SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DOUGLAS BROWNBACK, ET AL.,)

Petitioners,)

v.) No. 19-546

JAMES KING,)

Respondent.)

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Pages: 1 through 68

Place: Washington, D.C.

Date: November 9, 2020

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Washington, D.C.

Monday, November 9, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:13 a.m.

APPEARANCES:

MICHAEL R. HUSTON, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

PATRICK M. JAICOMO, ESQUIRE, Arlington, Virginia; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 19-546, Brownback versus King.

Mr. Huston.

ORAL ARGUMENT OF MICHAEL R. HUSTON

ON BEHALF OF THE PETITIONERS

MR. HUSTON: Mr. Chief Justice, and may it please the Court:

The text of the FTCA judgment bar resolves this case. The district court entered the judgment in an action under Section 1346(b), so that judgment constitutes a complete bar to any action by Respondent against the federal employees involved in his FTCA claim. That broad text unambiguously precludes Respondent's Bivens action here, which asserts the same injuries based on the very same subject matter.

The Sixth Circuit's refusal to apply the judgment bar in this case rested on two propositions: first, that when the United States prevails in an FTCA action, the district court must necessarily dismiss for lack of subject matter jurisdiction, and, second, that

such a jurisdictional dismissal does not trigger the judgment bar.

Both propositions are wrong. This Court rejected the Sixth Circuit's jurisdictional analysis in FDIC v. Meyer, but even more important for present purposes, this Court in Simmons v. Himmelreich squarely rejected the Sixth Circuit's conclusion that the judgment bar never applies to an FTCA judgment for the government.

The Court held instead that the judgment bar does apply where a plaintiff simply fails to prove his claim. And that conclusion follows directly from the text of Section 2676, which makes "the judgment" in an FTCA action preclusive, without drawing any distinction based on which side prevails.

Respondent now concedes that the Sixth Circuit's reasoning cannot be reconciled with Simmons, so he shifts to an alternative argument. He says he should be able to bring an FTCA action and an individual action together without the judgment bar coming into play.

But the statutory text directly refutes that argument too. Whereas common law

res judicata made a judgment preclusive "in a subsequent action," Congress in the judgment bar expressly departed from that rule and prohibited any individual action following an FTCA judgment.

That's because Congress wrote the judgment bar to prevent duplicative litigation against the government's employees, and that objective does not depend on whether the plaintiff's individual action is brought with the same case number or a different one.

The judgment below should be reversed.

CHIEF JUSTICE ROBERTS: Mr. Huston, I -- I want to ask you about your -- your last point. As -- as you read this statute, the disposition of an FTCA claim bars Bivens claims against the employee.

But, of course, the statute speaks of actions, not -- not claims. And it was -- was and is very well established that there's no bar with respect to claims in the same action.

If -- if Congress were going to make such a dramatic departure from that rule, the obvious word to use is right there; it's "claims." And yet, they -- they didn't do that.

MR. HUSTON: If I might make two points about that, Your Honor.

The first is that, as I just said, you're right that the common law rule was that a judgment in a -- in a subsequent action is preclusive. But I think you can see that Congress made exactly the type of express departure from the common law that Your Honor mentioned, because it deleted the word "subsequent," which you will find in the First Restatement, in this Court's cases. Over and over again, Congress removed the word "subsequent action" and replaced it with a complete bar to any action.

CHIEF JUSTICE ROBERTS: Well, I don't know -- I don't know that that's the clearest way they could go about it. The clearest way to go about it would say "the claim." It would be a -- a complete bar to any claim that is -- is raised, as opposed to, you know, any subsequent action.

That's where the real departure is. And it seems to me that that's a much more direct way to eliminate any confusion than simply deleting, you know, the "subsequent" in

-- that appeared in some -- some cases.

MR. HUSTON: Well, Your Honor, in -- in 1946, as we explain in our reply brief at page 8, the definition of the term "action" was a demand for relief in court. And I think you can see that Section 2676 uses the term "action" to be essentially synonymous with "claim" because it refers to an action under Section 1346(b). And so it's clearly tying the -- the word "action" to specific causes of action.

But, again, I think, if you put the common law, the classic canonical formulation of res judicata side by side with this statute, the key difference you see is the deletion of the word "subsequent" and the replacement with the word "any."

So I think it's not surprising that Congress would refer to preclusion of an action, because that's traditional common law res judicata. What the difference was, was that they eliminated the requirement that preclusion would occur only in a subsequent action and made it a complete bar to any action.

And that, of course, accords directly

with Congress's purpose because, from the standpoint of preventing duplicative litigation against the federal employees, it makes absolutely no difference whether the duplicative individual action is filed together in the same lawsuit with the FTCA action or separately. And I think it --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Mr. Huston, I'd like to pick up on your last point.

Now the -- in this case, Respondent filed the Bivens action together with the FTCA action and -- though the argument seems to have just disappeared and then reappeared here.

Petition -- Respondent now argues that if -- if he loses on the -- on the FTCA claim, that he -- that he has the alternative argument that since -- since these were filed together, the outcome should be different from a case in which they were filed separately or sequentially.

What would be your argument there? First, can he even make that argument now? And, two, if he can, what -- give -- would you elaborate more on your response to that?

MR. HUSTON: Absolutely, Justice Thomas.

To your -- to your first question, I think it's clear that Respondent did not develop this argument in anything like the way that he did in his brief below. Now whether -- whether he waived it or not, you know, we haven't taken a position on that. He gestured at the idea that this litigation wasn't duplicative because he only filed one lawsuit. But, certainly, this is largely an argument that's been developed in his brief in this Court.

To your -- to your question about why we -- I think the text makes clear that that's not allowed, in addition to the point I was just making to the Chief Justice about the way in which Congress expressly departed from the common law by changing the -- the formulation, I think the -- the implications of Respondent's position are striking. And the reason why every single court of appeals has rejected

Respondent's argument in the 70 years since the judgment bar was enacted is that his argument would permit him actually to litigate under the FTCA and prevail, to win a judgment against the United States and then seek additional damages against the government's employees, for example, punitive damages, just because he brought the actions together in the same lawsuit.

But we know from this Court's decision in Gilman that that result is precisely what Congress created the judgment bar to avoid, and that's because the policy of the judgment bar is one of repose. Congress found that lawsuits against the government's employees are extremely burdensome, and it wanted to limit them without precluding them entirely by saying that, if a plaintiff chooses to take advantage of the FTCA cause of action, then the judgment in that action will bring repose to the entire controversy.

JUSTICE THOMAS: On the point of what judgment, what sort of judgment in an action is included, would an appeal -- a -- a judgment that is still appealable also have the same preclusive effect?

