No. 19-546

IN THE

Supreme Court of the United States

DOUGLAS BROWNBACK, ET AL.,

Petitioners,

—v.—

JAMES KING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF MICHIGAN, AND THE ACLU OF UTAH, IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU regularly appears before this Court, both as direct counsel and as amicus curiae.[1] Having represented many 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 implicate the ACLU's broader commitment to ensuring that aggrieved individuals have access to the courts. The ACLU of Michigan is the state affiliate of the national ACLU in the jurisdiction where this action originated. The ACLU of Utah is a state affiliate that is involved in litigation in which the outcome of this case has a potential impact.

STATEMENT

Respondent James King alleges that two plainclothes task force officers wrongfully stopped, arrested, and beat him, when the officers mistook him for a fugitive. Pet. App. 78a. Respondent brought a single lawsuit—against the United States under the Federal Tort Claims Act (FTCA), and against the individual officers for constitutional violations under *Bivens v. Six Unknown Named Agents of Federal*

[1] Petitioners and Respondent have consented to the filing of this brief by letter on file with amici. Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Bureau of Narcotics, 403 U.S. 388 (1971). The government moved to dismiss Respondent's FTCA claim for lack of subject-matter jurisdiction under Federal Rule of Procedure 12(b)(1), arguing that the United States was entitled to the governmental immunity that would be afforded to individual officers under Michigan state law, as "the law of the place where the act or omission occurred," 28 U.S.C § 1346(b)(1). *See* Pet. App. 50a, 75a.[2] The district court agreed that a private person would be liable to Respondent under Michigan law only if the Michigan state law standard for overriding governmental immunity was met, which requires a showing of subjective malice. Pet. App. 78a–79a.

The district court ruled that because Respondent's own allegations established that the encounter between him and the officers began as a case of mistaken identity, his complaint did not include factual allegations showing that the officers acted with subjective malice. Pet. App. 79. The district court accordingly dismissed Respondent's FTCA claim for lack of subject-matter jurisdiction and also dismissed his *Bivens* claims. Pet. App. 79a–80a, 65a, 68a, 69a. In the alternative, the district court dismissed Respondent's FTCA claim for failure to state a claim. Pet. App. 79a–80a.

Respondent appealed the dismissal of his *Bivens* claims but not the dismissal of his FTCA claims. Pet. Br. 10. On appeal, the officers argued

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[2] In addition to moving to dismiss for lack of subject-matter jurisdiction, the government simultaneously moved to dismiss this case under Federal Rule of Civil Procedure 12(b)(6) and for summary judgment. Pet. App. 50a. The district court dismissed the FTCA claim for lack of subject-matter jurisdiction. *See* Pet. App. 79a–80a, 12a; *see also* Pet. 7

that the district court's decision dismissing Respondent's FTCA claims for lack of subject-matter jurisdiction triggered the FTCA judgment bar provision. *Id.* The majority and dissent on the court of appeals agreed that the district court held it lacked subject-matter jurisdiction—but disagreed about the consequences. *See* Pet. App. 8a ("[T]he district court dismissed Plaintiff's FTCA claim for lack of subject-matter jurisdiction."); *id.* at 40a ("[T]he district court's order established that the district court lacked subject-matter jurisdiction over the FTCA claims." (Rogers, J., dissenting)). The majority rejected the officers' argument that the FTCA judgment bar precluded Respondent's *Bivens* claims, explaining that because the district court lacked subject-matter jurisdiction over the FTCA claim, its dismissal does not carry any preclusive effect, and the FTCA's judgment bar provision was not triggered. Pet. App. 9a, 12a. Holding that the Respondent's *Bivens* claims were not barred by qualified immunity, the court of appeals remanded.

