No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case returns after remand from *Brownback* v. *King*, 141 S. Ct. 740 (2021), where this Court flagged for future review the question presented:

Whether the Federal Tort Claims Act's judgment bar, 28 U.S.C. 2676, which this Court has repeatedly said functions in much the same way as the common-law doctrine of res judicata, nevertheless operates to bar claims brought together in the same action.

PARTIES TO THE PROCEEDING

Petitioner is plaintiff James King. Respondents are defendants Special Agent Douglas Brownback of the Federal Bureau of Investigation and Detective Todd Allen of the Grand Rapids, Michigan, Police Department.

RELATED PROCEEDINGS

United States Supreme Court:

Brownback v. *King*,
No. 19-546 (Feb. 25, 2021);

King v. *Brownback*,
No. 19-718 (Mar. 30, 2020).

United States Court of Appeals for the Sixth Circuit:

King v. *United States*,
No. 17-2101 (Sept. 21, 2022),
petition for reh'g denied, Dec. 19, 2022;

King v. *United States*,
No. 17-2101 (Aug. 1, 2018),
petition for reh'g denied, May 28, 2019.

United States District Court for the Western District of Michigan:

King v. *United States*,
No. 16-cv-343 (Aug. 24, 2017).

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PETITION FOR A WRIT OF CERTIORARI

In its previous decision in this case, *Brownback* v. *King*, the Court stated for the third time that the Federal Tort Claims Act's judgment bar, 28 U.S.C. 2676, "functions in much the same way as the common-law doctrine of claim preclusion."[1] Pet. App. 31a–32a (citation and brackets omitted); *Simmons* v. *Himmelreich,* 578 U.S. 621, 630 n.5 (2016); *Will* v. *Hallock*, 546 U.S. 345, 354 (2006). With that analogy in mind, the Court flagged King's argument "that the judgment bar does not apply to a dismissal of claims raised in the same lawsuit because common-law claim preclusion ordinarily" does not. Pet. App. 32a n.4. It then "le[ft] it to the Sixth Circuit to address" King's argument on remand. *Ibid.*

Instead, the Sixth Circuit did what nearly every other circuit to have addressed the issue has done: It "uncritically held that the FTCA's judgment bar applies to claims brought in the same action" without explaining "how its text or purpose compels that result." Pet. App. 38a, 43a (Sotomayor, J., concurring). The Sixth Circuit neither addressed the common-law argument directed by this Court nor analyzed the text of Section 2676. It merely held it was bound by its earlier decision in *Harris* v. *United States*, 422 F.3d 322 (6th Cir. 2005), which was issued before the Court first identified the judgment bar's res-judicata backdrop in *Will*.

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[1] As the Court observed in *Brownback*, "[t]he terms res judicata and claim preclusion often are used interchangeably." Pet. App. 32a n.3.

The circuits are split over the question presented. Six circuit courts—the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth—apply the judgment bar to preclude claims in the same action. See, *e.g.*, *Serra* v. *Pichardo*, 786 F.2d 237, 239 (6th Cir. 1986). The Ninth Circuit does not, however, when an FTCA claim fails. See, *e.g.*, *Kreines* v. *United States*, 959 F.2d 834, 838 (9th Cir. 1992). This circuit split has persisted for more than thirty years. Even so, no circuit has squared its holdings with the judgment bar's common-law foundation or the language of res judicata that suffuses Section 2676. See, *e.g.*, *Manning* v. *United States*, 546 F.3d 430, 435 (7th Cir. 2008) ("Congress did not import common law res judicata into § 2676."). Consequently, the holdings on both sides of the split conflict with this Court's decisions, misinterpret Section 2676, and prove that no additional percolation will result in a different—and correct—outcome.

When this case was last before the Court, Justice Sotomayor observed that the question presented "deserves much closer analysis and, where appropriate, reconsideration." Pet. App. 43a (Sotomayor, J., concurring). It is time for this Court to settle the matter. This case is a good vehicle for it to do so.

The Court should grant King's petition.

OPINIONS BELOW

The Sixth Circuit's opinion on remand from this Court, Pet. App. 1, is reported as *King* v. *United States*, 49 F.4th 991 (6th Cir. 2022). The Sixth Circuit's previous opinion, Pet. App. 44a, is reported as

King v. *United States*, 917 F.3d 409 (6th Cir. 2019). The opinion of the district court, Pet. App. 95a, is not reported but is available electronically as *King* v. *United States*, 2017 WL 6508182 (W.D. Mich. Aug. 24, 2017).

