No. 15-109

IN THE

Supreme Court of the United States

JERMAINE SIMMONS, ET AL.,
Petitioners,

v.

WALTER J. HIMMELREICH,
Respondent.

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

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

ALLISON M. ZIEVE
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Counsel for Amici Curiae

February 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The FTCA judgment bar extends to government employees the res judicata effect of a judgment in an FTCA case. 3

A. Res judicata principles 3

B. Res judicata and the FTCA's judgment bar 5

II. Dismissal of an FTCA case that does not address the merits of the tort claim does not bar a subsequent *Bivens* claim. 8

III. Petitioners' reading has inequitable and irrational outcomes. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Pages**

Allen v. McCurry,
449 U.S. 90 (1980) 3, 5

Benbow v. Wolf,
217 F.2d 203 (9th Cir. 1954) 13

Bigelow v. Old Dominion Copper Co.,
225 U.S. 111 (1912) 4

Catlin v. United States,
324 U.S. 229 (1945) 9

Commissioner v. Sunnen,
333 U.S. 591 (1948) 3

Dalehite v. United States,
346 U.S. 15 (1953) 7

Davis v. Michigan Department of Treasury,
489 U.S. 803 (1989) 11

Dolan v. United States Postal Service,
546 U.S. 481 (2006) 17

Estate of Trentadue v. United States,
397 F.3d 840 (10th Cir. 2005) 19

Feres v. United States,
340 U.S. 135 (1950) 8

Freeze v. United States,
343 F. Supp. 2d 477 (M.D.N.C. 2004) 19

Gray v. Lacke,
885 F.2d 399 (7th Cir. 1989) 15

Gutierrez de Martinez v. Lamagno,
515 U.S. 417 (1995) 7

Hennessy v. Daniels Law Office,
270 F.3d 551 (8th Cir. 2001) 10

Hoosier Bancorp of Indiana, Inc. v. Rasmussen,
90 F.3d 180 (7th Cir. 1996) 18

King v. St. Vincent's Hospital,
502 U.S. 215 (1991) 11

Lauterbach v. United States,
95 F. Supp. 479 (W.D. Wash. 1951) 7

Lober v. Moore,
417 F.2d 714 (D.C. Cir. 1969) 15

Manning v. Miller,
546 F.3d 430 (7th Cir. 2008) 9, 17, 18

Maxwell v. Dodd,
2009 WL 3805597 (E.D. Mich. 2009) 19, 20

Montana v. United States,
440 U.S. 147 (1979) 5

Morgan v. City of Rawlins,
792 F.2d 975 (10th Cir. 1986) 15

Nordby v. Anchor Hocking Packaging Co.,
199 F.3d 390 (7th Cir. 1999) 10

Palma v. Dent,
2007 WL 2023517 (N.D. Cal. July 12, 2007) 18

Park Lake Resources Limited Co. v. Department of Agriculture,
378 F.3d 1132 (10th Cir. 2004) 4

Parklane Hosiery Co. v. Shore,
439 U.S. 322 (1979) 3, 5

Ray Haluch Gravel Co. v. Central Pension Fund,
134 S. Ct. 773 (2014) 10

Rose v. Town of Harwich,
778 F.2d 77 (1st Cir. 1985) 15, 16

Schlesinger v. Councilman,
420 U.S. 738 (1975) 4

Stephens v. Jessup,
793 F.3d 941 (8th Cir. 2015) 15

Sullivan v. Finkelstein,
496 U.S. 617 (1990) 11

United States v. F. & M. Schaefer Brewing Co.,
356 U.S. 227 (1958) 10

United States v. Gilman,
347 U.S. 507 (1954) 13

United States v. Moser,
266 U.S. 236 (1924) 5

United States v. Pink,
315 U.S. 203 (1942) 3

Will v. Hallock,
546 U.S. 345 (2006) 8

Statutory Materials

28 U.S.C. § 1292(a)(1) 10

28 U.S.C. § 1346(b) 2

28 U.S.C. § 2672 ..... 12, 13

28 U.S.C. § 2674 6

28 U.S.C. § 2676 ..... *passim*

28 U.S.C. § 2680 ..... 2, 16

28 U.S.C. § 2679(b)(1) 19

42 U.S.C. § 405(g) 11

H.R. Rep. No. 79-1287 (1945) 11

Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary,
77th Cong., 2d Sess. (Jan. 29, 1942) 7, 12, 13, 16

