No. 19-546

IN THE

Supreme Court of the United States

DOUGLAS BROWNBACK, ET AL.,
Petitioners,

v.

JAMES KING,
Respondent.

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

BRIEF OF PROFESSORS JAMES PFANDER, GREGORY SISK, & ZACHARY CLOPTON AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Professors James Pfander, Gregory Sisk, and Zachary Clopton, whose background and publications are listed in the Appendix, submit this brief as amici curiae. Their only interest in this matter is that of legal scholars on federal courts, jurisdiction, and procedure; constitutional and statutory claims against the Federal Government and its officers; and statutory waivers of federal sovereign immunity.

SUMMARY OF ARGUMENT

The Government's proposed interpretation of the Federal Tort Claims Act ("FTCA") judgment bar would treat any merits dismissal of an FTCA claim, however unrelated to the legal basis for *Bivens* liability, as preclusive of a *Bivens* claim, so long as the two claims arise from the same transaction or occurrence. 28 U.S.C. § 1346(b), § 2671 *et seq*.

Such a broad principle of non-mutual claim preclusion, and the election of remedies it would compel, turns the Congressional decision in 1974 to make available to victims of federal law enforcement both "a cause of action against the individual Federal agents" and "a cause of action against . . . the Federal Government," on its head. And it is bottomed on a wholly ahistorical reading of the 1946 FTCA judgment bar. It overlooks the ways in which, as this Court has recently recognized, the FTCA judgment

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[1] Pursuant to Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than amici made a monetary contribution to the preparation or submission of the brief. Both parties consented to the filing of this brief.

bar assumed and modestly supplemented the common law of preclusion in a *respondeat superior* context. It ignores the common law meaning of "subject matter" of an action that prevailed at the time of the enactment of the FTCA. And it disregards early judicial interpretation of the judgment bar and later interpretation of comparable provisions in other statutes.

INTRODUCTION

This case turns on the precise meaning of the phrase "by reason of the same subject matter" in the FTCA judgment bar provision. If "same subject matter" means "same underlying facts," "same actions, transactions, or occurrences," or "same acts or omissions," as the Government argues, then the statute would bar a claimant from ever bringing a *Bivens* action against individual employees if that *Bivens* action were based upon the same underlying facts as the claimant's original FTCA action against the United States.

But if "same subject matter" means "same primary right asserted by the plaintiff," "same legal issue presented for consideration," or "same cause of action," then the judgment bar would not necessarily bar a claimant from bringing a *Bivens* action based upon the same underlying facts as the FTCA action. That is because the primary rights and legal issues asserted in both actions, the *Bivens* claim based upon the U.S. Constitution, and the FTCA claim based upon state tort law, would not necessarily be the "same subject matter."

As a purely textual matter, interpreting "same subject matter" to mean the "same act or omission" of the employee of the government would render the phrase an unusual drafting choice. The judgment bar al-

ready contains a reference to the "act or omission" of the government employee that gave rise to the claim. It would therefore be odd to use a different, considerably more abstract phrase for presumably the same concrete idea already expressed later in the sentence. The choice to use this phrase suggests that while "subject matter" may have included the same underlying acts or omissions as *part* of its meaning, it meant *more* than just those underlying facts.

Since as early as 1986, however, courts of appeals, and even this Court in dicta, have assumed that "same subject matter" means "same actions, transactions, or occurrences." See, *e.g.*, *White* v. *United States*, 959 F.3d 328, 333 (8th Cir. 2020); *Unus* v. *Kane*, 565 F.3d 103, 121–22 (4th Cir. 2009); *Manning* v. *United States*, 546 F.3d 430, 432–36 (7th Cir. 2008); *Harris* v. *United States,* 422 F.3d 322, 333–37 (6th Cir. 2005); *Gasho* v. *United States*, 39 F.3d 1420 (9th Cir. 1994); *Arevalo* v. *Woods*, 811 F.2d 487, 489–90 (9th Cir. 1987); *Serra* v. *Pichardo*, 786 F.2d 237, 239–41 (6th Cir. 1986).