JURISDICTION

The Sixth Circuit entered its decision below on September 21, 2022, and denied rehearing on December 19, 2022. King timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. 2676 provides:

> **Judgment as bar**
>
> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

STATEMENT

I. Police task force members misidentified and hospitalized James King.

More than eight years ago, Respondents Todd Allen and Douglas Brownback, plainclothes members of a state-federal police task force, misidentified Petitioner James King as a fugitive wanted under a

Michigan warrant. King was not a fugitive; he was an innocent college student walking between his two summer jobs. Without identifying themselves, the officers forced King against an unmarked SUV and took his wallet. Believing he was being mugged, King tried to run, but Allen tackled and choked him unconscious before beating King so severely that onlookers believed King was being murdered and called 911. Pet. App. 2a–3a, 10a–14a.

Though it was clear the officers had the wrong man, Michigan officials jailed King, charged him with several felonies for his resistance to the officers' ostensible robbery, and put him on trial. A jury found King not guilty on all counts. Pet. App. 3a, 13a–14a.

II. The district court dismissed King's claims in a single judgment, which he successfully appealed in the Sixth Circuit.

Following his acquittal, King filed this lawsuit. His complaint alleged claims against the United States under the FTCA and claims against the officers for constitutional violations.[2] Without filing an

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[2] Because of their dual-authority, King sued the officers for constitutional violations committed under color of state law, 42 U.S.C. 1983, and federal law, *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). But the Sixth Circuit held that the claims had to proceed under *Bivens*. Pet. App. 82a–86a. This Court denied certiorari to address that holding. *King* v. *Brownback*, 140 S. Ct. 2565 (2020) (mem.) (asking whether "a law enforcement officer's membership in a joint state-federal police task force * * * preclude[s] him or her from acting 'under color of state law' for purposes of Section 1983"). See also Pet. App. 84a n.10 (Sixth Circuit calling its selection between Section 1983 and *Bivens* inconsequential because

answer, the government persuaded the district court to dismiss King's suit. As to his FTCA claims, the court found that the officers—and, vicariously, the United States—were entitled to Michigan-state qualified immunity. Pet. App. 128a–133a (citing *Odom* v. *Wayne County*, 760 N.W.2d 217, 224–225 (Mich. 2008)). The court similarly dismissed King's constitutional claims, ruling that the officers were entitled to federal qualified immunity. *Id.* at 109a–121a. The district court's opinion resulted in a single judgment, which King appealed. D. Ct. Judgment, R. 92, Page ID # 1032.

On appeal, King abandoned his FTCA claims.[3] Pet. App. 22a. Instead, he focused on his constitutional claims and qualified immunity. Seizing on King's decision to narrow the scope of issues in his action on appeal, the government argued King's decision not to pursue his FTCA claims precluded his constitutional claims under the judgment bar.

The Sixth Circuit held that the judgment bar did not apply, however, because "the district court dismissed [King]'s FTCA claim[s] for lack of subject matter jurisdiction" when it determined that he had not

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"liability is unchanged by whether Plaintiff's claims arise under *Bivens* or § 1983").

[3] King did so to spare party and judicial resources from the additional, complicated fight over whether the district court improperly imported Michigan qualified immunity into the elements of the FTCA, 28 U.S.C. 1346(b)(1), which opens the government to the liability of "a private person." See Pet. App. 128a–133a. As this Court noted in *Brownback*, that issue was unsettled at the time of King's initial appeal and still is today. *Id.* at 34a n.7.

stated a viable claim and so "did not reach the merits." Pet. App. 58a. The Sixth Circuit then held that the officers were not entitled to federal qualified immunity, so King's constitutional claims could proceed. *Id.* at 58a–82a.

III. This Court granted certiorari, reaffirmed that the judgment bar operates like res judicata, and remanded the question presented to the Sixth Circuit for first view.

The government petitioned for certiorari, and this Court granted review. In *Brownback* v. *King*, the Court addressed whether the district court's dismissal of King's FTCA claims was a decision on the merits that could trigger the judgment bar or, rather, a decision that the district court lacked jurisdiction that could not. Pet. App. 26a–27a. *Brownback* held that the district court's decision reached the merits and thus could trigger the judgment bar. *Id.* at 27a. But the Court declined to address whether the judgment bar did not apply for a different reason—because, like common-law res judicata, "the judgment bar does not apply to a dismissal of claims raised in the same lawsuit." *Id.* at 32a n.4.

That question was the subject of substantial briefing by the parties and amici[4] and received attention from the Court at oral argument. For instance, Chief Justice Roberts raised the issue in his first question to the government: "[O]f course, the statute speaks of

[4] See King Merits Br. at 12–26, 47–50; Gov't Merits Br. at 38–46; see generally Public Citizen Br.; Profs. Pfander, Sisk & Clopton Br.