Federal Rules of Civil Procedure

Forms 70 & 71 10
Rule 13 6
Rule 41(a) 18
Rule 41(b) 4
Rule 54(a) 9, 10
Rule 58 ..... 10, 11
Rule 68 10
Rule 58 advisory committee's note (2002) 11

Treatises

Restatement (First) of Judgments (1942) 4, 5
Restatement (Second) of Judgments (1982) 4
Charles Alan Wright, et al., *Federal Practice & Procedure* (2d ed. 2002) 3, 4, 5, 6

Articles

Baer, *Suing Uncle Sam in Tort: A Review of the Federal Tort Claims Act and Reported Decisions to Date,* 26 N.C. L. Rev. 119 (1948) 12
Note, *Government Recovery of Indemnity from Negligent Employees: A New Federal Policy,* 63 Yale L.J. 570 (1954) 13
Note, *The Federal Tort Claims Act,* 56 Yale L.J. 534 (1947) 8, 14
Parker, *The King Does No Wrong—Liability for Misadministration,* 5 Vand. L. Rev. 167 (1952) 14

Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341 (1949) 8

INTEREST OF AMICI CURIAE[1]

Amicus curiae Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in the proper construction of statutory provisions defining and limiting access to the federal courts. The resolution of such issues often has significant impacts on the efficacy of statutory and common-law remedies under both state and federal law, as well as on the allocation of power in our federal system and the proper implementation of congressional intent. Public Citizen attorneys have frequently represented parties or amici before this Court in cases involving significant issues of statutory interpretation and federal jurisdiction, including in *Will v. Hallock*, 546 U.S. 345 (2006), which presented the same question presented by this case.[2]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights law. Having represented many

---

[1] Pursuant to Rule 37.6 of this Court, amici curiae state that this brief was not written in whole or in part by counsel for a party and that no one other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to the filing of this amicus brief are being submitted concurrently with this brief.

[2] *See, e.g.*, *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. __, 132 S. Ct. 740 (2012); *Taylor v. Sturgell*, 553 U.S. 880 (2008).

clients over the years in *Bivens* actions and Federal Tort Claims Act (FTCA) claims, the ACLU has a direct interest in the outcome of this case. In addition, the issues in this case implicate the ACLU's broader commitment to ensuring that aggrieved individuals have access to the courts.

SUMMARY OF ARGUMENT

The FTCA's judgment bar, 28 U.S.C. § 2676, extends the res judicata effect—claim preclusion—of a judgment in an FTCA action brought against the government to the federal employee whose act formed the basis for the FTCA claim. The statutory language mimics the language of res judicata, which is also a "judgment bar." Furthermore, the purpose of section 2676, its legislative history, and legal commentary soon after its passage all reflect the understanding that the FTCA's judgment bar is a res judicata provision.

Because section 2676 embodies res judicata principles, it does not bar a subsequent action where an FTCA case was dismissed because one of the exceptions to the FTCA, 28 U.S.C. § 2680, applies. Dismissal because the claim falls outside the scope of the FTCA does not resolve the merits of the underlying tort claim, and the purpose of the judgment bar is not served by applying the bar in such a case. Accordingly, whether or not the exceptions are viewed as jurisdictional, *compare* Pet. Br. 4-5, *with* Amicus Br. of Professors 10-16, the only preclusive effect of dismissal on that ground is on the issue whether the FTCA applies.

In addition, the judgment bar, by its plain language, does not apply to cases that fall within the exceptions stated in section 2680. And where an FTCA case was dismissed because section 1346(b) does not apply to the plaintiff's claims, the case cannot properly be deemed

"an action under section 1346(b)." Respondent's brief and the amicus brief of Professors Sisk and Pfander address these points, and this amicus brief therefore will not discuss them further.

ARGUMENT

I. The FTCA judgment bar extends to government employees the res judicata effect of a judgment in an FTCA case.

A. Res judicata principles

Under traditional principles of res judicata, or claim preclusion, "a final judgment on the merits of an action precludes parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Thus, after a plaintiff loses a case on the merits, his "entire claim is barred by the judgment, even as to evidence, theories, arguments, and remedies that were not advanced in the first litigation." 18 Charles Alan Wright, et al., *Federal Practice & Procedure* § 4406, at 141 (2d ed. 2002).

