No. 20-587

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

PETITIONERS' REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents' statement that the decision below "does not conflict with any decision of this Court, and petitioner does not identify any conflict with the decision of another court or appeals that would warrant this Court's review" is incorrect. Brief in Opp. 7. Petitioners'[1] petition is replete with citations of this Court, the eighth circuit, and other courts of appeals showing

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[1] "Petitioners" is stated in the plural and plural possessive throughout this Reply when referring to Hope White in both of her two separate and distinct capacities – individually, and as personal representative for the estate of Myron Pollard (her deceased son). When referring to Hope White in a singular capacity, "petitioner" is used.

a conflict with the eighth circuit court of appeals' decision below. Petitioners will not reiterate the petition's arguments or the case law here; but, instead will refute the arguments in respondents' brief.

Respondents state, without any support, that "even if the question presented warranted further review, this case would be an unsuitable vehicle for considering it, because lifting the judgment bar *likely would not* affect the outcome of petitioner's *Bivens* action – which the jury rejected." (*emphasis* added). Brief in Opp. 7. Petitioners argued, and respondents wholly ignore the fact, that the decision below did not address the four key issues raised in the appeal of the *Bivens* claim. If the decision below were to be reversed, the court of appeals would have to address the issues raised in the *Bivens* aspect of the appeal that would most likely reverse the judgment against petitioners in the *Bivens* case.

These issues include: (1) the spoliation of evidence matter before the jury (not being able even to argue an adverse inference to a jury); (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 respondent 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.

All of the cases respondents cite deal with a singular plaintiff, suing in a singular capacity, suing for the same set of damages, and sometime in

multiple lawsuits. This is not the scenario in the case at bar. Hope White was suing in two separate capacities, for separate damages in each capacity, and in one lawsuit. The respondents cite *Simmons v. Himmelreich*, 136 S.Ct. 1843, 1847 (2016) for the proposition that "an FTCA suit *** *generally* cannot proceed with a suit against an individual...." (*emphasis* added). Brief in Opp. 7. The word "generally" is not absolutely limiting recovery from both an FTCA claim and a *Bivens* claim. In fact, respondents use the term "generally" (but not absolutely) to state that "[t]his Court in *Carlson* [v. Green 446 U.S. 14, 20 1980)] held only that the FTCA *generally* does not displace *Bivens* actions...." (*emphasis* in Brief in Opp. 14). Therefore, "generally cannot proceed" and "generally does not displace" are not absolute limitations.

Furthermore, in the case at bar, there would be no chance at "a second bite at the money-damages apple" if both cases were to proceed. *Simmons* at 1849. To the contrary, limiting petitioner in her individual capacity to proceed in the FTCA claim against the government only for her loss of consortium claim, mental anguish, funeral bills, and burial expenses, and not allowing her in her representative capacity of her son's estate to proceed in the *Bivens* claim against the ATF agent for the wrongful death claim is not giving Myron Pollard's estate even one bite of the apple.

Respondents repeatedly cite the language in Section 2676 that "an FTCA action 'is a complete bar to *any action* by the claimant' against the federal employee whose conduct was at issue in the FTCA action. 28 U.S.C.

2676 (*emphasis* added by respondents)." Brief in Opp. 10. Respondents emphasize the wrong words in that sentence. The emphasis should be on "by the claimant." There are essentially two claimants in the case each suing in separate capacities for separate damages. By respondents' own reasoning, the case may have proceeded with both the FTCA claim and the *Bivens* claim if Myron Pollard's father were appointed the personal representative of Myron Pollard's estate instead of petitioner Hope White. In doing so, it would allow petitioner, in her individual capacity, to sue for her own damages under the FTCA, and Myron Pollard's father, in his representative capacity, to sue for the estate's damages for wrongful death under *Bivens*.

Respondents own words state the order of the judgments: "...Congress chose in 1946 to bar any individual 'action' *following* an FTCA judgment..." (*emphasis* added). Brief in Opp. 10. Respondents state "Congress precluded all individual claims for relief against federal employees – in this or any other court proceeding – once the claimant's FTCA action has gone to judgment. Cf. *Ex parte Collett*, 337 U.S. 55, 58 (1949)." Brief in Opp. 11. It should be emphasized that this pertains to an individual action. In the case at bar, there were separate and distinct actions in each claim – the *Bivens* action being decided months before the FTCA claim.