'actions,' not 'claims.' * * * 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). Indeed, every Justice asked about the same-action issue, probing its merits or whether it was before the Court on the government's question presented.[5] Still, *Brownback* did not answer the question.

The Court instead remanded it to the Sixth Circuit, which had not addressed the issue in its earlier opinion. Explaining "that the judgment bar was drafted against the backdrop doctrine of res judicata" and that the bar "functions in much the same way," *Brownback* "le[ft] it to the Sixth Circuit to address" whether, under the common-law analogy, the judgment bar applies to claims brought together in a single action. Pet. App. 31a–32a & nn.3–4. The Court flagged King's arguments on the issue: "King argues, among other things, that the judgment bar does not apply to a dismissal of claims raised in the same

[5] See *e.g.*, *id.* at 20–21 (Justice Sotomayor observing "Congress knew * * * there was a big difference between a release of a claim rather than a bar to an action"), 28 (Justice Kavanaugh identifying as the government's "key problem" that the judgment bar precludes "'any action,' not 'any claims'"), 39 (Justice Thomas asking if the Court should consider whether "the judgment bar doesn't apply when the claims are brought together"), 40–41 (Justice Breyer asking what the Court should do if it did reach the intra-action question), 46–47 (Justice Alito asking for the circuit breakdown over the question), 52–53 (Justice Kagan asking about the difference between "action" and "claim" in the judgment bar), 54 (Justice Gorsuch addressing the "alternative argument"), 61–62 (Justice Barrett asking about the "alternative argument").

lawsuit because common-law claim preclusion ordinarily 'is not appropriate within a single lawsuit.'" *Id.* at 32a n.4. (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4401 (3d. ed. 2020)).

In a concurring opinion, Justice Sotomayor emphasized the same-action issue and argued it "merits far closer consideration than it has thus far received" because "the lower courts have uncritically held that the FTCA's judgment bar applies to claims brought in the same action," despite "few hav[ing] explained how its text or purpose compels that result." Pet. App. 38a, 43a.

IV. The Sixth Circuit held that the judgment bar applies to claims raised in the same action unlike res judicata.

On remand, the Sixth Circuit did not engage with the question the Court identified. Rather, it held in a 2-1 opinion that it was bound by its decision in *Harris* v. *United States*, which pre-dated this Court's decisions in *Will* and *Simmons* and did not address the fact that the judgment bar was drafted against the backdrop doctrine of res judicata. Pet. App. 2a.

Finding that *Brownback*, *Simmons*, and *Will* did not "directly" overrule *Harris*, the court concluded it was compelled to apply the judgment bar to claims brought in the same action. Pet. App. 6a. And while the majority distinguished *Harris* from this Court's three contrary decisions, it never tried to justify *Harris*'s holding. *Id.* at 5a–8a. Nor did the Sixth Circuit contend that *Harris* could be squared with the

judgment bar's common-law foundation. To the contrary, the panel majority omitted the phrase "common law" from its opinion entirely. *Ibid*.

Judge Clay "strongly dissent[ed]." Pet. App. 22a. He explained that this Court "remanded King's case back to the Sixth Circuit to answer the limited question of whether the FTCA's judgment bar can be used to preclude claims raised in the same lawsuit," *id.* at 15a, and that *Harris*—a decision by a panel on which Judge Clay sat—"is inconsistent with subsequent Supreme Court instruction that the judgment bar should 'function[] in much the same way' as common law claim preclusion," *id.* at 21a (citing *Will*, 546 U.S. at 535). Judge Clay argued the judgment bar "should be applied as would common law claim preclusion," where a bar is inappropriate "within a single lawsuit so long as it continues to be managed as a single action." *Id.* at 20a–21a (citing 18 Wright, Miller & Cooper §§ 4401, 4404).

Judge Clay further objected that the panel majority's decision caused the "strange result" the Supreme Court cautioned against in *Simmons*. Pet. App. 21a. In King's case, the outcome "is a profound and frightening miscarriage of justice" that is "not compatible with notions of an ordered and civilized society" because it punishes the victim of grave police abuse for his choice "*not* to waste judicial resources" on appeal. *Id.* at 22a. As a result, "future plaintiffs w[ill] be incentivized to always appeal FTCA claims or risk having their entire suit dismissed under the judgment bar." *Ibid.*

King petitioned for but was denied rehearing en banc. Pet. App. 135a–136a.

