No. 19-546

In The Supreme Court of the United States

DOUGLAS BROWNBACK, ET AL.,

Petitioners,

v.

JAMES KING,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PATRICK JAICOMO
Counsel of Record
KEITH NEELY
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
pjaicomo@ij.org
kneely@ij.org

ANYA BIDWELL
INSTITUTE FOR JUSTICE
816 Congress Avenue
Suite 960
Austin, TX 78701
(512) 480-5936
abidwell@ij.org

D. ANDREW PORTINGA
MILLER JOHNSON
45 Ottawa Avenue SW
Suite 1100
Grand Rapids, MI 49503
(703) 682-9320
portingaa@millerjohnson.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Congress enacted the judgment bar of the Federal Tort Claims Act, 28 U.S.C. 2676, to prevent a plaintiff who fails to prove a tort claim against the United States from having a second chance at that same failed claim by suing government officials individually. When a district court dismisses an FTCA tort claim against the United States for lack of jurisdiction, does that dismissal bar the plaintiff's constitutional claims against individual government officials in the same case?

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STATEMENT

Through the FTCA, Congress waived the government's sovereign immunity and accepted vicarious liability for certain torts committed by federal employees. To avoid duplicative litigation of those torts, Congress included a so-called "judgment bar" in the FTCA, 28 U.S.C. 2676, which operates like common-law claim preclusion. As the Sixth Circuit held below, this means that when a district court lacks jurisdiction over an FTCA claim, its dismissal of the claim does not trigger the judgment bar.

As it did in *Simmons* v. *Himmelreich*, 136 S. Ct. 1843 (2016), the government asks this Court to reverse the Sixth Circuit's decision and apply the judgment bar to claims dismissed for lack of jurisdiction. But this Court has already rejected that argument because

> [t]he Government's reading would * * * encourage litigants to file suit against individual employees before suing the United States to avoid being foreclosed from recovery altogether. Yet this result is at odds with the FTCA's purposes, channeling liability away from individual employees and toward the United States.

Id. at 1850.

There is no need for this Court to reiterate its holding in *Simmons* because there is no conflict of authority among the circuits over whether the judgment bar applies to cases dismissed on jurisdictional

grounds. Every case the government offers involved the application of the judgment bar to judgments entered on the merits by district courts with jurisdiction to enter them. This case does not.

On July 18, 2014, two members of a joint state-federal police task force—Grand Rapids, Michigan Police Detective Todd Allen and FBI Special Agent Douglas Brownback—unreasonably misidentified James King as a fugitive wanted on a Michigan warrant. Pet. App. 3a, 16a–23a. Although King looked nothing like the fugitive, Pet. App. 18a–19a, and was actually an innocent college student, the officers stopped, searched, beat, and arrested King. Pet. App. 3a–5a. Even though it was immediately clear that King was not the wanted fugitive, Michigan officials jailed King, charged him with several felonies, and put him on trial. Pet. App. 5a. A jury acquitted King of all charges.[1] *Ibid*.

On April 4, 2016, King filed this lawsuit. Because the officers' task force membership implicated both state and federal authority, King brought constitutional claims against the officers under 42 U.S.C. 1983 and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as well as tort claims against the United States under the FTCA, 28 U.S.C. 1346(b). In lieu of answering, the officers argued that King's FTCA claims "should be dismissed for lack

[1] King provides a more substantial statement of facts in his Conditional Cross-Petition for a Writ of Certiorari. Cross-Pet. at 2–8, *Brownback v. King*, No. 19–718 (Nov. 27, 2019). The additional facts provided there are not relevant to the officers' petition.

of subject-matter jurisdiction," D. Ct. Doc. 72, at 57, and King's constitutional claims should be dismissed because the officers are entitled to qualified immunity, *id.* at 1.