MR. HUSTON: Yes, Your Honor. I think the definition of "judgment" in Section 26 is the same as the definition of the word "judgment" in the Federal Rules of Civil Procedure. It is the order of a district court that is appealable.

Now, of course, that means that if a plaintiff succeeds in appealing an FTCA judgment and gets it vacated by a court of appeals, at that point, there no longer is a judgment in an action under Section 1346(b) and, therefore, the judgment bar would no longer apply.

But, while the judgment entered by the district court is in force -- and, of course, in this case, that judgment is final -- that judgment by the plain text is a complete bar to any individual action against the federal employee.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: Thank you.

Can -- can you tell me if I have this basically right? Courts of appeals get lots of appeals from district courts. And I thought a

judgment is a piece of paper normally that the district judge files at the end of a lawsuit, and it says "Judgment," and it tells you how the lawsuit turned out, who won, and perhaps on what grounds.

And, here, the judgment in an action under 1346(b) shall constitute a complete bar. But, normally, if you have four different claims in the lawsuit, the judgment doesn't come in until the whole thing is over.

You might preliminarily decide or you decide the judge says this -- he's going to lose on this claim, he's going to lose on this claim, maybe he'll win on this claim, and, at the very end of the thing, we have a judgment. Isn't that how it works?

MR. HUSTON: Yes, Your Honor, I think that description of the word "judgment" is right, but that is exactly the judgment that the district court entered here. And you can see that at Petition Appendix 86A. The district court resolved all of the claims in the case.

Now the key to the judgment bar, of course --

JUSTICE BREYER: Well, it's the

judgment shall constitute a bar to an action of the claimant by reason of the same subject matter, et cetera, but the judgment didn't appear until after he wanted to pursue his Bivens claim.

MR. HUSTON: Your Honor, the --

JUSTICE BREYER: There was no judgment to bar it because the judgment wasn't entered yet.

MR. HUSTON: Respectfully, I disagree, Your Honor. I think the judgment was entered by the district court at the -- when it resolved the dispositive motion, it resolved all of the claims in the case and it entered a judgment.

That document, which is at Petition Appendix 86A, that is the thing that triggered the judgment bar. And Respondent left that judgment final -- with respect, he left the judgment in the action under Section 1346(b) final by not appealing it.

So the core -- the core rule of the judgment bar, when that judgment was entered, it precludes any further litigation at that point.

JUSTICE BREYER: I -- I agree with that. But I -- but I -- I mean, wasn't the

judge wrong to enter a judgment before he decided the Bivens claim, or did he decide the Bivens claim in the judgment?

MR. HUSTON: He decided the Bivens claim, Your Honor. The district court resolved --

JUSTICE BREYER: All right. He decided it. Okay. On what ground did he decide it? He decided it because there was a bar. But, at that moment, there wasn't a bar because, when he decided it, it was before he entered the judgment.

MR. HUSTON: No, no --

JUSTICE BREYER: And at that point, there was no judgment.

MR. HUSTON: No, respectfully, Your Honor, the --

JUSTICE BREYER: Oh, all right.

MR. HUSTON: -- district court's analysis had nothing whatsoever to do with the judgment bar. The district court adjudicated the substance of both the Bivens cause of action and the FTCA cause of action. It never said anything about the judgment bar.

The judgment bar was triggered only

after the district court entered judgment. And you -- you can see this in the district court's opinion.

JUSTICE BREYER: All right. All right. I -- I -- I have enough to see that I have to sit down and figure this out word by word, which I'll do.

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: Assuming the principal argument now made by Respondent wasn't forfeited, we have discretion whether to affirm on that alternative ground. And what would you say as to why we should not exercise that discretion?

MR. HUSTON: Because, Your Honor, the -- the -- this Court has held repeatedly in interpreting the FTCA that the text means what it says.

And, in particular, the word "any" really does mean any. No exceptions. Those are the core lessons of the Court's decisions in Simmons, in Hui, in Millbrook, in Ali, and in Smith. And so I think that all the Court has to do is say that the language of this statute is intentionally and exceptionally broad.

Congress imposed a complete bar to any individual action, and that precludes Respondent from bringing a demand for relief under Bivens regardless of whether it's pleaded separately from or together with the individual action.

So I think it's just --

JUSTICE ALITO: Well, that's a -- that is an argument on the merits of that issue, isn't it? I'm -- I'm asking the preliminary question, why should we even get to that here?

We granted cert to decide a particular question which has to do with the effect of a final judgment. Why should we not presume most of the time we answer the question on which we -- we granted review and not some other question?

So that's my question. That -- that's what I'm asking you. Why should we depart from our normal practice of just deciding the question presented and decide another question --

MR. HUSTON: I don't think that --

JUSTICE ALITO: -- which has been addressed by -- how many courts of appeals have addressed this issue and what have they decided?

MR. HUSTON: Seven courts of appeals have addressed this argument, Your Honor. Every single one of them has rejected the argument that Respondent now makes that he is entitled to litigate under the FTCA, prevail, and then continue suing the government's employees.

So I think Your Honor is exactly right that the reason why you should not exercise discretion to consider this argument is because it simply doesn't warrant the Court's review.

The only court of appeals that has -- has even come close to accepting Respondent's argument is the Ninth Circuit, and the only way that it did that was by building in a rule that the judgment bar depends on which side wins.

And that, of course --

JUSTICE ALITO: Let me try to -- let me try to ask one question about the question on which we did grant review.

In your -- in your view, what is the dividing line between a claim that is not cognizable under 1346(b)(1) and a claim that is cognizable yet fails on the merits?

MR. HUSTON: Well, Your Honor, I think the insight of this Court's decision in FDIC v.

Meyer is that "cognizable" means the same thing as "actionable," and a claim is actionable so long as the plaintiff alleges the elements, and that -- of Section 1346(b).

And that makes sense because the question -- as this Court describes in -- in Meyer, the question whether the United States has waived sovereign immunity for a particular type of legal demand for relief is analytically distinct from the question whether the plaintiff can prevail on the merits or even whether he stated a claim for relief under Federal Rule of Civil Procedure 8.

JUSTICE ALITO: Well, is it -- is that the -- is it the same test as it would be under a federal question, in a federal question case?

MR. HUSTON: I think that that is a perfectly fine analogy, Your Honor. Of course, if a plaintiff pleaded in diversity that his demand for relief was worth more than $75,000, and then it turns out later that he actually has no claim at all at summary judgment, everyone understands that that is a dismissal on the merits of the claim that triggers res judicata, even though we now know at that point that the

amount in controversy in the case is zero.

