No. 19-546

In the Supreme Court of the United States

DOUGLAS BROWNBACK, ET AL., PETITIONERS

v.

JAMES KING

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

REPLY BRIEF FOR THE PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 19-546

DOUGLAS BROWNBACK, ET AL., PETITIONERS

v.

JAMES KING

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

REPLY BRIEF FOR THE PETITIONERS

In opposing certiorari, respondent does not meaningfully address the text of the Federal Tort Claims Act (FTCA) judgment bar: "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. By its terms, that provision covers this case. Respondent pleaded an action under 28 U.S.C. 1346(b)(1), and the district court entered judgment in favor of the government because it found the United States not liable. Pet. App. 80a. Respondent is therefore "complete[ly] barr[ed]" from pursuing "any" claims arising from the same subject matter against the same governmental employees. 28 U.S.C. 2676. Yet the decision below allows respondent to pursue claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the

same officers, based on the same factual allegations. That result does not comport with the plain text of the judgment bar.

Respondent's defense of the decision below rests on his assertion that "the judgment bar does not apply when an FTCA claim fails on jurisdictional grounds." Br. in Opp. 8; see *id.* at 1, 2, 7, 10, 11, 15, 17, 18. But the district court did not dismiss respondent's FTCA claims in jurisdictional, non-merits terms; the court rejected respondent's claims because his factual allegations and evidence failed to establish that the United States is liable. Pet. App. 80a. Specifically, the FTCA requires a plaintiff to prove (among other things) that "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." 28 U.S.C. 1346(b)(1). The district court dismissed because respondent failed to satisfy *that* requirement—*i.e.*, he failed to show any violation of Michigan law. And when a district court "issue[s] a judgment dismissing * * * because [the plaintiff] simply failed to prove his claim," this Court has said that the judgment bar *does* apply. *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1849 (2016). The decision below cannot be reconciled with *Simmons*.

At bottom, respondent's reasoning—which the Sixth Circuit adopted—is that a district court's summary judgment for the government on an FTCA claim *never* triggers the judgment bar. In respondent's and the Sixth Circuit's view, because Section 1346(b)(1) both waives sovereign immunity and creates a cause of action against the United States, any FTCA claim that "fails to satisfy the[] six elements" of Section 1346(b)(1) "does not fall within the FTCA's 'jurisdictional grant.'" Pet. App. 7a (citation omitted). Respondent does not dispute

that his approach would render the judgment bar meaningless whenever the government prevails on an FTCA claim before trial. And contrary to respondent's argument, the Sixth Circuit's interpretation conflicts with decisions of the Fourth, Seventh, and Tenth Circuits holding that, when a plaintiff fails to prove the elements of his FTCA claim, he may no longer pursue individual claims against the same governmental employees under *Bivens*.

A. The Decision Below Conflicts With The FTCA's Text And This Court's Decision in *Simmons*

1. Respondent does not attempt to square the Sixth Circuit's reasoning—that a dismissal for failure to establish an FTCA claim does not trigger the judgment bar, Pet. App. 9a—with *Simmons*'s express statement that "a judgment dismissing * * * because [the plaintiff] simply failed to prove his claim" carries preclusive force. 136 S. Ct. at 1849. Nor does respondent come to grips with *why* the *Simmons* Court held that the judgment bar applies "once a plaintiff receives a judgment (favorable or not) in an FTCA suit." *Id.* at 1847. The reason, this Court explained, is that when a plaintiff has had "a fair chance to recover damages for" his alleged injuries through an FTCA claim against the United States, "it would make little sense to give [the plaintiff] a second bite at the money-damages apple by allowing suit against the employees." *Id.* at 1849. Here, respondent had a fair chance to establish liability against the United States, and his failure to do so precludes *Bivens* claims against the officers.