REASONS FOR GRANTING THE PETITION

The circuits are split over the question presented. When a plaintiff like James King unsuccessfully litigates FTCA claims against the government, six circuits, including the Sixth Circuit below, interpret the FTCA's judgment bar, 28 U.S.C. 2676, to preclude claims against individual government employees in the same action. But the Ninth Circuit holds that the failure of a plaintiff's FTCA claims does not preclude his remaining claims in the same action. This circuit split has existed for three decades and, because of the rules of orderliness that guide circuit decision-making, the question presented here is unlikely to reoccur. Outside the Ninth Circuit, plaintiffs like King will not plead additional claims, regardless of their merit, because those claims are doomed by the judgment bar.

This Court's intervention is needed not only to settle the split but to resolve the question presented. Both sides have misinterpreted Section 2676 by overlooking the common law doctrine that provides its foundation. Yet as this Court has repeatedly explained—including in *Brownback*—the "judgment bar was drafted against the backdrop doctrine of res judicata." Pet. App. 32a. To prevent the "duplicative litigation" that could arise from the government's acceptance of vicarious liability through the FTCA, Congress included a judgment bar that "functions in much the same way as" common-law res judicata. *Simmons*, 578 U.S. at 629–630 & n.5. Consistent with Section 2676 (which precludes "actions," not "claims")

and the operation of res judicata (which precludes actions, not claims), the judgment bar has no effect when claims are brought in the same lawsuit. To apply the judgment bar to such claims, yields the "strange result[s]" against which this Court cautioned in *Simmons*. It bars meritorious claims for nonsensical reasons and encourages plaintiffs to inefficiently file and appeal multiple lawsuits. *Id.* at 630–631.

The decision below exemplifies these problems. As Justice Sotomayor warned in *Brownback*, "King's failure to show bad faith, which is irrelevant to his constitutional claims, means a jury will never decide whether the officers violated King's constitutional rights when they stopped, searched, and hospitalized him." Pet. App. 42a (Sotomayor, J., concurring). Worse still, the Sixth Circuit's decision forces plaintiffs like King to either forego meritorious claims outside the FTCA or else file multiple lawsuits and "appeal FTCA claims as a matter of course, regardless of merit, * * * absurd[ly] wast[ing] judicial resources." Pet. App. 22a (Clay, J., dissenting) (cleaned up).

Although the Court has repeatedly indicated that Congress imported common-law res judicata into Section 2676, and common-law res judicata never precludes claims brought in the same action, the lower courts have not gotten the message. If this Court's remand order was not clear enough to cause the Sixth Circuit to reexamine its premises, the Court should grant the petition, resolve the split, and settle this issue for the circuits. If history is any guide, they cannot do it themselves.

I. The circuit courts are split over the question presented and disregard this Court's instruction that Section 2676 was drafted against the backdrop of res judicata.

The circuits are split over the judgment bar's application to cases like King's. Six hold, as the decision below, that the judgment bar precludes all intra-action claims.[6] The Ninth Circuit, however, holds that the judgment bar only applies to intra-action claims if the triggering ruling was entered against the government, rather than the plaintiff.[7] Thus, if task force officers in California, rather than Michigan, had hospitalized King, the lower court would have held that the judgment bar does not preclude his constitutional claims.

Still, all seven circuits fail where it counts: first principles. While Congress used common-law language in Section 2676 and this Court has reiterated that the judgment bar incorporates res judicata, the lower courts have ignored that background and its application to the question presented. As a result, the circuits have applied the judgment bar in conflict with common-law res judicata and created an enduring circuit split.

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[6] *White* v. *United States*, 959 F.3d 328, 333 (8th Cir. 2020); *Unus* v. *Kane*, 565 F.3d 103, 121–122 (4th Cir. 2009); *Manning*, 546 F.3d at 435; *Harris*, 422 F.3d at 334; *Estate of Trentadue* v. *United States*, 397 F.3d 840, 858–859 (10th Cir. 2005); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989).

[7] *Quintero Perez* v. *United States*, 8 F.4th 1095, 1103 (9th Cir. 2021).

A. This Court has repeatedly explained the judgment bar operates like common-law res judicata.

Through three unanimous decisions, this Court has explained the judgment bar is functionally identical to common-law res judicata as applied to the question presented. So just as res judicata never bars claims brought together in a single lawsuit, neither does the judgment bar.

In 2006, this Court first acknowledged the judgment bar's common-law foundation in *Will* v. *Hallock*. The Court observed that "[a]lthough the statutory judgment bar is arguably broader than traditional res judicata, it functions in much the same way." 546 U.S. at 354. The reason, *Will* explained, is that the judgment bar and res judicata share the same purpose: "avoiding duplicative litigation," meaning "multiple suits[.]" *Id.* at 354–355 (quoting Wright, Miller, & Cooper § 4402).