But remarkably, no court that ever construed this phrase since 1986, nor the Government in this case, has yet attempted to fix its precise meaning by orienting itself to the time of adoption of the Federal Tort Claims Act in 1946. Specifically, these courts have not interpreted the words "same subject matter" in the light of the First Restatement of Judgments (1942), dictionary definitions, legal treatises, or state supreme court decisions that existed at the time of the enactment of the FTCA. Nearly every other key word in the judgment bar, like "judgment," (*Harris*, 422 F.3d at 334), "action" (*Unus*, 565 F.3d at 122) and "claim," (*Manning*, 546 F.3d at 433–34) has received such lexicographical scrutiny by courts and advocates. But as for "same subject matter," courts have

largely been content to follow the Sixth Circuit's 1986 decision in *Serra*, which decided for the first time that "same subject matter" meant the "same actions, transactions, or occurrences," not the "same claim." This bedrock of the current understanding of the phrase, however, was itself based on a cursory analysis of parallel language in a separate provision of the FTCA and two District Court of South Carolina decisions from 1977 and 1984. *Serra*, 786 F.2d at 239–41.

A "cardinal rule of statutory interpretation" holds: "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co. of N.J.* v. *United States*, 221 U.S. 1, 59 (1911).

"This rule carries particular force in interpreting the FTCA. 'Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending 'some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment.'" *Molzoff* v. *United States*, 502 U.S. 301, 307–308 (1992) (using contemporaneous dictionary definitions of "punitive damages" from the 1933 *Black's Law Dictionary* and 1940 *Cyclopedic Law Dictionary* to identify its meaning in the FTCA); see also *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 704–708 (2004) (using contemporaneous state court decisions of the meaning of the phrase "arising in" in comparable state borrowing statutes to identify the meaning of that phrase in the FTCA).

First, the judgment bar assumed and supplemented existing common law rules governing claim and issue preclusion in vicarious liability cases. That common law background, as summarized in Restatement

(First) of Judgments (1942) ("First Restatement") §§ 96 and 99, along with its legislative history, early judicial interpretation, and decisions by this Court, all indicate that the judgment bar was designed merely to "clos[e] a narrow gap" in the common law rules of preclusion involving *respondeat superior* liability. The clear intent was to preclude plaintiffs from a "second bite at the apple" on the "identical" tort claims that they had brought against the government, or at least could have brought against the government, in a successive action against the employee. There is no evidence that Congress envisioned letting federal employees go "scot free of any liability" when the FTCA judgment did not resolve the merits of the tort claim.

Second, as reflected in legal dictionaries, encyclopedias, legal treatises, state court decisions, and decisions of this Court that were contemporaneous with the enactment of the FTCA, the "subject matter" of an action had a well-defined meaning as the primary right or legal claim invoked by the plaintiff, as distinct from the transactions or underlying facts of a case. And as legal treatise writers like Pomeroy and Bliss, and numerous state court decisions at the time pointed out, the "primary right" in a tort-based action was the plaintiff's right to be free of tortious action or wrongful bodily harm vis-a-vis the defendant as defined by state law. But the "primary" right in a *Bivens* action would often be a different right or claim, bottomed as it is on the U.S. Constitution and requiring different elements for liability.

Imagine, for example, a protester who is beaten by a federal law enforcement officer in a public park, and who brings both an assault claim under the FTCA and a constitutional claim for violation of his First Amendment rights to speech and assembly.

Though the actions may grow out of the same underlying facts, the two "primary rights" invoked would be completely different.

Accordingly, under the common law understanding of "subject matter" of an action that prevailed in 1946, a successive *Bivens* action that was based upon the "same underlying facts" would not be brought "by reason of the same subject matter" as the FTCA action.

Third, the statutory context of the judgment bar confirms the narrow scope of its preclusive effect. In three other contexts, the Suits in Admiralty Act, Driver's Act, and Westfall Act, Congress created exclusive remedy provisions that barred actions brought "by reason of the same subject matter." And yet courts have consistently construed those provisions not to bar any actions based upon the "same underlying facts," but only actions based upon the same precise theory of liability or claim made cognizable under that particular statute.

ARGUMENT

I. THE FTCA JUDGMENT BAR ONLY PRECLUDES BRINGING THE SAME TORT CLAIMS AGAINST FEDERAL EMPLOYEES THAT WERE BROUGHT, OR COULD HAVE BEEN BROUGHT, IN THE FTCA ACTION AGAINST THE GOVERNMENT

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

As this Court has recently observed, the FTCA judgment bar assumed and supplemented the ordinary common law rules regarding *respondeat superior* liability and claim preclusion described in the First

Restatement §§ 96 and 99. See *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1849 n.5 (2016).

