No. 22-912

In the
Supreme Court of the United States

JAMES KING,
Petitioner,

v.

DOUGLAS BROWNBACK; TODD ALLEN,
Respondents.

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

BRIEF OF PROFESSORS JAMES E. PFANDER, GREGORY C. SISK, AND ZACHARY D. CLOPTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case turns on the proper construction of a seemingly-simple phrase: "same subject matter." "The Federal Tort Claims Act (FTCA) allows plaintiffs to seek damages from the United States for certain torts committed by federal employees." *Simmons v. Himmelreich*, 578 U.S. 621, 623 (2016). But under the FTCA's so-called "Judgment Bar," a judgment against the government under the FTCA "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government." 28 U.S.C. § 2676 (emphasis added).

According to the Government (and the Sixth Circuit), the FTCA's Judgment Bar operates to

[1] No counsel for a party authored any portion of this brief, and no person or entity other than amici or its counsel made any monetary contribution to its preparation or submission. Both parties were timely notified in advance of the filing of this brief.

prohibit Petitioner from bringing a *Bivens* claim against an individual government employee in the same lawsuit as a tort claim against the government itself brought under the FTCA. See *King v. United States*, 49 F.4th 991 (6th Cir. 2022). According to the Government, that is because "same subject matter" in the FTCA means "same underlying facts," same "factual transaction or occurrence," or same "act or omission." See, *e.g.*, Brief for Petitioner at 4, 16, 24, *Brownback v. King*, 141 S.Ct. 740 (2021) (No. 19-546) (citations omitted).

The Government's interpretation is incorrect. The proper interpretation of "same subject matter" in the Judgment Bar is "same primary right asserted by the plaintiff," "same issue presented for consideration," or "same cause of action." This brief illustrates why this is so.

First: The common law of vicarious liability on which the FTCA is based suggests that the Judgment Bar should be read only to preclude subsequent suits based on the same legal claim as the first suit. At common law, the rule was that if a plaintiff brought a tort action against an employee for acts committed in the course of employment and lost, that judgment would preclude the plaintiff from bringing the same claim against the employer—but not vice versa. The rule thus protected the employer, but not the employee, from duplicative litigation regarding the same tort claim. The Judgment Bar attempted to correct this asymmetry by barring suit against the government employee following a judgment in a suit against the government itself. And, at common law, a

plaintiff would be barred *only* from bringing an action for the *same tort claim* he had previously brought against the employer.

The FTCA's legislative history; early scholarly commentary on the Judgment Bar; early judicial interpretations of the Judgment Bar; and this Court's precedent all confirm that the FTCA's drafters intended to track the common law rule and did not intend the phrase "same subject matter" to mean "same underlying facts."

Second, legal authorities contemporaneous with the enactment of the FTCA—including legal encyclopedias and dictionaries, legal treaties, and this Court's precedent—confirm that the phrase "same subject matter" most often meant "primary right," or "legal question," or "cause of action." Those authorities did not construe the phrase "same subject matter" to mean "same underlying facts."

Third, other federal statutes—notably the 1950 amendment to the Suits in Admiralty Act, the 1961 Driver's Act, and the 1988 Westfall Act—all use the phrase "same subject matter." But the phrase "same subject matter" in those federal statutes has not been interpreted to mean "same underlying facts."

For these and the other reasons that follow, this Court should grant the petition for certiorari and clarify that the Judgment Bar's phrase "same subject matter" does not mean "same underlying facts."

ARGUMENT

I. The Common Law Of Vicarious Liability On Which The FTCA Was Based Confirms That "Same Subject Matter" Does Not Mean "Same Underlying Facts."

A. Common Law Preclusion Rules: First Restatement § 96 And § 99.

As this Court recently observed, the Judgment Bar assumed and supplemented the ordinary common law rules regarding respondeat superior liability and claim preclusion described in the First Restatement of Judgments §§ 96 and 99. See *Simmons*, 578 U.S. at 630 n.5.

Two features of those common law rules stand out. *First*, in the context of respondeat superior liability, preclusion only prevented the same claims from being brought in a successive action against the employer, but not the employee. *Second*, if a claim was precluded from being brought against the employer, it was only the identical tort claim that the plaintiff had originally brought (or could have brought) against the employee. The Judgment Bar "supplemented" the first rule by preventing suits against government employees. But the Judgment Bar was premised upon the second rule regarding the narrow scope of preclusion.

