No. _____

In the Supreme Court of the United States

HOPE ANGELIC WHITE, individually and as personal representative of the estate of Myron Pollard,

PETITIONERS

v.

UNITED STATES OF AMERICA and BERNARD HANSEN,

RESPONDENTS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq*., waives the sovereign immunity of the United States and creates a cause of action for damages for certain torts committed by federal employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The FTCA also imposes a judgment bar, which provides that "[t]he 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. Congress enacted the judgment bar of the FTCA to prevent a plaintiff who first fails to prove a tort claim against the United States from then having a second chance, in a separate lawsuit, at that same claim by suing the government's official individually.

The question presented is whether, in the same lawsuit, a partial judgment for or against a claimant in her capacity as personal representative for an estate claiming one set of damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) is vacated and barred by a subsequent judgment for or against a claimant in her individual capacity claiming another set of damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.,* and 28 U.S.C. Section 1346(b).

PARTIES TO THE PROCEEDING

Petitioner Hope Angelic White was the appellant in the court of appeals. She was serving in two separate and distinct capacities. Petitioner was serving as personal representative of the Estate of her deceased son, Myron Pollard, in the *Bivens* claim with one set of damages based on Constitutional violations, and in her individual capacity as Myron Pollard's mother in the FTCA claim with another separate and distinct set of damages based on Missouri tort law. Respondents are the United States of America, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) special agent Bernard Hansen.

RELATED PROCEEDINGS

1. *Hope Angelic White, individually and as personal representative of the estate of Myron Pollard v. The United States of America and Bernard Hansen*, No. 4:15CV1252SNLJ, United States District Court for the Eastern District of Missouri. Partial Judgment in a Civil Case on the *Bivens* claim only against Hope White in her capacity as personal representative of the estate of Myron Pollard entered August 21, 2018.

RELATED PROCEEDINGS (cont.)

2. *Hope Angelic White, individually and as personal representative of the estate of Myron Pollard v. The United States of America and Bernard Hansen*, No. 4:15CV1252SNLJ; 2019WL1426292, United States District Court for the Eastern District of Missouri. Judgment on the FTCA claim only against Hope White in her individual capacity entered March 29, 2019.

3. *Hope Angelic White, individually and as personal representative of the estate of Myron Pollard v. United States of America and Bernard Hansen*, 959 F.3d 328 (8th Cir. May 13, 2020), United States Court of Appeals for the Eighth Circuit, docket #19-1878. Judgment entered May 13, 2020, petition for reh'g denied, July 28, 2020.

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Attorney Howard A. Shalowitz, on behalf of Hope Angelic White, in her capacity as personal representative of the estate of Myron Pollard and in her individual capacity, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 959 F.3d 328 (8th Cir. May 13, 2020), rehearing denied, July 28, 2020 (App. E, *infra*, 44a). The memorandum and order of the district court on

the FTCA claim (App. C, *infra*, 12a – 42a) is not published in the Federal Supplement but is available at United States District Court (E.D. Mo.) No. 4:15CV1252SNLJ and at 2019WL1426292. The partial judgment on the *Bivens* claim (App. B, *infra*, 11a) and the judgment on the FTCA claim (App. D, *infra*, 43a) are not published in the Federal Supplement but are available at United States District Court (E.D. Mo.) 4:15CV1252SNLJ.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2020 (App. A, *infra*, 10a). A petition for rehearing was denied on July 28, 2020 (App. E, *infra*, 44a). The filing of this petition for a writ of certiorari is timely in that ninety (90) days from the denial of the petition for a rehearing falls on Monday, October 26, 2020. United States Supreme Court Rule 13.1.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Supreme Court Rules 10(a) and 10(c) because a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; a United States court of appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court; and the opinion of the court below conflicts with other decisions within its own circuit on this very issue.

A similar FTCA case is now before this Honorable Court in *Brownback v. King*, 140 S. Ct 2563 (2020) (docket No. 19-546), to be argued on November 9, 2020.

STATUTORY PROVISIONS INVOLVED

Federal Tort Claims Act (FTCA) – 28 U.S.C. 1346, 28 U.S.C. 2674, 28 U.S.C. 2676, and 28 U.S.C. 2779(b). Pertinent statutory provisions are reproduced in the appendix to this petition (App. F, *infra*, 45a – 46a).

STATEMENT OF THE CASE

The basis for federal jurisdiction in the district court was under 28 U.S.C. §1331 and 28 U.S.C. § 1346(b) for the FTCA claim, and 28 U.S.C. §1332 for the *Bivens* claim.

In the decision below, the court of appeals held that an FTCA judgment bars a *Bivens* claim in all circumstances. The opinion of the circuit court below conflicts with at least three decisions of the United States Supreme Court (*Carlson v. Green*, 446 U.S. 14, (1980), *Will v. Hallock*, 546 U.S. 345 (2006), and *Simmons v. Himmelreich*, 136 S.Ct. 1843 (2016))[1]; two decisions of the United States Court of Appeals for the Ninth Circuit (*Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019) amended in 965 F.3d 1015 (9th Cir. 2020), and *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992)); and three decisions of the United States Court of Appeals for the Eighth Circuit (*Arcoren v. Farmers Home Admin.*, 770 F.2d 137 (8th Cir. 1985), *Loge v. U.S.*,

[1] *Brownback v. King,* 140 S. Ct 2563 (2020) No. 19-546, is scheduled to be heard by this Court on November 6, 2020; albeit with different jurisdictional facts, and a plaintiff suing in one capacity with one cause of action under the FTCA and *Bivens* unlike the case at bar.