In respondent's view, *Simmons* held that the judgment bar does not apply whenever an FTCA claim is dismissed for lack of jurisdiction. See Br. in Opp. 11. That is not correct. The FTCA provides for liability

against the United States in certain circumstances, but also draws several "Exceptions" to Section 1346(b), including for discretionary functions performed by federal agencies or employees. 28 U.S.C. 2680(a). The question in *Simmons* was whether a dismissal under the discretionary-function exception triggers the judgment bar. The Sixth Circuit had answered no, because "district courts lack subject-matter jurisdiction over an FTCA claim when the discretionary-function exception applies." *Himmelreich* v. *Federal Bureau of Prisons*, 766 F.3d 576, 579 (2014) (per curiam). This Court notably did *not* adopt that rationale in *Simmons*: it rested instead on the FTCA's text, which provides that the entire chapter that contains the judgment bar "shall not apply to" claims excluded from the FTCA by one of the enumerated exceptions. 28 U.S.C. 2680; 136 S. Ct. at 1847-1848. The decision below thus resurrects the Sixth Circuit's reasoning in *Himmelreich*—reasoning that this Court correctly did not embrace in *Simmons*.

Moreover, the Court explained in *Simmons* why it may not make sense to treat a dismissal under an FTCA exception as triggering preclusion. Such a dismissal signals "that the United States cannot be held liable for a particular claim," but "has no logical bearing on whether an employee can be held liable instead." *Simmons*, 136 S. Ct. at 1849. Here, by contrast, the district court found against liability for the United States not because respondent's suit fell outside the FTCA altogether, but because he failed to prove his claim by showing that the officers violated state law. That conclusion bears directly on whether the officers should face individual liability under *Bivens* for the same conduct. As the Court observed in *Simmons*, "the judgment bar provision prevents unnecessarily duplicative litigation," *ibid.*, and

here respondent's *Bivens* claims both arise out of the same facts and seek to litigate the same issues as his FTCA claims.

Respondent invokes *Simmons*'s analogy between the judgment bar and common-law claim preclusion. Br. in Opp. 9-10 (quoting 136 S. Ct. at 1849 n.5). But the district court's FTCA judgment held that the officers acted with probable cause, with reasonable force, and within their authority. Pet. App. 80a. Respondent does not explain why those rulings should not preclude his *Bivens* claims against the officers. Respondent does say (Br. in Opp. 1, 10-11) that if the district court's FTCA judgment is preclusive, it will affect plaintiffs' choices about which claims to bring and in what order. See *Simmons*, 136 S. Ct. at 1850 (expressing the same concern). But to some extent, that is the inevitable result of the judgment bar. "Litigants frequently face tough choices" that come with "consequence[s]." *Unus* v. *Kane*, 565 F.3d 103, 122 (4th Cir. 2009), cert. denied, 558 U.S. 1147 (2010). A plaintiff who adds FTCA claims to his *Bivens* claims gains the prospect of a deeper pocket and a more settled source of liability, but he risks having his *Bivens* claims precluded if he fails to prove the liability of the United States.

2. Respondent alternatively argues that when the judgment bar precludes "any action * * * by reason of the same subject matter," 28 U.S.C. 2676, it covers only pursuing "the identical theory of liability" against individual employees. Br. in Opp. 13-14. According to respondent, a final judgment on an FTCA claim—even a judgment in the plaintiff's favor—never precludes *Bivens* claims or any other individual claim based on federal law as opposed to state law. See *id.* at 11-14. The Sixth Circuit did not decide the case on that basis,

and respondent does not point to any court that has adopted his reading of the judgment bar. In any event, respondent's interpretation is at odds with the statutory text, which precludes "any action by the claimant, by reason of the same subject matter," against the same employee "whose act or omission gave rise to the [FTCA] claim." 28 U.S.C. 2676. The phrase "same subject matter" naturally refers to the underlying facts or dispute, not the plaintiff's particular theory of liability.

This Court in *Simmons*—which involved a plaintiff with both *Bivens* and FTCA claims, 136 S. Ct. at 1846—read Section 2676 that way. The Court observed that a plaintiff who receives an FTCA judgment, favorable or not, "generally cannot proceed with a suit against an individual employee *based on the same underlying facts*." *Id.* at 1847 (emphasis added). And consistent with *Simmons*, every court of appeals to have considered the question has held that *Bivens* claims are not exempt from the judgment bar. See, *e.g.*, *Serra* v. *Pichardo*, 786 F.2d 237, 239-242 (6th Cir.) (Section 2676 bars claims "arising out of the same actions, transactions, or occurrences" as an FTCA judgment), cert. denied, 479 U.S. 826 (1986); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (same); *Arevalo* v. *Woods*, 811 F.2d 487, 489-490 (9th Cir. 1987) (same). Respondent does not address any of those decisions. Nor does he dispute that, applying a fact-based test, his *Bivens* claims arise "by reason of the same subject matter" as his dismissed FTCA claims: they allege wrongdoing based on exactly the same facts. See Pet. App. 80a.