1. Application Of Claim Preclusion Only Against Employer.

The Restatement of Judgments §§ 96 and 99 summarized the prevailing common law rule: if a

plaintiff brought a tort action against an employee for acts committed in the course of employment and lost, that judgment would preclude the plaintiff from bringing that same action against the employer. § 96(1)(a). The reverse, however, was not true: if a plaintiff brought a tort action against the employer for the torts of the employee and lost on that claim, that judgment would not preclude or bar the plaintiff from re-litigating that same claim against the employee. § 96(2). This rule thus protected the employer but not the employee from duplicative litigation regarding the same tort claim, creating an asymmetry in the rules of preclusion.[2]

The Judgment Bar attempted to create symmetry out of these asymmetric rules by barring successive suits against the employee of the government following a judgment against the federal government itself.

This Court's precedents confirm this point. As this Court recently, unanimously, observed:

> The judgment bar provision supplements common-law claim preclusion by closing a 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

[2] For the historic explanation for this asymmetry, and further historic context for the FTCA Judgment Bar, *see* James E. Pfander & Neil Aggarwal, *Bivens, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 429-39 (2011) (cited in *Brownback*, 141 S.Ct. at 745–46).

> employee but not vice versa. See Restatement of Judgments §§ 99, 96(1)(a), Comments *b* and *d* (1942). The judgment bar provision applies where a plaintiff first sues the United States and then sues an employee.

Simmons, 578 U.S. at 630 n.5.

2. Limitation Of Claim Preclusion To The Same Tort Claim.

The second feature of the common law rules of preclusion concerned the scope of the claim that would have been precluded in the context of an employer's vicarious liability for an employee's torts. At common law, the plaintiff would have been barred only from bringing an action for the same tort claim that he had previously brought against the employee.

The First Restatement § 99 makes that clear. In the context of wholly vicarious liability, where an employer's liability would have been based solely upon the act of their employee, the Restatement explained:

> A valid judgment on the merits and not based on a personal defense, in favor of a person charged with the commission of a tort or a breach of contract, bars a subsequent action by the plaintiff against another responsible for the conduct of such person *if the action is based solely upon the existence of a tort or breach of contract* by such a person, whether or not the other

> person has a right of indemnity. (emphasis added).

So for vicarious liability contexts, the rule only barred subsequent actions against the employer that were based "solely" upon the "existence of a tort" that had been previously litigated.

And the rationale for limiting the scope of preclusion to that same tort claim was that "the person against whom the rule works adversely has had his day in court and it is not unfair that if he is unsuccessful in his action against the alleged tortfeasor or contract breaker, he should be deprived of an action against another." § 99 cmt. a.

The First Restatement was clear that preclusion would not attach just because the successive actions arose out of the same underlying facts. As First Restatement § 99, cmt. b clarified, "The rule stated in this Section does not apply if there is an independent basis of liability against the person responsible for the act of the tortfeasor . . ." As an example, it provided: "where a person negligently puts into the hands of another a dangerous instrument, a judgment in favor of the other by a person injured thereby does not necessarily bar an action against the supplier of the instrument." *Id*. In that context, even though the facts of both suits were the same, preclusion did not attach because the legal claim against the employer was different from the legal claim against the employee.

The First Restatement § 96 also made it clear that common law preclusion in the respondeat superior context was limited to the actual tort claim made in

the original action against the employee ("indemnitor"). Section 96(1)(a) explains that "a valid judgment . . . for the defendant on the merits for reasons not personal to the defendant terminates the cause of action against the indemnitee [employer]." (emphasis added).

The First Restatement thus makes clear that preclusion for employers in the context of vicarious liability for the torts of their employees only obtained if the same essential tort claim was raised in the successive action.

B. The Judgment Bar's Legislative History.

The drafters of the FTCA repeatedly explained that they intended the Judgment Bar to track the common law rule and apply only to a subsequent action based "upon the same claim" as the one brought in the FTCA action:

- "The judgment in any such suit constitutes a bar to any action by the claimant against the Government employee *upon the basis of the same claim*." Torts Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary, 77th Cong. 2d Sess. 27 (emphasis added).

- "Judgment in a tort action constitutes a bar to further action *upon the same claim*, not only against the Government ... but also [against] the delinquent employee …." *Id*. (emphasis added).