662 F.2d 1268 (8th Cir. 1981), and *Vennes v. An Unknown Number of Unidentified Agents of U.S.*, 26 F.3d 1448 (8th Cir. 1994)).

Consideration by this Court is therefore necessary to secure and maintain uniformity among the various circuits and uphold this Court's decisions on whether a Federal Tort Claims Act (FTCA) claim may be maintained simultaneously with a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) without the former barring, vacating, or voiding the latter.

Procedural History: White filed a timely FTCA "Claim for Damage, Injury, or Death" individually and as personal representative for the estate of her son Myron Pollard. The ATF denied both of these administrative claims. White filed a timely original Complaint followed by a First Amended Complaint in her individual capacity for her own tort damages pursuant to Missouri law under the FTCA against the USA (Count I), and in her capacity as personal representative of the estate of her son Myron Pollard for his damages pursuant to constitutional violations in a *Bivens* action against Hansen (Count II). The bifurcated trial was held on July 23 through July 27, 2018. The jury returned a verdict on the *Bivens* claim on July 27, 2018; the district court[2] entered a "Partial Judgment in a Civil Case" on August 21, 2018 on the *Bivens* claim (App. B, *infra*, 11a); and the district court held in favor of the government on the FTCA claim on March 29, 2019 (App. C and App. D, *infra*, 12a – 43a).

[2] The Honorable Stephen N. Limbaugh, Jr., United States District Judge for the Eastern District of Missouri.

The circuit court affirmed the judgment entered in favor of the United States and against Petitioner Hope White, individually, on the FTCA claim; and vacated the judgment entered in favor of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) Special Agent Bernard Hansen and against Petitioner Hope White, as personal representative of the estate of Myron Pollard, on the *Bivens* claim. The circuit court remanded the *Bivens* claim with instructions to dismiss that claim as barred.

The court below held that "the FTCA judgment bar precludes the *Bivens* claim." (App. A, *infra*, 7a). Neither the government nor Hansen plead this alleged bar as an affirmative defense or raised the issue in the district court. Although the judgments for the FTCA and the *Bivens* claims were against Petitioner, the court of appeal's opinion only addressed the issues related to the FTCA claim and ignored all of the issues relating to the *Bivens* claim.

In doing so, the court of appeals avoided deciding all of the issues raised under the *Bivens* claim: (1) the spoliation of evidence matter before the jury (not being able to even argue an adverse inference); (2) the district court's committing reversible error when it did not allow White's counsel to ask the "insurance question" in *voir dire* against the established law in *Ivy v. Hawk*, 878 S.W. 2d 442 (Mo. banc 1994); (3) whether the manifest weight of the evidence was against Hansen and contrary to the verdict; and (4) the district court's error in allowing the jury to hear irrelevant and highly

prejudicial testimony and statements from counsel.

If the court below decided Section IV of the Opinion (App. A, *infra*, 7a – 9a) in favor of White, then it would have had to decide the remaining jury-tried issues on the *Bivens* claim. Had this occurred, any of the remaining issues regarding the *Bivens* claim would afford White a new trial consistent with that opinion.

The court below decided that in any circumstance, maintaining an FTCA claim automatically bars a *Bivens* claim. The court ignored and incorrectly applied three Supreme Court cases and cases in other United States circuit courts of appeals to the case at bar.

The circuit court opinion (App. A, *infra*, 1a – 9a) addresses three issues: (1) the spoliation claim only as it relates to the FTCA claim tried by the district court, (2) the FTCA claim, and (3) the FTCA's bar to the *Bivens* claim.

Facts of the Case: ATF set up a "fictitious home invasion" that lured black teenagers and young men to a vacant parking lot where the entire operation was captured on four stationary digital video recordings. Myron Pollard, a front seat passenger in a vehicle driven to the lot, was not a suspect in this operation. Out of the ten ATF agents who were carrying lethal weapons during the operation, ATF special agent Bernard Hansen was the only one to discharge his weapon, fatally wounding Pollard. ATF set up four separate video recordings of the incident but none captured the fatal

shot -- one was missing 4-1/2 seconds of crucial video, one "malfunctioned" and captured nothing, one had "frozen" video frames at the time a gun was discharged, and one was missing the audio when Hansen shot his weapon. The copies made from the original servers were not complete copies of the operation that was recorded. ATF then erased the original servers onto which these recordings were made. This evidence was crucial to White's case and the spoliation prejudiced her thereby. The district court did not even allow the Petitioner to argue an adverse inference from the erased servers and incomplete copies that were recorded. At a minimum, the district court should have allowed counsel to argue an adverse inference from the erased servers and the incomplete copies of the videos; and, at most, to sanction Respondents Hansen and the USA by one of the methods allowed under Rule 37(e), Fed.R.Civ.P.

Pre-operational Meeting: On the morning of August 29, 2012, ATF conducted a preoperational meeting for one hour with 30 to 35 law enforcement personnel, including Respondent ATF special agent Bernard Hansen ("Hansen") and other ATF agents regarding the operation to take place later that morning. Hansen was present when ATF Agent Justin Meyer ("Meyer"), the operational team leader that day, discussed all of the contingencies including the location of where the suspects' car was supposed to be parked, that there was one ingress and egress to the lot, that the entire

lot was surrounded by a fence and police officers, and the use of a bucket truck to block a fleeing vehicle. Hope White's son Myron Pollard ("Pollard") was not part of this investigation and was unknown to Hansen and the ATF.