Respondents' arguments 2.a., 2.b, and 2.c, found in their brief on pages 10 – 14, 14 – 16, and 16 – 18, respectively, deal with Congressional intent and claim preclusion "*following* an FTCA judgment." (*emphasis* added). Brief in Opp. 10. "[A] plaintiff who litigates an FTCA claim to judgment

cannot *thereafter* pursue any individual claims against the officers involved." (*emphasis* added). Brief in Opp. 16. Aside from the case at bar having two plaintiffs suing for two separate types of damages, the plain language of Section 2676 and respondents' words state the order of the precluded claim. According to respondents' citations, there must first be an FTCA claim, and then a *Bivens* claim – not the other way around – for the bar to exist. Even if Section 2676 states that the judgment in an FTCA action bars any action by the claimant, it does not state that it voids a previous judgment nor disallows a claim for separate damages suing in a separate capacity.

Respondent states: "Congress chose in 1946 to bar any individual 'action' following an FTCA judgment, its use of that word naturally meant that it was precluding any 'legal and formal demand of one's right from another person or party....' " Brief in Opp, p. 10. If Congress meant to bar the same cause of action following an FTCA judgment, it did not void a preceding separate cause of action. In the case at bar, the *Bivens* judgment preceded the FTCA judgment, not the other way around. Moreover, "preclude" means "Estop. To prohibit or prevent from doing something." *Black's Law Dictionary* (5th ed. 1979). Preclude, prevent, prohibit, and estop are all before the action takes place, not after the action already happened. The prefix "pre" signifies the order of the claims – nowhere does the Statute state that a subsequent FTCA claim would void the previous *Bivens* claim. Therefore, when respondents write that "...Congress precluded all individual claims for relief against federal employees ... once the claimant's FTCA

action has gone to judgment" [Brief in Opp. 11] they were proving this point of what action must come first in order for there to be an argument for claim preclusion.

Petitioner agrees with respondents' definition of the word "claim" as "a demand of some matter as of right made by one person upon another...." Brief in Opp. 12. The claim in the FTCA action was not the same as the claim in the *Bivens* action nor was it "made by one person." The claim in the FTCA action was made by Hope White individually, and the claim in the *Bivens* action was made by Hope White in her capacity as personal representative for the estate of Myron Pollard. Had anyone but Hope White been appointed the personal representative for the estate suing under the *Bivens* action, there would be no argument here.

Under respondents' theory, petitioner would have to choose whether she wanted to recover her own damages only allowed in the FTCA action or the damages to her son's estate only allowed in the *Bivens* action. Under this theory, it leaves either the individual or the estate without a remedy.

In the case at bar, there was no continued litigation after the FTCA claim was decided, there was no "duplicative litigation," nor was there a claim for "duplicative recovery." Brief in Opp. 17 referencing *Kreines v. United States*, 959 F.2d 834, 838 (9th Cir. 1992).

Respondents' statement that "no court of appeals has accepted petitioner's contention that the judgment bar is categorically inapplicable to individual claims brought in the same lawsuit with FTCA claims..." is not

true and contradicts respondent's own words. Brief in Opp. 18. On page 17 of respondents' brief, they refer to two ninth circuit cases as "idiosyncratic" because the ninth circuit held exactly the opposite of respondents' contention.

Respondents misstate petitioner's argument by stating "petitioner's interpretation of Section 2676 would permit a plaintiff to win a judgment under the FTCA, and then continue pursuing individual federal employees for additional damages from the same incident...." Brief in Opp. 14. In the case at bar, the individual claim came first (before the FTCA claim) and the claims were for separate damages brought in separate capacities. Had Hope White prevailed on the *Bivens* claim, the money for the wrongful death of Myron Pollard would have gone into the estate of Myron Pollard and would be distributed in accordance with the laws of Missouri, supervised by the probate division in the City of St. Louis, State of Missouri. Had Hope White won her FTCA claim, she would have been compensated for her funeral expenses, burial expenses, mental anguish, and loss of consortium.