Historically, federal law applied res judicata principles to subsequent litigation of the same claim only when the parties to the second action were also the parties to the first action or were in privity with those parties. "Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979). Although this requirement has eroded over time, *see id.* at 326-28, when the FTCA was enacted in 1946, the federal courts required mutuality. *See United States*

v. Pink, 315 U.S. 203, 216 (1942); *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912); Restatement (First) of Judgments § 93 (1942) (non-party or privy to prior action "not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action"). As respondent Himmelreich has explained, in 1946, the mutuality requirement was subject to an exception allowing an employer to assert claim preclusion where its employee had prevailed in a prior suit. Resp. Br. 41 (citing Restatement (First) of Judgments § 96(2) cmt. j). The converse was not true, however—that is, exoneration of the employer in an earlier suit generally did not enable the employee to assert claim preclusion in a later suit. *Id.*

Moreover, although res judicata generally bars litigation of claims that were brought, or could have been brought, in a prior case, the doctrine does not apply when the first case was not adjudicated on the merits, as when the dismissal is for lack of subject-matter jurisdiction. *Schlesinger v. Councilman*, 420 U.S. 738, 747 (1975); 18A *Federal Practice & Procedure* § 4436, at 150 (describing "well settled" rule); *see also* Fed. R. Civ. P. 41(b) (dismissal for lack of jurisdiction not an adjudication on merits). In that circumstance, the preclusive effect of the judgment of dismissal extends to the issue of subject-matter jurisdiction, but not to other matters that were or could have been raised in the case. *Park Lake Res. Ltd. Co. v. Department of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004); Restatement (Second) of Judgments § 12 cmt. c (1982). In other words, the decision in the first case will be given collateral estoppel effect—issue preclusion—but not res judicata effect.

This understanding of the scope of preclusion underlies the Court's repeated statements that res judicata

applies where a prior case was decided "on the merits," *see, e.g.*, *Allen*, 449 U.S. at 94; *Montana v. United States*, 440 U.S. 147, 153 (1979), and is consistent with the purpose of the res judicata doctrine: "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana*, 440 U.S. at 153.

B. Res judicata and the FTCA's judgment bar

Res judicata is primarily a creation of the common law, but various federal statutes embody res judicata principles. 18 *Federal Practice & Procedure* § 4403, at 35 & n.23. The FTCA is one such statute. *Id.* at 35 n.23. As relevant here, the FTCA's judgment bar, 28 U.S.C. § 2676, provides:

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

The language of section 2676—"judgment" and "bar"—is classic res judicata terminology. *See, e.g.*, *Parklane Hosiery Co.,* 439 U.S. at 326 n.5 ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action."); *United States v. Moser*, 266 U.S. 236, 241 (1924) (where res judicata applies, "judgment upon the merits constitutes an absolute bar" to subsequent action); Restatement (First) of Judgments, Ch. 3, Introductory Note ("When it is stated that 'the rules of res judicata are applicable,' it is meant that the rules as to the effect of a judgment as a merger or as a bar … are applicable."); *id.* § 48 (section entitled "Judgment for Defendant On The Merits—

Bar"); 18 *Federal Practice & Procedure* § 4402, at 7 (discussing "Terminology of Res Judicata"). And a judgment dismissing a case for lack of subject-matter jurisdiction, including a dismissal based on sovereign immunity, is generally not a "judgment on the merits," as petitioners agree. *See* Pet. Br. 36.

Moreover, section 2676's use of "subject matter" of the action to define the scope of preclusion echoes the common-law concept that claims arising from the same transaction are barred because they "merge" in the judgment. "Subject matter" was also used in Federal Rule of Civil Procedure 13, adopted in 1937, not long before the FTCA's enactment in 1946, to define the scope of compulsory counterclaims, which helps define the extent of claim preclusion of federal judgments.