A decade later, in *Simmons* v. *Himmelreich*, the Court reaffirmed that the judgment bar and res judicata have the same operation and purpose. See 578 U.S. at 629–630 & n.5 (quoting *Will* and explaining the judgment bar's purpose is avoiding "duplicative litigation," a "second bite at the money-damages apple by allowing suit" after the "first suit" fails). *Simmons* clarified *Will*'s analogy to res judicata. *Will*'s qualification that the judgment bar was "arguably broader" than res judicata and its statement that they only function "in much the same way," *Simmons* explained, was an acknowledgment that Congress needed to "clos[e] a narrow" gap in the common law at

the time the judgment bar was enacted. 578 U.S. at 630 n.5. When the FTCA was passed "common-law claim preclusion would have barred a plaintiff from suing the United States after having sued an employee but not vice versa." *Ibid.* (citing Restatement (First) of Judgments §§ 99, 96(1)(a), cmts. b, d (1942)). The judgment bar ensured preclusion worked in both directions. James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417, 419–421, 427–453 (2011). Otherwise, the judgment bar and res judicata function in the same way.

So it was little surprise when *Brownback* v. *King* explained five years later that the "judgment bar was drafted against the backdrop doctrine of res judicata." Pet. App. 32a. Going further than had *Simmons* and *Will*, the Court's previous holding here turned on a syllogism treating the judgment bar and res judicata interchangeably: The judgment bar functions like res judicata; res judicata can be triggered only by a judgment on the merits; therefore, the judgment bar can be triggered only by a judgment on the merits. *Id.* at 31a–34a. Because the district court's judgment was on the merits, *Brownback* held it "could trigger the judgment bar." Pet. App. 27a. But whether it does trigger the judgment bar is controlled by the question presented here, and the circuits are split over the answer.

i. Res judicata does not bar claims in the same action.

Applying *Brownback*'s logic should have made the question on remand to the Sixth Circuit

straightforward. The judgment bar functions like res judicata. Pet. App. 31a–32a. If res judicata does not apply to bar claims in the same action, neither does the judgment bar. And res judicata never applies to claims raised in the same action.

As Wright, Miller & Cooper explain, for instance, "[r]es judicata applies as between separate actions, not within the confines of a single action on trial or appeal." *Id.* § 4404. "Claim preclusion * * * is not appropriate within a single lawsuit so long as it continues to be managed as a single action." *Id.* § 4401. Accordingly, "[f]ailure to advance all parts of a single claim, or surrender of some part of a single claim as the action progresses, do not defeat the right to pursue the parts that are advanced." *Id.* § 4401 & n.3 (citing *Amadeo* v. *Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1158–1161 (9th Cir. 2002)).[8]

This Court has observed this axiom for more than a century. See *G. & C. Merriam Co.* v. *Saalfield*, 241

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[8] See also, *e.g., Lalowski* v. *City of Des Plains*, 789 F.3d 784, 789 (7th Cir. 2015) ("The doctrine of claim preclusion, or res judicata, operates to bar a 'second suit' after a final judgment involving the same parties and causes of action. However, it cannot be invoked to bar claims brought in the same suit." (citations omitted)); *ITCO Corp.* v. *Michelin Tire Corp.*, 722 F.2d 42, 52 (4th Cir. 1983) ("It comes as no surprise that [defendant] has been unable to direct our attention to a single decision according *res judicata* effect to the dismissal of one alternative claim in a single lawsuit to another alternative claim *in the same suit*. Such an application of *res judicata* would defeat the very purposes the doctrine is intended to serve."); Restatement (Second) of Judgments § 13 & cmt. a (1981) (noting that res judicata is only applicable "when a judgment in one action is to be carried over to a second action and given a conclusive effect there").

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)).

Even if this Court's statements in *Simmons* and *Will* had not revealed that the judgment bar applies only to separate lawsuits,[9] *Brownback*'s syllogism should have driven the point home for the Sixth Circuit on remand: The judgment bar functions like res judicata; res judicata never applies to claims in the same lawsuit; therefore, the judgment bar never applies to claims in the same lawsuit.

The reason the decision below still failed to follow that logic is because contrary circuit precedent interpreting Section 2676 without its common-law context is entrenched. Below, the Sixth Circuit relied on its decision in *Harris*, even though "the holding in *Harris* is the opposite of what common law claim preclusion demands [and] is inconsistent with subsequent

[9] *Simmons*, 578 U.S. at 630 n.5 ("The judgment bar provision applies where a plaintiff first sues the United States then sues an employee."); *id.* at 630 (referring to the preclusion of a "future suit"); *Will*, 546 U.S. at 355 ("[T]here will be no possibility of a judgment bar * * * so long as a *Bivens* action against officials and a Tort Claims Act [*sic*, action] against the Government are pending simultaneously."); *id.* at 354–355 (explaining that the concern underlying the judgment bar is "multiple suits").