B. The Decision Below Conflicts With Decisions Of Other Federal Courts of Appeals

1. As the officers have explained (Pet. 20-24), if this case had been brought in the Fourth, Seventh, or Tenth

Circuit, Section 2676 would have precluded respondent's *Bivens* claims once the judgment became final on his FTCA claims.

For instance, respondent does not dispute that this case is materially identical to the Fourth Circuit's decision in *Unus*, *supra*. There, as here, the plaintiffs pleaded both FTCA and *Bivens* claims against federal officers, 565 F.3d at 113-115; and as here, the district court "granted summary judgment to the United States" on the FTCA claims because it found no violation of state law, *id.* at 115. Compare *ibid.* (finding that "the agents acted reasonably under the circumstances"), with Pet. App. 80a (finding that petitioners "used reasonable force," had "probable cause," and "acted within their authority"); see Pet. App. 1a n.1 (treating the district court's order as a "grant of summary judgment for Defendants"). Faced with those same circumstances, the Fourth Circuit applied Section 2676 and held that the summary judgment for the government on the plaintiffs' FTCA claims precluded their *Bivens* claims. *Unus*, 565 F.3d at 121-122.

The Seventh and Tenth Circuits also have rejected the Sixth Circuit's interpretation of Section 2676. In *Manning* v. *United States*, 546 F.3d 430, 432-438 (7th Cir. 2008), cert. denied, 558 U.S. 1011 (2009), and *Farmer* v. *Perrill*, 275 F.3d 958, 962-964 (10th Cir. 2001), both courts of appeals held that district-court judgments in favor of the United States on FTCA claims precluded plaintiffs' *Bivens* claims arising from the same facts. Before the decision below, the Sixth Circuit had itself interpreted Section 2676 the same way in *Harris* v. *United States*, 422 F.3d 322, 333-337 (2005) (Sutton, J.).

Respondent's primary answer to these decisions is that they involved judgments "entered on the merits by a court with FTCA jurisdiction." Br. in Opp. 17. But that is no distinction at all; it merely repeats the Sixth Circuit's erroneous reasoning that when an FTCA plaintiff fails to establish the liability of the United States, it means the district court lacked subject-matter jurisdiction and hence the judgment bar does not apply. Pet. App. 8a. The Fourth, Seventh, and Tenth Circuits all disagree with that view of Section 2676. They apply the judgment bar to an FTCA judgment that is based on the plaintiff's failure to establish the elements of his claim. Respondent does not attempt to explain why, although the judgment in the government's favor in this case supposedly rests on a lack of jurisdiction, the judgments in the government's favor in *Unus*, *Manning*, and *Harris* rested instead on the merits.

Respondent correctly does not defend the Sixth Circuit's unexplained suggestion that it makes a difference whether the plaintiff's FTCA claim fails before trial (as in *Unus* and this case) or after trial (as in *Manning* and *Harris*). Pet. App. 12a. The text of Section 2676 does not draw any distinction based on when a judgment was rendered in the government's favor. Moreover, if the Sixth Circuit were correct that a plaintiff's failure to satisfy the elements of his FTCA claim deprives the district court of subject-matter jurisdiction, that would also be true after trial. That is why the Sixth Circuit's reasoning cannot be reconciled with *Harris* or *Manning*, and if applied consistently, it would nullify the judgment bar whenever the government prevails on an FTCA claim. See *id.* at 41a-42a (Rogers, J., dissenting).

Respondent does argue (Br. in Opp. 17) that *Farmer* rested on the merits because a dismissal for failure to

prosecute an FTCA action "operates as an adjudication on the merits" under Federal Rule of Civil Procedure 41(b). But that only highlights the oddity of the Sixth Circuit's reasoning. According to respondent and the Sixth Circuit, a dismissal for *failure to prosecute* carries preclusive force, but a judgment like the district court's here—which dismissed for *failure to show a violation of state law*, even taking respondent's allegations and evidence as true, Pet. App. 80a—"was not a disposition on the merits" and was not preclusive. *Id.* at 10a. The Sixth Circuit is the only court of appeals that ignores the substance of a district court's FTCA ruling when applying Section 2676.

