No. 04-1332

In the Supreme Court of the United States

RICHARD WILL, ET AL., PETITIONERS

v.

SUSAN HALLOCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The Federal Tort Claims Act (FTCA) provides, without limitation, that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar" to an action against a federal employee concerning the same subject matter as the FTCA suit. 28 U.S.C. 2676. Thus, a claimant who chooses to sue the United States under the FTCA is barred from suing a federal employee based on the same subject matter once her FTCA claim goes to judgment. In their brief in opposition, respondents do not dispute that they previously brought an action under 28 U.S.C. 1346(b), that judgment was entered against them in that FTCA action, and that the present action, brought against the individual government employees under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), arises out of the same subject matter as respondents' prior FTCA action. Section 2676, by its terms, thus bars respondents' suit. The court of appeals' contrary ruling squarely conflicts

with decisions of other courts of appeals and warrants review by this Court.

Respondents largely ignore the text of Section 2676 and focus instead on certain policy arguments that they view as sufficient to render Section 2676 inapplicable here "despite [its] literal, unconditional text," Br. in Opp. 6. None of those arguments is sound. Respondents' contention that the Court should recognize an implicit exception for constitutional claims in 28 U.S.C. 2676 based on the express exception for such claims in 28 U.S.C. 2679(b)(2) ignores the salient points that the difference in text should matter and that Section 2679(b)'s express exception only demonstrates that Congress knows how to exempt constitutional claims when it so desires. Moreover, to infer such a limitation in Section 2676 would render that provision largely superfluous because *Bivens* claims not excluded by Section 2679 are the claims most likely to implicate the judgment bar. It is with good reason that no court of appeals, including the court below, has adopted respondents' notion that *Bivens* claims are categorically outside the reach of Section 2676. See pp. 3-6, *infra*.

Respondents' attempts to defend the court of appeals' rationale fare no better. In particular, respondents' effort to distinguish between FTCA judgments that trigger Section 2676 and those that do not fails to account for the significant practical and conceptual overlap between "jurisdictional" and "merits" defenses under the FTCA and the fact that such defenses often may be raised either on a motion to dismiss or on summary judgment. Congress did not intend such subsidiary and often abstract issues to undermine the categorical nature of the judgment bar. Moreover, respondents' attempt to circumscribe the language of Section 2676 is inconsistent with this Court's decisions construing similar provisions of the FTCA.

A. Respondents' first argument (Br. in Opp. 6-11) does not seek to defend the court of appeals' decision on its own terms, but rather offers an alternative theory: that Congress impliedly amended 28 U.S.C. 2676 in 1988 to exempt constitutional claims against governmental officers from the judgment bar's scope when it enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4564. Respondents offer no authority for that novel proposition, which is contrary to the text of the very provisions respondents purport to "harmonize[]," Br. in Opp. 10.

The Westfall Act amended the FTCA to provide, as a general rule, that a suit against the United States under the FTCA is the exclusive remedy for torts committed by a federal employee acting within the scope of his employment, and that the United States should be substituted as the defendant in any such suit. See 28 U.S.C. 2679(b)(1) and (d)(1).[1] Section 2679(b)(2) creates an exception to that general rule for *Bivens* and certain statutory actions. See 28 U.S.C. 2679(b)(2)(A) and (B). Respondents contend that the Westfall Act's express exception for *Bivens* claims "should control interpretation of" Section 2676's judgment bar as well, "despite [Section 2676's] literal, unconditional text, and the fact that it ha[s] not been expressly amended by" the Westfall Act. Br. in Opp. 6. There is, however, no basis for the Court to ignore the "literal, unconditional text" of Section 2676 merely because the

[1] The Westfall Act was enacted in response to this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), which exposed federal employees to personal tort liability for actions that were within the scope of their employment but were not discretionary in nature. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 425-426 (1995).

