No. 15-109

In The
Supreme Court of the United States

JERMAINE SIMMONS & BRIAN BUTTS,

Petitioners,

v.

WALTER J. HIMMELREICH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PROFESSORS GREGORY SISK AND JAMES PFANDER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

GREGORY C. SISK
Counsel of Record
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
1000 LaSalle Avenue
Minneapolis, Minnesota 55403
(651) 962-4923
gcsisk@stthomas.edu

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TREATISES AND BOOKS:

TABLE OF AUTHORITIES – Continued

Page

LAW JOURNAL ARTICLES:

STATEMENT OF INTEREST OF AMICI CURIAE

Gregory Sisk and James Pfander submit this brief as amici curiae.[1] Our only interest in this matter is that of legal scholars on federal courts, jurisdiction, and procedure; constitutional and statutory claims against the Federal Government and its officers; and statutory waivers of federal sovereign immunity.

Professor Sisk holds the Laghi Distinguished Chair in Law at the University of St. Thomas (Minnesota). For more than a quarter of a century, his scholarly work has focused on civil litigation with the Federal Government. He has published both a treatise and the only law school casebook on the subject. *Litigation With the Federal Government* (ALI-ABA, 4th ed. 2006 & Supp. 2012); *Litigation With the Federal Government: Cases and Materials* (Foundation Press, 2d ed. 2008 & Update 2015). A new treatise on *Litigation With the Federal Government*, including a chapter devoted primarily to the Federal Tort Claims Act, is scheduled for publication in early 2016 as part of the West Academic hornbook series. Sisk also has

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation and submission of this brief other than the amici curiae and their employers, the University of St. Thomas and Northwestern University, which provide professional development funds to faculty members to support scholarly and public service work.

written a series of law review articles on federal statutes waiving sovereign immunity.

Professor Pfander is the Owen L. Coon Professor of Law at Northwestern University Pritzker School of Law. He focuses his research on federal jurisdiction and procedure. His books include *Principles of Federal Jurisdiction* (Thomson-West, 2d ed. 2011); *Civil Procedure: A Modern Approach* (West Academic, 6th ed. 2013) (with Richard L. Marcus, Martin H. Redish & Edward F. Sherman); *Federal Courts: Cases, Comments, and Questions* (West Academic, 7th ed. 2012) (with Martin H. Redish and Suzanna Sherry); and *One Supreme Court: Supremacy, Inferiority, and the Judicial Power of the United States* (Oxford U. Press, 2009). He has published numerous law review articles on federal courts and jurisdiction, sovereign immunity, and constitutional claims. Pfander has also served as chair of both the federal courts and civil procedure sections of the Association of American Law Schools.

SUMMARY OF THE ARGUMENT

Several federal courts have employed a Federal Tort Claims Act (FTCA) judgment which failed to address the substantive tort liability of the United States to preclude an injured plaintiff from seeking an alternative remedy against an individual federal officer on a distinct constitutional theory. By reading the FTCA judgment bar to apply to subsequent constitutional claims, these courts have offered a

breathtakingly dynamic interpretation of 28 U.S.C. § 2676 that is divorced from its specific text, original meaning, historical context, and purpose. A modest and narrowly targeted legislative supplement to the law of non-mutual collateral estoppel (issue preclusion) applying in tort cases has been converted into a super-charged, all-embracing, and novel rule of non-mutual res judicata (claim preclusion).

To make matters worse, when addressing the scope of the FTCA judgment bar, many Courts of Appeals have stumbled into a misguided exploration about whether rejection of an FTCA suit by reason of a statutory exception should be characterized as a jurisdictional dismissal rather than a judgment on the merits. Those courts correctly recognizing that the FTCA exceptions are non-jurisdictional substantive defenses have continued down the erroneous path by mistakenly reading a disposition on exception grounds to trigger the FTCA judgment bar.

When the FTCA was enacted in 1946, Section 2676 was designed to block a specific kind of duplicative litigation that could result from the Government's acceptance of *respondeat superior* liability in suits for ordinary negligence. Under the law of the period that prevailed in some states and as stated in the *Restatement (First) of Judgments* § 96 (1942), if a plaintiff filed a tort suit against an employee and the employee was exonerated of negligence liability, the doctrine of non-mutual issue preclusion likewise barred suit against the vicariously liable employer. But the opposite was not true under the *Restatement*,

that is, a judgment exculpating the derivatively-liable employer from liability for negligence did not bar a subsequent tort claim against the employee. The FTCA judgment bar ensured that a judgment on the merits of a negligence claim would operate as a preclusion bar in both directions.