Supreme Court instruction that the judgment bar should 'function[] in much the same way' as common law claim preclusion." Pet. App. 21a (Clay, J., dissenting) (citing *Will*, 546 U.S. at 353).

ii. Section 2676 does not bar "claims" in the same action.

Section 2676's text should have also led the Sixth Circuit to the opposite outcome in its decision below. The words Congress chose confirm the Court's observation that the judgment bar was drafted with res judicata in mind, Pet. App. 32a, and show the judgment bar does not apply to claims brought in the same action.

The reason is obvious: The judgment bar does not preclude "claims"; it precludes "actions." 28 U.S.C. 2676. "An 'action' refers to the whole of the lawsuit." Pet. App. 40a (Sotomayor, J., concurring) (citing Black's Law Dictionary 37 (11th ed. 2019) (defining "action" as a "civil or criminal judicial proceeding"); Black's Law Dictionary 43 (3d ed. 1933) ("The terms 'action' and 'suit' are now nearly, if not entirely, synonymous.")). In contrast, a "claim' is "the part of the complaint in a civil action specifying what relief the plaintiff asks for." Pet. App. 40a (Sotomayor, J., concurring) (citing Black's Law Dictionary 311 (2019) (defining a "claim" as "the part of a complaint in a civil action specifying what relief the plaintiff asks for"); Black's Law Dictionary, at 333 (1933) (defining a "claim" as "any demand held or asserted as of right" or "cause of action").

Chief Justice Roberts made this observation in the first question to the government at oral argument in *Brownback*:

> [O]f course, the statute speaks of "actions," not "claims." And it was and is very well established that there's no bar with respect to claims in the same action. If Congress were going to make such a dramatic departure from that rule, 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). Chief Justice Roberts and Justice Sotomayor are right. And the FTCA's release bar, 28 U.S.C. 2672, reinforces this by barring "claims," rather than "actions."[10] "Had Congress intended to give both provisions the same effect, it presumably would have done so expressly." Pet. App. 40a–41a n.1 (Sotomayor, J., concurring) (citation and internal quotation marks omitted).

But the Sixth Circuit declined to follow Section 2676's language where it leads because it applied old circuit precedent, decided long before this Court explained that the judgment bar operates like res judicata. Although the circuits are split over the judgment bar's application, all have misinterpreted Section

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[10] Section 2672 provides:

> The acceptance * * * of any * * * settlement shall be final and conclusive on the claimant, and 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.

2676 by failing to address the common law. That is why they have been repeating their mistakes.

B. Thirty years ago, the circuit courts split over the question presented and have overlooked the judgment bar's common-law backdrop ever since.

The circuits are split over the question presented, and the Sixth Circuit's reliance on its outdated decision in *Harris* illustrates why the split has persisted for decades. The circuits are repackaging the same superficial analysis the Sixth Circuit first announced in *Serra* v. *Pichardo*, which failed to recognize the judgment bar's common-law backdrop.

i. Since 1986, the circuit courts have repeated the same misinterpretation of the judgment bar.

Every circuit decision applying the judgment bar to intra-action claims traces back to the Sixth Circuit's 1986 decision in *Serra* v. *Pichardo*. There, a prisoner won damages against the United States under the FTCA and against a prison doctor and warden under *Bivens*. Citing Section 2676's "broad language," *Serra* held that the judgment bar precludes intra-suit claims. 786 F.2d 237, 239 (6th Cir. 1986). *Serra* homed in on the fact that the judgment bar provides "a 'complete' bar to 'any' action[.]" *Ibid*. And, according to *Serra*, the "only limitation on the scope of this bar is that the actions arise 'by reason of the same subject matter.'" *Ibid*. Under this shallow reading of Section 2676, *Serra* concluded it was "inconsequential

that the claims were tried together in the same suit[.]" *Id.* at 241.