Take-Down: Damitrius Creighton ("Creighton") called Pollard that morning to "hang out" and knew that Pollard had nothing to do with the fictitious drug sale/purchase. Creighton drove a car, in which Pollard was a front-seat passenger, into ATF's pre-determined parking spot, always with the wheels turned, on an angle, and facing a wall but not parked directly perpendicular to the wall. Hansen knew that the car could only travel in reverse after it was parked. Hansen and nine other ATF agents had protective gear and were armed with lethal semi-automatic M4 rifles. ATF Special Agent David Hall ("Hall") carried an LL-SL6 – a less than lethal weapon in order to knock out windows to the car.

When Meyer gave the order, the U-Haul back door was opened, two diversionary flash bangs went off, and Hansen jumped out of the U-Haul shouting "police, police" and moved toward the vehicle where Pollard was seated. The suspects' car had not moved from the parked position while four agents lined up to Hansen's left and were stationary approximately 21 feet away from the car in their predetermined location. Before the car began to reverse, an ATF bucket truck had driven onto the lot and continued to drive toward the car for the purpose of disabling it. Hansen heard the engine of the suspects' vehicle begin to rev and he observed the white reverse lights on

the suspects' vehicle light up. When the car started to reverse, it never went straight back, was always going on a curve, and never came toward Hansen. As the car travelled in reverse toward the exit, Creighton looked over his shoulder and saw the grille of the bucket truck but did not see any law enforcement officers in his path. As the car was moving in reverse, the agents remained stationary and lined up with their weapons pointed at the driver's side of the car. Of the four agents lined up shoulder to shoulder with lethal weapons, Hansen was the only one to fire a lethal weapon.

As the car was reversing on a curve, Hall shot three less than lethal baton rounds knocking out the rear driver's side window and the driver's window.

The car had travelled two and one half car lengths (44 feet) on a curved path when it collided with the bucket truck and was pushed forward. At impact, Pollard went down with his knee on the front passenger's floor, and there was no blood spatter on the windshield. Creighton observed Pollard pushing off of the dashboard trying to get up when Creighton heard three gunshots back to back and then felt blood splatter on his face. One of those gunshots struck Pollard in the head, knocked him all the way back into his seat, and fatally wounded him. Once the bucket truck disabled the car, the car was no longer a threat. Of the three bullets that Hansen fired, none struck the driver, two struck the backseat passenger and one struck Pollard. Hansen never yelled for other agents to get out of the way of the car because

he never observed them to be in harm's way.

Hansen's fatal shot was through the driver's side of the car. Although Hansen knew that a bullet from an M4 rifle can ricochet off of metal, asphalt, a brick wall, and items in a car if shot into a car, he did not think about this when he discharged bullets from his M4 rifle into the car. If Hansen would have run in the opposite direction of the car, he would not have been hit and nothing prevented him from moving out of the way. Had Hansen not shot and stood where he was, like the other agents, he would not have been struck by the car.

Audio/Video Recordings: Jason French ("French"), technical surveillance specialist for ATF, set up four stationary digital video cameras during the investigation to record the event – one on a pole that was video only being recorded onto his computer's hard drive ("server") at his office approximately 20 miles away (45 minutes by car); two wireless audio and visual cameras under a tractor trailer being recorded to his computer's hard drive ("server") in his van; and one audio and visual camera on his van directly wired to the server in his van. It was at the request of ATF case agent Chris Wiegner ("Wiegner") and Meyer where to place the cameras. French positioned the cameras in accordance with the plan that the suspects' vehicle would be parked next to a van facing a wall. All of the video/audio cameras were working properly when they were set up about 60 to 90 minutes before the incident, and the events were recorded to the server in the

van. After French burned the recording from the server to a DVD, he did not compare the DVD with the original recording on the server, and destroyed the original recording on the server that was in the van.

1. Pole-cam (video only): The recording of the pole-cam could be stopped only at French's office approximately 20 miles away. French testified that he copied "the video file of the whole operation" off of the pole cam that was recorded on the server at his office, and destroyed the original recording on the server. French never compared the recording on the server with the copy that was made to ensure that it was an exact copy without any glitches or skips. The copy of the pole-cam video is 11 minutes and 44 seconds in length. At the end of the pole-cam video at 11:42 a.m., French is seen on the video at the scene even though it could only be turned off at his office 48 minutes away. The pole-cam recorded for another 48 minutes, yet French edited out these 48 minutes when he returned to his office, turned off the recording, and burned a DVD off of the server without these last 48 minutes.

More significantly, this video does not show the car traveling in reverse nor the position of the agents when the shots were fired. The video skips from the frame capturing the car in a parked position facing the wall to the frame 4-1/2 seconds later when the bucket truck had already disabled the car. The pole-cam was turned away from the scene twice for several minutes at a time. French did not know who turned it the first time, but the second time he stated that Special Agent Mike Hungria asked French to turn it off

"so it wasn't covering anything." If the pole-cam was turned away from the scene or not copied in its entirety, it cannot be shown when the evidence cones were placed on the ground next to the spent bullet shell casings, if the casings were moved, if anyone searched for the bullets, or if anyone disturbed the evidence at the scene.

