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 OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

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August 2020

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization with members and supporters in all 50 states. Public Citizen appears before Congress, administrative agencies, and courts on a wide range of issues, and works for the enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in the proper construction of statutory provisions defining and limiting access to the federal courts. The resolution of such issues often has significant impacts on the efficacy of statutory and common-law remedies under both state and federal law, as well as on the allocation of power in our federal system and the proper implementation of congressional intent. Public Citizen has participated as amicus curiae before this Court in many cases involving significant issues of statutory interpretation and federal jurisdiction, including, of particular relevance here, *Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016), where the government argued for an expansive reading of the judgment bar provision of the Federal Tort Claims Act (FTCA) that would have had consequences similar to the construction it advocates here. *See also Will v. Hallock*, 546 U.S. 345 (2006) (Public Citizen attorney as counsel for respondent).

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[1] This brief was not authored in whole or part by counsel for a party, and no one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

SUMMARY OF ARGUMENT

The FTCA's judgment bar, 28 U.S.C. § 2676, does not direct dismissal of other claims brought in the same action as an FTCA claim, even when the FTCA claim is disposed of before other claims in the case. This understanding of the judgment bar follows directly from its text, which does not bar "claims," but rather bars an "action" based on the same facts as the FTCA "claim," after "judgment in the action" in which the FTCA claim was brought. *See Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2054 (2017) (distinguishing "action" from "claim").

The purpose of section 2676 supports this plain-text reading. Congress enacted the judgment bar in 1946 to close a narrow gap in common-law claim preclusion jurisprudence. At that time, courts recognized an exception to the mutuality-of-the-parties requirement of claim preclusion, or res judicata, that allowed an employer to assert claim preclusion in a subsequent suit where its employee had prevailed in an earlier suit regarding the same conduct. The converse was not true, however: A judgment for the employer did not bar a later suit against the employee. To rectify that disparity, the FTCA judgment bar extended the res judicata effect of a final judgment in an FTCA action brought against the government to a subsequent lawsuit against the federal employee whose act formed the basis for the FTCA claim. Res judicata, however, does not preclude additional claims within a single action.

The plain-text reading avoids inequitable results produced by the government's interpretation. As in *Will v. Hallock*, 546 U.S. 345 (2006), and *Simmons v.*

Himmelreich, 136 S. Ct. 1843 (2016), this Court should reject the government's effort to convert a statute enacted to provide individuals an avenue to seek compensation, and that expressly preserves the right to bring *Bivens* claims against employees as well as FTCA claims against the government, into one that effectively bars a plaintiff from pursuing otherwise valid claims in the alternative to FTCA claims brought together in the same case.

ARGUMENT

The plain language of section 2676 and its origin in res judicata principles point to one conclusion: The judgment bar does not require dismissal of a *Bivens* claim after dismissal of an FTCA claim brought in the same action. The inequitable results of the government's contrary argument confirm that reading.

I. The text of the FTCA judgment bar does not preclude *Bivens* claims brought in the same action as an FTCA claim.

As in any statutory construction case, "[w]e begin with the text," *King v. Burwell*, 576 U.S. 473, 486 (2015), and then "proceed from the understanding that [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning," *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). The text of the FTCA judgment bar demonstrates that it does not apply to claims against federal employees that are part of the same action in which the FTCA claim is brought.

The judgment bar 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.

An "action" is the whole of a lawsuit. *See* Black's Law Dictionary (11th ed. 2019) (defining action as "a civil or criminal judicial proceeding"); Black's Law Dictionary 43 (3d ed. 1933) (stating that "[t]he terms 'action' and 'suit' are … nearly, if not entirely, synonymous"); Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); *id*., advisory committee's note ("This rule provides that the first step in an action is the filing of the complaint.").

In contrast, a "claim" is "the part of a complaint in a civil action specifying what relief the plaintiff asks for." Black's Law Dictionary (11th ed. 2019); *see also* Fed. R. Civ. P. 12(b) (setting forth defenses to a "claim for relief"). Federal Rule of Civil Procedure 18, for example, provides for joinder of multiple "claims" in a single civil action. *See* Fed. R. Civ. P. 18 (providing that a "party asserting a claim … may join, as independent or alternative claims, as many claims as it has against an opposing party").

Expressly contrasting "action" and "claim," Federal Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all *the claims* or the rights and liabilities of fewer than all the parties does not end *the action* as to any of *the claims* or parties" (emphasis added). *See also* 28 U.S.C. § 1332(d)(11)(B)(i) (defining a "mass action" as "any civil *action* ... in which monetary *relief claims* of 100 or more persons are proposed to

be tried jointly on the ground that the plaintiffs' *claims* involve common questions of law or fact" (emphasis added)).