Serra missed, however, that the very language it used to justify its interpretation was common-law language Congress used to codify res judicata in Section 2676. See *Molzof* v. *United States*, 502 U.S. 301, 307 (1992) (explaining that when Congress borrows common-law terms, it adopts the "cluster of ideas" attached to them). Namely, "complete bar" is shorthand for res judicata;[11] the preclusion of "actions," rather than "claims," reflects res judicata's operation;[12] and

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[11] See, *e.g., Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001) ("complete bar"); *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 319 (1927) ("absolute bar"); *Montgomery* v. *Samory*, 99 U.S. 482, 490 (1878) ("complete bar"); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352, 365 (1876) ("absolute bar" and "complete bar"); *Aspden* v. *Nixon*, 45 U.S. (4 How.) 467, 472 (1846) ("complete bar"); *City of Elmhurst* v. *Kegerreis*, 64 N.E.2d 450, 456 (Ill. 1945) ("complete bar"); *Lauderdale* v. *Industrial Comm'n*, 139 P.2d 449, 451 (Ariz. 1943) (same); *Goddard* v. *Security Title Ins. & Guar. Co.*, 92 P.2d 804, 806 (Cal. 1939) (same); *Stringer* v. *Conway Cnty. Bridge Dist.*, 65 S.W.2d 1071, 1072–1073 (Ark. 1933) (same); *Zastrow* v. *Milwaukee Elec. Ry. & Light Co.*, 198 N.W. 275, 276 (Wis. 1924) (same); *North St. Louis Gymnastic Soc'y* v. *Hagerman*, 135 S.W. 42, 45 (Mo. 1911) (same); *Furneaux* v. *First Nat'l Bank*, 17 P. 854, 855 (Kan. 1888) (same); *Sewell* v. *Watson*, 31 La. Ann. 589, 591 (1879) (same).

[12] See, *e.g.*, *Bravo-Fernandez* v. *United States*, 137 S. Ct. 352, 357 (2016) (res judicata bars "successive litigation" and "multiple suits"); *United States* v. *Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011) (res judicata bars "repetitious suits"); *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (res judicata bars "successive litigation" and "relitigation" of claims raised in an "earlier suit"); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979) (res judicata bars "a second suit"); *Costello* v. *United States*, 365 U.S. 265, 285 (1961) (res judicata bars "a subsequent action"); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948) (res judicata bars

Section 2676's limitation of the bar to actions "by reason of the same subject matter" incorporates a universal restriction of res judicata.[13] The Sixth Circuit missed the connection between Section 2676 and res judicata, so it reached the wrong outcome.

The circuits have done little more than rely on *Serra*'s incorrect holding for the last 37 years. For instance, in *Arevalo* v. *Woods*, 811 F.2d 487, 490 (9th Cir. 1987), the Ninth Circuit cited *Serra* to preclude a *Bivens* claim in the same action as an FTCA claim but added little discussion.

Citing *Serra* and *Arevalo*, the Fifth Circuit followed suit in *Rodriguez* v. *Handy*, 873 F.2d 814, 816

"repetitious suits"); *Baltimore S.S. Co.*, 274 U.S. at 319 (res judicata bars "the second action or suit"); *Cromwell*, 94 U.S. at 352 ("In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action.").

[13] See, *e.g.*, Restatement (First) of Judgments, ch. 3, topic 2, tit. D., intro. note (1942) (explaining res judicata applies only "where a judgment is rendered in one action and subsequently a second action is brought upon the same claim or cause of action as that upon which the first action was based"); *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 76 (1939) ("same subject matter"); *Grubb* v. *Pub. Utils. Comm'n*, 281 U.S. 470, 479 (1930) ("subject-matter [is] the same"); *Cromwell*, 94 U.S. at 366 ("same subject"); *Beloit* v. *Morgan*, 74 U.S. (7 Wall.) 619, 622 (1868) ("same subject-matter"); *Aurora City* v. *West*, 74 U.S. (7 Wall.) 82, 97 (1868) (same); *Hughes* v. *United States*, 71 U.S. (4 Wall.) 232, 237 (1866) ("point of controversy must be the same"); *Aspden*, 45 U.S. at 498 ("same subject-matter"); *Darling Stores Corp.* v. *Beatus*, 33 S.E.2d 701, 701–702 (Ga. 1945) (same); *Baxter* v. *Cent. W. Cas. Co.*, 58 P.2d 835, 836 (Wash. 1936) (same); *State* v. *Sch. Dist. No. 1*, 50 P.2d 252, 253 (Mont. 1935) (same); *Howe* v. *Farmers' & Merchs.' Bank*, 264 P. 210, 212 (Okla. 1928) (same); *Little* v. *Barlow*, 20 So. 240, 240 (Fla. 1896) (same).

(5th Cir. 1987). Nodding to the "broad and sweeping phrases" of Section 2676—*i.e.*, the terms borrowed from common-law res judicata—the Fifth Circuit applied the judgment bar to preclude Texas tort claims brought in the same action as FTCA claims.[14] And hinting at what was to come as *Serra*'s misinterpretation spread to other circuits, *Rodriguez* declined to independently analyze the judgment bar. It concluded that it neither needed to nor could "add to the force of the reasoning and language of *Serra* and *Arevalo*[.]" *Rodriguez*, 873 F.2d at 816.

ii. The circuits split over the question presented in 1992.

