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

REPLY IN SUPPORT OF CERTIORARI

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The government's brief in opposition concedes more than it disputes. The government concedes that this Court has repeatedly held that the FTCA's "judgment bar was drafted against the backdrop doctrine of res judicata." BIO 10 (quoting Pet. App. 32a). The government concedes that the Sixth Circuit's interpretation of the judgment bar—which would permit its application against claims brought together in the same action—conflicts with res judicata. *Id.* at 9–12. And the government concedes that this issue has persistently divided circuit courts for the last 30 years. *Id.* at 14. Taken together, the government's concessions confirm the compelling reasons to grant the petition.

The only argument the government offers against review is that the Sixth Circuit's interpretation of the judgment bar is correct. As the petition and supporting amicus briefs establish, the Sixth Circuit's opinion rests on outdated precedent that fails to grapple with the judgment bar's text and purpose. If the government responds to these arguments, King addresses them below. More important, however, the fact that the parties' disagreement centers over the answer to the question presented only reinforces what Justice Sotomayor observed when this case was last before the Court: "[T]his question deserves much closer analysis and, where appropriate, reconsideration." Pet. App. 43a. This Court should grant the petition and give this question the closer analysis it deserves.

I. The government's concessions confirm that the petition should be granted.

The government's concessions in its brief in opposition confirm the petition should be granted. King established that this Court has repeatedly compared the FTCA's judgment bar to the doctrine of res judicata, which never applies against claims brought together in the same action. Pet. 13–17 (discussing *Will* v. *Hallock*, *Simmons* v. *Himmelreich*, and this Court's prior decision in *Brownback* v. *King*). The government disputes neither those holdings nor the scope of res judicata. BIO 9–12.

King further established that the lower court's interpretation of the judgment bar conflicts with res judicata by applying it against claims brought together in the same action. Pet. 17–19. The government readily agrees, even embracing the conflict. BIO 6–8, 11–12.

Lastly, King established that this issue has persistently divided circuit courts. Pet. 19–29. The government acknowledges the split but attempts to minimize it as a "narrow conflict" that has "existed for 30 years." BIO 14. Further attempting to downplay the divide, the government contends that no circuit court has adopted King's precise interpretation of the judgment bar. BIO 12. But the government conveniently ignores both that (1) one side of the split *would* side with King and refuse to apply the judgment bar here, and (2) both sides of the split disagree over the extent to which the judgment bar was built on principles of res judicata.

In other words, the government's brief in opposition does little to address the reasons King raised in

his petition for this Court's review. Instead, the government spends the bulk of its brief defending the merits of the lower court's decision. As explained below, the government's arguments ring hollow. But more importantly, they only reinforce why this Court should grant the petition and answer the question presented.

II. The government misconstrues the judgment bar's text and purpose and cannot reconcile the lower court's decision with those of this Court.

In an attempt to defend the Sixth Circuit's opinion below, the government engages in faux textualism and misconstrues the judgment bar's purpose. Because it does so, the government cannot square the lower court's decision with at least three decisions of this Court.

A. The government's faux textualism conflates "actions" and "claims."

The government's purportedly textual interpretation of the judgment bar hinges on an atextual premise: that "action" and "claim" mean the same thing. BIO 7–8. In the government's view, when Congress provided in Section 2676 that "[t]he judgment in an *action* under [the FTCA]" bars "any *action*" against the federal employee whose conduct "gave rise to the [FTCA] *claim*," 28 U.S.C. 2676 (emphases added), Congress was using the terms "action" and "claim" interchangeably. BIO 8. Thus, according to the government, Section 2676 may just as well read:

> The judgment in a~~n action~~ claim under section 1346(b) of this title shall constitute a complete bar to any ~~action~~ claim 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. As proof that Congress used the terms interchangeably, the government points to Section 2676, the very statute under dispute. BIO 8. Without explanation, the government asserts that because Section 2676 uses both words they must mean the same thing. *Ibid.* King and the Court are left to guess why that is so.

Setting aside the government's circular reasoning, this argument is atextual to its core. As King already explained, the terms "action" and "claim" had different meanings when the FTCA was enacted in 1946, just as they have different meanings today. Pet. 17–19. To reiterate: an "action" refers to "the whole of the lawsuit," while a "claim" refers to the "part of a[n] * * * action specifying what relief the plaintiff asks for." Pet. App. 40a (Sotomayor, J., concurring) (citing Black's Law Dictionary 37, 311 (11th ed. 2019)); see also Tr. of Oral Argument at 5 (Chief Justice Roberts drawing the same distinction when this case was last before the Court). By referring to "action" instead of "claim," Congress intended the judgment bar to apply to separate lawsuits, not to separate claims in the same suit. This is clear from the text of Section 2676 alone. And it is confirmed by the FTCA's "release bar," where Congress demonstrated its ability to distinguish between "actions" and "claims" just a few sections away—releasing "any claim." 28 U.S.C. 2672 ("The acceptance * * * of any * * * award, compromise,

or settlement * * * shall constitute a complete release of any claim * * * against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.").