- "Under the present bill, the judgment rendered will constitute a bar to further action *upon the same claim* not only against the Government but also against the employee whose wrongful conduct gave rise to the claim." *Id.* at 61 (emphasis added).

And the drafters considered the "claim" brought against the United States under the FTCA to be synonymous with the "subject matter" of the action, explaining that "the subject matter of the suit is a claim against the United States." *Id.* at 27.

C. Early Scholarly Commentary And Judicial Interpretations Of The Judgment Bar.

Early scholarly commentary upon the Judgment Bar recognized the narrow scope of its preclusive effect, tracking again the language and rules of the First Restatement. See Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 559 (1947) (the Judgment Bar will act as "a bar to any later action against the employee *arising out of the same cause of action*." "[A] judgment by a court of competent jurisdiction in an action against the master will be a bar to the same plaintiff in a subsequent action against the servant, where *the issue in dispute is identical*.") (emphasis added).

Likewise, early judicial interpretation of the Judgment Bar from 1946 until the 1970's consistently found that a judgment in a FTCA action only barred a successive suit against the employee when the judgment negated the employee's liability for the same tort claim, and not, for example, when it was based on

the fact that the employee had committed the tort outside the scope of employment. See, *e.g.*, *United States v. Eleazer*, 177 F.2d 914 (4th Cir. 1949); *United States v. First Sec. Bank of Utah*, 208 F.2d 424, 428 (10th Cir. 1953); *Johnston v. Earle*, 162 F. Supp. 149, 153 (D. Or. 1958); *Gov't Emps. Ins. Co. v. Ziarno*, 170 F. Supp. 197, 200 (N.D.N.Y. 1959); *Tavolieri v. Allain*, 222 F. Supp. 756 (D. Mass. 1963).

D. This Court's Precedents: *Will* and *Simmons*.

This Court's precedents confirm that the purpose of the Judgment Bar was to prevent duplicative litigation against the employee on the same tort claim previously litigated against the federal government. And applying the rules of the First Restatement, this Court has found that under the Judgment Bar, preclusion only attaches if the first judgment has a "logical bearing" on the merits of the second claim, and if the plaintiff had a "fair chance" to bring that second claim in the first action.

First, this Court has explained that the purpose of the Judgment Bar was not to ensure "that a defendant should be scot free of any liability," but rather to "avoid[] duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" *Will v. Hallock*, 546 U.S. 345, 354-55 (2006) (citation omitted).

The Government frequently cites this concern about "duplicative litigation." See, *e.g.*, Brief for Petitioner at 28, *Brownback v. King*, 141 S.Ct. 740 (2021) (No. 19-546). But it elides what this Court said

in *Will* made litigation "duplicative." Litigation is "duplicative" if it involves multiple suits on "identical entitlements or obligations," not just if it involves the "same underlying facts." But an action against the government on a FTCA claim based on state tort law and an action against a federal employee on a *Bivens* claim based on the United States Constitution do not involve "identical entitlements or obligations." Therefore they are not the sort of "duplicative litigation" the Judgment Bar was designed to avoid.

Second, this Court has explained that the Judgment Bar operates like claim preclusion or res judicata. *Will*, 546 U.S. at 354 (Judgment Bar "functions in much the same way" as "traditional res judicata"); *Simmons*, 578 U.S. at 630 n.5 (analyzing the scope of the Judgment Bar "by analogy to the common-law doctrine of claim preclusion"). But it has long been central to traditional res judicata that claims are precluded if, and only if, they could have been brought in the prior action. First Restatement § 62 cmt. k (plaintiff not barred by claim preclusion from bringing second suit arising from the same factual event if "he could not have maintained an action" in the earlier suit because of first court's lack of jurisdiction over that portion of his cause of action.); 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4406 (3d ed. 2020) (claim preclusion aspect of res judicata doctrine bars "matters that [were not, but] ought to have been raised" in prior litigation).