No one would think that the --

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, I -- I am a little confused, and perhaps your adversary will un-confuse me, but I don't think every circuit has held that same suit claims of an FTCA and a Bivens claim means that you can't appeal them.

I thought at least the Ninth Circuit has said so. All of the other circuits, I agree with you, have said that, if you lose a FTCA claim, you can't file a separate claim. That's not the issue. It's the same claim. But your adversary can tell me what the circuit split is on that question.

However, I am going to go back to what Justice Alito raised. You brought the cert petition. I believe that your adversary in its -- I believe I know in its response, not at length, but it did mention this as an alternative ground not to grant cert, that he

could bring the two claims in the same action and not be precluded. And I think the same argument was raised below. Am I correct?

MR. HUSTON: Well, I certainly agree with Your Honor that the Respondent raised the argument as an alternative ground in the brief in opposition. The argument -- again, in the lower courts, in the court of appeals, the argument -- the Respondent did not develop this argument with anything like the argumentation that now appears in this Court.

JUSTICE SOTOMAYOR: You know something, counsel, that may or may not be true, but it's fully briefed here. It's an issue of law, isn't it? And you can defend the judgment on any legal ground, correct?

MR. HUSTON: Yes, Your Honor. And that's why we have fully briefed the --

JUSTICE SOTOMAYOR: All right. Now, counsel, let me go on to where the Chief started. He said that the FTCA talks about a judgment in an action. In Section 2672 of the FTCA, it says explicitly: Acceptance of an administrative settlement with the U.S. shall constitute a complete release of any claim

against the United States and against the employee of the government.

It seems to me that Congress knew how to say that -- that there was a big difference between a release of a claim rather than a bar to an action. So why should we accept your argument that they meant the same thing when they used different language in two different sections?

MR. HUSTON: Because, Your Honor, the definition of the term "action" in 1946 when Congress wrote the judgment bar is a demand for relief in court. And I think that when -- if you just substitute that for -- that into the text, then the judgment in an action under Section 13 --

JUSTICE SOTOMAYOR: All right, counsel, I'm almost out of time, so let me just ask you one last question. As a matter of policy, why would Congress have wanted to go around the common law rule?

It seems to me that then happenstance controls. This district court could have ruled the other way, could have said the Bivens claim -- or, I'm sorry, the Bivens claims -- like in

Manning, the Bivens claim is good, but the FTCA claim is not.

And you're still saying there's a bar, correct?

MR. HUSTON: Arguably, Your Honor, I mean, that would be consistent with one of Congress's purpose for the judgment bar to wrap everything up.

JUSTICE SOTOMAYOR: But why does that make --

MR. HUSTON: It is that --

JUSTICE SOTOMAYOR: -- why does that make sense when Congress explicitly, in the FTCA and in the Westfall Act, saved the Bivens claims?

MR. HUSTON: Because the purpose of the judgment bar, Your Honor, is repose. Congress wanted the judgment in the FTCA action to bring repose to the entire controversy.

To your question specifically about Bivens, I think this Court addressed that issue directly in Hui, and just as it said there, the text of the judgment bar is certainly broad enough to preclude causes of action that are both known and unknown when Congress enacted it.

I think the more --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Kagan.

JUSTICE KAGAN: Count -- counsel, just a point of clarification first as to the extent of your argument. There are courts in the Seventh and the Tenth Circuit that have said that the judgment bar can undo even prior final judgments on Bivens claims, so sort of retroactively undo a Bivens judgment.

Do you think that that's right?

MR. HUSTON: I think it's possible, Your Honor, because it would be consistent with the goal of the judgment bar to wrap the entire resolution of the claim into the judgment on the FTCA action.

Now, on -- I would also understand the contrary argument that when the judgment has been entered in the individual action, there is no more individual action for the judgment bar to preclude. It's, of course, not something that this Court has to decide in this case, because this is the quintessential example of an FTCA judgment on the merits and, therefore, it's

the judgment in an action under Section 1346(b).

JUSTICE KAGAN: I guess I'm wondering whether your understanding of this provision makes it into something that the language suggests it's not.

So, if I understand your position correctly, you're really turning this into an election-of-remedies provision; in other words, that once somebody files an FTCA claim, then, really, they -- they can't bring a Bivens claim anymore. And the only way to bring a Bivens claim is just to forego the FTCA claim.

And that might make sense, you know, as a policy matter, to turn this statute into such an election-of-remedies provision, but the statute doesn't read like that. It -- I mean, Congress knows how to write a provision like that.

Instead, this statute reads like a preclusion statute. And preclusion, as the Chief Justice began the argument by saying, always applies between suits and not within a single suit.

MR. HUSTON: Well, Your Honor, I -- I -- I -- I really think that Your Honor has it

exactly right, that the purpose of this statute was to offer plaintiffs in Respondent's position a choice. They could either stick with the traditional individual cause of action, they weren't foreclosed from that. But, if they choose to take advantage of the FTCA cause of action, which, of course, opens the opportunity for the plaintiff to recover from the judgment fund -- judgment's fund, then that choice comes with consequences, and the critical consequence --

JUSTICE KAGAN: All right. But I think I was suggesting, just to -- just to make myself clear, that's a perfectly sensible statute. I guess my question is, is it the statute that Congress wrote? That Congress wrote a statute -- I mean, election-of-remedy statutes are easy to write. And this is not that. This is a preclusion statute, which has a different set of consequences.

MR. HUSTON: Your -- yes, Your Honor, but the -- the text of the judgment bar -- there's no -- is unambiguous. The triggering event is the judgment in an action under Section 1346(b), and then what comes next is a

extremely broad preclusion provision, a complete bar to any action against the employee.

I think the only fair way to read that provision is that Congress told plaintiffs that if they pursue an action under Section 1346(b) and it goes to judgment, then there can be no further litigation against the federal employees. And that's the --

JUSTICE KAGAN: Thank you.

MR. HUSTON: -- same objective --

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Thank you. No questions.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Good morning, Mr. Huston. I just want to follow up on something Justice Alito raised and then Justice Sotomayor followed up on, which is this alternative argument being before us.

I mean, we -- we could decide it, but, as the Court's often said, we're a court of review, not of first view. And there are obviously important exceptions to that

principle, but I'm not sure this case really cries out for us to depart from the general principle.

So why don't we resolve the question presented that's presented in the cert petition, I think was Justice Alito's question, and that's sufficient unto the day, and we can worry about the other issue when and if we need to address that?

MR. HUSTON: Justice Kavanaugh, I think that is exactly what the Court should do. And the reason why that would be appropriate in this case is that the alternative argument raised by the Respondent would not warrant this Court's review.