SUMMARY OF THE ARGUMENT

The question presented by this case is whether the district court's dismissal of Respondent James King's FTCA claim against the United States for lack of subject-matter jurisdiction bars any adjudication of his simultaneously filed *Bivens* action against the individual officers responsible for his injuries. In amici's view, the judgment bar does not apply. That bar, adopted against the backdrop of the common law claim preclusion doctrine, for the limited purpose of eliminating any "mutuality" requirements, necessarily incorporates the common-law understanding that only judgments *on the merits*

have claim preclusive effect. Dismissals for lack of subject-matter jurisdiction are not judgments on the merits, and therefore do not trigger the judgment bar.

Under the FTCA, subject-matter jurisdiction and the merits involve overlapping inquiries. The FTCA waives the United States' sovereign immunity, and therefore affords subject-matter jurisdiction, only when a plaintiff at least *alleges* all six elements set forth in Section 1346(b). On the merits, the statute permits recovery only when a plaintiff goes beyond mere allegations and *proves* all six elements set forth in Section 1346(b)(1). Where, as here, a district court rules that the plaintiff failed even to *allege* facts to support a valid FTCA claim, the district court lacks subject-matter jurisdiction, and a dismissal on that ground is not a "judgment" for purposes of the judgment bar provision. This interpretation accords with this Court's treatment of the similar jurisdictional requirements under the Foreign Sovereign Immunities Act.

This approach does not "nullify" the judgment bar. All the Court need decide here is that when a plaintiff does not even allege facts sufficient to establish jurisdiction under the FTCA, the judgment bar does not apply. Moreover, the fact that a plaintiff fails to allege sufficient facts for FTCA liability does not necessarily preclude liability for a constitutional violation, for the elements of an FTCA claim and a constitutional claim will often differ. The FTCA's judgment bar was designed to forestall two bites at the apple, but where a plaintiff's claim has been thrown out for failure to allege the minimum jurisdictional

requirements under the FTCA, he has not even had one bite at the apple on the merits.[3]

The district court here dismissed Respondent's FTCA claim for failure to allege sufficient facts to establish jurisdiction, and therefore the judgment bar ought not apply. While the district court entered what it described as alternative holdings, it plainly concluded that Respondent had failed to establish subject-matter jurisdiction, because his allegations did not advance a valid claim that the defendant officers acted with subjective bad faith, where the complaint alleged only facts showing a case of mistaken identity. As a result, the court concluded that Respondent had failed to allege facts sufficient to establish the sixth element of Section 1346(b)(1), namely, that "a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." That jurisdictional dismissal does not trigger the judgment bar.

[3] Amici support the views expressed by Public Citizen in its amicus brief, namely that the judgment bar does not apply where, as here, the FTCA and *Bivens* claims were brought in the same lawsuit. That is sufficient to affirm the decision below. *See also* Resp. Br. 26. But here, amici advance an alternative, independently sufficient basis to affirm: that a dismissal for lack of subject-matter jurisdiction, unlike a decision on the merits, does not trigger the judgment bar, even in a subsequent lawsuit.

ARGUMENT

I. THE TERM "JUDGMENT" IN THE FTCA JUDGMENT BAR PROVISION IS LIMITED TO JUDGMENTS ENTITLED TO CLAIM PRECLUSION, AND DOES NOT INCLUDE DISMISSALS FOR LACK OF SUBJECT-MATTER JURISDICTION.

The judgment bar, which takes its meaning from well-settled common law claim preclusion doctrine, applies only to judgments on the merits, and not to dismissals for lack of jurisdiction. The text and context of the FTCA make clear, and the government appears to concede, that the term "judgment" in the FTCA's judgment bar provision is limited to judgments that were entitled to claim preclusive effect under common law, subject only to the modification that under the FTCA, unlike claim preclusion at the time the FTCA was enacted, mutuality is not required. To have preclusive effect, a judgment must have been on the merits. And a decision that a court lacks jurisdiction to hear a claim is not a judgment on the merits. Thus, when a court, as here, dismisses a FTCA claim for lack of subject-matter jurisdiction, that decision does not trigger the FTCA's judgment bar.

