No. 22-912

IN THE

Supreme Court of the United States

JAMES KING,

Petitioner,

v.

DOUGLAS BROWNBACK AND TODD ALLEN,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONER

ALLISON M. ZIEVE
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org
Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization with members 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 access to the federal courts, because such provisions have significant impacts on the efficacy of remedies under both state and federal law. Public Citizen has participated as amicus curiae in many cases involving significant issues of statutory interpretation and federal jurisdiction, including, of particular relevance here, *Brownback v. King*, 141 S. Ct. 740 (2021), and *Simmons v. Himmelreich*, 578 U.S. 621 (2016), where the government advocated expansive readings of the judgment bar provision of the Federal Tort Claims Act (FTCA).

SUMMARY OF ARGUMENT

In 2021, this Court took up this case to address whether the district court's order dismissing the FTCA claims against the United States was a judgment "on the merits" that could trigger the FTCA's judgment bar. Although the Court held the district court's order could trigger the judgment bar, it noted that the question whether "the judgment bar does not apply to a dismissal of claims raised in the same lawsuit" had not been addressed below. The

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[1] This brief is being filed more than 10 days before the due date. The brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to the preparation or submission of the brief.

Court stated that it would "leave it to the Sixth Circuit to address" this question on remand. *Brownback*, 141 S. Ct. at 747 n.4.

On remand, the Sixth Circuit essentially declined to do so, with the panel stating that it was bound by prior Sixth Circuit precedent and the full court denying a petition for rehearing en banc. Accordingly, absent this Court's further review, the important question left open in the earlier decision will remain unanswered and the error in the Sixth Circuit's precedent will remain uncorrected.

Furthermore, there is a longstanding conflict among the circuits on this issue. Granting the petition will enable the Court to resolve the conflict and align the case law with the Court's recent precedent addressing the FTCA's judgment bar, 28 U.S.C. § 2676, and the language and history of section 2676. As Judge Clay explained in his dissent below, the judgment bar 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.

The plain-text reading avoids inequitable results produced by the decision below and the government's argument in the lower courts. As in *Will v. Hallock*, 546 U.S. 345 (2006), and *Simmons*, 578 U.S. 621, this Court should not allow 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, *see Carlson v. Green*, 446 U.S. 14, 20 (1980)—to be converted into a statute that effectively bars a plaintiff from pursuing otherwise valid claims in the alternative to FTCA claims brought in the same case.

ARGUMENT

The conflict among the circuits on the question presented on this case is longstanding: The Ninth Circuit held in 1992 that, in light of the judgment bar's statutory purpose—"to prevent dual recoveries arising from additional, subsequent litigation"—"section 2676 does not preclude *Bivens* relief" when a *Bivens* claim is brought in the same action as an unsuccessful FTCA claim. *Kreines v. United States*, 959 F.2d 834, 838 (9th Cir. 1992); *see Quintero Perez v. United States*, 8 F.4th 1095, 1103 (9th Cir. 2021). The Fifth Circuit appears to take a similar position. *See Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (endorsing the view that "the price of obtaining an FTCA judgment against the United States based on a given incident is the loss of all claims arising from that incident against the United States' agents").

In contrast, the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits require dismissal of a *Bivens* claim filed in the same action as an FTCA claim, regardless of the outcome of the FTCA claim. *See White v. United States*, 959 F.3d 328, 333 (8th Cir. 2020); *Unus v. Kane*, 565 F.3d 103, 122 (4th Cir. 2009); *Manning v. United States*, 546 F.3d 430, 438 (7th Cir. 2008); *Estate of Trentadue v. United States*, 397 F.3d 840, 859 (10th Cir. 2005); *Harris v. United States*, 422 F.3d 322, 333 (6th Cir. 2005).

The plain language of section 2676 and its origin in res judicata principles, as explained in this Court's

cases examining the judgment bar, reveal the correct answer: The judgment bar does not require dismissal of a *Bivens* claim pleaded in the same action as an FTCA claim. The inequitable results of decisions reaching the contrary result 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 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 "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 clause of section 2676, the "action" is the lawsuit in which a plaintiff asserts claims—those arising under the FTCA or otherwise. In the last clause, 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. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2054 (2017) ("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))).

Where, however, 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.").

Consistent with this plain-language reading, this Court in *Will*, using "case" as a synonym for "action," stated that "the judgment bar can be raised only after a case under the [FTCA] has been resolved in the Government's favor." 546 U.S. at 354. And in *Simmons*, using the synonym "suit," the Court explained that the judgment bar "forecloses any *future* suit against individual employees" after a final judgment in the FTCA action. *See* 578 U.S. at 624 (emphasis added); *id*. at 627 (noting that, if the judgment bar applied, it "would preclude any *future* actions" (emphasis added)). Although *Brownback* held that the district court's order dismissing the FTCA claim could potentially trigger the judgment bar, the issue before the Court was whether the dismissal was "on the merits" of the FTCA claim, 141 S. Ct. at 748, not whether the dismissal was a "judgment in an action." Indeed, the Court expressly reserved that question. *See id*. at 747 n.4.

Put simply, by its plain language, section 2676 does not bar other claims brought in the same "action" as the FTCA "claim." The bar "applies where a plaintiff *first* sues the United States and *then* sues an employee." *Simmons*, 578 U.S. at 630 n.5 (emphasis added).