In addition to the language of section 2676, the purpose and legislative history of the FTCA also demonstrate that section 2676 was intended to extend the res judicata effect of a judgment on the merits in an FTCA case to federal employees. As discussed above, non-mutual res judicata was generally disfavored in 1946. Consequently, when Congress enacted the FTCA, a judgment on the merits in favor of the United States in an FTCA suit would not have barred a subsequent suit by the same plaintiff against the government employee whose conduct gave rise to the FTCA claim. Absent a judgment bar, the employee might have been sued in tort after the plaintiff litigated against the United States—either because the plaintiff lost or to seek punitive damages, which are not available against the government. *See* 28 U.S.C. § 2674.

Permitting a second suit would have defeated one of the central purposes of the FTCA: "reliev[ing] employees of liability in cases in which the doctrine of

respondeat superior would apply if the United States were a private corporation." *Lauterbach v. United States*, 95 F. Supp. 479 (W.D. Wash. 1951); *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995) ("Generally, [FTCA] cases unfold much as cases do against employers who concede *respondeat superior* liability."); *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary*, 77th Cong., 2d Sess. 30 (Jan. 29, 1942) (hereinafter "Hearing") (stating that FTCA "will place the United States, in respect of torts committed by its agents, upon the same footing as a private corporate employer, with certain limitations required for the protection of important governmental functions"). Accordingly, to prevent a claimant from litigating his state-law tort suit a second time, the judgment bar releases the employee from liability upon resolution of the underlying tort claim, for "[i]t is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone." Hearing at 26, 27.[3]

Not surprisingly, in light of the purposes of the FTCA, legal commentary soon after passage of the Act construed the judgment bar in accordance with res judicata principles. One early commentator noted that the bar "applies only to judgments rendered on the merits" and cautioned that it "should not be interpreted as referring to any judgment by which the court denied

---

[3] The 79th Congress, which passed the FTCA, held no hearing on the bill. This Court therefore has relied on the hearing of the 77th Congress. *Dalehite v. United States*, 346 U.S. 15, 26-27 (1953). The bulk of the hearing report consists of the testimony of Assistant Attorney General Francis Shea, who explained the Attorney General's proposed amendments to H.R. 5373, one of which was the addition of the judgment bar. Hearing at 1, 3.

its jurisdiction." Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 559 (1947). This conclusion was based on the understanding that the judgment bar was a res judicata provision and that a judgment based on lack of jurisdiction "cannot be res judicata of the issues involved in the action." *Id.* at 559 & n.170; *accord* Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341, 358 (1949).

II. Dismissal of an FTCA case that does not address the merits of the tort claim does not bar a subsequent *Bivens* claim.

The FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres v. United States*, 340 U.S. 135, 139 (1950). Reading the judgment bar to embody traditional principles of res judicata, and thus reading "judgment" in section 2676 to include only decisions on the merits of the claim, is consistent with the structure and purpose of the FTCA as a whole and avoids the inequitable consequences of broader interpretations of the term.

Like res judicata, section 2676 reflects a concern for "avoiding duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" *Will v. Hallock*, 546 U.S. 345, 355 (2006) (quoting 18 *Federal Practice & Procedure* § 4402, at 9). Res judicata would not bar a *Bivens* action after dismissal of an FTCA suit that did not address the merits of the tort claim, such as dismissal because an section 2680 exception applied, because the employee was acting outside the scope of his employment, or for failure to exhaust—regardless of whether any of these

grounds are considered "jurisdictional" and even in a respondeat superior situation where non-mutual res judicata might today apply. So, too, section 2676 does not bar a subsequent *Bivens* action.[4]

A. Petitioners advocate a broad reading of "judgment" in section 2676, under which any final order in any case alleged (even incorrectly) to fall under the FTCA bars a subsequent action against the employee involved in the underlying act. The term "judgment," however, has many definitions, and its meaning varies with context.

For example, Federal Rule of Civil Procedure 54(a) defines "judgment" to mean "a decree and any order from which an appeal lies." Although the reading advocated by petitioners is consistent with that definition, Rule 54(a) specifies that its definition applies only "as used in these rules." Moreover, even the Rule 54 definition plainly does not include every judgment under the Federal Rules, such as a partial summary "judgment" under Rule 56 or a declaratory "judgment" in a case in which the plaintiff also seeks an injunction, the form of which has not yet been approved by the court. *See also Catlin v. United States*, 324 U.S. 229, 231, 236 (1945) (district court judgment of condemnation not immediately appealable where case not disposed of in its entirety).