As I mentioned, every court of appeals has rejected Respondent's position. Now the Ninth Circuit, as Justice Sotomayor pointed out, has adopted a slightly different rule, no -- not shared by any other circuit, that just -- but that really is just a relic of before Simmons, because the Ninth Circuit's rule is that whether or not the judgment bar is triggered depends on who wins in the FTCA action. And Simmons was absolutely clear that that is not how the

judgment bar works, which, of course, accords with the statutory text.

So I really don't -- I just -- I think the Court should not address the question. There's no need to, because it's not cert-worthy. We addressed it in our brief because it was raised and we wanted the Court to have all the arguments, but I think that's a perfectly sensible way to resolve the case.

JUSTICE KAVANAUGH: If we do resolve that question, I'm going to reiterate questions asked by others now, but the key problem for you is it says "any action," not "any claims."

Do you just want to summarize your best arguments in response to that?

MR. HUSTON: Thank you, Justice Kavanaugh, yes. Again, the term "action" is defined in legal dictionaries in 1946, at the relevant time, as a demand for relief in court.

So I think, if you substitute that phrase into the judgment bar, then the judgment in this FTCA action is a complete bar to any demand for relief by the plaintiff under Bivens.

And that is -- just the plain text of that understanding means that there's -- there's

no room for an exception for -- that -- that would -- that would make preclusion applicable only in a subsequent action. And I just think it's particularly clear that Congress didn't want that subsequent action limitation because that was in every description of the common law, and Congress changed that formulation expressly.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: Counsel, I want to ask you a question about the question on which we granted cert. Did the government make a mistake in moving -- moving for dismissal under Rule 12(b)(1) for lack of jurisdiction, as opposed to for judgment on the pleadings or just -- I -- I know -- I know they also moved for summary judgment, but why even have the motion to dismiss for lack of jurisdiction in there?

And I'll tell you the reason why I'm asking is it seems to me that 1346(c) gives district courts the jurisdiction to resolve civil actions against the government on the bases that's listed in the statute. And it seems to me that that means that the government

is submitting as sovereign to the district court's resolution of those claims either way, whether they win or not, so it's different than, say, in Simmons, where the district court does not have jurisdiction to resolve claims if they involve misconduct in the exercise of a discretionary function.

So why did the government even treat this as a jurisdictional issue?

MR. HUSTON: Well, Your Honor, there -- at -- at the time in the Sixth Circuit, there was some precedent that suggested that the resolution of an FTCA claim on the merits would also trigger some jurisdictional implications.

Now we don't think that that's correct. As we explain in our brief, I think Meyer explains -- and -- and as -- as Your Honor just explained exactly correctly, the text of Section 1346(c) refers to jurisdiction over civil actions on claims alleging the FTCA's element.

So -- and -- and as Meyer further explained, that's analytically distinct from the question whether the plaintiff is entitled to prevail.

But I think what -- what critically matters for the case in this case is whether there was the judgment in an action under Section 1346(b). And Meyer is perfectly clear that a claim is actionable under Section 1346(b) so long as the plaintiff alleges the elements. And Respondent certainly alleged all the elements of the FTCA claim. You can see that in the complaint at JA 39 and 40.

So there's no dispute about what the substance of the judgment was here. And as I think Justice Breyer helpfully explained for the First Circuit in Rowe, what matters to preclusion is not the label that gets -- the jurisdictional label that gets attached to something, it's the substance.

And Semtek and many of this Court's other cases are quite clear that where a district court, as here, adjudicated the substance of the FTCA cause of action --

JUSTICE BARRETT: So, counsel --

MR. HUSTON: -- that is a merits determination that's precluded.

JUSTICE BARRETT: -- before my time expires, let me just clarify something. So you

agree that if, say, the plaintiff had not alleged all the elements and so the claim was dismissed without prejudice under 12(b)(6), that wouldn't count as a judgment that would trigger the bar?

MR. HUSTON: Absolutely, Your Honor. A dismissal is not a judgment. Those things are not synonymous, as Justice Breyer explained. It's -- it is only the entry of judgment that triggers the judgment bar.

And that's why the judgment bar was triggered in this case. When the district court entered the final judgment at the end of the case, Respondent simply chose for his own reasons not to appeal that judgment.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: A minute to wrap up, Mr. Huston.

MR. HUSTON: Thank you, Mr. Chief Justice.

We've talked already about why our position is compelled by the statutory text and this Court's precedent. I want to emphasize for just a moment why it's fundamentally fair.

The decision below would permit a

plaintiff to bring a lawsuit against the United States, litigate it all the way through summary judgment, lose on the ground that the government's employees did not do what was alleged of them, and then turn around and pursue claims against the same employees using the same factual allegation.

That result makes little sense, and it is directly at odds with Congress's objective for the judgment bar, which was to prevent duplicative litigation against the government's employees after an FTCA judgment.

Congress's rule in the judgment bar was straightforward. If a plaintiff chooses to litigate an action under Section 1346(b), then the judgment in that action will bring repose to the entire controversy.

Respondent had a fair chance to obtain damages for his alleged injury. He didn't recover for the simple reason that he didn't prove his case. And the judgment bar does not allow him to start the case over again against the officers.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr.

Huston.

Mr. Jaicomo.

ORAL ARGUMENT OF PATRICK M. JAICOMO

ON BEHALF OF THE RESPONDENT

MR. JAICOMO: Mr. Chief Justice, and may it please the Court.

Through the text of the FTCA, Congress provides two independent and easily administrable rules that control the application of the judgment bar.

First, the judgment bar does not apply to claims brought together in a single action. As Will and Simmons explained, the text of Section 2676 imports common law res judicata. In the history of American law, res judicata has never been applied to claims brought together in a single action.

Section 2676's requirement of the judgment in an action, not a judgment on a claim, demonstrates that Congress did not intend a judgment bar to depart from that common law history.

Second, the judgment bar does not apply to claims dismissed for lack of jurisdiction. Because Section 1346 restricts

FTCA jurisdiction to actions on claims that satisfy six elements, the dismissal of an FTCA claim under Rule 12(b)(6) does not trigger the judgment bar.

As Meyer explained, a claim does not come within the FTCA's jurisdiction unless a plaintiff has alleged facts sufficient to state a cause of action under the statute. Thus, a court's holding that a plaintiff has failed to state a claim under the FTCA is not the judgment in an action under Section 1346; it is a holding that the court lacks jurisdiction to enter such a judgment.

Both the same claims rule and the jurisdictional rule honor the language Congress enacted in the FTCA. Both present simple, predictable standards that courts and parties can follow, and neither results in duplicative litigation. Under either rule, the judgment bar does not apply to this case.