A. The Text and Context of the Judgment Bar Provision Establish That it is Limited to Judgments Entitled to a Claim Preclusive Effect.

The FTCA's "judgment bar provision," *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1847 (2016), 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.

28 U.S.C. § 2676. The judgment bar provision incorporates the common law concept of res judicata—and extends it to government employees regardless of whether they were parties to the prior suit. The common law backdrop against which the judgment bar was enacted in 1946 generally did not apply res judicata in the absence of mutuality. "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 the "the mutuality rule had been under fire" at the time the FTCA was passed, "[a]s late as 1961, eminent authority stated that '[m]ost state courts recognize and apply the doctrine of mutuality, subject to certain exceptions [. . . .] And the same is true of federal courts, when free to apply their own doctrine.'" *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 322, 326 (1971) (alterations in original) (quoting James Wm. Moore & Thomas S. Currier, *Mutuality and Conclusiveness of Judgments*, 35 Tul. L. Rev. 301, 304 (1961)).

Under the mutuality rule, a suit against the United States resulting in a judgment on the merits in its favor would not necessarily bar re-litigation of the same claim against the individual government employees, so long as they were not parties to the first lawsuit. The FTCA's judgment bar provision closed

this loophole, by extending the common law doctrine of res judicata to prevent re-litigation of claims even absent mutuality. As this Court explained:

> The judgment bar provision supplements common-law claim preclusion by closing a narrow gap: At the time that the FTCA was passed, common-law claim preclusion would have barred a plaintiff from suing the United States after having sued an employee but not vice versa. The judgment bar provision applies where a plaintiff first sues the United States and then sues an employee.

Simmons, 136 S. Ct. at 1850 n.5 (citing Restatement (First) of Judgments §§ 99, 96(1)(a), Comments *b* and *d* (1942)).

The judgment bar provision's title, "judgment as bar" and its use of the term "complete bar," 28 U.S.C. § 2676, refer to and incorporate the common law of claim preclusion, and limit the term "judgment" to judgments that would be entitled to res judicata effect under common law.[4] "[T]he doctrine of res judicata or claim preclusion" provides "'a *complete bar* to a new suit between [the parties or their privies] on the same cause of action'" where "'[a] final judgment, [is] rendered upon the merits by a court having jurisdiction of the cause.'" *Semtek Int'l Inc. v.*

[4] The term "res judicata" is used both as a synonym for claim preclusion and to refer more broadly to the "effects of a judgment separately characterized as 'claim preclusion' and 'issue preclusion.'" 18A Charles Alan Wright, et al., Fed. Prac. & Proc. Juris. § 4402 (3d ed. 2020). ("§ 4402 The Terminology of Res Judicata"). The statute's use of "complete bar" makes clear it incorporates the claim preclusion aspect of res judicata.

Lockheed Martin Corp., 531 U.S. 497, 502 (2001) (emphasis added) (quoting *Goddard v. Security Title Ins. & Guarantee Co.*, 92 P.2d 804, 806 (Cal. 1939)); *see Montgomery v. Samory*, 99 U.S. 482, 490 (1878) (describing "*res judicata*" as "as a *complete bar* against all persons") (emphasis added); *see also Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1595 (2020) (claim preclusion "describes the rules formerly known as 'merger' and 'bar.'") (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892, n.5 (2008)); Resp. Br. 16 n.3–4, 18 n.6. (citing Supreme Court and state supreme court cases using the language of "complete bar" or "judgment as bar" to refer to claim preclusion).