2. The conflict between the courts of appeals over the judgment bar is important because the question frequently recurs. Plaintiffs like respondent often attempt to pursue *Bivens* claims after unsuccessful FTCA claims. The decision below also has important implications for the ability of the judgment bar to serve Congress's purposes. Respondent does not deny that, under the Sixth Circuit's interpretation, whenever the United States prevails on an FTCA claim before trial, the judgment will not be preclusive. That result would dramatically curtail the judgment bar as a means of "prevent[ing] unnecessarily duplicative litigation." *Simmons*, 136 S. Ct. at 1849. If the decision below were allowed to stand, FTCA plaintiffs in the Sixth Circuit could unsuccessfully pursue claims against the United States through summary judgment, and then force individual governmental employees to start the case over again as defendants. That result is precisely what this Court rejected in *Simmons*. *Ibid.*

C. This Case Is An Appropriate Vehicle To Decide The Question Presented

Respondent identifies nothing that would make this case an unsuitable vehicle to review the Sixth Circuit's interpretation of Section 2676. Respondent contends (Br. in Opp. 3 n.2) that Detective Allen is "judicially estopped" from invoking the judgment bar, because he argued in the district court that respondent had not preserved an FTCA claim against him. First, estoppel applies only where a party "succeeded in persuading a court to accept [its] earlier position." *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001). Here, the district court "assum[ed] arguendo that [respondent] preserved his FTCA claims as to both Officer Allen and Agent Brownback," and then rejected those claims for failure to show a violation of state law. Pet. App. 79a-80a. The district court plainly did not rest its judgment on respondent's failure to preserve an FTCA claim against Detective Allen. Second, even if estoppel applied, the Court should still grant review and hold that Agent Brownback is entitled to invoke the judgment bar.

Respondent also contends (Br. in Opp. 18-20) that this case does not implicate the purpose of the judgment bar because he brought *Bivens* and FTCA claims in the same lawsuit. But the Sixth Circuit did not decide the case on that ground; the court instead based its interpretation of Section 2676 on respondent's failure to establish the elements of his Section 1346(b)(1) claim. And while the Ninth Circuit has accepted respondent's reasoning that the judgment bar should not apply when plaintiffs bring FTCA and *Bivens* claims simultaneously, that outlier position has been rejected by every other court of appeals that has considered it. See Pet. 26 n.5 (citing cases); *Denson* v. *United States*, 574 F.3d

1318, 1334 n.50 (11th Cir. 2009) (citing five circuit-court decisions construing Section 2676 "as barring a plaintiff's *Bivens* claims, irrespective of whether the *Bivens* and FTCA claims were brought in the same lawsuit"), cert. denied, 560 U.S. 952 (2010). The text of Section 2676 draws no distinction between the preclusive effect of an FTCA judgment on a later lawsuit versus its effect on related claims in the same lawsuit. Rather, the FTCA judgment is a "*complete* bar to *any* action by the claimant" against the same governmental employees based on the same subject matter. 28 U.S.C. 2676 (emphasis added). In any event, the potential to address that additional conflict among the circuits provides more reason, not less, to grant review.

Finally, contrary to respondent's contention that he has never had a "fair chance to recover damages," Br. in Opp. 19-20 (quoting *Simmons*, 136 S. Ct. at 1849), his district-court filings relied extensively on documentary and testimonial evidence from his state-court trial and pre-suit administrative claim to the FBI. See D. Ct. Docs. 79, 80 & Exhibits (Jan. 17, 2017). The district court thoroughly considered all of respondent's allegations and evidence, and determined that, even "taken as true," Pet. App. 65a, they did not show any violation of state law, *id.* at 80a. The judgment bar forecloses respondent's attempt to forgo an appeal of that judgment and then restart the case under *Bivens* by making the same factual allegations against the officers individually.

* * * * *

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

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

FEBRUARY 2020