Implicitly recognizing that these terms carry different meanings, the government attempts to equate them syllogistically. If an "action" is comprised of "claims," the government argues, Section 2676's bar to "any action" bars the claims within the action. BIO 7. But the government's whole-equals-the-part syllogism would have extreme ramifications in other contexts. Res judicata, for example, is often defined using "actions" and "claims" as distinct terms. Pet. 15–16; see also 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4401 (3d. ed. 2020) ("Failure to advance all parts of a single claim, or surrender of some part of a single claim as the action progresses, do not [trigger res judicata and] defeat the right to pursue the parts that are advanced."). The government's interpretation asks this Court to render such distinctions, and thus the basic operation of res judicata, meaningless.

As this Court has held—in a decision interpreting the judgment bar no less—"Congress says what it means and means what it says." *Simmons* v. *Himmelreich*, 578 U.S. 621, 627 (2016). Congress crafted the judgment bar in terms of "actions," not "claims." Neither the government's brief nor the opinion below can be squared with the judgment bar's text.

B. The government misconstrues the judgment bar's purpose.

The government's pivot to the judgment bar's purpose fares no better. Although the government correctly recognizes that Congress enacted the judgment bar to prevent duplicative litigation, the government wrongly argues that its interpretation of the judgment bar fulfills that purpose by "protect[ing] federal employees and the United States from having to defend multiple *claims* arising from the same incident." BIO 8 (emphasis added). In the government's view, "[b]ecause the burdens of litigation arise whether or not a claimant has pleaded an individual claim in the same lawsuit or in a separate lawsuit," there is no reason for the judgment bar to "distinguish between simultaneous and sequential claims." *Id.*

The government's position is like arguing that there is no difference between carpooling and driving separately because both move multiple people to their destination. It fails on its face. Concerns about duplicative litigation have always been understood to refer to "multiple suits on identical entitlements or obligations between the same parties," not multiple claims within a single suit. *Will* v. *Hallock*, 546 U.S. 345, 354 (2006) (quoting 18 Wright, Miller, & Cooper § 4402). Indeed, King is unaware of a single instance in which this Court used the term "duplicative litigation" in any other context. *See, e.g.*, *Simmons*, 578 U.S. at 629–630 & n.5 (2016) (referring to multiple suits); *Arizona* v. *San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 569 (1983) (same); *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 663 (1978) (same); *Trainor* v. *Hernandez*, 431 U.S. 434, 445 (1977) (same).

The reason for this distinction is obvious. Multiple suits can involve "tension and controversy" between multiple forums, "hurried and pressured decisionmaking," and "confusion over the disposition" of the parties' rights. *San Carlos Apache Tribe*, 463 U.S. at 569. Filing and responding to multiple suits involves multiple complaints, multiple answers, and multiple dispositive motions, all of which take up limited judicial resources. These same concerns underpin the doctrine of res judicata, which as this Court explained, served as Congress' template for the judgment bar and applies only between multiple suits. See Pet. 13–19; see also *G. & C. Merriam Co.* v. *Saalfield*, 241 U.S. 22, 29 (1916) ("Obviously, [res judicata] applies only when the subsequent action has been brought."); *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1597 n.3 (2020) ("[C]laim preclusion applies only 'to a final judgment rendered in an action *separate* from that in which the doctrine is asserted.' Thus * * * it 'is not applicable to . . . efforts to obtain supplemental relief in the original action, or direct attacks on the judgment.'" (citation omitted)).

Filing multiple claims within a single suit, by contrast, implicates none of these concerns, as this case well shows. James King filed a single complaint with both constitutional claims and FTCA claims. The government filed a single motion to dismiss, which the district court granted in a single opinion. Pet. App. 95a. King filed one appeal raising only his constitutional claims, which is pending before this Court now. This is not the sort of "duplicative litigation" that Congress enacted the judgment bar to prevent. Rather, this is the kind of responsible litigation that the

judgment bar was designed to encourage. See *Gasho* v. *United States*, 39 F.3d 1420, 1438 (9th Cir. 1994). Applying it against King here "simply because [he] cho[se] *not* to waste judicial resources on a frivolous appeal" of his FTCA claim violates the judgment bar's purpose and "notions of an ordered and civilized society." Pet. App. 22a (Clay, J., dissenting).