2. Audio/Video Camera #s 1 and 2: One of the two audio/video cameras under the tractor trailer did not record the incident. French claims that this one "froze" before the suspects' vehicle even entered the lot and did not record any of the events at issue in this case. The other audio/video camera had a frozen video at the moment shots were fired while the audio portion was uninterrupted. The original audio/visual recordings on the server for these recordings were both deleted.

3. Audio/Video Camera # 3: The video from the camera set up in the surveillance platform ends at the moment the bucket truck collides with the car and omits all audio/video including the final shots after the collision. The original server was also erased. This was the only audio-video recording that the jury requested to see in its deliberations before it returned a verdict for Hansen.

French was to follow Meyer's orders as to when to turn off the videos that were recorded on the server. According to Meyer, he heard the flash bangs, heard a vehicle, heard shots, heard the car crash with the bucket truck, exited vehicle (surveillance platform), was "approaching the accident

scene," and then "told Jason [French] … you can turn off the cameras." Meyer cannot explain why the copies of the videos only go to the time of the crash or a second after the crash, stop at the moment the car and truck collide, and omit any video or audio after that moment.

Chain of Custody: After French made copies of the videos, he gave them to ATF agent Gettler who gave them to ATF agent Wiegner who put them into a temporary locker on August 29, 2012 until they went into an evidence locker on September 18, 2012. On September 18, 2012, Gettler gave the DVD copies to evidence custodian Mark Winn. There is no record of the chain of custody of these DVD video copies for 20 days when they were finally placed into the permanent evidence locker, there is no explanation why the date is smudged on the evidence tag for the videos, and no one can decipher the rest of the writing on the evidence tag.

Spoliation of evidence: White filed a motion for sanctions for spoliation of evidence under Rule 37(e), Fed.R.Civ.P. and common law spoliation of evidence principles with a memorandum in support of this motion because none of the four digital video cameras set up by the ATF recorded the actual shooting – one camera "malfunctioned," one camera had frozen video frames while shots were fired, one camera had over four (4) seconds of footage not recorded, and one camera was obstructed by the ATF truck and cut off the audio at the time the car was disabled omitting the final gunshots. Although the ATF made copies from the original servers, the copies were not of the

entire recordings on the servers and ATF then erased the master servers. The district court filed its Memorandum and Order ordering the USA and Hansen to inspect and produce any video files recovered from the servers and to report back to the court with their results. The court also denied without prejudice White's motion for sanctions. In response to this, the USA and Hansen had three (3) employees of the ATF, not independent examiners, inspect the servers and file their memorandum stating that no files were recovered from the August 29, 2012 operation. White then filed a motion to reconsider her motion for sanctions. The court denied White's motion for sanctions in its Memorandum and Order but allowed White to "argue an inference that the missing parts of the videos would be detrimental to the defendants at trial." The USA and Hansen's motion *in limine* # 5 requested that White not be allowed to argue an adverse inference regarding spoliation despite the court's allowing it in a previous order. The district court then reversed its previous order and stated: "The Court therefore withdraws its earlier statement that "plaintiff [White] will be permitted to argue an inference – as opposed to a presumption – that the missing parts of the video would have been detrimental to defendants [USA and Hansen]." The district court granted the USA and Hansen's motion *in limine* #5 and disallowed White to argue an adverse inference to the jury on the Bivens claim regarding the erased original servers and the missing video segments on the copies.

Insurance Question: White filed her request to use the "insurance question" in *voir dire* and the district court denied White's request.

Prejudicial error: During the opening statement, Hansen's counsel made several statements that were objected to and overruled including arguing the "Golden Rule" and stated that a confidential informant told an ATF agent that the undercover agent would be killed. Over White's objections at trial, various ATF agents were allowed to testify about unknown associates showing up, drug stash houses, threats of killing the undercover agent, and the dangerousness of the suspects despite the fact that White's son, Myron Pollard, was not a suspect and Hansen never feared for his safety because of any gun involvement.

REASONS FOR GRANTING THE PETITION

A. The decision below is wrong.

1. The decision conflicts with the FTCA's text and this Court's decisions.

The court of appeals' interpretation of the judgment bar violates the text of the FTCA. When interpreted properly to give meaning to all of the statutory text, the FTCA instructs that Section 2676 only applies when three independent requirements are met: (1) there is a separate lawsuit; (2) brought after a court with FTCA jurisdiction has entered a final judgment; (3) addressing the merits of the claims. The failure of any one of those requirements precludes the judgment bar's application. The first two

requirements fail here; therefore, barring White's *Bivens* claim, vacating the judgment on the *Bivens* claim, and allowing the court below not to address the issues raised in the *Bivens* claim are contrary to the FTCA's language, this Court's previous holdings, the holdings of another circuit court, and the holdings within the Eighth Circuit itself.

The judgment bar does not apply to an FTCA subsequent judgment in the same lawsuit. The text of Section 2676 (app. F, *infra*, 45a) and the Court's decisions in *Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016) and *Will v. Hallock*, 546 U.S. 345 (2006), show that the judgment bar does not operate against claims brought together in the same lawsuit. *Simmons* at 1849. If a plaintiff brings claims together in a single lawsuit, there is no chance of duplicative litigation. *Will* at 354.