Section 2676 was enacted with suits against the drivers of Government vehicles most prominently in mind: it would, for example, block negligence suits against the driver of a federal postal truck whose act or omission had given rise to an earlier tort suit against the Federal Government that had concluded with a judgment of non-negligence. The idea was straightforward: once a plaintiff pursued a vicarious liability tort claim against the Federal Government to judgment on the factual merits in an action that fell under the FTCA, the judgment bar blocked a later suit against the federal employee for the same act or omission when also based on "the same subject matter," that is, when grounded in the same theory of state law negligence. *See* 28 U.S.C. § 2676.

By its text, understood in light of its original legal context and animating purpose, Section 2676 cannot be stretched to suppress a broader range of claims than those made actionable under the FTCA. In paricular, the judgment bar cannot preempt constitutional claims brought under the authority of *Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Such *Bivens* claims seek to impose liability on federal officers or employees in their personal capacity. The Government itself

bears no liability for *Bivens* claims, that is, the United States has no vicarious or *respondeat superior* liability for the constitutional torts of its employees.

Moreover, when a putative FTCA action is excluded by reason of one of the statutory exceptions stated in 28 U.S.C. § 2680, the judgment bar in Section 2676 is expressly retracted. Section 2680 directs that when an exception applies, then "[t]he provisions of this chapter and section 1346(b) of this title shall not apply." Accordingly, when an exception defeats an FTCA action, Section 2676 is never triggered and does not preclude a subsequent lawsuit against a different party.

ARGUMENT

I. Rather Than Faithfully Applying the Text and Original Meaning of 28 U.S.C. § 2676, the Courts of Appeals Have Entangled the Application of the Judgment Bar With a Misguided Jurisdictional Inquiry

When a person injured at the hands of a federal employee is unable to maintain a putative state tort action against the United States because the claim by its nature falls outside the purview of the Federal Tort Claims Act (FTCA), the judgment bar as codified in 28 U.S.C. § 2676 never comes into operation. As addressed in Part II of this brief, this judgment bar was meant to preclude a plaintiff who failed to establish negligence in an FTCA action against the United

States from taking a second bite at the same tort apple (the "same subject matter") by thereafter suing the individual employee.

When a claimant's state-law tort case against the United States as an entity falls away on an exception to the FTCA, the Courts of Appeals have divided on whether a subsequent *Bivens* claim against the individual employee is precluded by the statutory judgment bar. Rather than faithfully attending to the specific text and original meaning of Section 2676, many lower federal courts have reached disparate results by addressing the separate question of whether the dismissal of the FTCA action on exception grounds should be characterized as a jurisdictional or non-jurisdictional disposition. That misguided debate has prompted a further digression into the meaning of the word "judgment" for preclusion purposes.

A. The Courts of Appeals Have Mistakenly Understood the Application of the FTCA Judgment Bar as Turning on Characterization of a Judgment as Jurisdictional or Not

Appreciating that the exceptions to the FTCA stated in 28 U.S.C. § 2680 are substantive limitations on the Government's liability, the United States Court of Appeals for the Seventh Circuit has long and rightly refused the Government's importuning to treat these exceptions as non-waivable jurisdictional preconditions. *See Stewart v. United States*, 199 F.2d

517, 519 (7th Cir. 1952). To accept the Government's suggestion that an FTCA exception is jurisdictional "would mean that even if the government failed to raise any of these defenses, the district court and this court (and the Supreme Court, if the case went that far) would be obliged to consider it." *Collins v. United States*, 564 F.3d 833, 837 (7th Cir. 2009). Instead, the FTCA exceptions "limit the breadth of the Government's waiver of sovereign immunity, but they do not accomplish this task by withdrawing subject-matter jurisdiction from the federal courts." *Parrott v. United States*, 536 F.3d 629, 634 (7th Cir. 2008).

Having avoided the error of carving the FTCA exceptions into jurisdictional stone, the Seventh Circuit nonetheless has gone astray by misapprehending the judgment bar in Section 2676 as triggered whenever a judgment is on the merits, but regardless of the subject matter of the ruling or the nature of the subsequent lawsuit. Thus, the Seventh Circuit mistakenly extrapolates an FTCA dismissal on exception grounds into preclusion of a *Bivens* constitutional tort claim against an individual federal officer arising from the same events (but not the same tort theory). *See Williams v. Fleming*, 597 F.3d 820, 823 (7th Cir. 2010). Indeed, the Seventh Circuit takes an exceptionally broad (and wrongheaded) view of the FTCA judgment bar: any FTCA judgment will bar the claimant's *Bivens* action, no matter that the FTCA judgment turned on statutory defenses peculiar to the Government that do not bear the slightest relevance to the viability of the constitutional tort claim. *See*

Hoosier Bancorp of Indiana, Inc. v. Rasmussen, 90 F.3d 180, 184-85 (7th Cir. 1996).

Other Courts of Appeals have sensibly sought to narrow the sweep of the FTCA judgment bar to prevent manifest unfairness. In the case under review, for example, the United States Court of Appeals for the Sixth Circuit appropriately observed that it would be "punitive" to bar a plaintiff from seeking an alternative remedy in a subsequent action because he had mistakenly filed an earlier FTCA action, "when that statute does not permit recovery." *Himmelreich v. Federal Bureau of Prisons*, 766 F.3d 576, 580 (6th Cir. 2014).