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. And 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 FTCA judgment bar "supplemented" the first rule by preventing suits against government employees. But it was premised upon the second rule regarding the narrow scope of preclusion.

1. Application of Claim Preclusion Only Against Employer

As the Restatement of Judgments §§ 96 and 99 summarized the prevailing rule at the time: if a plaintiff brought a tort action against an employee for acts committed in the course of employment and lost on that claim, that judgment would preclude the plaintiff from bringing that same action against the employer. § 96(1)(a). However, if a plaintiff brought a tort action first against the employer for the torts of the employee and lost on that claim, that judgment would *not* preclude or bar the plaintiff from relitigating 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 a striking asymmetry in the rules of preclusion.[2]

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[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*

The judgment bar of the FTCA 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.

The testimony of Francis Shea during the hearing over the FTCA shows plainly that closing this particular gap was the point of the judgment bar. Responding to a question about both the judgment bar and the similarly phrased release bar, Shea observed:

> 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 a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck.

Torts Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary, 77th Cong. 2d Sess. 9 ("1942 Hearing") (Statement of Francis M. Shea, Assistant Att'y Gen. of the United States).

Shea's concern, and the judgment bar's own textual asymmetry, barring successive suits only against the employee of the federal government, but not also against the federal government, is explained by this background common law rule of preclusion.

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,

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Perils of Dynamic Textualism, 8 U. St. Thomas L.J. 417, 429–39 (2011).

> common-law claim preclusion would have barred a plaintiff from suing the United States after having sued an 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, 136 S. Ct. at 1849 n.5.

2. Limitation of Claim Preclusion to 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. Under the 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, as the Restatement put it, "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"). § 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. Legislative History of the FTCA Judgment Bar

The legislative history of the judgment bar confirms that it was designed to track this common law rule regarding the scope of its preclusive effect.

On three separate occasions in the legislative record, the drafters summarized the text of the judgment bar. And on each occasion they summarized it to mean that it only barred 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*." 1942 Hearings at 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 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 record further reveals that Congress considered the "claim" brought against the United States under the FTCA to be synonymous with the "subject matter" of the action. "[T]he subject matter of the suit is a claim against the United States." *Id*. at 27.

The legislative history of the similarly phrased release bar, 28 U.S.C. § 2672, further indicates that the

claimant was only releasing the specific tort theory of liability administratively asserted. As the drafters summarized the release bar, "Acceptance by the claimant of any award constitutes a complete release *of his claim*, both against the United States and against the delinquent employee." 1942 Hearings at 43 (emphasis added). And in this context, "his claim" could mean only the claimant's tort claim brought under the FTCA that had been administratively settled upon. The drafters made this point again later in the proceedings:

> The acceptance of the award by the claimant constitutes a complete release of his claim not only against the United States but also against the delinquent employee. It seems proper for the United States alone to bear the onus, within limits, of damages caused by the negligent or wrongful conduct of its employees acting within the scope of their authority.

Id. at 59.

On both these occasions, the drafters, again tracking the language and rules of the First Restatement, indicated that the release bar released just the individual tort claim of the claimant that had been brought against the government under the FTCA.

The legislative history of both the judgment bar and release bar thus confirms this Court's view that members of Congress were well aware of the prevailing law of torts when drafting the FTCA. See *Molzoff*, 502 U.S. at 307–308.

C. Early Commentary and Judicial Interpretation of FTCA Judgment Bar

Early commentary upon the judgment bar recognized the narrow scope of its preclusive effect, track-

ing 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).

And 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).[3]

D. Supreme Court Precedent: *Will* and *Simmons*

This Court's precedents again 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

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[3] See *Perils of Dynamic Textualism*, *supra*, at 445–48.

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." But it elides what this Court said in *Will* made litigation "duplicative" in this context. 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 said that the FTCA 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*, 136 S. Ct at 1849 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 earli-

er 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*, 136 S. Ct at 1849. 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 plaintiff's] first suit would have given him a fair chance to recover damages for his beating." *Id*.

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 1849 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.

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 that 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 this statute, a plaintiff would simply not be able to bring a constitutional claim. 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.

E. First Restatement § 70 and § 84

The Government suggests that elsewhere in the First Restatement, at §§ 70 and 84, the Restatement used the phrase "same subject matter" to refer to the same underlying facts of the parties' dispute, as dis-

tinguished from the legal claims or issues. Br. of Petitioner at 41.