Accordingly, as this Court has explained, a judgment under the FTCA is only preclusive of another action if that FTCA judgment has a "logical

bearing" on the merits of the action against the employee and the plaintiff had a "fair chance" to litigate his claim in the first action. *Simmons*, 578 U.S. at 630. As this Court explained in *Simmons*, if a judgment under the FTCA dismisses a suit against the government because the court finds that the employees were not negligent, the plaintiff was not harmed, or the plaintiff failed to prove his claim, then such a judgment would be preclusive of another action against those employees on those same negligence claims, because that finding "bear[s]" on the merits of those claims against the employee. *Id*. In that case, "it would make little sense to give [the plaintiff] a second bite at the money-damages apple by allowing suit against the employees: [the plaintiffs] first suit would have given him a fair chance to recover damages for his beating." *Id*. at 629-30.

But if an FTCA judgment does not have a "logical bearing" on the merits of the second action brought against the employee, and the employee did not have a "fair chance" to bring that claim forward in the FTCA action, then the Judgment Bar does not preclude a subsequent action. For example, in *Simmons*, this Court found that when the FTCA action is dismissed because it falls within one of the exceptions in the FTCA that provide special immunity for the government, "the judgment bar provision makes much less sense" because that judgment has no "logical bearing" on the merits of a claim against the employee, and because the employee would not have had a "fair chance" to litigate his claim against the employee. *Id*. at 630 n.5 (citing Restatement of Judgments § 96 to interpret preclusive effect of

judgment in immunity context). In such a case, the Judgment Bar does not bar a second action. In this regard, *Simmons* implicitly embraced the correct reading of the Judgment Bar: the second claim at issue in *Simmons* had no "logical bearing" on the first, and was thus not precluded by the Judgment Bar, *even though* both claims arose from the same set of operative facts.

This rule has direct application here. A judgment on the merits of an FTCA action does not have a logical bearing on the merits of an independent *Bivens* claim simply because each arose from the same underlying facts. For example, whether a federal officer assaulted a protester in a public park under Michigan law should not preclude litigating whether that same officer's orders abridged the protester's First Amendment right to speak or peacefully assemble.

And in an FTCA action, the plaintiff may only bring claims that are cognizable under that statute. Those claims are carefully limited to "tort claims" in the statute. 28 U.S.C. § 2674. Under the FTCA a plaintiff would not be able to bring a constitutional claim in the first place. The plaintiff therefore would not have had the opportunity or "fair chance" to bring this claim and "have his day in court" on the subject matter of his constitutional right in the FTCA action. Accordingly, under traditional res judicata principles, a previous judgment under the FTCA in which a plaintiff could not have even brought his constitutional claim would not bar a subsequent *Bivens* action. See also *Carlson v. Green*, 446 U.S. 14, 20 (1980) (holding that because of the different interests protected by a *Bivens* action (constitutional

claims) and a claim under the FTCA (torts under state law), "victims of intentional wrongdoing … shall have an action against the United States as well as a *Bivens* action against the individual officers alleged to have infringed on their constitutional rights").

II. Legal Authorities In Existence At the Time Of The FTCA's Enactment Confirm That "Same Subject Matter" Does Not Mean "Same Underlying Facts."

A review of every major legal dictionary and encyclopedia contemporaneous with the enactment of the FTCA, leading treatises on civil procedure, and the decisions of this Court and state supreme courts, and the usage by this Court of the phrase, indicates that the "subject matter" of an action, most often meant the primary right, or legal question at the center of the dispute, or sometimes the "cause of action." And, those same sources consistently distinguished "subject matter" from the underlying facts and transactions that may have given rise to the action.[3]

A. Legal Dictionaries And Encyclopedias.

The "subject matter" of an action was frequently defined as "the right which one party claims as against the other." *Black's Law Dictionary* (4th ed. 1968); The Cyclopedic Law Dictionary (3d ed. 1940); *Cyclopedia of Law and Procedure* (William Mack, ed. 1911);

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[3] When analyzing the FTCA's language, this Court has in the past looked to sources in existence at the time of the FTCA's passage. For example, in *Simmons*, this Court looked to the Restatement of Judgments—from 1942—to analyze language from the FTCA—enacted in 1946. *Simmons*, 578 U.S. at 630 n.5.

William C. Anderson, *Anderson's Dictionary of Law* (T.H. Flood & Co., 1895). "Subject matter" was also sometimes defined as the "cause" or "cause of action." *Black's Law Dictionary*; *Cyclopedic Law Dictionary*; *Bouvier's Law Dictionary* (William Edward Baldwin, ed., Banks-Baldwin Publishing Co., 1934); 27 American and English Encyclopedia of Law (Charles F. Williams & David S. Garland, eds., Edward Thompson Co., 1896); *Anderson's Dictionary of La*w.