Unfortunately, to reach this correct outcome, these courts have held that the judgment bar does not apply to FTCA suits dismissed on jurisdictional grounds, which these same courts mistakenly regard as including dismissals based on the FTCA exceptions found in Section 2680. *See, e.g.*, *Himmelreich*, 766 F.3d at 578-80; *Hallock v. Bonner*, 387 F.3d 147, 154-55 (2d Cir. 2004), *vacated on other grounds sub nom. Will v. Hallock*, 546 U.S. 345 (2006). In so doing, these courts have imposed a jurisdictional gloss on to the FTCA exceptions that is not supported by the text of the statute or consistent with this Court's FTCA decisions. *See infra* Part I.B.

By extending a jurisdictional mischaracterization of substantive defenses to limit the reach of the judgment bar, these courts have perpetuated confusion

about the nature of the FTCA exceptions.[2] The answer for which these courts have been searching is to be found forthrightly in the text and animating purpose of Section 2676 and its express direction that a prior FTCA judgment precludes a subsequent suit only when that judgment was based on the "same subject matter," that is, the same tort theory. *See infra* Part II. The question thus turns on the legal terms of art found in Section 2676 itself, not on side disputes about the jurisdictional character of other provisions or about the meaning of "judgment."

[2] The Ninth Circuit has deepened the confusion by treating an FTCA exception as a curious hybrid between a jurisdictional prerequisite and an affirmative defense. Under *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992), the plaintiff has the initial burden of demonstrating jurisdiction, which will fail if the claim on the face of the complaint appears to come within one of the FTCA exceptions. If the plaintiff's complaint does not clearly trigger an exception, the Ninth Circuit shifts the burden to the United States to actually prove the applicability of the exception, saying it is "analogous to an affirmative defense." *Id.* at 702. In contrast with a typical affirmative defense, however, the Ninth Circuit permits the United States to raise an exception at a late stage, once again elevating the exception to a jurisdictional command not subject to waiver. *Richardson v. United States*, 943 F.2d 1107, 1112-13 (9th Cir. 1991).

B. The Exceptions to the FTCA in Section 2680 Are Substantive Defenses, Not Jurisdictional Prerequisites

Because they are stated in the FTCA as substantive exceptions to liability, rather than as limits on the grant of subject matter jurisdiction to the courts, the numerous exceptions should not be treated as jurisdictional.[3] *See generally* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 552-58 (2008); Thomas E. Bosworth, Comment, *Putting the Discretionary Function Exception in Its Proper Place: A Mature Approach to "Jurisdictionality" and the Federal Tort Claims Act*, 88 Temple L. Rev. 91 (2015).

The FTCA was enacted in part as a conferral of jurisdiction on the District Courts, with a textual delineation of the factors that define court jurisdiction. In *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. 471 (1994), this Court directly outlined the genuinely jurisdictional elements of the Federal Tort Claims Act (which notably do not include the exceptions in 28 U.S.C. § 2680). Examining 28 U.S.C. § 1346(b), which speaks in the language of jurisdiction, the *Meyer* Court explained that it "grants the federal district courts jurisdiction over a certain

[3] Under exceptional circumstances, such FTCA exceptions as the discretionary function exception, 28 U.S.C. § 2680(a), and the military combat exception, *id.* § 2680(j), may have jurisdictional or justiciability implications under the political question doctrine.

category of claims for which the United States has waived its sovereign immunity and 'render[ed],' itself liable." *Meyer*, 510 U.S. at 477 (citations omitted).

The jurisdictional parameters of the FTCA thus include that "category" of claims which "allege the six elements" outlined in 28 U.S.C. § 1346(b)(1), namely a claim (1) against the United States, (2) for money damages, (3) for personal injury, death, property harm, or property loss, (4) caused by the negligent or wrongful act or omission of any employee of the United States, (5) while acting within the scope of his office or employment, (6) under circumstances where a private person would be liable under the law of the place where the act or omission occurred. *Meyer*, 510 U.S. at 477.

By contrast, those additional provisions of the FTCA that "prescribe the test of allowable claims" and articulate exceptions to such liability fall within the court's jurisdiction to grant or deny a claim on its merits, but are not jurisdictional rules in and of themselves. *See Feres v. United States*, 340 U.S. 135, 140-41 (1950).

