 would give a jurisdictional dismissal more potent preclusive effect as to non-parties than with respect to the original litigants.

For similar reasons, dismissal for lack of jurisdiction due to § 2680 is not dismissal of "an action under" § 1346(b). When a court dismisses an FTCA action pursuant to § 2680, it is ruling that § 1346(b)—a jurisdictional grant—does "not apply." In other words, "the action was not *properly* brought *under* the Federal Tort Claims Act in the first place." *Hallock*, 387 F.3d at 155, *vacated on other grounds*, *Will*, 546 U.S. 345. To be sure, a court "has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002); Pet. 11. But if the court determines that jurisdiction in an FTCA suit is lacking, particularly if it was expressly stripped by § 2680, the suit was not—as it turns out— "under" § 1346(b).

Finally, to close the loop, there is no dispute in this case that the exceptions to FTCA liability found in § 2680 are jurisdictional in nature. *Cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510–14 (2006) (explaining differences between jurisdictional facts and elements of claim). Section 1346(b) "is the jurisdictional provision of the FTCA." Pet. 3. Absent that provision, there would be no jurisdictional authority for any federal court to hear state-law tort claims against the United States. Moreover, because "[s]overeign immunity is jurisdictional in nature," *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), the courts' jurisdiction in FTCA actions also depends on § 1346(b)'s limited waiver of sovereign immunity, *see id.* at 475–77. And § 2680 expressly says that § 1346(b) "*shall not apply*" to claims falling within its enumerated exceptions. Hence, as Petitioners agree, "this Court and the courts of appeals have generally recognized that Section 2680's exceptions to FTCA liability constitute 'jurisdictional' limits on the power of courts to adjudicate FTCA claims." Pet. 3–4. And, in this case, the Government obtained dismissal of Himmelreich's tort claim by contending that the district court "lack[ed] subject matter jurisdiction." Dkt. 31, *Himmelreich*, No. 4:10-CV-307 (N.D. Ohio Oct. 13, 2010); *see also* Pet. App. 49a (court agreeing).

In sum, § 2676 is a rule of preclusion; its terms must be construed in light of background principles of *res judicata*; and under those principles, dismissal for lack of subject-matter jurisdiction is not a "judgment" entitled to preclusive effect. Nor is it a judgment in an action "under" the inapplicable jurisdictional grant. Because § 2680's exceptions are jurisdictional limits on the FTCA, a dismissal under one of those exceptions is for lack of jurisdiction and does not trigger § 2676.

2. Petitioners briefly argue that § 2676's reference to "judgment" is not limited in *any* way, and therefore applies to *all* judgments, notwithstanding the far more limited statutory context and function. Pet. 12. But, perhaps recognizing the absurd results of such a construction, *see infra* Part V.C, they then contend at greater length that, even if the Sixth Circuit were correct that § 2676 is limited to judgments "on the merits," dismissals under § 2680 *are* "on the merits," because the § 2680 exceptions are "substantive" in addition to jurisdictional. Pet. 13–16.

Petitioners misunderstand the meaning of "on the merits." As this Court has explained, a judgment "on the merits" was historically synonomous with a judgment "entitled to claim-preclusive effect." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 502–03 (2001). But "over the years," the phrase's meaning has changed, and in the context of claim preclusion it is now more accurate to distinguish directly between judgments that are entitled to claim-preclusive effect and those that are not. *Id.* "That is why the Restatement of Judgments has abandoned the use of the term ['on the merits']—'because of its possibly misleading connotations.'" *Id.* at 503 (quoting *Restatement (Second) of Judgments* § 19, cmt. a). Nonetheless, many courts continue to refer to a judgment "on the merits" as a prerequisite for claim preclusion, when they mean, more precisely—albeit less descriptively—that there must be a type of judgment entitled to claim-preclusive effect. *See id.* at 502. That is surely how the Sixth Circuit intended the phrase, when it explained that § 2676 is triggered only by a judgment "on the merits," Pet. App. 8a, as opposed to one for "lack of subject-matter jurisdiction," Pet. App. 6a.

In other words, whether § 2680 dismissals can properly be characterized as "substantive" is irrelevant. *Cf.* Pet. 14–15. Either way, they are still dismissals *for lack of jurisdiction*—as Petitioners admit. Pet. 14. Under *res judicata* principles, they are therefore *not* entitled to claim-preclusive effect. And that is why they do not trigger the judgment bar, which merely expands the existing *res judicata* effects of FTCA judgments to overcome traditional mutuality requirements.

Petitioners ultimately confront this point, and assert that a sovereign-immunity dismissal *does*, in fact, have claim-preclusive effect. Pet. 18–20. Again, Petitioners are conflating two distinct concepts. *State* sovereign immunity, as a matter of *state law*, may well be an affirmative defense that does not deprive *state* courts of subject-matter jurisdiction. And, if so, a dismissal on that basis would be preclusive. Thus, for example, the first case Petitioners cite on this point (Pet. 19 n.11), *Flores v. Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773, 775 & n.3 (5th Cir. 1984), relies on a Texas decision holding "sovereign immunity" to be an "affirmative defense," *Herring v. Tex. Dep't of Corrs.*, 500 S.W.2d 718, 719-20 (Tex. Ct. Civ. App. 1973).[5] But the sovereign immunity of the *United States*, as a matter of *federal law*, is decidedly a jurisdictional limit on the *federal* courts, not an affirmative defense. *Meyer*, 510 U.S. at 475. Thus, dismissals on that basis are jurisdictional, and have "no *res judicata* effect." *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995).