First, the court below states that the use of Section 2676 phrase "by reason of the same subject matter" (App. A, *infra*, 8a) can include a *Bivens* claim. Even if true, that does not mean that the judgment bar can reach a *Bivens* claim brought together with FTCA claims in the same lawsuit. Second, the court treats Section 2676 as an election of remedies. That argument holds no support in the FTCA or Congress' unequivocal intention that FTCA claims and *Bivens* claims complement one another. *Carlson v. Green*, 446 U.S. 14, 19-20, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). Although there are strong arguments that the judgment bar only applies to claims based on the same theory of tort liability and not constitutional

claims, that question has no relevance in lawsuits where a plaintiff raises FTCA and *Bivens* claims together. See generally James E. Pfander & Neil Aggarwal, Bivens, the Judgment Bar, and the Perils of Dynamic Textualism, 8 U. St. Thomas L.J. 417 (2011).

Under the holding of the court below, if a plaintiff brings *Bivens* and multiple FTCA tort claims in the same lawsuit, the failure of any single tort claim would instantly bar all *Bivens* claims. Under this theory, if a court were to hold that a plaintiff could sustain a claim of battery, but not intentional infliction of emotional distress, and grant a motion to dismiss on that single claim, Section 2676 would bar the plaintiff from proceeding concurrently on a *Bivens* claim. This Court has already rejected that outcome, *Simmons*, 136 S. Ct. at 1850, and it contradicts principles of *res judicata*. The election-of-remedies theory in the court below promotes the "strange result" *Simmons* cautioned against and violates *res judicata* principles. The "strange result" rejected in *Simmons*, 136 S. Ct. at 1850, is "the inevitable result of the judgment bar," which operates as an election of remedies. *Ibid*.

There is nothing in the FTCA or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations. Rather, in the absence of a contrary expression from Congress, the FTCA's provision creating a cause of action against the United States for intentional torts committed by federal law

enforcement officers, contemplates that victims of the kind of intentional wrongdoing alleged in the complaint in this case shall have an action under the FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights. *Carlson*, at 18-20.

The following factors also support the conclusion that Congress did not intend to limit White to an FTCA action: (i) the *Bivens* remedy, being recoverable against individuals, is a more effective deterrent than the FTCA remedy against the United States; (ii) punitive damages may be awarded in a *Bivens* suit, but are statutorily prohibited in an FTCA suit; (iii) White cannot opt for a jury trial in an FTCA action as she may in a *Bivens* suit; and (iv) an action under the FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. *Carlson*, at 20-23. The holding in the court below conflicts with the Court's holding in *Carlson* that it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson,* at 19–20.

Although the claims are predicated on the same conduct of Hansen, they do not regard the same subject matter – each claim was for different damages, different causes of action, and by White in different capacities. The remedy provided by the FTCA is generally "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter

against the [federal] employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1). That limitation, however, "does not extend or apply to a civil action against an employee of the Government … which is brought for a violation of the Constitution of the United States." 28 U.S.C. 2679(b)(2). The opinion of the court below has a contrary interpretation of the judgment bar and disregards the text of Section 2676, and the balance identified by *Simmons* and *Will*. Instead, the court below provides a theory of the judgment bar as an election of remedies. That theory would, in the words of *Simmons*, "encourage litigants to file suit against individual employees before suing the United States to avoid being foreclosed from recovery altogether," 136 S. Ct. at 1850, a result at odds with the FTCA and this Court's decisions. See *Ibid*.

In *Will v. Hallock*, 546 U.S. 345, 353-354 (2006), this Court unanimously explained that the judgment bar is analogous to "the defense of claim preclusion, or *res judicata*," and "[a]lthough the statutory judgment bar is arguably broader than traditional *res judicata*, it functions in much the same way, with both rules depending on a prior judgment as a condition precedent and neither rejecting a policy that a defendant should be scot free of liability." *Will*, 546 U.S. at 354. Both rules, *Will* explained, are concerned with saving trouble for the government and it employees in "avoiding duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.' " *Ibid*. For that reason, "there will be no

possibility of a judgment bar … so long as a *Bivens* action against officials and a Tort Claims Act [action] against the government are pending simultaneously." *Ibid.*

Congress wanted to prevent unsuccessful FTCA plaintiffs from "turn[ing] around" and "su[ing]" the employee whose alleged misconduct was at issue, thereby initiating another disruptive round of litigation. *United States v. Gilman*, 347 U.S. 507, 512 n.2 (1954) (quoting 1942 Hearing 9).

The Court unanimously confirmed those conclusions in *Simmons*, 136 S. Ct. at 1849 (explaining that the judgment bar does not cut off a plaintiff 's "first suit" or "a fair chance to recover damages"). *Simmons* reinforced Section 2676's requirements: a separate lawsuit, a final judgment by a court with FTCA jurisdiction, and a merits decision.

The judgment bar establishes that a plaintiff who "receives a judgment (favorable or not) in an FTCA suit … *generally* cannot *proceed* with a suit against an individual employee based on the same underlying facts." [*emphasis* added]. *Simmons at* 1847. This does not mean that an FTCA judgment retroactively voids a prior *Bivens* claim judgment. This language applies to the proposition that a single plaintiff may generally not sue for the same damages, under the same theory of recovery under *respondeat superior* liability against both the employee and the United States in a separate suit. This is a general rule and not an absolute one. Furthermore, the language states the order of the judgments – first, there is a judgment for the FTCA

suit, and then the same plaintiff "cannot proceed with a suit against an individual…." In the case at bar, White was suing in two separate capacities – one individually, and one as personal representative of the Estate of her son Myron Pollard. Furthermore, the jury's verdict on the *Bivens* claim was handed down first on July 27, 2018 with the partial judgment being entered on August 21, 2018 (App. B, *infra*, 11a); and the judgment on the FTCA claim being entered on March 29, 2019 (App. D, *infra*, 43a). This was the opposite order of the language that is specified in *Simmons*. The statute thereby "prevents unnecessarily duplicative litigation" after an FTCA claimant has had "a fair chance to recover damages for his" alleged injury. *Id*. at 1849. *Simmons* held that "the judgment bar provision prevents unnecessarily duplicative litigation"; that Congress adopted Section 2676 to codify non-mutual *res judicata*; and that the judgment bar does not apply to claims in the same lawsuit. *Simmons*, 136 S. Ct. at 1849 & n.5 ("The judgment bar provision applies where a plaintiff first sues the United States and then sues an employee.").