An all-consuming jurisdictional-style imperative for each element of the FTCA's waiver of federal sovereign immunity would have "drastic" consequences because "[s]ubject-matter jurisdiction can never be waived or forfeited," "objections may be resurrected at any point in the litigation," and courts are obligated to consider jurisdictional requirements *sua sponte*. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012)

(non-FTCA case). The federal courts would be obliged to identify and thoroughly explore each item on an exhaustive (and exhausting) list of every statutory exception, procedural requirement, and time limitation that could conceivably be invoked as a defense to an FTCA claim. As David Currie lamented about the duty of the courts to "investigat[e] the existence of jurisdiction on their own and at any stage of the proceedings," this is an "expensive habit." David P. Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. Chi. L. Rev. 268, 298 (1969).

Moreover, when a statutory provision is mistakenly characterized as jurisdictional in nature, the determination of which issues deserve to be litigated (or which instead may be waived or forfeited) is taken out of the hands of the parties (both the claimant and the Government). *See* Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1, 10 (2008) ("Waiver, consent, and forfeiture allow the parties to designate which issues require court decision and which are of such relative unimportance to the parties that they would rather forgo the costs of litigating them.").

Mindful of the drastic effects of a jurisdictional reading, the earliest Court of Appeals decision to address the character of the exceptions concluded that the FTCA "confer[s] general jurisdiction of the subject matter of claims within its purview, and the exceptions referred to are available to the government as a defense only when aptly pleaded and proven." *Stewart v. United States*, 199 F.2d 517, 519 (7th Cir. 1952). The suggestion that a plaintiff must anticipate

and negate every FTCA exception as a jurisdictional precondition was thought "preposterous." *Id.* at 520.

In an occasional stray passage, this Court sometimes described an FTCA exception as "preclud[ing] the exercise of jurisdiction," *Smith v. United States*, 507 U.S. 197, 199 (1993), or offered a footnote sketch of an earlier exception ruling as preventing "jurisdiction to try a tort action," *Dalehite v. United States*, 346 U.S. 15, 31 n.25 (1953). These casual comments fell far short of a holding that the exceptions partake of subject matter jurisdiction. Never has the Court suggested the exceptions were jurisdictional in the distinct sense of being non-waivable prerequisites requiring *sua sponte* consideration by the courts. Indeed, in both *Indian Towing Co. v. United States*, 350 U.S. 61, 64, 68 (1955) (which described the FTCA exceptions as "substantive limitations"), and *Block v. Neal*, 460 U.S. 289, 294 (1983), the Court noted that the Government had conceded that the discretionary function exception was not implicated – a concession the Court did not question as it would have been obliged to do *sua sponte* were the exception a jurisdictional element.

In recent decades, no decision by this Court has hinted at jurisdictional consequence for an FTCA exception.[4] Indeed, decisions since the turn of the

[4] In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 710 (2004), the Court did say that foreign substantive law might apply in FTCA cases "if federal courts follow headquarters doctrine to assume jurisdiction over tort claims against the Government for foreign

(Continued on following page)

century have strongly indicated otherwise. For example, in *Dolan v. United States Postal Service*, 546 U.S. 481 (2006), the Court observed that the waiver of sovereign immunity for the FTCA comes in two sections of the code. The first expressly "confers federal-court jurisdiction in a defined category of cases involving negligence committed by federal employees in the course of their employment," and the second directs that the United States is liable in the same manner as a private person under like circumstances but not for prejudgment interest or punitive damages. *Id.* at 484-85 (citing 28 U.S.C. §§ 1346(b)(1), 2674). By contrast, the "qualifi[cation of the FTCA] waiver of sovereign immunity for certain categories of claims" through thirteen exceptions is found in a separate part of the statute. *See id.* at 485; *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

---

harm" that had been planned or supervised inside the borders of the United States. This then was another reason to read the foreign country exception, 28 U.S.C. § 2680(k), as barring claims involving injury in another nation. However, in this part of the opinion, the Court was speaking of "jurisdiction" primarily in terms of the geographic location of the court, whether in one or another state or country, with choice of law consequences, rather than in terms of federal judicial authority to hear a particular class of claims. In any event, the Court did not suggest that the FTCA exception was a non-waivable jurisdictional prerequisite.

Moreover, the *Dolan* Court emphasized that the nature of the statutory provision at issue affects the manner in which it should be construed. The Court "noted that this case does not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Dolan*, 546 U.S. at 491 (citation omitted). The Court explained that "this principle is 'unhelpful' in the FTCA context, where 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.'" *Id.* at 491-92 (citations omitted). This Court thereby rejected the Government's plea for strict construction of the exceptions in its favor as conditions on the waiver of sovereign immunity. *See id.* at 491. *See generally* Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1268-71 (2014).

Most recently, in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), this Court expressly rejected the Government's assertion that the statute of limitations for the FTCA is jurisdictional. The Court characterized the propensity to "attach[ ] jurisdictional consequence to conditions on waivers of sovereign immunity" as belonging to an "earlier era." *Id.* at 1637. Today, the Court sets a "high bar" for reading a particular provision to impose jurisdictional limitations, given the "harsh consequences" of preventing

any waiver of the issue and imposing a duty on the courts to evaluate the matter *sua sponte*. *Id.* at 1632.