[5] Similarly, *Kutzik v. Young*, 730 F.2d 149, 151 (4th Cir. 1984), relied on Maryland law, under which sovereign immunity is a "legal defense," not a "jurisdictional" deficiency, *Annapolis Urban Renewal Auth. v. Interlink, Inc.*, 405 A.2d 313, 318 (Md. Ct. Spec. App. 1979). *Accord Beaver v. Bridwell*, 598 F. Supp. 90, 93 (D. Md. 1984) ("under Maryland law, a dismissal based upon sovereign immunity defense is a final judgment on the merits").

In short, Petitioners *do not* deny that the § 2680 exceptions are jurisdictional, and *cannot deny* that jurisdictional dismissals have no claim-preclusive effect. With those two propositions combined, the Sixth Circuit's ruling is unassailable.

4. Finally, it is worth noting that neither of the two Courts of Appeals that allegedly disagree with the decision below has adopted Petitioners' reading of § 2676. The Seventh Circuit, as discussed above, holds that the § 2680 exceptions are mere affirmative defenses—and, on that view, a dismissal under § 2680 would be entitled to claim-preclusive effect under the common law, and thus to § 2676's expanded preclusive effect as against non-parties. *See supra* Part I.B. And in the Ninth Circuit, Judge Clifton's concurrence reasons that *not* all dismissals trigger the judgment bar; those based on "procedural defect[s]" do not, in his view. *Pesnell*, 543 F.3d at 1046 (Clifton, J., concurring). Thus, Petitioners' position is that not a single Court of Appeals has ever correctly construed the judgment-bar provision in the nearly seventy years it has been on the books, despite its supposedly "plain" text. Tellingly, Petitioners proceed to offer Judge Clifton's construction as an "alternative basis" to reverse the decision below, Pet. 12 n.7, thereby belying their aggressive, repeated insistence that § 2676's meaning is clear and admits of no exceptions.

C. Any Contrary Rule Would Have Absurd Implications

It is no surprise that the text of the judgment bar does not encompass the scenario presented here. Not only would such a result make no sense in light of the purposes of the FTCA and cause a host of absurd results, it would also *undermine* Congress's objectives in enacting the landmark statute.

First, Petitioners' wooden reading causes a host of absurd results. Their view is that the "plain text" of § 2676 "does not limit its scope" in any way, Pet. 10, 12, and so any "entry of judgment" in a suit invoking the FTCA (even only implicitly, as here, Pet. App. 47a–48a) precludes subsequent *Bivens* actions. On that construction, if a plaintiff erroneously filed his FTCA suit in the *Southern* District of Ohio instead of the *Northern* District, leading to dismissal without prejudice for improper venue, 28 U.S.C. § 1402(b), he could refile that suit—but would somehow be precluded from filing a *Bivens* action. Or, if the FTCA action was dismissed for lack of jurisdiction because the federal employee was not acting within the scope of employment at the time of the tort—a holding that means the employee himself ought to be "personally answerable," *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 423 (1995)—a suit against the employee, paradoxically, would then be *precluded*. That makes no sense. Yet these bizarre consequences are compelled by Petitioners' interpretation.

Second, the practical consequence of that broad reading is that injured parties would have every incentive to sue the employee *first*—to avoid the risk of a jurisdictional dismissal under the FTCA extinguishing the right to bring a *Bivens* action. Section 2676, after all, precludes only the *latter* based on the *former*, not vice versa. But one of the principal objects of the FTCA was to offer a direct remedy against the deep-pocketed Government so as to *discourage* personal-capacity suits against federal employees, which "attack … the morale of the services." *Gilman*, 347 U.S. at 511 n.2. The Westfall Act took that one step further by forbidding most suits against employees, because "the threat of protracted personal tort litigation

would seriously undermine the morale and well-being of federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the [FTCA] as the proper remedy for federal employee torts." *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989). That Petitioners' construction of § 2676 would *heighten* that threat is yet another confirmation that it is badly misguided.

Finally, if injured parties did *not* sue the employee first, Petitioners' reading would deprive them of any opportunity to remedy their injuries—even if they are otherwise entitled to relief from *someone* as a matter of both fact and law. It may well be that § 2680 bars relief *from the Government*. But that hardly implies that the employee has complied with the Constitution. To the contrary, it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980). That is why Congress expressly exempted *Bivens* claims from the Westfall Act's exclusive-remedy provision. *See* 28 U.S.C. § 2679(b)(2)(A). Yet, on Petitioners' reading, a judicial decision finding the FTCA *inapplicable*—even if § 2680's applicability presented a close question, and the plaintiff's claim was legally colorable—would be a death knell for the "parallel" *Bivens* remedy. Nothing in the FTCA's purposes or history supports that strange result. The Act was not designed to minimize litigation at all costs (*cf.* Pet. 24), but rather to give plaintiffs a choice between two remedies. If one of those remedies is categorically unavailable, that is *all the more reason* to extend the other.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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