The district court accepted the officers' arguments and dismissed King's case. It held that "the United States is entitled to dismissal [of King's FTCA tort claims] because Michigan [governmental immunity] bars these claims," Pet. App. 75a, and that the officers—who King could only pursue under *Bivens*, not Section 1983—were entitled to qualified immunity. Pet. App. 78a (holding that King failed to establish subject-matter jurisdiction under the FTCA because "the United States is entitled to * * * Michigan governmental immunity from intentional torts * * * under state law in this case"); 58a (dismissing King's Section 1983 claim because the officers "acted under color of federal law"), 59a–69a (granting the officers qualified immunity on King's *Bivens* claims).[2]

[2] At the officers' urging, the Court also suggested that King had not "preserved his FTCA claims as to * * * Officer Allen" because King failed to exhaust his administrative remedies as to Allen. Compare Pet. App. 75, 79a (assuming that King preserved his claim) to D. Ct. Doc. 72, at 58–59 ("[T]he SF-95 [form King submitted to the FBI] clearly identifies King and his counsel's deliberate choice to pursue liability for Officer Allen's conduct under § 1983 and *Bivens* only."). So even if this Court accepts the officer's interpretation of the FTCA's judgment bar, the officers are judicially estopped from applying it to King's constitutional claims against Allen. *New Hampshire* v. *Maine*, 532 U.S. 742, 749–751 (2001).

In a single paragraph of obiter dicta, the district court then offered that "[e]ven if the United States is not entitled to immunity * * * [King's FTCA claims are] properly dismissed for failure to state a claim * * * ." Pet. App. 80a.

King appealed, but dropped his FTCA claim, focusing instead on his constitutional claims. Doc. 36, at 18 n.5. After all, the district court had held King could not establish FTCA jurisdiction and suggested that King had failed to exhaust his administrative remedies as to Allen. See note 2, *supra*. Citing King's decision to drop his FTCA claim and the district court's dicta, the officers argued on appeal that King's constitutional claims are barred by the FTCA's judgment bar, see Doc 41, at 11–12, which provides that "[t]he judgment in an action 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 whose act or omission gave rise to the claim." 28 U.S.C. 2676.

The Sixth Circuit rejected the officers' interpretation of the judgment bar. Relying on its decision in *Himmelreich* v. *Federal Bureau of Prisons*, 766 F.3d 576 (6th Cir. 2014), aff'd *sub nom. Simmons*, and this Court's decision in *Simmons*, the Sixth Circuit held that "[t]he FTCA does not bar Plaintiff from maintaining his claims against Defendants because the district court lacked subject-matter jurisdiction over Plaintiff's FTCA claim." Pet. App. 9a. It further explained:

> Plaintiff failed to satisfy the sixth element of [Section 1346(b) as articulated in *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994)]—he failed to allege a claim "under circumstances where the United States, if a private person, would be liable to the claimant * * * ." Because Plaintiff failed to state a FTCA claim, his claim did not fall within the FTCA's "jurisdictional grant." And because the district court lacked subject-matter jurisdiction over Plaintiff's FTCA claim, the district court's dismissal of his FTCA claim "does not trigger the § 2676 judgment bar." *Himmelreich*, 766 F.3d at 579.

Ibid. Judge Rogers dissented from the panel's FTCA analysis. Pet. App. 39a.

The Sixth Circuit also rejected the officers' reliance on the district court's dicta because lack of jurisdiction "*precluded* the district court from exercising subject matter jurisdiction over the FTCA claim and *prevented* the district court from reaching a decision on the merits." Pet. App. 10a–11a (citing *Haywood* v. *Drown*, 556 U.S. 729, 755 (2009); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.")).

The Sixth Circuit then addressed King's constitutional claims. Although it affirmed the district court's holding that the officers are immune from claims

under Section 1983 because they were task force members at the time of their actions,[3] Pet. App. 34a–37a, the court held that King's constitutional claims can proceed under *Bivens* and that the officers are not entitled to qualified immunity. Pet. App. 38a.

The officers petitioned for rehearing en banc, arguing that the panel's FTCA holding conflicted with *Simmons* and *Harris* v. *United States*, 422 F.3d 322 (6th Cir. 2005), Doc. 57, but the Sixth Circuit denied rehearing. Pet. App. 82a.

The officers now petition this Court, asking it to reverse the Sixth Circuit's FTCA holding, reinterpret the judgment bar, and expand its scope to provide novel protections to federal employees.

King conditionally cross-petitions, asking the Court, only if it grants the officers' petition, to also address whether membership in a joint state-federal police task force precludes law enforcement officers from acting "under color of state law" for purposes of Section 1983. Such task forces have become increasingly common, and their proliferation has caused confusion with both courts and plaintiffs over how constitutional claims may be pursued against task force members. See 19–718, Cross Pet., at 10–11.