The United States made just this argument in 1954: "Section 2676 is merely an application of the generally accepted common law principle of *res judicata* or estoppel by judgment." Br. for the United States, *Unites States v. Gilman*, 347 U.S. 507 (1954), 1954 WL 72902, at 36. And this Court has explained that "the judgment bar provision 'functions in much the same way' as" the "common-law doctrine of claim preclusion." *Simmons*, 136 S. Ct. at 1850 n.5 (quoting *Will v. Hallock*, 546 U.S. 345, 354 (2006)); *see also Will*, 546 U.S. at 354 (explaining that "[a]lthough the statutory judgment bar is arguably broader than traditional res judicata, it functions in much the same way, with both rules depending on a prior judgment as a condition precedent and neither reflecting a policy that a defendant should be scot free of any liability." (footnote omitted)). Here, although the government cites general dictionary definitions of the term "judgment" unmoored from the common law, it nonetheless acknowledges that "[t]his Court has observed that, when Congress adopted the judgment

bar, it drew in a rough way on concepts of common-law claim preclusion, and expanded them" by "relax[ing] th[e] mutuality requirement." Pet. Br. 22.

B. Claim Preclusion is Limited to Prior Claims Decided "On the Merits."

As the United States concedes, "[b]oth at the time Congress enacted the FTCA and now, common-law claim preclusion applies where a court enters 'a judgment upon the merits.'" Pet. Br. 23 (quoting *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620, 623 (1933)). "It is commonly said that preclusion can rest only on a judgment that is valid, final, and on the merits." 18A Charles Alan Wright, et al., *Fed. Prac. & Proc. Juris.* § 4435 (3d ed. 2020) [hereinafter Wright] (footnotes omitted). As this Court has explained:

> [res judicata] provides that when a court of competent jurisdiction has entered a final judgment *on the merits of a cause of action*, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) (emphasis added) (quoting *Cromwell v. Cty. of Sac*, 94 U.S. 351, 352 (1876)).

"Under res judicata, a final judgment *on the merits* of an action precludes the 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) (emphasis added); *see Montana v. United States*, 440 U.S. 147, 153 (1979) ("Under res judicata, a final judgment *on the merits* bars further claims by parties or their privies based on the same cause of action." (emphasis added)); *Cromwell*, 94 U.S. at 352 ("[T]he judgment, *if rendered upon the merits*, constitutes an absolute bar to a subsequent action." (emphasis added)).

By contrast, "[a]t common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." *Costello v. United States*, 365 U.S. 265, 285 (1961). Thus, at the time the FTCA was enacted, the ordinary meaning of the term "judgment" for purposes of claim preclusion was a "judgment on the merits." A dismissal for lack of subject-matter jurisdiction is not a judgment on the merits, and thus not entitled to claim preclusive effect. *Hughes v. United States*, 71 U.S. 232, 237 (1866) ("In order that a judgment may constitute a bar to another suit, it . . . must be determined on its merits. If the first suit was dismissed for . . . the want of jurisdiction, . . . the judgment rendered will prove no bar to another suit."); *Smith v. McNeal*, 109 U.S. 426, 431 (1883) (same); *see generally* Restatement (First) of Judgments § 49 (1942) (explaining that a judgment is not preclusive "where the judgment is based on the lack of

jurisdiction of the court . . . over the subject of the action.").[5]

Because this well-settled understanding formed the legal backdrop for the FTCA, the statute must be read to reflect that original understanding. Contemporaneous scholarly work reinforces the point, noting that the judgment bar provision "clearly applies only to judgments rendered on the merits and should not be interpreted as referring to any judgment by which the court denies its jurisdiction." *The Federal Tort Claims Act*, 56 Yale L.J. 534, 559 (1947).

As this Court explained in interpreting another legal term of art in the FTCA,

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and

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[5] This remains the rule to this day. *See, e.g.*, *Prakash v. Am. Univ.*, 727 F.2d 1174, 1182 (D.C. Cir. 1984) ("A dismissal for lack of subject-matter jurisdiction . . . is not a disposition on the merits and consequently does not have res judicata effect." (footnotes omitted)); *see generally* Restatement (Second) of Judgments § 20 (1982) ("A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim . . . When the judgment is one of dismissal for lack of jurisdiction."). The principle that dismissal for lack of jurisdiction is not a judgment on the merits entitled to claim preclusion is also embodied in Federal Rule of Civil Procedure 41(b), which provides: "Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—*except one for lack of jurisdiction*, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." Fed. R. Civ. P. 41(b) (emphasis added)); *see Costello*, 365 U.S. at 286 ("We do not discern in Rule 41(b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition.").

> adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Molzof v. United States, 502 U.S. 301, 307 (1992) (quoting *Morissette v. United States,* 342 U.S. 246, 263 (1952)) (interpreting "punitive damages" as used in 28 U.S.C. § 2674). Thus, as this Court stated in *Simmons,* where a court "issued a judgment dismissing" a suit because the plaintiff "simply failed to *prove* his claim, it would make little sense to give [plaintiff] a second bite at the money-damages apple by allowing suit against the employees." *Simmons*, 136 S. Ct. at 1849 (emphasis added). But where there has been no decision on the merits, a dismissal of a case for lack of subject-matter jurisdiction, like a dismissal under the "Exceptions" section at issue in *Simmons*, "would not be entitled to claim-preclusive effect" and therefore "should not foreclose a second suit against individual employees." *Id.* at 1850 n.5.

II. A FEDERAL COURT LACKS SUBJECT-MATTER JURISDICTION UNDER THE FTCA IF THE COMPLAINT FAILS TO INCLUDE FACTUAL ALLEGATIONS THAT SATISFY THE STATUTE'S JURISDICTIONAL ELEMENTS.

A. The FTCA Sets Forth Six Elements Necessary for Subject-Matter Jurisdiction, and Therefore a Failure to Allege Facts Supporting Those Elements Deprives the Court of Jurisdiction.

A claim comes within the FTCA "jurisdictional grant—and thus is 'cognizable' under § 1346(b)—if it is actionable under § 1346(b)." *F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994). "And a claim is actionable under § 1346(b) if it alleges the[se] six elements," :

> [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. (alterations in original) (quoting 28 U.S.C. § 1346(b)); *see United States v. Kwai Fun Wong*, 575 U.S. 402, 411–12, 419 (2015) (referring to § 1346(b) as the "[t]he FTCA's jurisdictional provision."). Because the FTCA sets forth six necessary elements as a

waiver of sovereign immunity, the federal courts have jurisdiction only if the complaint alleges facts supporting all six elements.

In *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, this Court held that to establish subject-matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), "the relevant factual allegations must make out a legally valid claim." 137 S. Ct. 1312, 1316 (2017) [hereinafter *Helmerich*]. The FTCA is, like the FSIA, a waiver of sovereign immunity. And the FTCA's jurisdictional provision, like that of the FSIA, confers jurisdiction only where specific prerequisites are met. Thus, the FTCA, like the FSIA, "grants jurisdiction only where there is a valid claim." *Id.* at 1318–19. Therefore, to establish subject-matter jurisdiction, at minimum a plaintiff must allege facts which, if true, support a valid claim for FTCA liability.

In the first instance, this analysis requires an assessment of whether the complaint *alleged* facts sufficient to establish jurisdiction. "[T]he trial court should engage in a threshold analysis to ensure that the plaintiff's *allegations* are sufficient to confer jurisdiction. This step is, essentially, a facial analysis where 'a presumption of truthfulness should attach to the plaintiff's allegations' to determine if they state facts that plausibly confer jurisdiction." *Kuntze v. Josh Enterprises, Inc.*, 365 F. Supp. 3d 630, 638–39 (E.D. Va. 2019) (emphasis in original) (internal citation and footnote omitted) (quoting *Rich v. United States*, 811 F.3d 140, 145 (4th Cir. 2015)). Unless the plaintiff can meet this threshold, the court lacks subject-matter jurisdiction. *See Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 401 (D.C. Cir. 2018) (concluding that plaintiff "has alleged sufficient

facts to make it plausible" that plaintiff met jurisdictional element); *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 743 F. App'x 442, 444, 446 (D.C. Cir. 2018) ("[d]raw[ing] our factual recitation from the complaint's allegations, assuming their truth and construing them in the light most favorable to the plaintiff companies" and assessing whether the companies "have pled facts that 'do show (and not just arguably show) a taking of property in violation of international law.'" (quoting *Helmerich*, 137 S. Ct. at 1324)).