In *Brownback v. King,* 140 S. Ct 2563 (2020), (a case to be argued before this Court on November 9, 2020), James King resisted arrest after being stopped by FBI Special Agent Douglas Brownback and Grand Rapids Police Department Detective Todd Allen. King was tried and acquitted of the charges of assault with intent to do great bodily harm, aggravated assault of

a police officer, and resisting arrest. He then sued the United States under the FTCA and *Bivens*. The U.S. district court for the Western District of Michigan held Brownback and Allen had not violated King's constitutional rights under *Bivens*. The district court also decided against King's FTCA claims. On appeal, the U.S. Circuit Court of Appeals for the Sixth Circuit reversed the district court's ruling.

The decision in *Brownback* may have important implications for parties bringing simultaneous FTCA and *Bivens* claims. Although the jurisdictional facts, the number of plaintiffs, and the different causes of action in *Brownback* differ from the case at bar, this Court may clarify whether a merits-based FTCA judgment allows or bars *Bivens* claims based on the same underlying facts, even when the claims are brought in the same action. Although the case at bar involves different claims and plaintiff's serving in different capacities, this Court may nevertheless address these issues as well.

The court below cites two Supreme Court cases, and five United States Courts of Appeals cases to support the proposition that the FTCA judgment bar precludes the *Bivens* claim. The circuit court was correct in citing "*Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (noting that it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action"). (App. A, *infra*, 8a). One may exist with the other.

Simmons v. Himmelreich, 136 S.Ct. 1843, 1847 (2016) cited by the

court below is not on point to support its opinion. *Simmons* began with two separate suits filed by Himmelreich -- one for an FTCA claim that fell under the "exceptions" section of the FTCA and one under *Bivens*. While the government's motion to dismiss the FTCA claim was pending, Himmelreich filed a separate lawsuit under *Bivens*. Himmelreich first filed an FTCA suit, was the only plaintiff, and was suing for the same damages against both the government (FTCA claim) and its employee (*Bivens* claim). Ultimately, this Court ruled that Himmelreich had a right to pursue his *Bivens* claim after the district court dismissed the FTCA claim.

Had the personal representative for the estate of Myron Pollard prevailed in the *Bivens* claim, the proceeds from the judgment for a violation of Pollard's constitutional rights would have gone into an estate account to be distributed to Myron Pollard's heirs at law in accordance with the probate laws of the State of Missouri. White, in her individual capacity, was suing for her loss of consortium, emotional distress, funeral bills, and burial expenses on the FTCA claim. White is suing under separate theories of recovery for these different damages – one for negligence and wrongful (tortious) conduct in the FTCA claim and one for a violation of a Constitutional right in the *Bivens* action. White brought both of these suits together in one proceeding, rather than in separate lawsuits.

2. The decision conflicts with decisions of other federal courts of appeals.

a. Cases in other circuits are in complete opposition to the holding in the court below.

The parties agree that the judgment bar's purpose is to prevent unnecessarily duplicative litigation. See, e.g., *Gasho v. United States*, 39 F.3d 1420, 1438 (9th Cir. 1994) ("Our interpretation of § 2676 [barring a subsequent *Bivens* action] serves the interests of judicial economy. Plaintiffs contemplating both a *Bivens* claim and an FTCA claim will be encouraged to pursue their claims concurrently in the same action, instead of in separate actions."); see also *Hoosier Bancorp of Ind., Inc. v. Rasmussen*, 90 F.3d 180, 184–185 (7th Cir. 1996) (citing judicial economy). The court below contends that the judgment bar precludes simultaneous claims that involve no duplicative litigation at all.

The Ninth Circuit has held that a merits-based FTCA judgment for the government bars a *Bivens* claim, but not if the two claims are brought in the same action. See *Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019). The Ninth Circuit held in *Fazaga* at 1250 that:

> "The judgment bar provision precludes claims against individual defendants in two circumstances: (1) where a plaintiff brings an FTCA claim against the government and non-FTCA claims against individual defendants in the same action and obtains a judgment against the government, see *Kreines v. United States*, 959 F.2d 834, 838 (9th Cir. 1992); and (2) where the plaintiff brings an FTCA claim against the government, judgment is entered in favor of either party, and the plaintiff then brings a subsequent non-FTCA action against individual defendants, see *Gasho v. United States*, 39 F.3d 1420, 1437-38 (9th Cir. 1994); *Ting v. United States*, 927 F.2d 1504, 1513 n.10 (9th Cir. 1991). The purposes of this judgment bar are 'to prevent dual recoveries,' *Kreines*, 959 F.2d at 838, to 'serve[ ] the interests of judicial economy,' and to 'foster more efficient settlement of claims,' by 'encourag[ing plaintiffs] to pursue their claims concurrently in the same action, instead of in separate actions,' *Gasho*, 39 F.3d at 1438.