B. Legal Treatises.

In *Remedies and Remedial Rights by The Civil Action* (1876), John Pomeroy defined "subject of the action,"—which he observed to be synonymous with "subject matter of the action," § 475—as "the plaintiff's main *primary right* which has been broken, and by means of whose breach a remedial right arises." § 775. (emphasis in original). He distinguished the "subject matter of the action" from the "cause of action," the "transactions" underlying the action, and the remedy or "object of the action." The "cause of action" was "[first], the primary right, and the facts from which it flows; and [second], the breach of that right, and the facts constituting such breach." *Id*. The "transaction" was the "act of transacting or conducting any business; negotiation; management; a proceeding," or the single, continuous, and complex set of "facts" out of which the plaintiffs primary right flowed and the breach of it occurred. § 473. The remedy was the "object of the action." § 775.

The "subject matter" of the action was not the underlying facts of the case but rather just the "primary right" of the plaintiff which functions as "the

very central element of the controversy around which all the other elements are grouped and to which they are subordinate." *Id*. In property disputes, the subject matter might well be the actual piece of property or *rem* in controversy. But in many cases, "there is no such specific thing in controversy over which a right of property exists." *Id*. "It seems, therefore, more in accordance with the nature of actions... to regard 'the subject of the action' as denoting the plaintiff's principal primary right to enforce or maintain which the action is brought, than to regard it as denoting the specific thing in regard to which the legal controversy is carried on." *Id*.

In *A Treatise Upon the Law of Pleading Under the Codes of Civil Procedure* (E.F. Johnson, ed., West Publishing Co., 3d ed. 1894), Philemon Bliss echoed and refined Pomeroy's "primary rights" definition of "subject matter." According to Bliss, the "cause of action" was the legal wrong threatened or committed against the plaintiff, and the "object of the action" was the relief sought to redress the wrong. § 126. However, the "subject of the action" was the underlying matter, thing, or right in regard to which the wrong had been done. *Id* § 126. Because different actions at law involved different kinds of wrong, they often had different kinds of underlying "subject matters." In an action to recover property, for example, the "subject matter" was the land or title in question. *Id*. But in a tort suit, the "subject matter" was the "right, interest [relation], or property which has been affected." *Id*. Different torts had different associated "primary rights." So in libel or slander, the plaintiffs' character or occupation was the subject matter; for negligence,

the duty, property, or person in respect to which the negligence occurred; for false imprisonment, the plaintiffs' liberty; and for assault and battery, the right to immunity from personal violence. *Id*.

C. Supreme Court Precedent.

This Court's decisions in existence at the time of the FTCA's enactment reflected the common law understanding of "subject matter." "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought." *Cooper v. Reynolds*, 77 U.S. 308, 316 (1870). "Now, in this case, the declaration shows that the same parties are attempting to litigate the same subject-matter, or points or questions in admiralty that were adjudicated and settled in the State court." *Goodrich v. City of Chicago*, 72 U.S. 566, 571 (1866). "That suit and the present one do not relate to the same subject-matter. The issues and questions, therein decided, are not the ones presented for decision here." *United States v. S. Pac. Co.*, 259 U.S. 214, 240 (1922) (citation omitted).

In prior FTCA cases, the Government has suggested that this Court has previously used the phrase "same subject matter" to refer to a transaction or occurrence at issue in a case, and not the legal theory asserted. When it makes this argument, the Government typically points to three of this Court's prior cases. See, *e.g.*, Brief for Petitioner at 40-41, *Brownback v. King*, 141 S.Ct. 740 (2021) (No. 19-546).

But those cases do not support the Government's position. In *Grubb v. Pub. Utils. Comm'n*, 281 U.S. 470, 475 (1930), this Court used the phrase "subject

matter" to refer to a legal question (the constitutional validity of an order issued by the Public Utilities Commission of Ohio) and not the underlying facts of the case. In *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 297 (1917), this Court used the phrase "subject-matter" to refer to the specific rem or property (patents) at issue in the controversy, which was fully consistent with common law usage. And in *United States v. Cal. & Or. Land Co.*, 192 U.S. 355, 358 (1904), this Court used the phrase "subject matter" again to refer to certain patents and their validity, not just the underlying facts of the case.