If the complaint's factual allegations do not plausibly support each element necessary for jurisdiction, the court must dismiss for lack of subject-matter jurisdiction. Moreover, if a defendant challenges the truth of the factual allegations necessary for jurisdiction, a court may permit jurisdictional discovery and then determine, as a factual matter, whether jurisdiction exists. "[W]here jurisdictional questions turn upon further factual development, the trial judge may take evidence and resolve relevant factual disputes." *Helmerich*, 137 S. Ct. at 1316; *see, e.g.*, *In re Terrorist Attacks on Sept. 11, 2001*, 298 F. Supp. 3d 631, 640–41 (S.D.N.Y. 2018).[6] But where a complaint fails to allege the

[6] Courts have rightly been concerned to avoid prematurely forcing plaintiffs to prove their claims in order to establish subject-matter jurisdiction. This concern is properly addressed by "demand[ing] less in the way of jurisdictional proof than it would for a ruling on the merits" to determine subject-matter jurisdiction. *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000). "By requiring less of a factual showing than would be required to succeed at trial, district courts ensure that they do not prematurely grant Rule 12(b)(1) motions to dismiss claims in which jurisdiction is intertwined with the merits and could be

threshold showing, the court need go no further; that alone is sufficient to deny subject-matter jurisdiction.

Where a court dismisses a case for failure to include factual allegations that plausibly establish a jurisdictional element, its decision is jurisdictional. Such a dismissal would not have claim preclusive effect, and is not subject to the FTCA jurisdictional bar. This approach makes eminent sense. The purpose of the FTCA was to deny plaintiffs two bites at the apple. But where a plaintiff has lost on jurisdictional grounds, he hasn't had even one opportunity for a resolution on the merits. In that situation, his *Bivens* action would be his first opportunity to have his claims considered on the merits, and thus his *first* bite at the apple.

B. The Fact That a Dismissal for Lack of Subject-Matter Jurisdiction Does Not Trigger the FTCA Judgment Bar Does Not "Nullify" The Provision.

Judge Rogers, dissenting below, agreed that "the district court's order established that the district court lacked subject matter jurisdiction over the FTCA claims." Pet. App. 40a. But he maintained that a dismissal for jurisdiction "cannot be sufficient to preclude application of the FTCA judgment bar because that would effectively nullify the judgment

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established, along with the merits, given the benefit of discovery." *CNA v. United States*, 535 F.3d 132, 145 (3d Cir. 2008), as amended (Sept. 29, 2008) (footnote omitted); *see generally* Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973, 975 (2006) ("[I]f any factual (or legal) issue that a court must determine in ascertaining the authority of the forum (whether as a matter of jurisdiction, service, or venue) overlaps the merits, a lower standard of proof prevails for jurisdictional purposes, but not for merits purposes.").

bar with respect to cases where the FTCA judgment was in favor of the government." Pet. App. 42a. The government repeats this argument before this Court, Pet. 11, 12, 16, 27; Pet. Br. 13, and contends that merely "alleging the elements under Section 1346(b)(1) confers subject-matter jurisdiction that enables a district court to enter a judgment on the merits of the plaintiff's FTCA claims." Pet. Br. 32. Otherwise, the government argues, "a district court's order resolving the merits of the FTCA claims against the plaintiff [would] retroactively strip the court of jurisdiction," Pet. Br. 32, because "*any* ruling that a plaintiff has failed to prove his FTCA claim must be understood as a dismissal for lack of jurisdiction that cannot trigger the judgment bar." Pet. Br. 30 (emphasis in original).