The *Kwai Fun Wong* Court highlighted that the FTCA statute of limitations, 28 U.S.C. § 2401(b), is set out in a different section of the statute than the jurisdictional grant. *Kwai Fun Wong*, 135 S. Ct. at 1633. Likewise, the exceptions to the FTCA are found in Section 2680, not in the grant of jurisdiction over FTCA claims in Subsection 1346(b)(1).

* * *

The question in this case is not, as too many of the Courts of Appeals have seen it, whether a prior FTCA disposition was on jurisdictional grounds, nor whether a jurisdictional dismissal qualifies as a "judgment." Rather, restoring attention to the text, context, and historical origins of Section 2676, the crucial inquiry is whether the FTCA judgment disposed of the same state tort theory that the plaintiff seeks to resurrect in the subsequent action. Preclusion follows under Section 2676 when the prior judgment was "by reason of the same subject matter," which is a term of art borrowed from the *Restatement (First) of Judgments* to indicate resolution on the identical legal theory. The textually specific and historically correct interpretation would deny the judgment bar *any* role in the preclusion of *Bivens* claims. In the next part of this brief, we turn to that dispositive analysis.

II. Under Section 2676, Exoneration of the Vicariously-Liable Government Employer for Non-Negligence in an FTCA Suit Bars a Subsequent Claim Only as to the Same Tort Theory Against the Individual Employee

Under Section 2676 of the Federal Tort Claims Act, "[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." When enacted in 1946, Federal Tort Claims Act of 1946, chap. 753, 60 Stat. 844, the judgment bar was designed to complement and supplement the common law of preclusion to prevent the plaintiff from getting two bites at the apple on the merits of a single tort claim, regardless of whether the plaintiff went to judgment first against the Government as the employing entity or first against the individual Government employee.

A. Congress Enacted Section 2676 to Supplement Limited Preclusion Law and Direct That a Non-Negligence Finding for the Derivatively-Liable Federal Employer Bars a Claim on the Same State Tort Theory Against the Employee

Under the law of preclusion when the FTCA was enacted in 1946, if an injured plaintiff first sued the servant (the employee) on a theory of negligence and lost with a finding of non-negligence, the

exoneration would block a second suit against the master (employer). *Restatement (First) of Judgments* § 96 (1942). As a narrow exception to the strict rule of mutuality that prevailed at the time, *see id.* § 93, a judgment in favor of the directly-liable employee was accorded preclusive effect in a later action against the vicariously-liable employer. The *Restatement* justified this departure from mutuality by pointing to the duty of indemnity, *id.* § 96(1)(a), that is, the servant's duty to indemnify the master for any vicarious liability imposed on the master on account of the servant's negligence, *Restatement (First) of Restitution* § 96 (1937).

But when the order of litigation was reversed, the rule of non-mutual preclusion did *not* apply, at least in some states and under the 1942 *Restatement of Judgments*. An exoneration of the master in an earlier action had no effect in a subsequent claim against the servant; it "binds neither the plaintiff nor the [servant]." *Restatement* § 96(2). The *Restatement* could discern "no reason for an exception to the ordinary rules of mutuality," because the servant, as the party primarily liable, was owed no duty of indemnity and faced no threat of unfairness through inconsistent results. *Id.* § 96(2) cmt. j.

In sum, the employer would enjoy preclusion from exoneration of the employee in a prior judgment because the employer's liability was derivative or secondary under the doctrine of *respondeat superior*. But some state courts and the *Restatement* refused to treat a judgment in an action against the master as a bar to further litigation against the servant, even

where the issue of negligence had been resolved against the plaintiff in the earlier suit. *See generally* James E. Pfander & Neil Aggarwal, Bivens*, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417, 419-20, 429-39 (2011).

As Congress during the 1930s and 1940s considered legislation waiving sovereign immunity and imposing *respondeat superior* liability on the United States for tort claims, the Government expressed concern that the *Restatement*'s rules of preclusion would not regard a prior non-negligence finding in an action against the United States as barring renewal of the same negligence claim against the employee. Assistant Attorney General Francis M. Shea testified at the leading hearing on the legislation in support of a legislative-fix to this problem:

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

Tort Claims: H.R. 5373 and H.R. 6463 Hearings Before the Comm. on the Judiciary, 77th Cong. 9 (1942) (hereinafter "Hearings") (statement of Francis M. Shea, Assistant Att'y Gen., U.S. Dept. of Justice).