Thus, in the first line of section 2676, the "action" is the lawsuit in which a plaintiff asserts claims—those arising under the FTCA or otherwise. In the last line, the "claim" is the FTCA claim arising from the government employee's act or omission. Accordingly, under section 2676, "[t]he judgment in an action" containing the FTCA claim—not a judgment on one claim in that action—bars any other "action" by the plaintiff based on the acts that gave rise to the FTCA "claim" asserted in the first action. *See Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2054 ("The term 'action,' however, refers to a judicial 'proceeding,' or perhaps to a 'suit'—not to the general content of claims." (citing Black's Law Dictionary 41 (3d ed. 1933))).

Accordingly, where, as here, an FTCA claim against the United States and *Bivens* claims against government employees are brought in a single "action," the judgment bar does not preclude the plaintiff from continuing to pursue his *Bivens* claims in that action after dismissal of the FTCA claim in that same action. The dismissal of the FTCA claim does not constitute a "judgment in an action," as is required to trigger the judgment bar, because other claims in the "action" remain pending. *See Krieger v. Dep't of Justice*, 529 F. Supp. 2d 29, 56 (D.D.C. 2008) ("[I]t is not clear to the Court that [section 2676] would extend to a prior *ruling*, as the Court has not entered a final *judgment* in this case."). In other words, the dismissal of a single claim in the case is not a "prior judgment in [the] action" and, therefore, does not trigger the judgment bar.

The opinions in *Will* and *Simmons* strongly support this plain language reading. In *Will*, this Court, using "case" as a synonym for "action," stated that "the judgment bar can be raised only after a case under the Tort Claims Act has been resolved in the Government's favor." 546 U.S. at 354. And in *Simmons*, the Court, using the synonym "suit," explained that the judgment bar "forecloses any *future* suit against individual employees" after a final judgment in the plaintiff's FTCA action. *See* 136 S. Ct. at 1846 (emphasis added)); *id.* at 1847 (noting that if the judgment bar applied, it "would preclude any *future* actions" (emphasis added)).

The government, contending that section 2676 bars claims brought in the same case as an FTCA claim, argues that a bar on an "action" must include claims within that action: "A claim is part of the broader term action, and Section 2676 cannot plausibly 'be read to preclude the whole while preserving its parts.'" Pet'r Br. 44 (quoting *Manning v. United States*, 546 F.3d 430, 434 (7th Cir. 2008)). Although the government is correct that section 2676 preludes any claim that might be alleged in a barred "action," its conclusion that the *Bivens* claim alleged here is therefore barred wrongly conflates claims brought in the two different actions to which section 2676 refers. Even the government agrees that the original "action" (the one that contains the FTCA claim) is not barred by section 2676; after all, barring that action would have the nonsensical result of barring litigation of the FTCA claim itself. The plain language reading, under which additional claims brought in the same action as the FTCA claim are not barred, therefore does not "preclude the whole while preserving its parts," because it does not

preclude "the whole" of the first action at all. Rather, section 2676 precludes none of the claims in the initial action and bars all of the claims ("the whole") brought in any other "action" maintained "against the employee" after "the judgment in" the initial action.

Put simply, the "judgment bar provision applies where a plaintiff *first* sues the United States and *then* sues an employee." *Simmons*, 136 S. Ct. at 1849 n.5 (emphasis added). The plain language of section 2676 does not bar other claims brought in the same "action" as the FTCA "claim."

II. The purpose of section 2676 does not support applying the judgment bar to dismiss additional claims brought in the same action as an FTCA claim.

The plain language reading of section 2676—that it does not foreclose additional claims brought in the same action as an FTCA claim—is consistent with the purpose of the judgment bar: to extend the res judicata effect of a judgment against the United States in an FTCA case to a case filed against the individual employee.

Although res judicata is primarily a creation of the common law, various federal statutes embody res judicata principles. 18 *Federal Practice & Procedure* § 4403, at 35 & n.23. The FTCA is one such statute. *Id*.

Traditional principles of res judicata, or claim preclusion, "prevent[] parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated." *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594 (2020); *see also*

Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948). Historically, federal law applied preclusion principles (including both claim and issue preclusion) to claims raised in subsequent litigation only when the parties to the second action were also the parties to the first action or were in privity with those parties. "Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–27 (1979).

In 1946, when Congress enacted the FTCA, the federal courts generally enforced a strict requirement of mutuality of the parties in order to apply claim preclusion principles. *See United States v. Pink*, 315 U.S. 203, 216 (1942); *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912); Restatement (First) of Judgments § 93 (1942) (non-party or privy to prior action "not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action").