Westfall Act expressly carves out an exception for *Bivens* claims from a different provision.[2]

To the contrary, as explained in the certiorari petition (at 17 n.5), Section 2679(b)(2)(A)'s explicit carve-out for *Bivens* claims is an additional reason *not* to read an implied exception for *Bivens* claims into Section 2676. By expressly excluding *Bivens* claims from the FTCA exclusivity provision when it enacted the Westfall Act, Congress demonstrated its awareness that that provision otherwise would have barred a *Bivens* action. But Congress did not carve out a similar exception to the judgment bar in Section 2676. As the Court noted in *United States* v. *Smith*, 499 U.S. 160 (1991), the Westfall Act exception for *Bivens* claims makes clear that Congress knew how to preserve constitutional-tort liability of federal employees when it desired to do so, and that inferring other exceptions in the FTCA is not warranted. See *id.* at 166-167 (citing *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.")).

In fact, it is not at all clear what function the judgment bar would continue to serve if the Court were to engraft the

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[2] To the extent respondents argue that a federal statute cannot, consistent with the Constitution, effect or limit *Bivens* remedies, see, *e.g.*, Br. in Opp. 11, 14, 18, that argument is foreclosed by this Court's decisions in *Bush* v. *Lucas*, 462 U.S. 367, 372, 389-390 (1983) (civil service statutes foreclose a *Bivens* action even if the "civil service remedies were not as effective as an individual damages remedy and did not fully compensate [the employee] for the harm he suffered"), and *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988) (declining to recognize *Bivens* remedy for Social Security claimants challenging termination of their benefits, explaining that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies").

Westfall Act's exceptions onto Section 2676. In other words, the exception of *Bivens* and certain federal statutory claims alone from the Westfall Act means they are the classes of cases most likely to be affected by the judgment bar. If the judgment bar did not apply to those claims within the Westfall Act exemptions, it would be superfluous, because, with respect to all other claims, the United States could always substitute itself for the individual defendants and then move to dismiss on the same grounds that led to the dismissal of the first FTCA claim. See *Smith*, 499 U.S. at 166 (holding that the Westfall Act applies even where the FTCA provides no means of recovery).

This case is not like *United States* v. *Estate of Romani*, 523 U.S. 517 (1998), upon which respondents rely. See Br. in Opp. 6-10. *Romani* concerned the relative priority of federal liens over other claims. The general priority statute, 31 U.S.C. 3713(a), dating from 1797, states in general terms that the United States "shall be paid first" from an insolvent decedent's estate. *Romani*, 523 U.S. at 519. In the specific context of tax liens, however, Congress has more recently made a different determination as to which claims should take priority over the government's claim for unpaid taxes. *Id.* at 532 (citing 26 U.S.C. 6323). In that context, the Court held, as it had in other cases involving the priority statute, that the later, specific priority statute governed, rather than the earlier, general provision, which would have "frustrate[d] a specific policy embodied in a later federal statute." *Id.* at 530 (quoting *Massachusetts* v. *United States*, 333 U.S. 611, 635 (1948) (Jackson, J. dissenting)).

The Westfall Act's exception for *Bivens* claims from Section 2679(b)'s exclusivity provision would not be frustrated by applying the judgment bar, as written, to *Bivens* claims. The Westfall Act and Section 2676 impose *distinct* limitations on FTCA claims. This therefore is not a situation, as in *Romani*,

in which the question is whether a later statute supplants an earlier statute that covered the *same subject matter*. The Westfall Act "makes the FTCA the exclusive mode of recovery for the tort of a Government employee," except for constitutional and certain statutory violations. *Smith*, 499 U.S. at 166-167; 28 U.S.C. 2679(b)(2)(A) and (B). The judgment bar, by contrast, presupposes the existence of separate causes of action and prevents a claimant whose FTCA claim against the United States has gone to judgment from also seeking a remedy from individual federal employees. Nothing in the judgment bar prevents a claimant from electing to pursue a *Bivens* remedy against government officials who have violated her constitutional rights, so long as she has not brought a suit against the United States pursuant to the FTCA that has gone to judgment. Thus, the Westfall Act's exception for *Bivens* claims is not frustrated by the judgment bar, and there is no basis for reading an implied limitation into the judgment bar's express terms in order for it to be "harmonized," Br. in Opp. 10, with the Westfall Act.