To avoid that uneven result, Congress enacted Section 2676 into the FTCA to block negligence suits against the driver of a federal postal truck whose act or omission had given rise to an earlier judgment in a negligence suit against the United States. The drafters of Section 2676 borrowed the "same subject matter" reference from the *Restatement* where it had been used to describe a narrow subset of claims that rested on the same theory of liability. *See Restatement (First) of Judgments* §§ 70, 84 (1942). The "same subject matter" formulation captured the logic underlying the judgment bar's relaxation of mutuality. Thus, a judgment for the Government through a finding of non-negligence – that is, on the "same subject matter" – fairly bars a negligence claim against the employee arising from the same act or omission because the prior judgment negates the identical theory of tort liability.

By establishing non-mutual preclusion in both directions for both federal employer and federal employee when the underlying negligence issue had been decided in a suit against either, Section 2676 of the FTCA operates to furnish a symmetry that had eluded the *Restatement*. In this way, the judgment bar served to block a specific kind of duplicative litigation that otherwise could have resulted from the Government's acceptance of *respondeat superior*

liability in suits for ordinary negligence. *See generally* Pfander & Aggarwal, *supra*, 8 U. St. Thomas L.J. at 420-21, 439-49.

B. By Barring a Subsequent Claim "By Reason of the Same Subject Matter," Section 2676 Precludes Only the Same State Tort Claim Against the Employee That Had Been Adjudicated in a Prior FTCA Claim Against the United States in *Respondeat Superior* Litigation

Tearing Section 2676 loose from its animating purpose when enacted by Congress and re-interpreting the text in a manner divorced from its meaning and legal context, some Courts of Appeals have driven this symmetrical *respondeat superior* preclusion provision into the nonparallel and non-*respondeat superior* context of constitutional tort claims. Instead of the term of art, "same subject matter," that had been used in the 1940s to limit the reach of the judgment bar to the same legal claim on which the Government had waived its immunity in the FTCA, these courts have improperly substituted the modern preclusion language of "same transaction or occurrence" to reach all claims that arose from the same set of events. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 n.22 (1982) ("Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes . . . ."); *Restatement (Second) of Judgments* § 24(1) (1980) ("[T]he claim extinguished includes all rights . . . with respect to all

or any part of the transaction, or series of connected transactions, out of which the action arose.").

Under this novel and textually untethered reading of the statute, when a case proceeds to judgment on a common-law tort theory under the FTCA, the judgment bars the plaintiff from maintaining a factually related constitutional tort claim against an individual federal officer under *Bivens*. *See, e.g.*, *Manning v. United States*, 546 F.3d 430, 432-37 (7th Cir. 2008); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858-59 (10th Cir. 2005). But this typically unexamined extension of Section 2676 to factually related claims asserted in the *Bivens* context cannot be squared with the text, history, and simple logic of the FTCA.

First, by its plain language, Section 2676 applies only when the subsequent action against the employee is brought "by reason of the same subject matter" as was the prior judgment in the action against the United States under the FTCA. When evaluating whether two lawsuits have been brought "by reason of the same subject matter," the courts should interpret the language Congress adopted not by reference to modern ideas of supplemental jurisdiction or transactional relationship but according to the meaning of those terms at the time of their enactment. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 704-08 (2004) (determining congressional understanding of the FTCA exception for a claim "arising in" a foreign country by looking to the "sense of 'arising in' [that] was the common usage in state borrowing statutes

contemporary with the Act" and by considering the "object" of the provision in light of principles of substantive law when the FTCA was enacted).

Importantly, Section 2676 does not enact a free-standing preclusion provision, but rather forms an integral part of the Federal *Tort* Claims Act. In general, the FTCA imposes liability on the Federal Government according to principles of state tort law. Thus, the most logical conclusion from the statutory context is that phrase "same subject matter" in the statute takes its meaning from the state tort law that is the central theme and field of operation for the FTCA as a whole. *See Dalehite*, 346 U.S. at 28 ("Uppermost in the collective mind of Congress were the ordinary common-law torts.").

As discussed in Part II.A, when the FTCA and its judgment bar became law in 1946, non-mutual preclusion doctrine treated an unsuccessful suit for negligence against the *employee* as a bar to a subsequent action against the employer on the same theory of negligence. *See Restatement (First) of Judgments* § 96 (1942). But this rule of non-mutual issue preclusion did not apply when the first suit was brought against the *employer*. *Id*. The FTCA's judgment bar corrects this asymmetric result by enabling the Government employee to raise the prior Government judgment as a bar to a second negligence suit, despite the absence of mutuality.

While the statute supplemented the common law of non-mutual preclusion to achieve a measure of

symmetry, the judgment bar applied only when the judgment on the FTCA claim and the claim against the employee were based on the same theory of tort liability. Factual overlap between the two claims did not alone trigger the application of the bar. Thus, where the Government's liability, based on the doctrine of *respondeat superior*, was derivative of that of the employee, exoneration of the Government (through a finding, say, of non-negligence) was tantamount to exoneration of the employee. In that narrow situation, a judgment in the suit against the Government would negate the liability of the employee and appropriately bar further litigation.