But to resolve this case the Court need only rule that a dismissal for failure to include factual *allegations* sufficient to establish jurisdiction does not have preclusive effect. It can leave for another day how to address cases where the *allegations* are sufficient but the plaintiff is unable to prevail against a *factual* attack on his jurisdictional claims—in other words, whether the factual allegations that were plausibly recited in the complaint could actually be proved up.

In any event, as this Court made clear in *Helmerich*, the fact that jurisdiction and the merits overlap does not justify a court in bypassing the jurisdictional inquiry to resolve the merits, as the government seems to propose here. Pet. Br. 33–34. Without jurisdiction, the court has no power to act, and therefore jurisdiction must be assessed first. If the jurisdictional and merits issues overlap, the *Helmerich* Court stated that "the court must still

answer the jurisdictional question. If to do so, it must inevitably decide some, or all, of the merits issues, so be it." 137 S. Ct. at 1319. The decision remains a jurisdictional one, and as explained above, therefore does not trigger the judgment bar because jurisdictional decisions are always, whenever raised, a threshold consideration to be determined before power to reach the merits exists.

Moreover, the fact that a plaintiff cannot pursue an FTCA claim does not mean that he cannot pursue a *Bivens* claim. What state law requires and what the federal Constitution require will often diverge. Here, for example, the district court concluded that state law, and therefore the FTCA, required a showing of subjective malice. Pet. App. 78a–79a. The Fourth Amendment, however, turns on objective reasonableness, not subjective intent, *see Whren v. United States*, 517 U.S. 806, 814 (1996), and therefore requires no showing of subjective malice to establish a constitutional violation. The fact that the court lacked jurisdiction to hear Respondent's FTCA claim therefore has little relevance to whether his clearly established constitutional rights were violated.

To resolve this case, the Court need only decide that where a court dismisses a complaint for failure to allege facts sufficient to satisfy the six jurisdictional elements of the FTCA, the judgment bar does not apply. That holding does not nullify the judgment bar; it merely recognizes the fundamental distinction between a dismissal for want of jurisdiction and a ruling on the merits. The government's interpretation of the judgment bar not only fails to pay heed to the courts' obligation to assess subject-matter jurisdiction prior to addressing the merits, but also deprives individuals of the very opportunity the FTCA was

enacted to facilitate—an opportunity to hold government officials accountable when they cause harm.

III. THE DISTRICT COURT'S DISMISSAL OF RESPONDENT'S FTCA CLAIM FOR LACK OF JURISDICTION DOES NOT TRIGGER THE JUDGMENT BAR.

The district court concluded that Respondent's complaint had a fatal omission for purposes of the FTCA: the complaint included no facts to support what the court deemed a necessary element for liability under Michigan law, and therefore, for jurisdiction under the FTCA—subjective bad faith or malice. On Respondent's own allegations, he was the victim of a case of mistaken identity. A mistake does not amount to bad faith or malice, and no allegations suggested anything more. As a result, the district court properly found that it lacked subject-matter jurisdiction. It then offered an alternative holding that Respondent failed to state a claim on the merits, but given its jurisdictional holding, that alternative ruling is pure dicta. Once the court determined that it lacked jurisdiction, it had no authority to address the merits. Because the dismissal was for lack of subject-matter jurisdiction, it does not trigger the judgment bar.

The district court dismissed Respondent's FTCA claims for lack of subject-matter jurisdiction. The district court determined that the complaint failed to include factual allegations that the "United States, if a private person, would be liable to the claimant in accordance with the law of [Michigan] where the act or omission occurred," § 1346(b)(1), the sixth element necessary for jurisdiction over an FTCA

claim. Respondent did not plead or proffer any facts to support the subjective malice that the district court deemed is required under Michigan law. *See* Pet. App. 79a ("[T]he parties' undisputed facts support the finding that the Task Force officers' actions were not undertaken with the malice required under Michigan law."); *see* J.A. 39–40 (Complaint). The complaint offered no allegation that defendants knew that they had made a mistake and went ahead anyway. *See* Pet. App. 79a ("[E]ven Plaintiff 's stated reason for the officers' stop was the officers' determination that Plaintiff was the fugitive, and the officers' motive for restraining Plaintiff was to secure him and ensure their safety after Plaintiff admittedly attempted to flee and bit Officer Allen."); J.A. 46–50 (Joint Statement of Material Facts).