---

[4] The judgment bar is best read not to bar a *Bivens* action regardless of the outcome of the FTCA claim: Because a *Bivens* claim cannot be asserted against the government, it does not merge into a final FTCA judgment and thus is not barred by res judicata. Although the question whether a judgment on the merits of the FTCA claim bars a *Bivens* claim has arisen in other cases, *see*, *e.g.*, *Manning v. Miller*, 546 F.3d 430 (7th Cir. 2008), the answer does not affect Mr. Himmelreich's case.

In contrast, as used in Federal Rule of Civil Procedure 68, "judgment" means "either the substantive relief ordered (whether legal or equitable), or that plus attorneys' fees." *Hennessy v. Daniels Law Office*, 270 F.3d 551, 553 (8th Cir. 2001); *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 392 (7th Cir. 1999). Accordingly, when comparing a Rule 68 "offer of judgment" to the "judgment finally obtained" in the case, courts have noted the ambiguity of the term "judgment." *See Hennessy*, 270 F.3d at 553; *Nordby*, 199 F.3d at 392.

Federal Rule of Civil Procedure 58 requires that "[e]very judgment … must be set out in a separate document." That separate document is commonly referred to as the "judgment." *See* Fed. R. Civ. P., Forms 70 & 71. This use of "judgment" is much narrower than the definition in Rule 54(a), which includes various collateral orders and orders with respect to injunctions, *see* 28 U.S.C. § 1292(a)(1), that do not end the litigation. *See* Rule 54(a) ("any order from which an appeal lies").

In addition, in discussing what constitutes a judgment in the context of a prior version of Rule 58, this Court equated "judgment" with a court's "final act" in a case. *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232-35 (1958). Under that definition, a ruling on the merits would not constitute a "judgment" if additional matters were still pending—for example, entitlement to attorney fees where the court has granted summary judgment on the merits of the cause of action. But this Court has also held that a decision that resolves all merits issues except fees is always an appealable final judgment. *See Ray Haluch Gravel Co. v. Cent. Pension Fund*, 134 S. Ct. 773 (2014). It is therefore unsurprising that, when revising Rule 58 in 2002, the Advisory Committee noted the "horridly confused problems" that

resulted from courts' varied understandings of what constitutes a "judgment" for purposes of determining whether Rule 58's separate document requirement has been satisfied. *See* Fed. R. Civ. P. 58 advisory committee's note (2002).

B. Thus, "judgment" may mean, among other things, the final decision in a case, or the substantive relief ordered, or a decision on the merits of a claim, or an appealable order, or a formal document ending a case. *See also Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990) (under Social Security Act, district court remand order pursuant to fourth sentence of 42 U.S.C. § 405(g) is "judgment," but remand order under sixth sentence is not). Because the meaning depends on context, one must look to the structure and purpose of the FTCA to guide construction of the term "judgment" in section 2676. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.") (citation omitted); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (rejecting "hypertechnical reading" consistent with the language examined in isolation, because "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

Here, the context and purpose of the FTCA belie the government's reading. The purposes of the FTCA generally and the judgment bar specifically show that the term "judgment" in section 2676 means a decision on the merits. "The basic purpose of the legislation is to waive a part of the governmental immunity to suit in tort" so as to provide a remedy for people injured by the tortious conduct of government employees acting in the scope of their employment. H.R. Rep. No. 79-1287 at 1, 2 (1945). That purpose reflected recognition that the right

to sue individual employees was insufficient to provide an adequate remedy because employees often were "not financially capable of meeting a sizable judgment" and because "Government should in all conscience bear the responsibility" for those torts. Hearing at 25. The drafters were also concerned about avoiding duplicative recoveries and easing the burden on the government of defending duplicative lawsuits, given the government's practice of defending suits brought against employees for conduct within the scope of their employment. *See* Hearing at 9 ("If the Government has satisfied a claim … that should, in our judgment, be the end of it. … [The claimant] should not be able to turn around and sue the [government employee]."); *id.* at 24-26; *see also* Baer, *Suing Uncle Sam in Tort: A Review of the Federal Tort Claims Act and Reported Decisions to Date*, 26 N.C. L. Rev. 119, 126 (1948) ("Such a provision is, of course, in accord with the common law rule that a claimant can have but one satisfaction for one wrong. Presumably, the claimant will have been made whole by virtue of the judgment he obtained against the government and hence should have no claim against the employee.") (footnote omitted). These objectives were achieved, in part, through section 2676, by extending the res judicata effect of a judgment on an FTCA claim to the employee.