Where the Government succeeded on the basis of a defense personal to the Government, however, the judgment bar did not apply and the suit could proceed against the employee. *See Restatement (First) of Judgments* § 99 (1942) (a "valid *judgment* on the merits and not based on a personal defense *bars* a subsequent action" in circumstances of vicarious liability) (emphasis added). Thus, judgments for the Government based upon a finding that an employee was acting outside the scope of employment (thereby rendering the *respondeat superior* liability of the Government inapplicable) were certainly "judgments" within the meaning of the FTCA. But those judgments did not foreclose an action against the employee because they did not negate the employee's liability. *See, e.g.*, *Government Emp. Ins. Co. v. Ziarno*, 170 F. Supp. 197, 200 (N.D.N.Y. 1959), *rev'd on other grounds*, 273

F.2d 64 (2d Cir. 1960); *see generally* Pfander & Aggarwal, *supra*, 108 U. St. Thomas L.J. at 439-48.

Viewed in light of then-existing rules of preclusion, Congress chose the "same subject matter" as a term of art to limit the judgment bar's application to cases where tort issues arose in the vicarious liability context and thus shared an essential identity. *See Molzoff v. United States*, 502 U.S. 301, 307 (1992) (looking to the legal understanding during the FTCA enactment period to define a legal term of art incorporated into the statute). For Section 2676, Congress borrowed the "same subject matter" phrase directly from the 1942 *Restatement*, where it described claims in which both the relevant facts and the theory of liability were identical. *See Restatement (First) of Judgments* §§ 70, 84 (1942).

For example, *Restatement* § 70 provides that legal determinations made in litigation between the parties are not conclusive "in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction." In explaining the construct, comment b defines the same subject matter quite narrowly to apply to successive breach of contract claims on a single contract, or successive suits for installments of interest under a single contract or rental payments due under a single lease. *Id.* § 70 cmt. b. At the time, these were regarded as different "causes of action" because they arose from separate breaches of duty, but they were nonetheless subject to preclusion

because the legal question at the heart of the two claims was otherwise identical.

The requisite identity exists under the FTCA only where the Government has accepted *respondeat superior* liability and the basis on which the Government's liability was adjudicated bears on the viability of the underlying claim against the employee. Claims to which Section 2676 applies – again, claims arising from "the same subject matter" – are claims based on common-law theories of tort liability to which the FTCA's acceptance of *respondeat superior* liability extends. *See* Hearings, *supra*, at 26-27 ("It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone."). For that reason, Section 2676 has logical effect only when the asserted liability of the employer is indeed vicarious. But the Federal Government is not liable in *respondeat superior* for a *Bivens* claim. *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484-86 (1994). That legal nullification of vicarious liability interrupts the corresponding operation of the FTCA's judgment bar.

Applying the "same subject matter" test that Congress incorporated into the FTCA, a constitutional tort claim under *Bivens* simply does not arise from the same source of state common law or follow the same theoretical trajectory as that under the FTCA. Thus, where a court rejects an FTCA claim on grounds that shed no light at all on the viability of a factually related *Bivens* claim, neither the statute's text nor its logic call for application of the judgment bar.

Consider the Seventh Circuit's mistaken decision in *Williams v. Fleming*, 597 F.3d 820, 823 (7th Cir. 2010). There, the finding that slander claims were not cognizable as intentional torts under the FTCA did not logically bar a wholly distinct constitutional tort claim under *Bivens* for racial discrimination; the claims were not brought "by reason of the same subject matter." But the Seventh Circuit nonetheless found that the judgment bar was applicable, denying the plaintiff a day in court on the race discrimination claim. The court's mistaken decision grew out of its failure to recognize that the constitutional tort claim did not arise from "the same subject matter" as a common-law tort claim within the scope of the FTCA.

C. Federal Courts Can Effectively Coordinate FTCA and *Bivens* Claims Without the Blunt Instrument of the Judgment Bar

By holding that the FTCA judgment bar does not apply to *Bivens* litigation, this Court would reaffirm a proper and properly limited interpretation of the language Congress enacted. But in doing so, the Court need not abandon the goal of securing the coordinated resolution of parallel claims under the FTCA and *Bivens*, a goal that doubtless animates some lower court interpretations of the judgment bar.

Section 2676 offers a solution to only one very modest problem of preclusion law: the problem of asymmetric non-mutual issue preclusion in the context

of *respondeat superior* litigation. But this statutory judgment bar does not otherwise supersede the continued application of evolving common-law rules of claim and issue preclusion.

Indeed, Section 2676 was drafted on the assumption that those rules would continue to apply. Section 2676 was intended to fill a specific gap in the law of non-mutual collateral estoppel at the time, not to displace the general law of preclusion. In particular, the FTCA judgment bar does not state that a prior judgment against the employee with a finding of non-negligence would preclude a subsequent suit against the employer. That was not necessary to say in the statute, as the 1940s-era law of preclusion already so provided. Common-law preclusion rules of that period would bar an action to impose vicarious liability on the Government after a judgment exonerating the primarily-liable employee whose act or omission gave rise to the claim.