[3] This holding is the subject of King's conditional cross-petition for certiorari.

REASONS FOR DENYING THE PETITION

The Sixth Circuit's holding stands for the unremarkable proposition that a district court's dismissal of an FTCA claim for lack of jurisdiction does not trigger the FTCA's judgment bar. This Court should deny the officers' petition because the Sixth Circuit's decision follows this Court's holding that the judgment bar's purpose is to prevent duplicative litigation, *Simmons*, 136 S. Ct. at 1849; the FTCA's text, which provides that the judgment bar only applies to "judgment[s] in an action under section § 1346(b)"; and the FTCA's history, which proves that the judgment bar "clearly applies only to judgments rendered on the merits."[4] Without jurisdiction, a court cannot enter a judgment under the FTCA.

There is no split of authority on this issue. Every case the officers cite involved a situation in which a district court had jurisdiction and entered a judgment on the merits. Only then was the judgment bar triggered.

Even if the officers could show that the Sixth Circuit erred or created a conflict, this case would provide a poor vehicle to address it. Because this is the only lawsuit King has filed to vindicate his 2014 beating, it does not present the duplicative litigation this Court identified in *Simmons* as the judgment bar's target.

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[4] *The Federal Tort Claims Act*, 56 Yale L.J. 534, 559 (1947); see also *ibid.* (The language of the judgment bar "should not be interpreted as referring to any judgment by which the court denies its jurisdiction.").

I. This Court's review is unnecessary because the decision below is consistent with *Simmons v. Himmelreich* and the FTCA.

Simmons confirms the judgment bar does not apply when an FTCA claim fails on jurisdictional grounds. 136 S. Ct. at 1847. The text, history, and purpose of the FTCA require that conclusion. If, to the contrary, this Court accepted the officers' interpretation, the judgment bar would cause, not prevent, duplicative litigation and channel liability toward, not away from, individual officers—precisely the "strange result" this Court warned against in *Simmons*. 136 S. Ct. at 1850.

A. In *Simmons*, this Court explained that the judgment bar's purpose is to prevent duplicative litigation.

Simmons involved two suits filed by a federal inmate. In both, the plaintiff alleged a fellow inmate beat him as the result of prison officials' negligence. In the first suit, the plaintiff alleged an FTCA claim against the United States, which moved to dismiss because the claim fell within the FTCA's discretionary-function exception of 28 U.S.C. 2680(a). The court granted that motion. *Simmons*, 136 S. Ct. at 1845–1846.

Before it did so, however, the plaintiff filed a second suit. This time he alleged constitutional claims against individual prison employees. Once the plaintiff's FTCA suit had been dismissed, the individual defendants moved to dismiss the second suit under the

judgment bar, arguing that the dismissal of the first suit was a "judgment in an action under section 1346(b)," which precluded the plaintiff's constitutional claims against them. *Id.* at 1846 (citing 28 U.S.C. 2676). The district court agreed and dismissed the second suit, holding that the judgment bar applies "to all actions * * * not just judgments on the merits." *Himmelreich*, 766 F.3d at 578.

The Sixth Circuit rejected that holding. Because the discretionary-function exception deprived the district court of subject-matter jurisdiction, *Himmelreich* held that the dismissal was not a judgment "under section 1346(b)." *Id.* at 579. When a court does not or cannot reach the merits of an FTCA claim, its dismissal of that claim cannot trigger the judgment bar. *Ibid*.

On certiorari, this Court unanimously affirmed *Himmelreich*. 136 S. Ct. 1843. Although *Simmons* addressed the narrower issue of whether the judgment bar applies to FTCA claims that fall under the FTCA's "Exceptions," its analysis supports the Sixth Circuit's broader holding below. See *id.* at 1850 ("We therefore affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.").

Noting that Congress enacted the FTCA to supplement the common law in effect at the time, *Simmons* explained that where a dismissal would "not be entitled to claim-preclusive effect * * * the roughly analogous judgment bar should not foreclose a second suit against individual employees." *Id.* at 1849 n.5 (citing

Will v. *Hallock*, 546 U.S. 345, 354 (2006); Restatement (First) of Judgments § 96, 96(1), cmts. b, d (1942)).