Finally, it is notable that no court of appeals has embraced respondents' theory. Each of the six circuits to address the question has held that Section 2676 does apply to *Bivens* claims. See Pet. App. 12a-14a; *Farmer* v. *Perrill*, 275 F.3d 958, 963 (10th Cir. 2001); *Hoosier Bancorp, Inc.* v. *Rasmussen*, 90 F.3d 180, 184-185 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437-1438 (9th Cir 1994), cert. denied, 515 U.S. 1144 (1995); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Serra* v. *Pichardo*, 786 F.2d 237, 241 (6th Cir.), cert. denied, 479 U.S. 826 (1986). Respondents' argument based on the Westfall Act accordingly provides no reason for the Court to decline to grant a writ of certiorari to resolve the important conflict that *does* exist among the circuits.

B. Respondents argue in the alternative (see Br. in Opp. 11-15) that the court of appeals was correct to hold that their

prior FTCA claim was "non-justiciable" and therefore a "nullity"—and that the judgment bar in 28 U.S.C. 2676 is therefore inapplicable—because their FTCA suit was dismissed for lack of subject matter jurisdiction on the basis of the FTCA's detention-of-goods exception, 28 U.S.C. 2680(c). Respondents cannot reconcile that argument with this Court's decisions construing the parallel text in other provisions of the FTCA, and they fail to come to grips with the breadth of their position in light of the fact that so many defenses under the FTCA can be viewed as "jurisdictional."

1. Respondents do not deny that they sued the United States under 28 U.S.C. 1346(b). But they nonetheless contend that the judgment dismissing that suit was not a "judgment in an action under 1346(b)" for purposes of 28 U.S.C. 2676 because the basis for the prior judgment was that the United States' sovereign immunity was preserved by the detention-of-goods exception in Section 2680(c). Br. in Opp. 11-12. That argument is inconsistent with this Court's decisions in *Smith* and *FDIC* v. *Meyer*, 510 U.S. 471 (1994). As the certiorari petition explains (at 16-19), those decisions construed similar language of the FTCA in 28 U.S.C. 2679(b)(1) ("[t]he remedy * * * provided by sections 1346(b) and 2672") and 28 U.S.C. 2679(a) ("claims * * * cognizable under section 1346(b)") to bar any state tort claim arising out of the conduct of a federal employee from being brought against a federal employee or agency, even though ultimate recovery against the United States might be precluded by one of the FTCA's limitations, such as one of the exceptions in Section 2680. *Smith*, 499 U.S. at 165-166; *Meyer*, 510 U.S. at 477 & n.5. Respondents point out certain factual differences between this case and those (Br. in Opp. 22-23), but they offer no analysis of the text of the FTCA provisions the Court construed in *Smith* and *Meyer* that would explain why the closely parallel language of Section 2676 should not be interpreted in the same manner.

2. As the petition demonstrates (at 11-14), the supposed distinction between jurisdictional and merits-based judgments, upon which the court of appeals relied, is unworkable in the context of the FTCA. Respondents in no way allay that concern. Rather, their attempts to explain the distinction provide further evidence of how ephemeral it is.

For example, the petition notes that, whereas the court of appeals identified a judgment on statute-of-limitations grounds as one that *would* trigger the judgment bar (Pet. App. 15a), a dismissal for lack of jurisdiction on statute-of-limitations grounds in the FTCA context can also be termed a dismissal on grounds of sovereign immunity—as, indeed, the Second Circuit itself has done. See *Johnson* v. *Smithsonian Inst.*, 189 F.3d 180, 189-190 (2d Cir. 1999); *Millares Guiraldes de Tineo* v. *United States*, 137 F.3d 715, 719-720 (2d Cir. 1998). Respondents agree that a statute-of-limitations dismissal is "an adjudication on the merits," Br. in Opp. 17, but disclaim any inconsistency with *Johnson* and *Millares*, *id.* at 19-20. Respondents contend that in *Millares*, for example, the issue "was not the Statute of Limitations, but the failure to give timely notice as required by the Federal Tort Claim Act." *Id.* at 21. But that is a distinction without a difference. Indeed, *Johnson* recognized that the notice requirement in 28 U.S.C. 2401(b), which provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues," *is* a "statute of limitations." See 189 F.3d at 190.