Section 2672 of the FTCA likewise requires this reading of section 2676. Section 2672 states that acceptance of an administrative settlement constitutes "a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." This language in many ways mirrors the language of the judgment bar. Furthermore, during the hearing on the bill later enacted as the FTCA, the only example provided of the operation of the judgment bar

bundled together sections 2672 and 2676, and explained that these provisions would come into play where "the claimant has *obtained satisfaction of his claim* from the Government, either by a judgment or by an administrative award." Hearing at 9 (emphasis added). The "complete release" of section 2672 applies only in instances where the claimant has accepted a settlement at the administrative stage, thereby substantively resolving the matter. The parallelism—of both language and purpose—between section 2672 and section 2676, and the unitary treatment of the two sections in the legislative history, further support reading the judgment bar to address only cases in which the judgment substantively resolves the plaintiff's tort claim.

The understanding that the judgment bar and the administrative settlement provision serve similar purposes and that the judgment bar applies only where the substantive merits of the underlying tort claim have been resolved is reflected in this Court's earliest statement with respect to the bar. In *United States v. Gilman*, 347 U.S. 507 (1954), the Court explained:

> The Tort Claims Act does not touch the liability of the employees except in one respect: by 28 U.S.C. § 2676, it makes the *judgment against the United States* "a complete bar" to any action by the claimant against the employee. And see § 2672.

Id. at 509 (emphasis added); *see also Benbow v. Wolf*, 217 F.2d 203, 205 n.4 (9th Cir. 1954) ("The Congress has the apparent intention that the individual be not pursued if the United States be liable."). Early commentators construed the judgment bar similarly. *See* Note, *Government Recovery of Indemnity from Negligent Employees: A New Federal Policy*, 63 Yale L.J. 570, 575 n.30 (1954) ("palpably unfair" to construe judgment bar

to apply to all judgments, such as "where judgment is rendered for the Government on the grounds that the employee acted outside the scope of his employment"); Parker, *The King Does No Wrong—Liability for Misadministration*, 5 Vand. L. Rev. 167, 176 (1952) (judgment bar "obviously" does not apply where first action was dismissed because the employee had not acted within the scope of his employment); Note, 56 Yale L.J. at 559 (stating that the bar "clearly applies only to judgment rendered on the merits and should not be interpreted as referring to any judgment by which the court denies jurisdiction").

C. Notably, petitioners concede that a dismissal "distinct" from the merits of a claim, such as dismissal for subject-matter jurisdiction, generally is not a "judgment on the merits" with res judicata effect. They suggest, however, that "in [a] rare situation," that "rule" does not apply. Pet. Br. 36. Specifically, petitioners argue that a claim is precluded by a prior dismissal for lack of jurisdiction where the jurisdictional inquiry and the merits inquiry "turn on the exact same legal issue." *Id.* Petitioners declare that because a dismissal on the ground that an exception to the FTCA waiver of sovereign immunity applies means that the government "is not substantively liable for the alleged tort," that dismissal is "on the merits." Only petitioners' imprecision makes the point appear tenable. To be sure, the determination that an exception applies means that the government is not liable, but the determination does not address the *substance of the tort claim*: It does not require the court to consider duty, causation, injury, or any other aspect of the underlying claim.