Nor does Section 2676 foreclose the use of the single satisfaction rule as a limit on the ability of a plaintiff to pursue separate awards against both the Government and its employees. *See Brooks v. United States*, 337 U.S. 49, 54 (1949); *Restatement (Second) of Judgments* § 51 (1982); *cf.* 28 U.S.C. § 2672 (settlement with the Government under the FTCA also releases claims brought against employees by reason of the same subject matter).

Lower courts have successfully applied these nuanced coordination tools to litigation under 42

U.S.C. § 1983 and can do so here once the Government's expansive account of the judgment bar has been rejected. *See generally* Pfander & Aggarwal, *supra*, 108 U. St. Thomas L.J. at 465-70.

Early decisions under the FTCA adopted precisely these forms of coordination both to ensure that the plaintiff did not recover more than a single satisfaction and to protect the plaintiff's right to trial by jury. *See, e.g.*, *Moon v. Price*, 213 F.2d 794, 796-97 (5th Cir. 1954) (plaintiff may pursue claims against both the employee and the Government but may secure only a single satisfaction; trial court drew upon jury trial findings in assessing the Government's liability under the FTCA). Such coordination would protect plaintiffs from astonishingly broad conceptions of the preclusive effect of the judgment bar. *See Manning v. United States*, 546 F.3d 430, 433 (7th Cir. 2008) (retroactively invalidating a *Bivens* jury verdict on the basis of the trial court's subsequent rejection of an FTCA claim).

III. Because Section 2680 Directs That the Provisions of the FTCA "Shall Not Apply" When a Case Falls Within an Exception to the FTCA, Section 2676's Judgment Bar Is Then Retracted

For tort allegations that are precluded by the statutory exceptions, the plain language of 28 U.S.C. § 2680 further confirms the inapplicability of the judgment bar to such dismissals. Section 2680 sets

out the various exceptions to the FTCA and is prefaced with the directive that "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to" the excluded types of claims. 28 U.S.C. § 2680.

This introductory text to the FTCA exceptions directly negates the judgment bar. By retracting the "provisions of this chapter" – which of course includes Section 2676 – Section 2680 states unequivocally that the judgment bar has no function when an exception is applied. *See Levin v. United States*, 133 S. Ct. 1224, 1232 (2013) (holding that the phrase "shall not apply" in the Gonzalez Act, 10 U.S.C. § 1089(e), states "in no uncertain terms" that the intentional tort exception to the FTCA does not apply to claims involving medical personnel employed by certain agencies).

The Government's primary response (Pet. Br. at 48-50) is to bypass the FTCA as enacted in 1946 and invoke a self-sufficient provision enacted four decades later in 1988. Under the direct terms of the Federal Employees Liability Reform and Tort Compensation Act (Westfall Act), a remedy against the Federal Government as an entity is broadly made "exclusive of any other civil action or proceeding for money damages" when a personal injury claim arises 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), with an express exception for a *Bivens* constitutional action against an employee, *id.* § 2679(d)(2).

After the United States has taken the place of the employee as defendant, the matter "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) and shall be subject to the limitations and exceptions applicable to those actions." *Id.* § 2679(d)(4). Thus, by the terms of the Westfall Act itself, the action against the substituted United States goes forward as a matter of course under the FTCA, subject to its exceptions. *United States v. Smith*, 499 U.S. 160, 161-62 (1991).

The independent operation of the Westfall Act of 1988 according to its own terms and purpose sheds no light on the parameters of the FTCA judgment bar of 1946 nor expands its modest preclusive effect.

CONCLUSION

The judgment bar, 28 U.S.C. § 2676, was designed to achieve the modest goal of ensuring the availability of non-mutual issue preclusion in favor of Government employees after the Government had been exonerated with a finding against negligence in a proper Federal Tort Claims Act suit. Section 2676 was framed at a fairly high level of specificity to foreclose not all subsequent litigation against employees, but only such subsequent claims that (1) were brought against the employee by reason of the "same subject matter," that is, the same state law tort theory, and (2) that had been resolved on the factual merits in favor of the United States in a prior suit

that came inside the scope and outside the exceptions of the FTCA.

Under Section 2676, the prior dismissal of the respondent's putative FTCA action does not preclude the respondent's subsequent *Bivens* action. The FTCA action was neither one concluded by a judgment "by reason of the same subject matter" nor one to which the FTCA would apply. Accordingly, the ruling of the Sixth Circuit should be affirmed.

Respectfully submitted,

GREGORY C. SISK
Counsel of Record
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
1000 LaSalle Avenue
Minneapolis, Minnesota 55403
(651) 962-4923
gcsisk@stthomas.edu

Counsel for Amici Curiae