> Ordinarily, the judgment bar provision prevents unnecessarily duplicative litigation. If the District Court in this case had issued a judgment dismissing Himmelreich's first suit because the prison employees were not negligent, because Himmelreich was not harmed, or because Himmelreich simply failed to prove his claim, it would make little sense to give Himmelreich a second bite at the money-damages apple by allowing suit against the employees: Himmelreich's first suit would have given him a fair chance to recover damages for his beating.

Simmons, 136 S. Ct. at 1849. But applied to a dismissal for lack of jurisdiction—as with the Exceptions—"the judgment bar provision makes much less sense." *Ibid.*

Simmons further rejected the government's argument to the contrary because it "would yield another strange result":

> According to the Government, the viability of a plaintiff's meritorious suit against an individual employee should turn on the order in which the suits are filed (or the order in which the district court chooses to address motions). For example, had the District Court in this case addressed the individual employee suit first, there would be no FTCA judgment in the picture, and so the judgment bar provision would not affect the outcome of the suit. The Government's reading would thus encourage

> litigants to file suit against individual employees before suing the United States to avoid being foreclosed from recovery altogether. Yet this result is at odds with one of the FTCA's purposes, channeling liability away from individual employees and toward the United States.

Id. at 1850 (citing *Dahelite* v. *United States*, 346 U.S. 15, 25 (1953)).

The officers' arguments here are identical to those in *Simmons*. Although this case involves a situation in which Section 1346(b) never granted FTCA jurisdiction, whereas *Simmons* involved a situation in which Section 2680(a) revoked FTCA jurisdiction, that is a distinction without a legal difference. All that matters for the analysis of the judgment bar is *that* jurisdiction failed—*why* jurisdiction failed is immaterial. Whenever jurisdiction is lacking, "[t]o apply the judgment bar * * * would be passing strange." *Simmons*, 136 S. Ct. at 1849–1850.

B. The text and history of the FTCA support *Simmons* and the Sixth Circuit's decision.

The FTCA's text and history align with *Simmons* and underscore that the judgment bar's purpose is to avoid duplicative litigation.

Before the FTCA's enactment in 1946, individuals harmed by government employees sued the employees directly. The government often defended its employees

in such suits and would often—through a case-by-case process of adopting private legislation—indemnify the employees if damages were awarded against them. James E. Pfander & Neil Aggarwal, Bivens*, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417, 425 (2011). By the 1940s, the growth of the government had led to a flood of petitions for indemnification from government employees and those who claimed to have been harmed by them. Congress enacted the FTCA to streamline the government's vicarious tort liability and "transfer government tort litigation to the federal courts." *Id.* at 426; see also *Dahelite*, 346 U.S. at 24–25.

As part of the new system, Congress enacted a so-called "judgment bar" to block a specific type of duplicative litigation that could result from the government's acceptance of vicarious liability in tort cases. See generally Pfander, 8 U. St. Thomas L.J. at 430–439. Under the law that prevailed in many states and the Restatement of Judgments, if a plaintiff sued an employee and lost, the plaintiff was barred from also suing the employer. *Id.* at 430; Restatement (First) of Judgments § 96 (1942). But the opposite was not true. If a plaintiff sued an employer and lost, he or she could still sue the employee. Pfander, 8 U. St. Thomas L.J. at 431.

Illustrating the concern over that imbalance, Assistant Attorney General Francis M. Shea testified to Congress:

> If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. If he could sue the driver of the truck we would have to go in and defend the driver in the suit brought against him, and there will thus be continued a very substantial burden which the Government has had to bear in conducting the defense of post-office drivers and other Government employees.

Pfander, 8 U. St. Thomas L.J. at 428 (quoting *Tort Claims: H.R. 5373 and H.R. 6463 Hearings Before the Comm. on the Judiciary*, 77th Cong. 9 (1942) (statement of Francis M. Shea, Assistant Att'y Gen., U.S. Dep't of Justice)).

Congress included the judgment bar in the FTCA to add symmetry to the Restatement*'s* articulation of preclusion and address the concerns raised by Shea: primarily, duplicative litigation that would permit a plaintiff to pursue a claim of negligence against an employee even after the plaintiff lost the same claim against the United States.