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 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. *See* 18 Charles Alan Wright, Arthur Miller & Edward Cooper, *Federal Practice & Procedure* § 4403 (3d ed. 2002 & Apr. 2022 update) (noting that the FTCA embodies res judicata principles). "[T]he judgment bar was drafted against the backdrop doctrine of res judicata." *Brownback*, 141 S. Ct. at 748. And this Court has applied res judicata principles to determine the scope of the bar, including in this case. *Id.*

A. 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 v. Marcel Fashions Grp.*, 140 S. Ct. 1589, 1594 (2020). Historically, federal courts applied preclusion principles (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 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, federal courts generally enforced a strict requirement of mutuality of the parties for claim preclusion. *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). An exception to the mutuality requirement, 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. The converse was not true: 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 *Simmons* explains, the FTCA's judgment bar "supplements common-law claim preclusion by closing [this] narrow gap." 578 U.S. at 630 n.5. "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." *Id.* "Appl[ying] where a plaintiff *first* sues the United States and *then* sues an employee," *id.* (emphasis added), the 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.

B. "The rules of res judicata are applicable only when a final judgment is rendered." Restatement (Second) of Judgments § 13. Prior to a judgment

terminating an action, there is no conclusive determination of any issue between the parties that could give rise to preclusion. *See* Fed. R. Civ. P. 54(b) (stating that 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"). Thus, res judicata bars a second suit after final judgment involving the same parties and causes of action; it does not bar claims brought and still pending in the first suit. *See Wilkins v. Jakeway*, 183 F.3d 528, 532 (6th Cir. 1999) (explaining that res judicata applies to an issue "in a subsequent action which should have been litigated in the prior action"); *Lalowski v. City of Des Plaines*, 789 F.3d 784, 789 (7th Cir. 2015).

Reflecting the purpose for which it was enacted, the judgment bar "functions in much the same way" as res judicata. *Will*, 546 U.S. at 354. Section 2676 therefore should apply, like res judicata, "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 judgment bar and traditional res judicata "depend[] on a prior judgment as a condition precedent" for application; "neither reflect[s] a policy that a defendant should be scot free of any liability").

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 res judicata serves the purpose of section 2676 and avoids unjust results. The

Sixth Circuit's rule, however, transforms the judgment bar from a tool for fairness and efficiency into a trap for plaintiffs who, consistent with the judgment bar's 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").

Courts, like the Sixth Circuit in this case, that extend the judgment bar to cover claims brought in the same action as an FTCA claim transform a sensible preclusion provision into a "Kafka-esque" dilemma. *McCabe v. Macaulay*, 2008 WL 2980013, at *14 (N.D. Iowa 2008). Because in each such case the court will *eventually* issue a judgment on the FTCA claim, the *Bivens* claim, regardless of the order in which the court addresses it, is doomed from the start. *See Manning*, 546 F.3d at 438.

In *Harris*, 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." 422 F.3d at 333.

That decision—which was applied in this case to bar King's *Bivens* claim—cannot be reconciled with this Court's later recognition in *Will* that FTCA and *Bivens* claims may be brought simultaneously. 546

U.S. at 354. It is also inconsistent with Congress's "crystal clear" intention that FTCA and *Bivens* exist "as parallel, complementary causes of action." *Carlson*, 446 U.S. at 20; *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).

Indeed, under the government's view, reflected in some court decisions, 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. *See, e.g., Porter v. Hendrix*, 2022 WL 848357, at *3 (E.D. Ark.) (recommending that the government's motion to stay litigation of a *Bivens* claim pleaded in the same complaint as an FTCA claim be granted because, after adjudication of the FTCA claim, "[r]egardless of whether it results in a verdict in favor of [the plaintiff] or the United States," the *Bivens* claim "will be barred"), *recommendation adopted*, 2022 WL 843489 (E.D. Ark. 2022).

For example, in *Estate of Trentadue*, 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." 397 F.3d at 859. The court rejected as "inconsequential" that the district court's entry of judgment on the *Bivens* claims would precede the anticipated judgment on the FTCA claims. *Id.*

Similarly, in *Manning*, the plaintiff had been erroneously convicted of kidnapping and murder, based in part upon material evidence fabricated by federal agents. 546 F.3d at 432. Heeding the Seventh Circuit's advice that "[p]laintiffs 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," *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. *Manning*, 546 F.3d at 431–32. Manning then 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. The court granted the motion. *Id.* at 432. Eighteen months later, the district court ruled for the United States on the FTCA claims. Citing the judgment bar, the defendants then moved to vacate the judgment on the *Bivens* claim. The district court granted the

motion, *see id.*, and the Seventh Circuit affirmed, *id.* at 438.

The Seventh Circuit 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 could not control the order of the verdicts.

Under these decisions, *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, and whether resolved before, after, or contemporaneously. Before filing a case, the plaintiff therefore must make an irrevocable choice whether to pursue a *Bivens* claim or an FTCA claim; and if a court ultimately determines that the plaintiff made the wrong choice, it will be impossible to sue the proper defendant. *Brownback*, 141 S. Ct. at 752 (Sotomayor, J. concurring) (noting the "seemingly unfair results by precluding potentially meritorious claims when a plaintiff's FTCA claims fail for unrelated reasons"). That result cannot be squared with Congress's decision "that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States *as well as* a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." *Carlson*, 446 U.S. at 20 (emphasis added). To avoid these draconian consequences, this Court should

grant the petition to correct the lower court decisions misapplying federal law.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ALLISON M. ZIEVE
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Attorneys for Amicus Curiae

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