C. The government cannot reconcile the opinion below with this Court's decisions.

Because the government's interpretive methodologies fall short, it also fails to reconcile the opinion below with this Court's prior decisions that analogize the judgment bar to res judicata. This inconsistency requires certiorari to correct, or else FTCA claimants and the courts that hear them will be left guessing how to handle FTCA and constitutional claims brought together.

As King already explained, this Court has consistently analogized the FTCA's judgment bar to the doctrine of res judicata. Pet. 13–19 (discussing *Will*, *Simmons*, and this Court's prior decision in *Brownback*). Through this trilogy of cases, the Court has firmly established that the "judgment bar was drafted against the backdrop doctrine of res judicata," *Brownback* v. *King*, 141 S. Ct. 740, 748 (2021), Pet. App. 32a, and that the two operate "in much the same way," *Will*, 546 U.S. at 354, by guarding against "duplicative litigation," *Simmons*, 578 U.S. at 629.

The government rightly recognizes that these cases connect the judgment bar with res judicata. BIO 9–10. The government also appears to

acknowledge that the lower court's interpretation of the judgment bar veers from res judicata by applying it against claims brought together in the same action. BIO 11–12. The government's only attempt to reconcile this disharmony is to argue that these cases "do not equate the judgment bar with common-law claim preclusion *in every particular*." BIO 10 (emphasis added). And in the government's view, the opinion below can be squared with these cases because none of them are precisely on point. *Ibid.*

But the government's position neither meaningfully harmonizes the opinion below with this Court's decisions nor provides a reason to deny the petition. If anything, it *reinforces* why the Court should grant the petition: If the government is right that the judgment bar is like res judicata in some respects but not in others, this Court needs to make those differences clear. This is especially true in the context of this case, which implicates a potentially seismic difference between the judgment bar and res judicata: whether it applies within or only between actions.

The government's attempt to justify this disharmony with the judgment bar's text fails for much the same reason. The government argues that Section 2676's reference to "any action" reflects Congress' intent to expand the judgment bar beyond the scope of res judicata. BIO 11–12. But as Chief Justice Roberts observed when this case was last before the Court, "If Congress were going to make such a dramatic departure from [the common-law] rule [of res judicata], the obvious word to use is right there; it's 'claims.' And yet, they didn't do that." Tr. of Oral Argument at 5 (cleaned up). Put another way, the government's interpretation of the judgment bar leaves

Congress "hid[ing] elephants in mouseholes," which it does not do. *Whitman* v. *American Trucking Assocs.*, 531 U.S. 457, 468 (2001).

Unless the Court grants the petition and addresses this confusion, litigants and courts will be left guessing how to handle FTCA and constitutional claims brought together. One possibility is that litigants will simply stop bringing these claims together at all. The government alludes to as much when it portrays the judgment bar as a "remedial compromise" that "gives plaintiffs a choice" between filing an FTCA claim or a constitutional claim. BIO 8. But this framing contradicts the well-settled view that Congress views FTCA and constitutional claims "as parallel, complementary causes of action." *Carlson* v. *Green*, 446 U.S. 14, 20 (1980); see also 28 U.S.C. 2679(b) (providing that the FTCA is not exclusive of constitutional claims).

Even if the government's interpretation allows FTCA and constitutional claims to be brought together, the government argues that litigants must ensure that the claims are "pending simultaneously" to avoid application of the judgment bar. BIO 11. But here, the government advances a legal fiction. Claims do not remain pending simultaneously forever. Eventually, a court must enter judgment on the FTCA claim. When it does, under the government's view, "judgment on that claim will resolve the controversy completely," even if the claimant brought additional constitutional claims in the same suit. BIO 8.

As the amici supporting King point out, the government's legal fiction promotes bizarre gamesmanship that is already confusing lower courts. *See* Cato

Institute Amicus Br. 7–10; Public Citizen Amicus Br. 9–14. Some courts are refusing to adjudicate the constitutional claims, either by staying them until the FTCA claim is resolved, see*, e.g.*, *Porter* v. *Hendrix*, No. 2:19-CV-138, 2022 WL 848357, at *3 (E.D. Ark. Jan. 28, 2022), adopted, 2022 WL 843489, at *1 (E.D. Ark. Mar. 21, 2022), or by dismissing the constitutional claims entirely, even *after* the plaintiff wins judgment, *Estate of Trentadue* v. *United States*, 397 F.3d 840, 859 (10th Cir. 2005) (instructing the district court to dismiss the successful constitutional claim on remand once it enters judgment on the FTCA claim). These confusing tactics will only intensify unless the Court grants the petition and provides guidance.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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AUGUST 3, 2023