This Court should affirm the decision below and allow King to pursue his meritorious constitutional claims in this action, which is the one and only lawsuit King has ever filed.

I welcome this Court's questions.

CHIEF JUSTICE ROBERTS: Mr. Jaicomo, your theory really would combine the merits and jurisdiction not just in a case like this but in every case.

I mean, if you think you have a claim under a federal question statute, if it turns out you don't, then you would say, okay, well, then there wasn't jurisdiction because I didn't satisfy the elements of the statute that gave rise to a federal -- a federal question.

We've -- we've, I think, long held that in a case like -- like this one, where, if you make a determination under the merits, there isn't the established jurisdiction against the United States, that they're treated the same. You can't -- in other words, whenever you lose, you don't lose because the court had -- under your theory, would have had no jurisdiction.

That doesn't seem to make much sense.

MR. JAICOMO: Yes, Mr. Chief Justice, that's -- that's not the extent of our position. We actually offer three different ways the Court can view jurisdiction. And -- and I'll first state that the reason that it's so complicated is that through Section 1346, as the government

agrees, Congress simultaneously waived its sovereign immunity, sets jurisdiction, and provides the elements for a cause of action.

So the -- the most narrow way this Court could look at that is to look at a case like this and simply say the district court itself entered a judgment under 12(b)(1). Therefore, it concluded pursuant to Rule 12(h)(3) that it lacked jurisdiction of the subject matter.

The -- the -- the middle ground position is the position from Meyer, which is that to trigger the jurisdiction of Section 1346, a claim has to allege a valid cause of action, which is also consistent with this Court's dealing with the sovereign immunity statute in Helmerich and Payne.

Only in the very broadest understanding, which is brought in through the Arbaugh decision, do any of the concerns that you have raised come to light.

And so this Court could easily dispose of this jurisdictional question without reaching that furthest ruling, but I'm happy to discuss it further if -- if Your Honor would like to do

so.

CHIEF JUSTICE ROBERTS: Well, I guess I don't really understand. I think, under your view, a -- a -- a favorable decision for the government would never satisfy the elements of the judgment bar because of the lack of jurisdiction.

What -- what am I missing in that?

MR. JAICOMO: Yes, Your Honor. No, that's only if this Court adopts the Arbaugh standard. We offer two other more restrictive understandings. So only under Arbaugh would that be the case.

If this Court decides that jurisdiction attaches after a claim passes beyond Rule 12(b)(6) or if this Court decides that jurisdiction has to be decided at Rule 12(b)(1), either way, a -- a -- a decision favorable or not for the government would trigger the judgment bar.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Counsel, why should we even consider your argument that the judgment bar doesn't apply when the claims are brought together?

MR. JAICOMO: For several reasons, Your Honor.

The first is that that's what the language of the statute requires.

But the second is that that question is embedded in the question presented that the government brought to this Court. And I'll quote the relevant language. It says, "the question presented is whether a final judgment in an action bars a claim." And that necessarily requires this Court to consider how that claim is presented.

And -- and, finally, this is not an issue that has just come up now. The first argument we made in the Sixth Circuit was that the reason the judgment bar shouldn't be applied to this case is because there's no chance of duplicative litigation when claims are brought together in the same action.

And as the government has conceded, this is also a point that we made in our brief in opposition to cert when that was filed.

JUSTICE THOMAS: Well, I have one unrelated question, brief question.

Should it matter in deciding this case that Bivens was -- didn't exist at the time the judgment bar was enacted?

MR. JAICOMO: No, Your Honor, I don't think that -- that that has an impact on the outcome of this case simply because, as we explain in our briefing, since the judgment bar incorporates res judicata, the controlling issue is that claim -- or that King brought all of his claims in a single action.

So the subject matter for the action is not at issue here since the Bivens claim and the FTCA claim are brought in the same lawsuit.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: Well, if we did reach this other question, what is your -- what will you say to what your opposing colleague said? Look, he said, if you read 1346(b)(1), if you read -- it says the judgment in any action shall constitute a complete bar.

Now, to any government claimant --

against the employee of the government, now that's the point of this statute. Go sue the United States; don't sue the employee.

But, if you're right, what you could do as a plaintiff is you sue under the statute against the government, you win, and then you go sue against the employee, the very thing that the statute was passed to stop.

MR. JAICOMO: No, Your Honor. Our -- our position, even under the broadest understanding of jurisdiction, is that if you bring separate actions and one of them is against the United States and that concludes --

JUSTICE BREYER: No, you bring the same action. What you do is you have a couple of defendants.

MR. JAICOMO: Well, in -- in that case, Your Honor, this would simply be a matter of applying res judicata through the judgment bar, which presents exactly that same scenario where you could sue, for example, an employer and an employee in the same lawsuit. And the disposition of one claim or another wouldn't necessarily foreclose your claim against the other one.

JUSTICE BREYER: Well, that's my problem, the disposition of one against the other. So you win against the employer, the government, and then you go sue the employee.

Well, I think, if there was one thing this statute was passed to stop, it was that. It was that the United States should take the liability and the employee wouldn't.

MR. JAICOMO: Well, Your Honor, that --

JUSTICE BREYER: Am I wrong about that?

MR. JAICOMO: No. But the hypothetical you propose is that the claims are brought together in the same action, so there is no separate going and suing the employee. There's only one lawsuit.

JUSTICE BREYER: Look, take my point. I'm not interested in exactly how you do it.

MR. JAICOMO: Sure.

JUSTICE BREYER: But if you can get -- Claim 1, we sue the government, give us some money. Claim 2, employee, you're involved in this lawsuit too, give us some money. Okay?

Now that's what I'm worried that your

argument here would lead to. And from what you said so far, you say that's just what it would lead to, and that's a good thing.

MR. JAICOMO: No, Your Honor. There's no chance, for example, you could get a duplicative recovery where you would --

JUSTICE BREYER: No, not duplicative. He said extra damages, for example.

MR. JAICOMO: Oh, okay. Yes, so this comes down to the fact that, as the Westfall Act and this Court's decisions in Carlson and Wilkie versus Robbins and Correction Incorporation versus Malesko indicate, that Bivens and the FTCA provide parallel, complementary remedies.

So it was exactly what Congress intended for the rest of the courts --

JUSTICE BREYER: Okay. Then your answer is he's right, you could do this, and you're saying Congress did not want to stop all the recoveries against the employee, right?

MR. JAICOMO: Yes, absolutely.

JUSTICE BREYER: Okay.

MR. JAICOMO: Absolutely.

JUSTICE BREYER: That's your answer. Thank you very much.