Respondents also embrace the court of appeals' distinction between the grant of a motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), which, in their view, does not trigger the judgment bar, Br. in Opp. 19, and a judgment in the government's favor at the summary judgment stage, which they concede *does* trigger the judg-

ment bar, even when summary judgment is based on one of the FTCA's exceptions, see *id.* at 16 ("summary judgment [based on the exception provided by Section 2680(c)] is clearly an adjudication on the merits"). There is simply no basis in the text or purposes of Section 2676 to distinguish between a judgment dismissing a claim under Rule 12(b)(1) on the basis of one of the FTCA's exceptions in Section 2680, as occurred in respondents' prior FTCA suit, and a judgment on that same basis entered at the summary judgment stage of the litigation. The need for minimal factual development routinely forces courts to make jurisdictional judgments at the summary judgment stage, and, on the other hand, they just as routinely dismiss cases "on the merits" prior to factual development, pursuant to a 12(b)(6) motion to dismiss.

C. Finally, contrary to respondents' contention (Br. in Opp. 15-18), the Second Circuit's decision in this case creates a square conflict with decisions of the Ninth Circuit in *Gasho*, 39 F.3d 1420, and the Seventh Circuit in *Hoosier Bancorp*, 90 F.3d 180.

The *Gasho* plaintiffs, who sued under the FTCA and *Bivens* after their airplane was seized by customs agents, lost on at least one count of their FTCA action on summary judgment because the actions of the customs agents who seized their plane were excepted from liability under the FTCA by 28 U.S.C. 2680(c). See *Gasho*, 39 F.3d at 1433. Thus, that count, like respondents' FTCA claim here, failed because it was barred by sovereign immunity. The Ninth Circuit then proceeded to apply the judgment bar to the *Gasho* plaintiffs' corresponding *Bivens* claim, stating that because "we have affirmed the district court's judgment in favor of the United States in the FTCA claims involving the seizure of the aircraft, that prior judgment precludes any subsequent *Bivens* claim based on the seizure." *Id.* at 1438. Contrary to respondents' suggestion (Br. in Opp. 15-16), nothing in *Gasho* turns

on the nature of a claimant's tort allegations or the stage of the proceedings at which the ruling under Section 2680(c) occurred.

Respondents are also incorrect in asserting that *Hoosier Bancorp*'s conclusion that Section 2676 barred the plaintiffs' *Bivens* claims was dictum. The Seventh Circuit characterized that part of its *Hoosier Bancorp* decision as "an alternate ground for dismissing the present case." See 90 F.3d at 184. An alternative ground is not dictum. See 1B James Wm. Moore, *Moore's Federal Practice* ¶ 0.441[2], at III-523 (2d ed. 1996) ("a judgment based alternatively upon two determinations, either of which alone would have been sufficient to sustain it, is an effective adjudication as to both grounds, and is collaterally conclusive as to both"); *Yamaha Corp. of Am.* v. *United States*, 961 F.2d 245, 255 (D.C. Cir. 1992), cert. denied, 506 U.S. 1078 (1993) (same). Thus, as the Second Circuit recognized, the decision below squarely conflicts with *Hoosier Bancorp*. See Pet. App. 14a ("We do not stand with the Seventh Circuit in its analysis of the issue before us."). This Court should grant certiorari to resolve that conflict.[3]

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[3] Respondents raise a question (Br. in Opp. 13-14) as to how the judgment bar should apply to a case in which an FTCA claim and a *Bivens* claim are filed together. That question is not presented in this case. Here, petitioners rely on a *final* judgment in a *separate* case as precluding respondents' *Bivens* claims.