Similarly, even today, although the preclusive effect of a judgment in a suit against the employer based on

respondeat superior has expanded since 1946, a court decision that an employer is not liable under a respondeat superior theory, without adjudication of the underlying claim, is not res judicata as to the employee's liability. *See*, *e.g.*, *Stephens v. Jessup*, 793 F.3d 941, 945 (8th Cir. 2015) (no preclusion where court cannot discern whether earlier case against employer found employee had not acted within scope of employment or found employee had not been negligent); *Gray v. Lacke*, 885 F.2d 399, 405-06 (7th Cir. 1989) (holding that claims against County employees not barred by earlier unsuccessful claim against County, where judgment for County was entered because plaintiff could not show that employees were acting pursuant to official policy and court reserved question of employees' liability); *Morgan v. City of Rawlins*, 792 F.2d 975, 980 (10th Cir. 1986) (applying Wyoming law to hold that "[i]f the only basis of the City's liability was respondeat superior, and the suit was dismissed, Mr. DeHerrera can still be subject to suit in his own capacity"); *Lober v. Moore*, 417 F.2d 714, 718 n.31 (D.C. Cir. 1969) (holding that res judicata barred claim against employee who was acting within the scope of his employment, but stating: "If it were possible that the employer's exoneration by the Virginia judgment came in consequence of a finding that the employee acted beyond the scope of his employment, the judgment would not merit conclusiveness here.").

The cases on which the government relies are not to the contrary. In *Rose v. Town of Harwich*, 778 F.2d 77 (1st Cir. 1985) (Judge Breyer), for example, the court held that, although the state court had used the term "jurisdiction" when it held that the statute of limitations had run, "Massachusetts would treat this particular limitations-based dismissal as one with claim-preclusive effect," as the first court had made a definitive

determination that the limitations period extinguished both the right and the remedy. *Id.* at 79-80. In Mr. Himmelreich's FTCA case, however, the court made no such determination, holding only that it "lack[ed] subject matter jurisdiction over acts falling within the discretionary function exception" and that the claims alleged fell within that exception. Pet. App. 49a-53a. In short, *Rose* applies the same approach as the decisions discussed above, and, under it, Mr. Himmelreich's claims are not precluded here.

Petitioners (at 34) argue that the section 2680 exceptions are substantive, and thus that a dismissal based on section 2680 has a substantive quality. But the key inquiry is not whether the exceptions have "substantive" content, but their role in the FTCA. The very first line of section 2680 makes their role clear: "The provisions of this chapter and section 1346(b) shall not apply to—." That is, the exceptions limit the scope of the government's liability for employees' torts. *See* Hearing at 28 (describing § 2680 claims as "exemptions" and "exceptions" from the bill, in contrast to torts "within the scope of the bill"). Regardless of whether the parties are correct to view exceptions as jurisdictional, *see* Pet. Br. 4-5; Resp. Br. 3, dismissal based on a section 2680 exemption (or because the government employee was not acting within the scope of his employment) does not touch on the merits question in the case: whether the employee committed a tort under the applicable state law. It is a decision with respect to whether the case falls within the class of cases for which the United States may be sued.

That a plaintiff's suit against the government failed for a reason having nothing to do with the merits of the underlying tort claim provides no reason—from either

the standpoint of traditional res judicata principles or that of the policies underlying the FTCA—to bar a claim against the employee. Just as res judicata would not bar a subsequent suit, so too section 2676 should not be stretched to do so.

III. Petitioners' reading has inequitable and irrational outcomes.

Giving the judgment bar a common-sense reading that accords with principles of res judicata serves the goals of the statute and avoids unjust results. Petitioners' reading, however, would transform the judgment bar from a tool for fairness and efficiency into a punitive provision to trap unsophisticated plaintiffs or those who—at the start of litigation, before discovery—have a good faith (but incorrect) belief that a federal employee was acting within the scope of employment or that a claim does not fall within an exception to the waiver of sovereign immunity. *Cf. Dolan v. U.S. Postal Serv.*, 546, 481, 491 (2006) (rejecting government's "unduly generous interpretation" of FTCA exception that would "run the risk of defeating the central purpose of the statute").

Lacking a crystal ball, many plaintiffs with viable claims cannot avoid the "Kafka-esque" results of the government's position. *Manning v. Miller*, 546 F.3d 430, 438 (7th Cir. 2008) (quoting *McCabe v. Macaulay*, 2008 WL 2980013, at *14 (N.D. Iowa 2008)). Although some courts have suggested that plaintiffs could protect themselves by bringing both a *Bivens* claim and an FTCA claim in the same suit, the government would block that avenue as well. For example, at the government's urging, the Seventh Circuit in *Manning* held that a later FTCA judgment bars entry of judgment on an *earlier Bivens* verdict in the same case.