III. In Other Federal Statutes, The Phrase "Same Subject Matter Does Not Mean "Same Underlying Facts."

The FTCA is not the only federal statute that contains the phrase "same subject matter." In nearly identical exclusive remedies provisions in the Suits in Admiralty Act, Drivers Act, and Westfall Act, courts have made clear that that phrase did not bar any and all other actions based upon the same underlying facts, but only those actions that sound in the same theory of liability covered by the particular statute.

A. 1950 Amendment To The Suits In Admiralty Act.

In 1950, Congress amended the Suits in Admiralty Act (SIAA), which allowed suits against the United States for personal injury or property damage caused by the negligence of government agents sounding in admiralty. Four years after the passage of the FTCA, Congress inserted into the SIAA an exclusive remedy

provision that used the key phrase "by reason of the same subject matter." 46 U.S.C. § 30904.

Courts regularly interpreted the phrase "by reason of the same subject matter" in the SIAA to refer not to the same underlying facts, but to the same theory of liability or same primary right invoked.

For example, this Court in *Amell v. United States*, 384 U.S. 158 (1966) found that the exclusive remedy provision of the SIAA did not bar federal employees who were seamen from bringing their wage claims against the government in the Court of Federal Claims under the Tucker Act. The underlying facts involved in the case were of a maritime nature. But the Court found that the exclusive remedy provision of the SIAA did not bar their claim under the Tucker Act because the underlying cause of action of the seamen was not primarily of 'a maritime nature,' but rather a contractual one. With respect to the gravamen of their claim, the litigants were more federal workers than seamen. Accordingly, because the "subject matter," or primary right the seamen sought to vindicate, sounded more in contract than admiralty, the exclusive remedy provision of the SIAA did not bar them from bringing this action under the Tucker Act.

Similarly, in *Cornell Steamboat Co. v. United States*, 138 F. Supp. 16 (S.D.N.Y. 1956), the Southern District of New York interpreted "same subject matter" in the SIAA to mean same "theory of liability" rather than "same transaction." The court held that the SIAA exclusive remedy provision did not bar a FTCA claim arising out of the same underlying events involving a collision of a tug with an unmarked

wrecked federal vessel because "the claim under the Federal Tort Claims Act for the same recovery is maintained pursuant to an entirely different theory of liability." *Id*. at 19. The FTCA claim arose "by virtue of the failure of the government, through the Army Engineers, to carry out a mandatory duty to mark every wreck." *Id*. But "[s]uch a claim is not cognizable in admiralty and therefore could not have been brought under the Public Vessels Act or the Suits in Admiralty Act." *Id*. Accordingly, the SIAA remedy provision did not bar this suit, based as it was upon a different subject matter.

B. 1961 Driver's Act.

In 1961, Congress amended the FTCA to protect federal employees from motor vehicle negligence claims by providing in section 2679 that "[t]he remedy against the United States" under the FTCA shall hereafter be "exclusive of any other civil action or proceeding by reason of the same subject matter against the employee [or his estate] whose act or omission gave rise to the claim." 28 U.S.C. § 2679(b)(1).

The purpose of the Drivers Act was straightforward: having accepted government liability for the negligence of its employees, Congress concluded that those injured in motor vehicle accidents should recover only against the government under the FTCA rather than against the negligent employee in a suit brought at common law. But Congress did not extend its regime of FTCA exclusivity to all claims arising from federal vehicle operation. Instead, tracking the restrictive terms of

the Judgment Bar, Congress limited exclusivity to claims brought against employees "by reason of the same subject matter." When a claim fell outside the FTCA, perhaps because the federal employee had acted intentionally or outside the scope of employment, no FTCA remedy was available and exclusivity did not attach. Such claims did not arise "by reason of the same subject matter" and the victim was permitted to sue the employee/driver directly in state court.