An exception to the mutuality requirement at the time of the FTCA's enactment, however, allowed an employer to assert claim preclusion in a subsequent suit where its employee had prevailed in an earlier suit regarding the same conduct. *See* Restatement (First) of Judgments § 96(1)(a) & cmts. b, d (1942). The converse was not true, however: Exoneration of the employer in an earlier suit generally did not enable the employee to assert claim preclusion in a later suit regarding the same conduct. *Id.* at cmt. j.

As this Court recognized in *Simmons*, the FTCA's judgment bar "supplements common-law claim preclusion by closing [this] 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 1849 n.5 (emphasis added; citation omitted). Thus, the FTCA's judgment bar extends the res judicata effect of a prior judgment against the United States to an action against a federal employee for the same conduct.

"The doctrine of claim preclusion, or res judicata, operates to bar a 'second suit' after final judgment involving the same parties and causes of action. However, it cannot be invoked to bar claims brought in the same suit." *Lalowski v. City of Des Plaines*, 789 F.3d 784, 789 (7th Cir. 2015) (citations omitted). Prior to a judgment terminating the action, there has been no conclusive determination of *any* issue between the parties that could give rise to preclusion effects. *See* Fed. R. Civ. P. 54(b) (stating that an adjudication of "fewer than all the claims" in an action "does not end the action as to any of the claims … and may be revised at any time before the entry of a judgment adjudicating all the claims"). "The rules of res judicata are applicable only when a final judgment is rendered," Restatement (Second) of Judgments § 13; they address "when a judgment in one action is to be carried over to a second action and given a conclusive effect there." *Id.* at cmt. a.

Reflecting the purpose for which it was enacted, the judgment bar "functions in much the same way" as traditional res judicata. *Will*, 546 U.S. at 354. Accordingly, section 2676 applies "as between separate actions, not within the confines of a single

action on trial or appeal." 18 *Federal Practice & Procedure* § 4404 (discussing res judicata); *see Will*, 546 U.S. at 354 (stating that both the FTCA judgment bar and traditional res judicata "depend[] on a prior judgment as a condition precedent" for application, and "neither reflect[s] a policy that a defendant should be scot free of any liability").

By extending the res judicata effect of FTCA litigation, the judgment bar serves the goal of "avoiding duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" *Will*, 546 U.S. at 354 (quoting 18 *Federal Practice & Procedure* § 4402, at 9)); *see Simmons*, 136 S. Ct. at 1849 ("Ordinarily, the judgment bar provision prevents unnecessarily duplicative litigation."). And although it is "the avoidance of litigation for its own sake that supports the judgment bar," *Will*, 546 U.S. at 353, the government's reading would also encourage unwarranted appeals on FTCA claims joined with other claims in an action after the government has prevailed on those claims. Here, for example, the government's position, if accepted, would penalize respondent for not appealing the district court's ruling in favor of the government on the FTCA claim.

In short, as is true of res judicata, a "rule of respecting a prior judgment by giving a defense against relitigation," *Will*, 546 U.S. at 355, has no application to individual claims brought in a single case.

III. Applying the judgment bar to dismiss claims brought in the same case as an FTCA claim has inequitable consequences.

Interpreting the judgment bar according to its plain text and the principles of traditional res judicata serves the goals of the statute and avoids unjust results. The government's reading, however, would transform the judgment bar from a tool for fairness and efficiency into a punitive provision to trap plaintiffs who, consistent with the judgment bar's intended purpose, seek to resolve their claims against the United States and its employees in the most efficient manner: by bringing the claims in a single lawsuit. *See Kreider v. Breault*, 2012 WL 3518470, at *1 (E.D. Pa. 2012) (declining to apply the judgment bar within a single lawsuit because of "common sense, an ambiguous statute, and the likelihood of an absurd result").

Extending the judgment bar to cover claims brought in the same action as an FTCA claim transforms a sensible preclusion provision into a "Kafka-esque" dilemma. *McCabe v. Macaulay*, 2008 WL 2980013, at *14 (N.D. Iowa 2008). Because the court will in most cases *eventually* issue a judgment on the FTCA claim, the *Bivens* claim, regardless of the order in which the courts address it, is doomed from the start. Thus, in *Estate of Trentadue v. United States*, 397 F.3d 840, 859 (10th Cir. 2005), the court of appeals—before the FTCA claims were resolved—instructed the district court to dismiss the *Bivens* claim. There, the district court had entered judgment for the plaintiff on both the *Bivens* claim (following a jury verdict in favor of the plaintiff) and the FTCA claim. The Tenth Circuit remanded the case to the district court for further consideration of the FTCA

claim. Then, recognizing that the district court would ultimately enter another judgment on the FTCA claim, and accepting the view that the bar applies to claims brought within the same action, the court directed: "[U]pon entry of a final judgment in the FTCA action, the district court shall dismiss the *Bivens* action." *Id.* at 859. The court rejected as immaterial that the district court's disposition of the *Bivens* claims prior to the appeal would precede the anticipated judgment on the FTCA claims: "[T]he fact that the district court entered judgment on the *Bivens* claims before issuing its order and judgment in the FTCA case is inconsequential under § 2676." *Id.*; *see also Manning*, 546 F.3d at 438 (reaching same result).