Yet in § 70, for example, the Government ignores the commentary and examples, where the Restatement expressly distinguishes "subject matter" from "transaction." As First Restatement § 70 cmt. b puts it, "The rule here stated is applicable where the causes of action arise in the *same transaction*, although each involves a *different subject matter*."

Similarly in § 84, the Government ignores the comments and examples furnished in this section that illustrated that "subject matter" and "transaction" were not used synonymously. For example, First Restatement § 84, cmt. b says that "where the one in control of the action or the defense has no interest in the precise *subject matter of the suit* but controls it because of his connection with the *transaction* out of which the suit arose, he is bound by and entitled to the benefits of the rules of res judicata upon issues which are actually litigated." (emphasis added). The Restatement here again confirms that "subject matter" is different from "transaction" and clarified that difference in the context of the contract and property cases it was discussing.

II. AT COMMON LAW, THE "SUBJECT MATTER" OF AN ACTION WAS UNDERSTOOD TO REFER TO THE PRIMARY RIGHT OR CORE LEGAL CLAIM OF THE PLAINTIFF, AS OPPOSED TO THE UNDERLYING FACTS OF A CASE

A review of every major law dictionary and encyclopedia contemporaneous with the enactment of the FTCA, leading treatises on civil procedure, the decisions of state supreme courts, and the usage by this Court of the phrase, indicates that the "subject mat-

ter" 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 it was consistently distinguished from the underlying facts and transactions that may have given rise to the action.

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); William C. Anderson, *Anderson's Dictionary of Law* (T.H. Flood & Co., 1895). It 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. Willaims & David S. Garland, eds., Edward Thompson Co., 1896); *Anderson's Dictionary of Law*. See Appendix B.

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 "1st, the primary right, and the facts from which it flows; and 2d, 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 plaintiff's primary right flowed and the breach of it occurred. § 473. The remedy was the "object of the action." § 775.

But 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, while 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, the "subject of the action" was the underlying matter, thing, or right in regard to which the wrong had been done. § 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 plaintiff's 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 plaintiff's liberty; and for assault and battery, the right to immunity from personal violence. *Id*.

C. State Supreme Court Decisions

The definition of "subject matter" as "primary right" or "issue in dispute" or "cause of action" found in contemporaneous dictionaries, encyclopedias, and treatises was similarly reflected in the decisions of numerous State Supreme Courts.

In one of the most canonical and frequently cited formulations, in the Michigan Supreme Court case of *Jacobson* v. *Miller*, 1 N.W. 1013 (Mich. 1879) cited in *The Cyclopedic Law Dictionary* (3d ed. 1940) and *Anderson's Dictionary of Law* (1895), Justice Thomas Cooley explained:

> The subject-matter involved in a litigation is the right which one party claims as against the other, and demands the judgment of the court upon; as, for example, the right in ejectment to have possession of the lands in assumpsit to recover a demand; in equity to have a mortgage foreclosed for an amount claimed to be due upon it, or to have specific performance of a contract, and so on.

Jacobson, 1 N.W. at 1015.

Drawing upon a decision of this Court in *Cromwell* v. *Cty. of Sac*, 94 U.S. 351, 356 (1876), Justice Cooley distinguished "subject matter" from the underlying

"transaction" of a particular case, explaining that "The subject-matter of the first suit between these parties was the right to recover certain rents alleged to have accrued upon the lease prior to April, 1877" but that a separate "subject matter" could well have concerned the validity of the execution and delivery of the lease in question. *Jacobson*, 1 N.W. at 1015. Cooley concluded that a defendant sued in respect to the first subject matter would not be precluded from raising certain claims and defenses in a successive action that concerned the second "subject matter," even though both actions arose "out of the same transaction." *Id*. at 1016–17.

By the time of the enactment of the FTCA, the highest courts of at least twenty states, and nearly all the states with codes of civil procedure, had, often citing Pomeroy and Bliss, provided a definition of the "subject matter" of an action as the "primary right" which the plaintiff claimed against the other, as expressly distinguished from the underlying facts of the case. And there is no evidence that even a small minority of other state Supreme Courts defined "subject matter" alternatively as the underlying facts or transactions that gave rise to the dispute in the case. See Appendix C for list of State Supreme Court cases defining "subject matter" as the primary right of the plaintiff.