To achieve that result, Congress borrowed the term of art "by reason of the same subject matter" from the Restatement, where it was used to describe a narrow subset of claims that rested on exactly the same

theory of liability. See Pfander, 8 U. St. Thomas L.J. at 421. Thus, a judgment for the United States through a finding of non-negligence—*i.e.*, "by reason of the same subject matter"—would bar a negligence claim against the employee arising from the same act or omission because the prior judgment would negate the identical theory of liability.[5] *Ibid.*

Contemporary analysis of the FTCA confirms that conclusion. See *Federal Tort Claims Act*, 56 Yale L.J. 534, 559 (1947) ("[I]f the court denies recovery because of a finding of fact that no negligence or wrongfulness has been proved, its finding will be a bar to any later action against the employee *arising out of the same cause of action*.") (emphasis added). So too does *Simmons*. Compare *Simmons*, 136 S. Ct. at 1849 ("If the District Court * * * had issued a judgment dismissing Himmelreich's first suit because the prison employees were not negligent, because Himmelreich was not harmed, or because Himmelreich simply failed to prove his claim," the judgment bar may apply.) to *Federal Tort Claims Act*, 56 Yale L.J. at 559.

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[5] Professors Pfander and Gregory Sisk provided this same historical analysis to the Court in *Simmons*. Pfander & Sisk Amicus Br., *Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016), 15–109 (Feb. 4, 2016), https://tinyurl.com/yzlwyg2j.

C. The officers' interpretation of the judgment bar would encourage, not prevent, duplicative litigation.

Contrary to *Simmons* and the FTCA's history, the officers argue that this Court should reinterpret the judgment bar to cover all dismissals of FTCA claims, regardless of jurisdiction. Pet. 17. But that interpretation would cause duplicative litigation and create the "strange results" this Court rejected in *Simmons*.

Under the officers' theory, plaintiffs should first bring constitutional claims against government employees individually, pursue those claims to disposition, and, if unsuccessful, file a second, tort lawsuit against the government under the FTCA. Not only would that result in more litigation against individual employees, it would create more defense costs for the government—precisely Shea's concern in arguing for the judgment bar's enactment in the first place.

Moreover, the officers' position disregards the operation of common-law claim preclusion. Although the officers argue that the district court's judgment "likely *would* have preclusive force under the common law," Pet. 19, that is incorrect. "At common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." *Costello* v. *United States*, 365 U.S. 265, 285 (1961); see also *Federal Tort Claims Act*, 56 Yale L.J. at 559 n.170 (a dismissal that does not reach the merits "cannot be res judicata of the issues involved in the action.") (citing

Gould v. *Evansville & C.R.R.*, 91 U.S. 526 (1875));[6] Restatement (First) of Judgments § 7 (1942) ("A judgment is void if it is not rendered by a court with competency to render it.");[7] Restatement (Second) of Judgments § 1 & cmt. a. (1982) (same).

II. There is no circuit split because the decision below does not conflict with the cases cited by the officers.

Not only is the Sixth Circuit's decision below consistent with the FTCA and *Simmons*, it is consistent with the cases cited by the officers to suppose a circuit split: *Farmer* v. *Perrill*, 275 F.3d 958 (10th Cir. 2001); *Unus* v. *Kane*, 565 F.3d 103 (4th Cir. 2009); and *Manning* v. *United States*, 546 F.3d 430 (7th Cir. 2008). Pet.

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[6] In *Gould* this Court explained, "[I]t is * * * well settled that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action." 91 U.S. at 534.

[7] As the comments to that section—in effect when Congress enacted the FTCA—further explain:

> Although a State has jurisdiction over the person of the defendant, it may not have given to a particular court or it may not have given to any of its courts power to entertain the action. In such a case the court has no "competency" to render a valid judgment. The court has no power to render a valid judgment, not because the State lacks power but because it has not conferred power upon the court.

Ibid. cmt. a.

20–25. None of those cases holds that the judgment bar applies absent FTCA jurisdiction. Unlike this case, all three involved the application of the judgment bar only after a judgment had been entered on the merits by a court with FTCA jurisdiction under Section 1346(b). *Farmer*, 275 F.3d at 962–964; *Unus*, 565 F.3d at 115–122; *Manning*, 546 F.3d at 432.