A string of cases from the 1960s through the 1980s confirmed the narrow scope of FTCA exclusivity. Just as it does today, the Government took an exceptionally broad view of the scope of the exclusivity provision, arguing that the Drivers Act barred all claims against an employee that arose from a federal vehicle's operation. Yet lower federal courts consistently rejected the Government's argument, thereby preserving the individual liability of federal employees when the FTCA offered no coverage. See *Nasuti v. Scannel*, 792 F.2d 264, 266 (1st Cir. 1986) (affirming, for want of appellate jurisdiction, lower court decision remanding plaintiff's intentional tort claims concerning automobile accident to state court that were outside the scope of defendant's employment); *Willson v. Cagle*, 694 F. Supp. 713, 717 (N.D. Cal. 1988) (intentional tort claim brought against federal driver was not cognizable under the FTCA and thus, claimants may pursue drivers in their personal capacities in a diversity action); *Smith v. Dicara*, 329 F. Supp. 439, 442 (E.D.N.Y 1971) ("it is obvious that the Drivers Act is not applicable to a

federal driver who intentionally injures a plaintiff with his motor vehicle.").

In each of these cases, the Government argued that all claims against the employee/driver were barred so long as they arose from the operation of a federal motor vehicle. But the courts limited exclusivity to the negligence claims on which the government had accepted vicarious liability, thereby concluding that intentional tort claims against the employee were preserved. *See Willson*, 694 F. Supp. at 717; see also *Dagnan v. Gouger*, No. CIV-1-88-452, 1989 WL 81655, at * 3 (E.D. Tenn. 1989). Intentional tort claims did not arise "by reason of the same subject matter" as those for negligence within the coverage of the FTCA, even though they arose out of the same underlying facts.

C. 1988 Westfall Act.

Finally, Congress built on the framework of the Drivers Act in the Westfall Act when it extended FTCA exclusivity from motor vehicle claims to all common law tort claims that individuals might bring against the federal government under section 1346(b). In doing so, however, Congress retained the limiting reference to claims brought "by reason of the same subject matter," thereby confirming that FTCA exclusivity would apply only to claims as to which the FTCA imposed vicarious liability on the government. § 2679(b)(1).

Next, Congress adopted a preclusion provision, declaring that "[a]ny other civil action or proceeding for money damages arising out of or relating to the

same subject matter . . . is precluded." The preclusion provision sweeps more broadly than the exclusivity provision, barring all claims relating to "the same subject matter." *Id.*

The differential use of the "same subject matter" formulation confirms that the language was a well-understood common law phrase, referring to tort claims under the FTCA as to which the government had accepted vicarious liability. In both the Drivers Act and in the Westfall Act, Congress created a regime of exclusivity that foreclosed suits against employees and provided for litigation to proceed instead against the government under the FTCA. In both cases, Congress narrowed the regime to exclude only those claims brought "by reason" of the same subject matter against the employee whose act or omission gave rise to the claim. As with the Judgment Bar, then, "by reason of the same subject matter" described claims within the vicarious liability scheme of the FTCA. When Congress meant to confer a broader immunity on employees, and to preclude claims outside the FTCA, it changed the formulation. Thus, in precluding "all other claims" against federal employees, the Westfall Act refers to claims "arising out of or relating to" the same subject matter. This formulation, inexplicable under the Government's account of the relevant language, clearly seeks to sweep in and preclude all claims related to those made cognizable under the FTCA.

In the past, the Government has argued that the text of the Westfall Act actually supports its position. For example, in this very case the Government previously pointed to *Hui v. Castaneda*, 559 U.S. 799

(2010), arguing that the "'explicit exception for *Bivens* claims is powerful evidence' that Congress understood, were it not for the exception, the phrase 'by reason of the same subject matter' in Section 2679(b)(1) would naturally have covered *Bivens* claims that are based on the same underlying facts as the plaintiff's potential FTCA claims. *Hui*, 559 U.S. at 807." Brief for Petitioner at 26, *Brownback v. King*, 141 S.Ct. 740 (2021) (No. 19-546).

But *Hui* addressed a different question under a different statute, the immunity conferred on public health officials by section 233. The Court in *Hui* emphasized that the issues presented by a statutory immunity from suit were quite different from the availability of a right to sue under *Bivens* and thus clearly implied that its analysis would not control the preclusive effect of the Judgment Bar. What's more, the decision in *Hui* did not carefully attend to the specific terms of the Westfall Act on which it relied and assumed, without the benefit of careful briefing on the issue, that the "same subject matter" reference in section 233 extended more broadly than the text of the statute, understood in historical context, would allow. This Court should confine *Hui*'s reading of same subject matter to its specific statutory context.

CONCLUSION

The Sixth Circuit erred in applying the FTCA's Judgment Bar to Petitioner's claims. This Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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