Often the context was joinder, as those states that had codes of civil procedure typically permitted joinder only if the cause arose from "The same transaction or transactions connected with the same subject of action." This language required courts of these states to carefully and repeatedly distinguish "transaction" from "subject matter."

As just one example, the Supreme Court of Wisconsin in a frequently cited case observed that:

> The word "transaction" was intended to define one thing, and the words 'same subject of action' another and different thing, and both were intended to define a different thing from the words "cause of action." . . . It seems probable, as Mr. Pomeroy suggests, that the Code makers used the term having in mind the term "subject–matter of the action," which was in use before the Code, and which is defined by Bouvier as "the cause, the object, the thing in dispute." . . . . It seems to us that this basic and fundamental element is to be found in the plaintiff's main primary right, for the invasion of which the action is brought.

McArthur v. *Moffett*, 128 N.W. 445, 446, 453–54 (Wis. 1910).

D. Supreme Court Precedent

This Court's decisions reflected this 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).

The Government suggests, however, that this Court "repeatedly used the phrase 'same subject matter' in the law of preclusion to refer to the factual transaction or occurrence at issue in a dispute, not the legal

theories asserted." Br. of Petitioner at 40. But a careful review of the three cases cited for that proposition suggests otherwise. 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. THE STATUTORY CONTEXT OF THE JUDGMENT BAR CONFIRMS THE NARROW SCOPE OF "BY REASON OF THE SAME SUBJECT MATTER"

The statutory context of the judgment bar, particularly those statutes and subsequent amendments to the FTCA that made remedies under a statute exclusive of "any other action by reason of the same subject matter" further indicates that that phrase has a narrower scope than the Government contends. 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.[4] 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.

But 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. In 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.

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[4] Gregory Sisk, *Litigation With the Federal Government* §2.4(b), at 90 (2016).

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 "The 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. True, 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.

The Government argues that the text of the Westfall Act actually supports its reading. Citing this Court's decision in *Hui* v. *Castaneda*, 559 U.S. 799 (2010), it argues 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." Br. of Petitioner at 26.

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 under the FTCA. 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 judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Appendix

APPENDIX A: AMICI CURIAE

Professor James Pfander is the Owen L. Coon Professor of Law at Northwestern University Pritzker School of Law. He focuses his research on federal jurisdiction and procedure. His books include *Principles of Federal Jurisdiction* (West Academic) (3d ed. 2017); *Civil Procedure: A Modern Approach* (7th ed. 2018) (with Marcus, Redish, & Sherman); *Federal Courts: Cases, Comments, And Questions* (8th ed. 2018) (with Redish & Sherry); *Constitutional Torts and the War on Terror* (Oxford University Press 2017); *One Supreme Court: Supremacy, Inferiority, and the Judicial Power of the United States* (Oxford University Press 2009). He has published numerous law review articles on federal courts and jurisdiction, government accountability, and constitutional litigation. Pfander has also served as chair of both the federal courts and civil procedure sections of the Association of American Law Schools.

Professor Gregory Sisk holds the Laghi Distinguished Chair in Law at the University of St. Thomas (Minnesota). For more than a quarter of a century, his scholarly work has focused on civil litigation with the Federal Government. He has published both a treatise and the only law school casebook on the subject. *Litigation With the Federal Government* (West Academic Press 2016) (hornbook); *Litigation With the Federal Government: Cases and Materials* (Foundation Press, 2d ed. 2008 & Update 2020). Sisk also has written a series of articles on interpreting federal statutes waiving sovereign immunity.

Zachary D. Clopton is a Professor of Law at Northwestern Pritzker School of Law. Clopton's research and teaching focus on civil litigation and procedure, including litigation involving the federal government. He has published numerous law review articles on these and related topics.

APPENDIX B: LEGAL DICTONARY AND ENCYCLOPEDIA DEFINITIONS OF "SUBJECT MATTER"

***Black's Law Dictionary* (4th ed. 1968):**

> **Subject Matter:** The subject, or matter presented for consideration; the thing in dispute; the right which one party claims as against the other, as the right to divorce; of ejectment; to recover money; to have foreclosure. *Flower Hospital v. Hart*, 178 Okl. 447, 62 P.2d 1248, 1252. Nature of cause of action, and of relief sought. *Moffatt v. Cassimus*, 238 Ala. 99, 190 So. 299, 300.

***The Cyclopedic Law Dictionary* (3d ed. 1940):**

> **Subject Matter:** The right which one party claims as against the other, and claims the judgment of the court upon. 41 Mich. 93. The cause of action. 15 N.Y. 509.