Manning had been erroneously convicted of kidnapping and murder, based in part upon material evidence fabricated by agents. *Id.* at 432. Heeding the Seventh Circuit's advice that "plaintiffs contemplating both a *Bivens* claim and an FTCA claim will be encouraged to pursue their claims concurrently in the same action, instead of in separate actions," *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996), Manning after he was cleared brought the two claims together in one complaint. The claims were tried together, the *Bivens* claim to a jury and the FTCA claim to the judge. The jury found in favor of the plaintiff on his *Bivens* claim and awarded $6.5 million in damages. Before the district court had ruled on the FTCA claims, Manning moved for entry of judgment on the jury's *Bivens* verdict, noting concern that a subsequent judgment on his FTCA claim might nullify the *Bivens* judgment. A year later, without having ruled on the motion for entry of judgment, the district court found for the United States on the FTCA claims. Citing the judgment bar, the defendants then moved to vacate the jury verdict on the *Bivens* claim. The district court granted the motion. *See* 546 F.3d at 434.

Affirming the district court's order, the Seventh Circuit in *Manning* suggested that the plaintiff was to blame for losing his favorable *Bivens* judgment because he did not dismiss the FTCA claim after obtaining the *Bivens* verdict. 546 F.3d at 438. But at that stage of the case, a plaintiff cannot unilaterally dismiss. *See* Fed. R. Civ. P. 41(a). Moreover, in the government's view, even a voluntary dismissal of an FTCA claim triggers the judgment bar. *See Palma v. Dent*, 2007 WL 2023517, at *1, *5 (N.D. Cal. July 12, 2007) (rejecting government's argument that a *Bivens* claim was barred by a contemporaneously filed FTCA claim that was voluntar-

ily dismissed without prejudice). Under the government's reading, any resolution of an FTCA claim, once filed, bars other claims, whether filed before or after, and regardless of the reason why the FTCA claim was dismissed. *See*, *e.g.*, *Estate of Trentadue v. United States*, 397 F.3d 840, 859 (10th Cir. 2005) ("[T]he fact that the district court entered judgment on the *Bivens* claims before issuing its order and judgment in the FTCA case is inconsequential under § 2676.").

The government's invocation of the judgment bar in Westfall Act cases further illustrates the irrational results of the government's position. Under the Westfall Act, the government can transform certain claims—but not *Bivens* claims—into FTCA claims by certifying that the wrongful act that forms the basis for the suit was committed by an "employee of the Government while acting within the scope if his office or employment." 28 U.S.C. § 2679(b)(1). The government has used the Westfall Act certification in combination with section 2676 as a basis for dismissal of *Bivens* claims in ways that neither reflect nor further the purposes of the FTCA and the Westfall Act.

In *Freeze v. United States*, 343 F. Supp. 2d 477, 481 (M.D.N.C. 2004), for example, after the government's Westfall Act substitution, the government attorney moved to dismiss the resulting FTCA claim for failure to exhaust and the *Bivens* claim on the basis of the judgment bar. The court dismissed both claims. In another case, *Maxwell v. Dodd*, 2009 WL 3805597 (E.D. Mich. 2009), the plaintiffs sued government employees in connection with an unlawful search, alleging both Fourth Amendment violations and state tort claims. When the government substituted in and converted the claims into FTCA claims, the case was dismissed without prejudice

for failure to exhaust the FTCA administrative remedy. Rather than exhausting, the plaintiffs amended their complaint to allege only *Bivens* claims against the individuals. *Id.* at *1-*2. The individuals, represented by the U.S. Attorney's Office, then moved to dismiss that complaint on the basis of the judgment bar. *Id.* at *3 (quoting defendants as asserting "'[t]he judgment bar applies in this case simply because plaintiff alleged state law claims against [] federal employee(s) acting within the scope of their federal employment'"). In other words, although the plaintiffs neither filed nor pursued an FTCA suit, the government's position was that the judgment bar blocked the plaintiffs from any remedy at all. There, the court rejected the argument, *id.* at *4, but the government's position there follows from its position before this Court.

The Court should not sanction the government's plea to transform the FTCA into a trap for the unwary.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

ALLISON M. ZIEVE
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Counsel for amici curiae

February 2016