In argument 3 of respondents' brief, they state, without any supporting cases, that once the FTCA claim was decided, petitioner was precluded "from pursuing her *Bivens* action any further, including in the court of appeals or on remand after her appeal." Brief in Opp. 18-19. This reasoning is fallacious. If respondents are correct, then how could anyone bring an appeal to challenge the very issue at bar?

Petitioner stands by the assertion that neither the government nor Hansen pleaded the FTCA judgment bar as an affirmative defense. Pet. 5.

Respondents cite a district court document that is not part of the joint record on appeal. Brief in Opp. 19, footnote 6. Respondents' motion *in limine* #1 acknowledged that the claims under the FTCA and *Bivens* were separate claims, and requested the court to prohibit petitioner from raising any issue regarding the FTCA claim in the *Bivens* claim before the jury. R. Doc 307-308 (July 13, 2018).

Respondents assert "petitioner tacitly concedes at one point that her FTCA and *Bivens* claim would be duplicative...." Brief in Opp. 20, footnote 7. This is not the case. Respondents misinterpret and take out of context the quotations from petitioners' petition. Petitioner clearly wrote "Assuming *arguendo* ...." Furthermore, it was to prove the point of the holding in *Wagner v. Jones*, 2:13-cv-00771-CG-WPL, p. 12 (Dist. Ct. NM, 2014).

Respondents contend in their argument 3.b that the two cases involve "the same subject matter" for purposes of Section 2676. Brief in Opp. 20. There are underlying facts that differ in each of the claims. In the FTCA claim, there was evidence presented about petitioner's individual loss of consortium, mental anguish, funeral bills, burial bills, hospital bills, and tombstone bills. These were not allowed to be presented before the jury in the *Bivens* case. In the *Bivens* case before the jury, the value of Myron Pollard's life was presented to the jury and was not allowed to be presented as part of the FTCA claim. The facts leading up to the death of Myron Pollard were similar, but the subject matter after his death were completely different. In respondents' brief, argument 3.b (p. 21) respondents cite *Estate*

of Trentadue ex rel. Aguilar v. United States, 397 F. 3d 840 (10th Cir. 2005) in which 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. *Trentadue* at 859.

Argument 4 of respondents' brief reflects fallacious reasoning of *circulus in probando* (circular logic). As stated in the petition and above, petitioners contend that there were four serious errors at trial that caused a verdict to be returned for respondent Hansen in the *Bivens* claim. Respondents state "[t]he jury rejected petitioner's *Bivens* action, and petitioner has not demonstrated any reasonable prospect that she could overturn the verdict even if Section 2676 did not apply." Brief in Opp. 21. How can petitioner demonstrate a reasonable prospect to overturn the verdict when these four errors stand? It is axiomatic that if the court of appeals found any one of the four errors to have occurred in the *Bivens* trial, then the verdict and judgment would have been reversed and the case would be remanded for a new trial. Unfortunately, in this case, the court of appeals never addressed any of the these four issues of error on the *Bivens* claim because it held that the FTCA subsequent judgment against Hope White in her individual capacity precluded even addressing any errors in the *Bivens* claim. Respondents ignore the fact that petitioner was not even allowed to argue an adverse inference to the jury on the spoliation of evidence matter. (Pet. 14 referencing Motion *in limine* # 5). This went far beyond the district court's denial of giving an adverse inference instruction to the jury.

Respondents wholly ignore two of the issues on appeal that were never addressed in the court's opinion – denying petitioners the right to ask the "insurance question" in violation of settled law in Missouri, and the highly prejudicial comments by respondents' counsel that constituted reversible error.

In footnote 5, respondents try to refute the eighth circuit holdings in *Arcoren v. Farmers Home Admin.*, 770 F.2d 137 (1985), and *Loge v. United States*, 662 F.2d 1268 (1981), *cert.* denied, 456 U.S. 944 (1982) by stating that "neither of those decisions even mentioned the judgment bar." Brief in Opp. 15. Although *Arcoren* did not deal with a simultaneous FTCA and *Bivens* case, 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." *Id.* at 140 n. 6. "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).
See petitioners' petition pp. 31-32.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 11th day of March, 2021.

Respectfully submitted,

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