***Bouvier's Law Dictionary* (William Edward Baldwin, ed., Banks-Baldwin Law Publishing Co., 1934):**

> **Subject Matter:** The cause; the object; the thing in dispute.
>
> > It is a fatal objection to the jurisdiction of the court when it has not cognizance of the subject-matter of the action: as, if a cause exclusively of admiralty jurisdiction were brought in a court of common law, or a criminal proceeding

in a court having jurisdiction of civil cases only. 10 Co. 68, 76; 8 Mass. 87. In such case, neither a plea to the jurisdiction nor any other plea would be required to oust the court of jurisdiction. The cause would be dismissed by the court.

William C. Anderson, *Anderson's Dictionary of Law* (T.H. Flood & Co., 1893):

Subject Matter: The cause of action.

The thing or matter spoken of, written about, or legislated upon; the thing or object in controversy or dispute.

The subject matter of litigation is the right which one party claims against the other, and demands the judgment of the court upon.

27 *The American and English Encyclopedia of Law* (Charles F. Williams & David S. Garland, eds., Edward Thompson Co., 1896):

Subject Matter: The subject-matter is the subject or matter presented for consideration in some written or oral statement or discussion[1]; the subject[2].

[1] Cent. Dict. **Contracts – Parol Evidence Admissible to Ascertain or to Explain Subject-matter.** – *Sorensen* v. *Keser*, 2 U.S. App. 177, 51 Fed. Rep. 30; *Consolidated Coal, etc. Co.* v. *Mercer*, 16 Ind. App. 504. See also the title *Parol Evidence*, vol. 21, pp. 1108, 1119.

[2] **Jurisdiction of Subject-matter**. (See the title *Jurisdiction*, vol. 17, p. 1060) – The term subject-matter is defined as "the cause, the object, the thing in dispute." *People* v. *Lindsay*, 1 Idaho 399, quoting Bouv. L. Dict.

'By jurisdiction of the subject-matter is meant jurisdiction of the class of cases to which the particular case belongs.' *Chicago, etc. R. Co.* v. *Sutton*, 130 Ind. 405. *See also Goodman*

v. *Winter*, 64 Ala. 410; *Block* v. *Henderson*, 82 Ga. 23; *Perkins* v. *Hayward*, 132 Ind. 105.

Jurisdiction of the *subject-matter* has been defined to be 'the power to adjudge the general question involved.' *Hunt* v. *Hunt*, 72 N.Y. 229, quoted in *In re Peraltereavis*, 8 N. Mex. 27. *See also Groenvelt* v. *Burwell*, 1 Ld. Raym. 466.

Same – In Suits for Divorce (See also the title *Divorce*, vol. 9, p. 739.) – In *Hunt* v. *Hunt*, 72 N.Y. 228, it was said: 'A text-writer of repute says that "it is the act or acts which constitute the cause of action" which is the subject-matter in a suit for divorce.; *See* 3 Am. L. Reg. N. S. 206. And in *Holmes* v. *Holmes*, 4 Lans. (N.Y.) 388, the learned and able judge who delivered the opinion of the court speaks of the acts relied upon to obtain a divorce as being the *subject-matter*. The definitions of lexicographers imply a broader scope to the phrase, a more general meaning. It is 'the cause; the object; the thing in dispute.' Bouv. L. Dict. 'The matter or thought presented for consideration in some statement or discussion.' Webst. Dict. * * * So that there is a more general meaning to the phrase *subject-matter*, in this connection, than power to act upon a particular state of facts. It is the power to act upon the general and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."

Interrogatories. – A statute provided that a party interrogated might require that the whole of the answers upon any *subject-matter* inquire of should be read if part of them was read. It was held that subject-matter did not mean the particular fact covered by any one or more interpretations, but the matter to be in issue by the pleas and thus to be inquired of. *Churchill* v. *Ricker*, 109 Mass. 211.

Subject-matter involved. – In *Jacobson* v. *Miller*, 41 Mich. 93, it was said: "The *subject-matter* involved in a litigation is the right which one party claims as against the other, and demands the judgment of the court upon; as, for example, the right in ejectment to have possession of the lands; in assumpsit to recover a demand; in equity to have a mortgage foreclosed for an amount claimed to be due upon it, or to have specific performance of a contract, and so on."