This observation is not novel. *Himmelreich* distinguished *Manning* on this basis in 2014. *Himmelreich*, 766 F.3d at 579 ("*Manning* does not hold to the contrary or support the district court's statement that '[t]he plain language of section 2676 requires that the bar apply to all actions by the Plaintiff, not just judgments on the merits.'"); see also *id.* at 579 n.1 (citing *Pellegrino* v. *U.S. Transp. Sec. Admin.*, No. 09–5505, 2014 WL 1489939 (E.D. Pa. April 16, 2014), which notes, at *10 n.6, that *Farmer* was not decided on the merits.[8]

Farmer highlights the crucial importance of jurisdiction in the analysis. There, the plaintiff's FTCA claim was dismissed for failure to prosecute under Rule 41(b), which "operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b). The Tenth Circuit held, as a result, that the judgment bar applied. *Farmer*, 275 F.3d at 962. But Rule 41(b) includes the important caveat that a dismissal for lack of jurisdiction does not operate as a merits decision. Fed. R. Civ.

[8] Perhaps for these reasons, the officers did not cite *Farmer*, *Unus*, or *Manning* in their briefing to the Sixth Circuit. See, *e.g.*, Pet. C.A. Supp. Br. 4–5.

P. 41(b). Thus, *Farmer* supports the Sixth Circuit's analysis below.

Alternatively, the officers argue that the Sixth Circuit's decision below contradicts its decision in *Harris*. That argument is also mistaken. Like the other cases the officers cite, *Harris* involved the judgment bar's application to a judgment entered with jurisdiction and on the merits, *id.* at 324, a fact the Sixth Circuit pointed out below. Pet. App. 12a ("Here, unlike in those cases, the district court did not reach the merits of the FTCA claim."). And all 16 of the Sixth Circuit's judges rejected that argument when none requested a vote on the officers' petition for reconsideration, which centered on *Harris*.

III. The question presented in the petition does not warrant this Court's review, but even if it did, this case would make a poor vehicle to address it.

If this Court wants to consider whether FTCA dismissals rendered without jurisdiction still somehow implicate duplicative litigation, a case where a plaintiff brings multiple claims simultaneously in a single lawsuit provides a bad foundation. A much more appropriate case would be one like *Simmons*, *Unus*, *Harris*, or *Farmer* where a plaintiff filed more than one lawsuit. There, the problem of duplicative or successive litigation is on display; here, it is not.

The language the officers must employ in support of their position bolsters that conclusion. While the

officers agree with King and *Simmons* that the judgment bar's purpose is to prevent duplicative litigation, Pet. 14, 27, they tie themselves in rhetorical knots to justify the judgment bar's application here because King has filed only one lawsuit:

> [T]he court of appeals' decision below would now force the officers to stand trial for the very same conduct that was the subject of the FTCA claims that respondent abandoned. * * * [I]t makes "little sense" to afford him "a second bite at the money-damages apple by allowing suit against the employees."

See Pet. 28 (citing *Simmons*, 136 S. Ct. at 1849).

But as the officers know better than anyone, King is still taking his first bite. This is the only lawsuit King has ever filed, and the officers have been parties from its inception. There is no duplicative or successive litigation; there is no second bite at the apple. Indeed, King's first bite has hardly begun: This case has been pending since April 4, 2016, and the officers have not even had to answer, much less stand trial.[9]

If this Court were to adopt the officers' position, the thought that the continuation of King's case would constitute a second bite at the apple would not only be "passing strange," it would deny King a "fair chance to

[9] If anyone is asking for a second bite at the apple, it is the officers, who reprise precisely the same arguments *Simmons* rejected just three years ago.

recover damages for his beating." *Simmons*, 136 S. Ct. at 1849, 1850.

CONCLUSION

This Court should deny the officers' petition, but if it grants the petition, it should also grant King's cross-petition.

Respectfully submitted,

PATRICK JAICOMO
Counsel of Record
KEITH NEELY
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
pjaicomo@ij.org
kneely@ij.org

ANYA BIDWELL
INSTITUTE FOR JUSTICE
816 Congress Avenue
Suite 960
Austin, TX 78701
(512) 480-5936
abidwell@ij.org

D. ANDREW PORTINGA
MILLER JOHNSON
45 Ottawa Avenue SW
Suite 1100
Grand Rapids, MI 49503
(703) 682-9320
portingaa@millerjohnson.com