Such decisions flout this Court's recognition in *Will* that FTCA and *Bivens* claims may be brought simultaneously. 546 U.S. at 354. Instead, under these cases, a plaintiff who relies on the FTCA's preservation of *Bivens* claims against employees, 5 U.S.C. § 2679(b)(2), and seeks to pursue an FTCA claim in the alternative to her *Bivens* claim in the most efficient manner—by asserting the claims in the same action—will have doomed her *Bivens* claim, regardless of its merits or those of her FTCA claim.

In *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005), for example, the district court *erroneously* dismissed the plaintiff's *Bivens* claim based on the statute of limitations and later entered judgment in favor of the United States on the FTCA claim. On appeal, the court first considered the FTCA claim, upheld the ruling, and on that basis applied the judgment bar to the *Bivens* claim, "[e]ven though the district court [had] incorrectly dismissed Harris's *Bivens* claims." *Id.* at 333.

Such outcomes contradict Congress's "crystal clear" intention that FTCA and *Bivens* exist "as parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980); *see United States v. Smith*, 499 U.S. 160, 166–67 (1991) ("Section 5 declares that the FTCA is *not* the exclusive remedy for torts committed by Government employees in the scope of their employment when an injured plaintiff brings … a *Bivens* action, seeking damages for a constitutional violation by a Government employee[.]" (footnote omitted)); *see also Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (noting the Westfall Act's explicit exception from the exclusivity of the FTCA remedy for *Bivens* claims).[2] Indeed, under the government's view, when the claims are brought in the same case, neither the timing nor outcome of a decision on the *Bivens* claim matters. In many cases, as soon as an FTCA claim is pleaded, dismissal of the *Bivens* claim becomes inevitable.

For example, in *Manning*, the plaintiff had been erroneously convicted of kidnapping and murder, based in part upon material evidence fabricated by federal agents. *Id.* at 432. Heeding the Seventh Circuit's advice that "[p]laintiffs contemplating both a *Bivens* claim and an FTCA claim will be

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[2] When enacting an amendment extending the FTCA to cover intentional torts committed by federal employees, Congress explained that "[a]fter the date of enactment of this measure, innocent individuals who are subjected to raids [like that in *Bivens*] will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a *counterpart* to the *Bivens* case and its progenty [sic] [.]" *Carlson*, 446 U.S. at 20 (quoting S. Rep. No. 93-588, p.3 (1973), emphasis added in *Carlson*).

encouraged to pursue their claims concurrently in the same action, instead of in separate actions," *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 185 (7th Cir. 1996), Manning brought the two claims together in one complaint. The claims were tried together—the *Bivens* claim to a jury and the FTCA claim to the judge. The jury found in favor of Manning on his *Bivens* claim and awarded him $6.5 million in damages. Before the district court had ruled on the FTCA claims, Manning moved for entry of judgment on the jury's *Bivens* verdict, noting a concern that a subsequent judgment on his FTCA claim might nullify the *Bivens* judgment. A year later, without having ruled on the motion for entry of judgment, the district court found for the United States on the FTCA claims. Citing the judgment bar, the defendants then moved to vacate the jury verdict on the *Bivens* claim. The district court granted the motion, *see* 546 F.3d at 434, and the Seventh Circuit affirmed. *Id*. at 438.

The court in *Manning* suggested that the plaintiff was to blame for losing his favorable *Bivens* judgment because he did not dismiss the FTCA claim after obtaining the *Bivens* verdict. *Id*. But at that stage of the case, a plaintiff cannot unilaterally dismiss, *see* Fed. R. Civ. P. 41(a), and the government, with an eye to the judgment bar, would have reason to oppose. Moreover, in most cases, the plaintiff would have no assurance of the availability of that option because the plaintiff will not be able to control the order of the verdicts.

Indeed, under the government's reading, *any* merits resolution of an FTCA claim bars all other claims against individual employees based on the same subject matter—whether filed before, after, or

contemporaneously; whether resolved before, after, or contemporaneously.

* * *

This case is the third time that the government has sought the Court's assistance in expanding the FTCA judgment bar beyond its plain language or purpose. Once again, as in *Will* and *Simmons*, the Court should reject the government's plea.

CONCLUSION

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

Respectfully submitted,

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