> Neither of those two circumstances, nor their attendant risks, is present here. Plaintiffs brought their FTCA claim, necessarily, against the United States, and their non-FTCA claims against the Agent Defendants, in the same action. They have not obtained a judgment against the government. *Kreines* held that 'an FTCA judgment in favor of the government did not bar the *Bivens* claim [against individual employees] when the judgments are `contemporaneous' and part of the same action.' *Gasho*, 39 F.3d at 1437 (quoting *Kreines*, 959 F.2d at 838)."

The Ninth Circuit held in *Fazaga v. FBI*, 916 F.3d 1202 (2019), amended opinion at 965 F.3d 1015 (9th Cir. 2020), that the judgment bar does not apply where a plaintiff brings FTCA claims and *Bivens* claims in the same action (as opposed to bringing FTCA claims first and then later attempting separately to bring *Bivens* claims concerning the same alleged injuries), unless the plaintiff obtains a judgment in his or her favor against the government. *Id*. at 1250 (citing *Kreines v. United States*, 959 F.2d 834, 838 (9th Cir. 1992)).

In *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992) the Ninth Circuit held that when the government prevails on a plaintiff's FTCA claim, Section 2676 did not bar the plaintiff from recovering on a *Bivens* claim brought within the same suit. The court viewed the primary purpose of Section 2676 was to prevent dual recoveries arising from subsequent litigation. The court concluded that Section 2676 should not bar a contemporaneous *Bivens* recovery when the government prevailed on the plaintiff's FTCA claim. "Congress' primary concern in enacting the bar was

to prevent multiple lawsuits on the same facts. *See Hearings Before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess. 9 (1942) (statement of Francis Shea, Assistant Attorney General). That concern is absent when suit is brought contemporaneously for FTCA and other relief." *Kreines* at 838.

In *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), *certiorari* denied, ___ U.S. ___, 115 S.Ct 2585, 132 L.Ed.2d 831, the court found that the legislative history of the section indicated that Congress was concerned not only with double recoveries by plaintiffs, but with the prevention of multiple lawsuits as well. The court stated: "Plaintiffs contemplating both a *Bivens* claim and an FTCA claim will be encouraged to pursue their claims concurrently in the same action, instead of in separate actions." *Gasho* at 1438. This is exactly how White proceeded with her claims – concurrently in the same action.

The United States and Hansen argued throughout the litigation, including in the motions *in limine,* that the FTCA and the *Bivens* actions are two separate claims and that White's FTCA individual claims may not be mentioned in the *Bivens* case and White's claims as personal representative for the Estate of Myron Pollard in the *Bivens* action are not relevant to the FTCA claim. Assuming *arguendo* that the FTCA judgment bars the judgment in the *Bivens* action, then had White been afforded a fair trial on

the *Bivens* claim without spoliation of evidence, without improper statements by the United States and Hansen's counsel, without improper prejudicial evidence being allowed, and with the "insurance question" in *voir dire* being allowed, then a favorable verdict would have been returned in the *Bivens* case and the FTCA claim could have been dismissed. This would have been allowed as it was in *Wagner v. Jones*, 2:13-cv-00771-CG/WPL, p. 12 (Dist Ct. NM, 2014) when the court stated in accordance with *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), the district court "cannot find that the dismissal of Plaintiff's FTCA claim constituted a judgment on the merits with any claim-preclusive effect over other actions arising from the same transaction. For all of the foregoing reasons, the Court holds that the § 2676 judgment bar does not preclude Plaintiff's *Bivens* claim in this suit."

In *Rodriguez v. Handy*, 873 F.2d 814 (5th Cir. 1989) the 5th Circuit Court of Appeals stated: " § 2676 is applicable only *after* a plaintiff obtains a judgment against the United States. " [*emphasis* added]. *Rodriguez v. Handy*, 873 F.2d 814, 816 n.1 (5th Cir. 1989). *Rodriguez* held that the FTCA claim bar was to prevent from double recoveries of a judgment first against the government, and then against the individual. White, individually, did not obtain a judgment against the United States nor was the FTCA claim decided before the *Bivens* claim.

b. The cases cited by the court below may easily be distinguished from and do not apply to the case at bar.

The court below cited five cases from various courts of appeals to support the proposition that the FTCA judgment bars a *Bivens* claim.

In *Unus v. Kane*, 565 F.3d 103, 122 (4th Cir. 2009), the plaintiffs were both married and sued in their individual capacities for the same damages. In the case before this Court, White cannot and did not sue in her individual capacity under *Bivens*, and did not sue in her representative capacity under the FTCA.

In *Manning v. United States*, 546 F.3d 430, 434 (7th Cir. 2008) and *Harris v. United States*, 422 F.3d 322, 337 (6th Cir. 2005), the plaintiff was an individual suing in his individual capacity for the same cause of action in both the FTCA and *Bivens* claims. In those cases, it would be possible to have multiple judgments for the same damages. In the case before this Court, the damages were totally separate for each claim and White was suing in two separate capacities. To get around *Carlson* and Congress' intent and convert the FTCA and *Bivens* from parallel remedies to exclusive remedies, the lower court employed an election-of-remedies theory crafted by the Seventh Circuit in *Manning*. In *Manning*, the Seventh Circuit wrongly approved the application of Section 2676 to invalidate a jury's verdict under *Bivens* based on a court's later FTCA judgment in the same lawsuit. *Manning*, at 431. The court's argument began with the faulty premise that "Congress did not import common law *res judicata* into § 2676." *Id.* at 435.