Same – New York Code. - Upon the meaning of subject-matter, as used in Code Civ. Pro. N. Y., providing for additional allowances of costs, *see Devlin* v. *New York*, (C. Pl. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 31; *Coleman* v. *Chauncey*, 7 Robt. (N. Y.) 578; *Godley* v. *Kerr Salt Co.*, 3 N. Y. App. Div. 20; *Ogdensburgh, etc., R. Co.* v. *Vermont, etc., R. Co.,* 63 N. Y. 176; *Lattimer* v. *Livermore*, 72 N. Y. 174; *Conaughty* v. *Saratoga County Bank*, 92 N. Y. 401; *Spofford* v. *Texas Land Co.*, 41 N. Y. Super. Ct. 228: *Rothery* v. *New York Rubber Co.*, 24 Hun (N. Y.) 172; *Empire City Subway Co.* v. *Broadway, etc., R. Co.*, 87 Hun (N. Y.J 279. And see the title *Additional Allowances of Costs*, 1 Encyc. of Pl. and Pr. 211.

Subject-matter in Controversy Equivalent to Cause of Action.- *See Borst* v. *Corey*, 15 N. Y. 509: *Norfolk, etc., R. Co.* v. *Pinnacle Coal Co.*, 44 W. Va. 574.

Res Judicata. (See also the title *Res Judicata*, vol. 24, p. 778.) - In *Hughes* v. *Kline*, 30 Pa. St. 230, it was said: 'Was the subject-matter the same in that case as in this? These words, "the subject-matter" – terms always used in this connection in the law – indicate plainly that if the substance or essence of the controversy be the same, being between the same parties or privies, then the conclusiveness of the decree or judgment follows.

APPENDIX C: STATE SUPREME COURT DECISIONS ON THE MEANING OF "SUBJECT MATTER"

Arkansas

Ward v. *Blackwood*, 3 S.W. 624, 625 (Ark. 1887)

Hawaii

Kapoluhi Palau v. *Helemano Land Company, Ltd.*, 22 Haw. 357, 361 (Haw. 1914)

Iowa

Reed v. *City of Muscatine*, 73 N.W. 579, 579 (Iowa 1897)

Kansas

Salina Coca-Cola Bottling Corp. v. *Rogers*, 237 P.2d 218, 223 (Kan. 1951)

Scarborough v. *Smith*, 18 Kan. 399, 405–07 (Kan. 1877)

Michigan

Machen. v. *Budd Wheel Co.*, 265 Mich. 530, 535 (Mich. 1933)

Minnesota

Price v. *Minnesota, D. & W. Ry. Co.*, 130 Minn. 229, 236 (Minn. 1915)

Missouri

McCormick Harvesting Mach. Co. v. *Hill*, 79 S.W. 745, 750 (Mo. Ct. App. 1904)

Montana

Osmers v. *Furey*, 81 P. 345, 349 (Mont. 1905)

Nebraska

Archer v. *Musick*, 147 Neb. 1018, 1029–30 (Neb. 1947) (en banc)

Nevada

Casey v. *Musgrave*, 292 P.2d 1066, 1067 (Nev. 1956)

New York

Glen & Hall Mfg. Co. v. *Hall,* 61 N.Y. 226, 236 (1874)

North Carolina

Hancammon v. *Carr*, 47 S.E.2d 614, 616 (N.C. 1948)

Ohio

Baltimore & O. R.R. v. *Hollenberger*, 81 N.E. 184, 185–86 (Ohio 1907)

Oklahoma

Boettcher Oil & Gas Co. v. *Westmoland*, 113 P.2d 824, 825 (Okla. 1941)

Stone v. *Case*, 124 P. 960, 966 (Okla. 1912)

Oregon

Le Clare v. *Thibault*, 69 P. 552, 554 (Or. 1902)

South Carolina

Ophuls & Hill v. *Carolina Ice & Fuel Co.*, 158 S.E. 824, 827–28 (S.C. 1931)

South Dakota

Tripp v. *City of Yankton*, 74 N.W. 447, 448 (S.D. 1898)

Washington

First Nat. Bank v. *Parker*, 68 P. 756, 757 (Wash. 1902)

Wisconsin

McArthur v. *Moffett*, 128 N.W. 445, 446, 453–54 (Wis. 1910)

Wyoming

Studebaker Corp. of America v. *Hanson*, 157 P. 582, 584–85 (Wyo. 1916).