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: If a district court rejects a claim under the FTCA for failure to proof -- failure of proof, does the judgment bar apply to that, or is that a jurisdictional determination?

MR. JAICOMO: It wouldn't apply in any case if the claims are brought together in the same action, but, if they were brought separately --

JUSTICE ALITO: Well, that wasn't my question. How about if you answer the question I actually asked?

MR. JAICOMO: If -- if they were brought separately, Your Honor, the case would have to pursue beyond trial, the same -- which is the line that's drawn by Rule 12(h)(2).

JUSTICE ALITO: The case would have to proceed beyond trial. What does that mean?

MR. JAICOMO: It -- it's the standard where a party can no longer raise a 12(b)(6) defense. Rule 12(h)(2) says you can raise that defense up to and at trial but not beyond it.

JUSTICE ALITO: Why is 12(b)(6) the dividing line?

MR. JAICOMO: Because the language of Section 1346 confers jurisdiction only when there are claims that satisfy the elements of the FTCA.

JUSTICE ALITO: Why are the elements of the FTCA satisfied up to the -- not satisfied up to 12(b)(6) but are satisfied after that point?

MR. JAICOMO: Because, as this Court explained in the Meyer decision, Your Honor, the -- the trigger for jurisdiction is whether a plaintiff has pleaded allegations that set forth a cause of action. And so the failure of proof portion of it, as is noted in the footnote of Meyer, doesn't come into play until there's actually fact-finding being done by the court.

JUSTICE ALITO: Why was the decision here in essence a 12(b)(6) decision?

MR. JAICOMO: Well, for several reasons.

First, Your Honor, is that the government itself moved under 12(b)(1) and 12(b)(6). And the reason is that the court more specifically held it was dismissing the case under Rule 12(b)(1) or, alternatively, for

failure to state a claim under Rule 12(b)(6).

JUSTICE ALITO: What is the breakout of the circuits on the question that you would like us to decide?

MR. JAICOMO: Yes, Your Honor. So there -- there is -- only the Ninth Circuit has -- has adopted this same claims argument, but that argument's also consistent with this Court's decisions in Will and Simmons.

And, as we point out in the brief, none of the other courts of appeals, which all have somewhat different analyses of how they get there, actually address the common law aspects of Section 2676. And most of them simply rely on the Manning decision from the Seventh Circuit.

JUSTICE ALITO: In light of those -- what is it -- six circuits that have decided the issue the other way, do you still think the question is so clear that we should decide it even though it was not the question that we were asked to decide in this case?

MR. JAICOMO: Yes, Your Honor, it is that clear. I think the language of Section 2676 and the common law concepts that it

incorporates make it very clear. And so the government has essentially come up with its using of the judgment bar in this way in the last couple decades. It's not as if this has been the case since 1946.

And so I think this Court's involvement would be very helpful on this issue.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, I want to separate out the two arguments, the jurisdictional argument, which was the government's -- which was the Sixth Circuit's conclusion and the basis of the -- most of the government's argument.

Your alternative argument, I call, the same case argument. Can you -- Justice Kavanaugh asked this question earlier, and I posed the same one.

Given that it is one circuit against others, has there been sufficient percolation before the court below, the Sixth Circuit, for us to jump in and decide this question now?

MR. JAICOMO: Yes, Your Honor.

JUSTICE SOTOMAYOR: As a matter of policy, why should we do that? Meaning it's up to us to decide whether to take a -- to address a ground not decided upon by the court below.

MR. JAICOMO: Yes, Your Honor. So, although the Sixth Circuit decision below didn't address this issue, the Sixth Circuit has addressed this issue, and I'll -- I'll concede that it came out on the other side of it.

But the reason that this Court should address this issue from a policy standpoint is exactly the reason that this Court explained the judgment bar shouldn't operate in the Simmons decision, which is, if this Court doesn't draw the line on claims in the same action, the result of a favor -- a decision in favor of the government will be an enormous increase in litigation. And because the government has adopted this peculiar election of remedies that's not really an election of remedies, that litigation will be infinitely more complex and plaintiffs will be obligated to make it complex to ensure that the FTCA portion or separate action never gets --

JUSTICE SOTOMAYOR: Counsel, I -- I do

have some practical difficulties with the government's position on the same action, meaning that what the government is encouraging plaintiffs to do is to file their Bivens claims first, win or lose, then file their FTCA claims, and -- and hope that they've won and that we don't put a bar in like the one that Justice Kagan referred to earlier.

That seems somewhat time-confuse -- consuming. It also makes a difference whether a district court decides whether it's going to decide the Bivens claims first and just say, I don't need to decide the FTCA claims, or try both claims together, win both, give judgment on both, and then go on appeal.

There seems variations that are very inefficient. Am I right about that?

MR. JAICOMO: Yes, Your Honor. In fact, every variation is very inefficient because, as Your Honor's question indicates, there's no way from an ex-post position for a plaintiff to know what it should do to ensure that it can litigate these claims in parallel, even though Congress and this Court have both said they can be litigated in parallel.

JUSTICE SOTOMAYOR: And that's the answer to Justice Breyer, isn't it, that Congress in both -- in both -- in both the FTCA and in Westfall have agreed that Bivens claims can and should be brought, correct?

MR. JAICOMO: Yes, Your Honor, that's exactly correct.

JUSTICE SOTOMAYOR: Unless there's been a bar of a judgment previously?

MR. JAICOMO: That's correct.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Yes, Mr. Jaicomo, just to continue in this same vein, I mean, what the government is saying about this provision, you know, makes sense in a way. I mean, the government is saying this reflects a broad remedial compromise. Plaintiffs can sue the United States, but, in exchange for that, they give up certain remedies against federal employees, and that that's the way we should read the provision.

And you can well imagine how Congress might have thought that that would be a good thing to do. So why shouldn't we read the provision that way?

MR. JAICOMO: Yes, Your Honor. I don't dispute that you could make a policy argument for why the -- that Congress should create an exclusive -- or an election of remedies, but the reason this Court shouldn't read it that way is because Congress has not done so and has explicitly carved out the ability of plaintiffs to bring, under the Westfall Act, an FTCA claim and a Bivens claim.

And even before then, since 1952 in the Brooks case this Court decided, it has said there is not an election of remedies in the FTCA and has continued to say that every time it's had the opportunity over the last 70 years.

JUSTICE KAGAN: And if you were just to look at the -- at the language of the provision, what would you say about the language of the provision with respect to this question?