The court concluded that the complaint's factual allegations failed to support an assertion that the officers acted with the "'malicious intent, capricious action or corrupt conduct' or 'willful and corrupt misconduct,'" required to overcome governmental immunity under Michigan state law. Pet. App. 78a (quoting *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 784 (6th Cir. 2015)). Thus, subjective malice, an essential element of jurisdiction over Respondent's claim, was unsupported by any allegations in the complaint. *See* Pet. App. 8a ("[T]he district court dismissed Plaintiff's FTCA claim for lack of subject-matter jurisdiction."); Pet. App. 79a–80a. A decision to dismiss a claim for lack of subject-matter jurisdiction is not entitled to preclusive effect, and

thus is not a "judgment" under the judgment bar provision. *See supra* pp. 6–13. [7]

Because the district court lacked subject-matter jurisdiction over Respondent's FTCA claim, the district court's alternative holding, that "[e]ven if the United States is not entitled to immunity under the FTCA in this case, [it] is also properly dismissed for failure to state a claim," Pet. App. 80a, is dicta. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)); *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S.

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[7] It is immaterial that the district court found a lack of subject-matter jurisdiction in deciding a motion where the United States also sought summary judgment and a motion to dismiss. Although the issue of subject-matter jurisdiction can be raised at any point in the proceedings, including after trial, the standard of proof necessary for its establishment remains the same regardless of the procedural mechanism invoked or the stage of the proceeding. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993).

The issue of jurisdiction precedes the merits. "[W]hen the motion is based on more than one ground, the cases are legion stating that the district court should consider the Rule 12(b)(1) challenge first because if it must dismiss the complaint for lack of subject-matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined by the judge." Wright § 1350; *see, e.g.*, *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1279 (7th Cir. 1983) ("Once a court expresses the view that it lacks jurisdiction, the court thereafter does not have the power to rule on any other matter. Any finding made by a court when the court has determined that it does not have subject-matter jurisdiction carries no *res judicata* consequences." (internal citation omitted)).

765, 778 (2000) ("[I]f there is no jurisdiction there is no authority to sit in judgment of anything else."); *Feres v. United States*, 340 U.S. 135, 141 (1950) ("Jurisdiction is necessary to deny a claim on its merits as a matter of law as much as to adjudge that liability exists."); *see, e.g.*, *Dassinger v. S. Cent. Bell Tel. Co.*, 505 F.2d 672, 674 (5th Cir. 1974) ("Turning to the trial court's order of summary judgment against plaintiff, we note at the outset that the court had already found that it had no jurisdiction over the action, so that it had no power to render a judgment on the merits against either party."); *see generally* Wright § 4436 ("[A] dismissal that rests both on lack of jurisdiction and alternative rulings on the merits is dominated by the jurisdictional ruling and should not preclude a second action on a claim caught up with the jurisdiction ruling"); Restatement (First) of Judgments § 49 (1942), comment *c* ("If, however, the court decides that it has no jurisdiction over the defendant and also that no cause of action is shown, the latter decision is so clearly unnecessary to the result that it is not a bar to a subsequent action in a different court.").

Here, the district court plainly held that it lacked subject-matter jurisdiction, based on Respondent's failure to allege facts sufficient to satisfy the FTCA's jurisdictional requirements. Accordingly, the FTCA judgment bar provision does not apply. Respondent should be afforded an opportunity to hold the individual offices liable for violating his Fourth Amendment rights under *Bivens*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Date: August 31, 2020