From there, *Manning* cited selective language from Section 2676 and concluded that the phrase "a complete bar to any action" "must be read to include claims brought within the same action." *Id*. at 433–434.

In *Arevalo v. Woods*, 811 F.2d 487(9th Cir. 1987) the case involved a double recovery against both the government and the government's employee. "In 1974 Congress amended § 2680(h) of the FTCA to create a cause of action against the United States for certain intentional torts committed by federal investigative and law enforcement officers. Under this section, victims of the kind of intentional wrongdoing alleged by Arevalo have an action against the United States under the FTCA as well as a *Bivens* action against the individual federal investigative or law enforcement officers alleged to have infringed constitutional rights. *Carlson v. Green*,446 U.S. 14, 19-20, 100 S.Ct. 1468, 1471-72, 64 L.Ed.2d 15 (1980)." *Arevalo v. Woods*, 811 F.2d 487, 489 n.2 (9th Cir. 1987).

In *Serra v. Pichardo*, 786 F.2d 237 (6th Cir.), *cert*. denied, ___ U.S. ___, 107 S.Ct. 103, 93 L.Ed.2d 53 (1986) the Sixth Circuit stated the issue was "whether a plaintiff's actions against individual defendants on *Bivens* claims are barred *after* he obtains a judgment against the government on a FTCA claim, when each claim arises out of the same acts and events. [*emphasis* added] *Id*. at 239." *Arevalo v. Woods*, 811 F.2d 487, 490 (9th Cir. 1987). Again, in the case at bar, the judgment for the *Bivens* claim came first.

In *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F. 3d 840,

859 (10th Cir. 2005) the court acknowledged "the language of the statute does not speak to situations where FTCA and non-FTCA claims are tried together in the same action, see *Kreines v. United States*, 959 F.2d 834, 838 (9th Cir.1992),…." It is interesting to note that the lower court's opinion below never addressed the ***Kreines*** case.

A handful of circuits have concluded that Section 2676 bars claims in the same lawsuit; but, of the decisions the circuit court cites, one is *Manning*, and the rest reach the same incorrect conclusion because they rely on *Manning*, ignore the language of Section 2676, or both. *Unus v. Kane*, 565 F.3d 103, 121–122 (4th Cir. 2009) (citing *Manning*); *Estate of Trentadue v. United States*, 397 F.3d 840, 858–859 (10th Cir. 2005) (relying on the phrase "any action"); *Harris v. United States*, 422 F.3d 322, 334 (6th Cir. 2005) (surveying caselaw without analysis); see also *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (relying on the "broad sweeping phrases" of Section 2676); but see *Fazaga v. FBI*, 965 F.3d 1015, 1064 (9th Cir. 2020). None of the cases cited by the court below grapple with the common-law language of Section 2676 or the gamesmanship their holdings invite.

All of the cases cited in Section "IV. *Bivens* Claim" in the Opinion (App., *infra*, 7a – 9a) are either distinguishable or inapplicable to the case at bar. The following facts distinguish the case before this Court and the cases cited in the Opinion:

(1) Although Hope Angelic White is one person, she served in two separate and distinct capacities. She served: (1) in her individual capacity for her individual claims against the government under the FTCA, and (2) as the personal representative for the estate of Myron Pollard in the *Bivens* claim. The court below treated her as one plaintiff serving in one capacity, with one set of claims.

(2) The FTCA and *Bivens* claims and damages were separate and distinct from one another. The FTCA claim for Hope White individually was for her loss of consortium, emotional distress, funeral expenses, and burial bills under Missouri law. The *Bivens* claim was for Myron Pollard's estate (in which White was the personal representative) for the wrongful death of Myron Pollard for a violation of a provision of the United States Constitution.

(3) The FTCA and *Bivens* claims were tried at the same time – one did not follow the other.

(4) The *Bivens* judgment was entered first on August 21, 2018 and the FTCA judgment was entered on March 29, 2019.

As shown by *Will, Simmons, Carlson*, and the text of Section 2676, the judgment bar does not apply to claims in the same lawsuit.

3. The decision conflicts with decisions within its own circuit.

Previous decisions of the Eighth Circuit Court of Appeals on this issue hold that an FTCA claim does not bar a *Bivens* claim. In *Arcoren v. Farmers*

Home Admin., 770 F.2d 137, 140 n. 6 (8th Cir. 1985), the court stated "[t]he Supreme Court has held specifically that the FTCA does not preclude a *Bivens* remedy. See *Carlson v. Green*, 446 U.S. at 19-20, 100 S.Ct. at 1471-72." "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Recently the Supreme Court held that a *Bivens* action is available even though plaintiff's allegations could also support a suit filed under the FTCA. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980)." *Loge v. U.S.*, 662 F.2d 1268, 1275, n.8 (8th Cir. 1981).

B. The Question Presented Warrants This Court's Review

As explained above, the court of appeals' decision in this case conflicts directly with Congress' intent, the plain meaning of the FTCA, this Court's decisions, other circuit courts' decisions, and decisions within its own circuit. Certiorari is warranted to resolve the division and to clarify the correct application of the judgment bar under the FTCA.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 26th day of October, 2020.

Respectfully submitted,

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