MR. JAICOMO: Yes, Your Honor. So this gets us back to the distinction between "an action" and "any action." And it would -- it's simply a situation where someone had the coupon to go to a grocery store that says if you buy a case of pop or soda, as -- as people might call it, you get any case free. Of course, a

reasonable person would not understand that coupon to mean the first case was free. You have to buy the first case.

The government is, in this case -- in this situation, asking the Court to say that coupon applies to the first case of soda or, in this instance, the first and only action that's ever been brought.

JUSTICE KAGAN: If I understood Mr. Huston's argument, it was that, you know, you might think that we're taking the word "action" and making it mean "claim" and, in fact, you might think that the two words are different, but, in fact, they're not, because Mr. Huston said an action is just a demand for relief in court, you know, when this statute was written.

So why isn't that true?

MR. JAICOMO: Yes, Your Honor. Because the definition that my friend relies on is -- is definitely well outside the mainstream. In the CalPERS decision, which is actually cited in Public Citizen's textual analysis, amicus brief, they -- this Court clearly delineated between actions and claims, and it did so by

citing 1933's Black's Law Dictionary, which says that the concept of an action is, if not entirely, almost entirely synonymous with a suit.

And so there's no way to split that hair, especially in light of the fact that, as I believe you pointed out earlier, Your Honor, Section 2672, which is the release bar, refers to complete release of any claim.

So Congress knew how to distinguish between these concepts. It chose not to in the judgment bar because it was adopting res judicata.

JUSTICE KAGAN: Thank you, Mr. Jaicomo.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Good morning, counsel. I -- I'd like to just return to the -- I guess your alternative argument in the same action simultaneously pending position. What do we do about the fact that your client chose not to pursue his FTCA claim on appeal? And so the judgment there would seem to be in an action and it's final. There doesn't appear to be any

simultaneously pending action under the FTCA at this point.

MR. JAICOMO: Yes, Your Honor. So the distinction is still the concept of actions versus claims. So even with an action that has multiple claims, the -- the failure of one claim or the waiver of that claim doesn't doom the other claims, as we cite on page 26 of our brief the statement from Wright Miller, which says claim preclusion is not appropriate within a single lawsuit so long as it continues to be managed as a single action.

JUSTICE GORSUCH: So -- so we go back to the question whether "any" means any, any judgment in an action, which seems to contemplate the possibility of multiple judgments.

MR. JAICOMO: No, Your Honor. Actually, the language of Section 2676 says "the" judgment in an action, which is -- the definite article requires that there can only be a single judgment in an action.

JUSTICE GORSUCH: Yeah.

MR. JAICOMO: And that judgment necessarily must deal with all the claims in the

action. So you can't have the judgment in an action and there still be any action left to apply the preclusive bar to.

JUSTICE GORSUCH: What -- what about the "any action by the claimant" language?

MR. JAICOMO: Yes, Your Honor. This just goes back to the -- the linguistic distinction between "an action" and "any action." And I'll -- I'll also point out that a number of courts before the enactment of the judgment bar had used the phrase "complete bar to any action" to mean res judicata.

But, even if that weren't the case, at the time the judgment bar was enacted, Congress understood that, for jurisdictional reasons, a party could not sue the United States as a codefendant with its employees. So the need for something like separate or subsequent --

JUSTICE GORSUCH: I -- I guess what I'm trying to get at is we have "the" judgment in an action under the FTCA, and that would seem to bar any other action like Bivens later.

MR. JAICOMO: Right.

JUSTICE GORSUCH: And your way around that is to say that they're simultaneously

pending, but "the" judgment under the FTCA seems to be final in this case.

MR. JAICOMO: No, Your Honor, the --

JUSTICE GORSUCH: It ought to be.

MR. JAICOMO: The judgment in an action is not final because that action is this case directly on appeal. So --

JUSTICE GORSUCH: But you -- you have to -- well, okay. All right. Thank you, counsel.

MR. JAICOMO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you.

Good afternoon, Mr. Jaicomo. I want to raise the point that's bothering me about what we should decide, and I don't blame you for raising the alternative argument. I understand that. You're trying to win the case. But trying to think about why we should consider it.

We obviously discuss very carefully our decisions to grant certiorari on particular cases and particular issues within that case, and we don't usually decide things that weren't decided by the court below.

And there are exceptions to that, and no doubt about that, and you -- but I don't think this is embedded within in the way you said. And sometimes we'll do it if it's really -- really simple and it will be helpful just to go ahead and resolve it. But I'm not sure this qualifies as really simple either because, if we get to the merits -- at least not very simple in your direction because, if we get to the merits of that alternative argument, every court of appeals, save one, has ruled against you, and the text says "any action," not any subsequent action.

You have forceful arguments in response to that, but I guess I'm just back at why should we consider that issue at this time in this case, given the way it was developed in the Sixth Circuit?

MR. JAICOMO: Yes, Your Honor. So, like -- as I mentioned earlier, there's no question that the Sixth Circuit didn't predicate its decision on this point. But it was raised in the Sixth Circuit. And in the Simmons case, this Court actually decided the FTCA decision on a separate ground than the one that the Sixth

Circuit had used below.

And so, here, I think the -- the existence of the other circuit court decisions -- which, as I mentioned, although they somehow agree on this same claims point, they do so in very different ways -- illustrates that there's an enormous amount of confusion that this Court could very simply clear up and do so consistent with its decision in Simmons and Will, which is focused on stating that the purpose of the judgment bar is to prevent duplicative litigation, as this Court said in Will, multiple suits on identical matters.

JUSTICE KAVANAUGH: Well, can I just stop you there? You said the other courts of appeals have ruled against your position on this issue in many different ways, and I don't see how that makes it easier to clear that up. That just means there are lots of routes that courts of appeals have thought that lead to the opposite result from what you're suggesting here. That would seem to make it harder, not easier, for us to just, in your words -- well, I don't know if you used this phrase, but to clean it up or clear it up, as you said.

MR. JAICOMO: Yes, Your Honor. I -- I do think the -- the one thing that animates all of those decisions is why this Court should weigh in, which is that all of those decisions repudiate or simply ignore the fact that Section 2676 incorporates res judicata, which has as its central premise the concept that you can't be barring claims brought together in one lawsuit.

JUSTICE KAVANAUGH: Well, that just goes back to the "any action" versus "any subsequent action" argument of the government, which I -- I understand your point on that.

My time's up. Thank you very much.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: Counsel, I want to make sure that I understand your position on the nature of this judgment and whether it's on the merits or can be a bar.

Is it your position -- I thought I heard you say this earlier; maybe it was in response to the Chief Justice -- that a judgment is only -- functions as a bar if it's entered after trial?

MR. JAICOMO: Yes, Your Honor, that's one of the lines that we draw. There are three. Simply put, in this case, because the government requested and received a 12(b)(1) dismissal, the Court doesn't even need to reach that second --

JUSTICE BARRETT: Okay. But -- but what about if it's a summary judgment? Didn't the government also in this case request summary judgment in the alternative? I thought they had said 12(b)(1), 12(b)(6), or summary judgment.

MR. JAICOMO: Yes, Your Honor, they did request it in the alternative, but the district court didn't grant that. And all through the Sixth Circuit, the government continuously said it only moved under Rule 12, and only then at the merits stage did they announce that it was actually a Rule 56 summary judgment decision.

JUSTICE BARRETT: Okay. So what if they had won summary judgment? In your view then, is that a judgement that, even if the United States wins, can then be a bar?

MR. JAICOMO: I -- I think it depends, Your Honor. I think, because a court is required to assess its own jurisdiction, that a

court necessarily has to decide. Certainly, in a -- in a situation where a party has raised these alternative avenues for relief, that --

JUSTICE BARRETT: No, no, no, just answer as to the question. So it's summary judgment and the United States -- I just don't understand how that's not done on the merits.

MR. JAICOMO: Yes, Your Honor. It -- it simply depends on whether there has been actual fact-finding or not. And the reason that the on-the-merits portion is a little obscure is because, as I mentioned, and the government agrees, the language of Section 1346(b) intertwines merits, jurisdiction, and sovereign immunity.

JUSTICE BARRETT: Okay. Let me ask you a question about the second alternative argument that you've made. Let's say that you're -- you bring a Bivens claim first and you lose, and then you bring an FTCA claim against the United States.

Can the United States then just under regular common law preclusion assert defensive issue preclusion against you?

MR. JAICOMO: No, Your Honor, I don't

think that it can because, as the professors' amicus brief points out, there's a different primary right at stake. And so, if -- if simple preclusion was being applied, a Bivens claim before an FTCA claim would not have a preclusive bar.

JUSTICE BARRETT: Well, but issue preclusion just requires identity of issues, right?

MR. JAICOMO: Yes. Of course, we're talking about claim preclusion, but, if we were talking about issue --

JUSTICE BARRETT: I know, but I asked about issue.

MR. JAICOMO: If we were talking about issue preclusion, Your Honor, yes, there would be certain issues that could be carried over from the Bivens claim to the FTCA claim. But, if you look at a case like this, the FTCA claim was decided on grounds of government immunity that wouldn't apply to a Bivens claim.

So it depends on how the Bivens claim is decided, if you're -- if you're looking at issue preclusion.

JUSTICE BARRETT: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Mr. Jaicomo, you can take a couple of minutes to wrap up.

MR. JAICOMO: Yes, Your Honor.

Embedded in Congress's enactment of the FTCA and its judgment bar, it is a very simple common law doctrine that has been with litigants since the beginning of this country, which is the concept of res judicata.

The primary basis for res judicata is that it only applies to separate lawsuits. This Court has said so on many occasions. And that it only applies once a judgment has been entered on the merits by a court with jurisdiction.

So, as I mentioned, we raised this issue of duplicative litigation in the Sixth Circuit. The government has addressed it in its brief. It's fully briefed. There's no reason that this Court shouldn't honor the language that Congress enacted by addressing this claim at issue.

And even if -- even in the alternative, the independent ground here also justifies this Court affirming the Sixth Circuit because the government moved for and received a dismissal on the basis of jurisdiction.

It should not now be allowed to come to this Court and say: Jurisdiction and merits are the same and -- and merits should, therefore, prevail because, as Wright and Miller in the First Restatement and many other places have said, anytime jurisdiction's entwined with merits, jurisdiction controls, not merits.

And if it were the other way around, the Court would be able to reach beyond its actual authority granted by Congress.

So, for these reasons, this Court should affirm the Sixth Circuit and allow James King to continue taking his first and only bite at the apple in this lawsuit.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Huston, three minutes for rebuttal.

REBUTTAL ARGUMENT OF MICHAEL R. HUSTON
ON BEHALF OF COMPLAINANT

MR. HUSTON: Thank you, Mr. Chief Justice.

Regarding the question presented, the judgment bar is triggered by the judgment in an action under Section 1346(b). Respondent

created just such an action by pleading a demand for relief alleging the elements of Section 1346(b), and the district court indisputably entered judgment.

The Sixth Circuit explained at Petition Appendix 1A, Note 1, why the district court's judgment is best understood as a summary judgment in favor of the government, because both parties submitted a body of extensive evidentiary exhibits in support of the motion.

But even if the Court concluded that the judgment was best understood as a dismissal for failure to state a claim, it makes no difference because it's still the judgment in an action under Section 1346(b), as Meyer explained, and this Court's canonical decision in Bell v. Hood makes clear that a dismissal for failure to state a claim for relief is a decision on the merits and, therefore, preclusive.

The surest way to know Respondent's main argument on the question presented is incorrect is that it forces my friend into the extraordinary conclusion that the judgment bar is not triggered by a judgment in favor of the

United States on the FTCA action. Simmons squarely foreclosed that, and the plain text refutes it.

Now, regarding my friend's fallback argument, I think, as the Court has recognized this morning, it certainly has discretion not to consider that argument in this case, and that's the most appropriate disposition because the alternative question simply isn't cert-worthy.

There's no significant disagreement about the circuits on it. The only circuit that has even come close to saying something like that argument is the Ninth, and that's -- the basis of its -- of its reasoning was abrogated by Simmons.

The Court should not leave in place the Sixth Circuit's rather obvious mistaken interpretation of the judgment bar and, instead, decide the case in favor of Respondent on an alternative ground that no other court has accepted.

And -- and even if -- if the Court were inclined to reach the alternative question, we think the text is unambiguous in our favor. Congress would have looked at a lawsuit like

this one and said Respondent has an action under Section 1346(b) and an action under Bivens, and he has joined them together in a single lawsuit, but there's simply no way to read the phrase "complete bar to any action" to actually mean that Respondent is precluded only from bringing a subsequent action when that is exactly the common law rule that Congress expressly changed.

In the 70 years since the judgment bar was enacted, the courts of appeals have overwhelmingly rejected this argument, and that's because, as Justice Breyer recognized, it directly conflicts with Congress's purpose.

Congress's -- the rule that Respondent advocates would permit a plaintiff to sue the United States and win and then continue pursuing individual government employees for additional relief just because he brought his two actions together in the same lawsuit. That is exactly the result that Congress created the judgment bar to prevent, as this Court explained in Gilman.

For all those reasons, the judgment should be reversed.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 12:16 p.m., the case was submitted.)

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