Despite first following *Serra,* the Ninth Circuit split from its sisters in 1992. In *Kreines* v. *United States*, the court veered away from the other circuits and toward the right course, concluding that "Congress' primary concern in enacting the bar was to prevent multiple lawsuits on the same facts." 959 F.2d at 838. The court then reasoned "[t]hat concern is absent when suit is brought contemporaneously for FTCA and other relief." *Ibid*. But stuck with its previous decisions like *Arevalo*, the court distinguished between judgments *for* the government (for which the judgment bar did not apply to intra-action claims), and

[14] State tort claims were available against federal officers until Congress passed the Westfall Act, 28 U.S.C. 2679(b), in 1988. This provision makes FTCA claims the near-exclusive remedy against federal officers, 28 U.S.C. 2679(b)(1), but, crucially, provides that the FTCA does not exclude constitutional claims or other federal statutory claims. 28 U.S.C. 2679(b)(2).

judgments *against* the government (for which it did). *Ibid.*

The Ninth Circuit reiterated its position two years later in *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), explaining that *Kreines* was confined to claims in a single lawsuit. At bottom, the Ninth Circuit rested its analysis on its concern about duplicative litigation: "Plaintiffs contemplating both a *Bivens* claim and an FTCA claim will be encouraged to pursue their claims concurrently in the same action, instead of in separate actions." *Id.* at 1438.

The same year as *Gasho*, the Tenth Circuit decided *Engle* v. *Mecke*, 24 F.3d 133, 135 (10th Cir. 1994). The court joined the Fifth and Sixth Circuits to conclude that Section 2676 bars *Bivens* claims in the same action. Other than citing *Serra*, *Engle* gave little explanation for its holding.

A decade later, the Tenth Circuit took up the issue again in *Estate of Trentadue* v. *United States*, 397 F.3d 840, 858–859 (10th Cir. 2005). Citing *Serra* once more, the Tenth Circuit likewise relied on the phrases "by reason of the same subject matter" and "complete bar to *any* action" to support the judgment bar's broad application. *Trentadue*, 397 F.3d at 859 (emphasis in original). Just like the Sixth Circuit in *Serra*, the Tenth failed to recognize the common-law language it was reading and interpret Section 2676 accordingly. *Ibid.*

The Sixth Circuit issued *Harris* v. *United States* soon after, bringing the issue full circle and illustrating the absurd results caused by misapplying the

judgment bar. In *Harris*, the plaintiff brought *Bivens* and FTCA claims in the same lawsuit. 422 F.3d at 326. The district court ruled for the government on the merits of the FTCA claims but improperly dismissed the *Bivens* claims by miscalculating the statute of limitations. *Id.* at 331–333. The Sixth Circuit affirmed the erroneous *Bivens* dismissal by applying the judgment bar. *Id.* at 333.

Noting many of the foregoing cases, *Harris* addressed whether the judgment bar applies "where plaintiff has from the outset alleged his *Bivens* claims * * * in the same lawsuit alleging FTCA causes of action[.]" 422 F.3d at 334 (quotation marks omitted). Relying on *Serra*, the Sixth Circuit again held that it does. *Ibid*. Observing the split with the Ninth Circuit, *Harris* rejected *Kreines*'s distinction between judgment winners and losers. *Id.* at 335–336. But like the other circuit decisions before it, *Harris* offered little independent analysis of Section 2676 and nowhere recognized common-law res judicata's influence. Rather, it continued to build on "the consistent application of the judgment bar" since *Serra*. *Harris*, 422 F.3d at 334.[15]

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[15] *Harris* cited older cases too, but these addressed different applications of the judgment bar. 422 F.3d at 334 ((citing *Aetna Cas. & Sur. Co.* v. *United States*, 570 F.2d 1197, 1201 (4th Cir. 1978) (discussing the judgment bar in the context of disqualifying government attorneys for a conflict of interest); *Gilman* v. *United States*, 206 F.2d 846, 848 (9th Cir. 1953) (citing Section 2676 to prohibit the government from suing its employee for indemnification); *United States* v. *Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952) (citing Section 2676 to prohibit double recovery without discussing the statutory text or res judicata); *Satterwhite* v. *Bocelato*, 130 F. Supp. 825, 829 (E.D.N.C. 1955) (same);

iii. The circuit split has persisted for decades despite multiple statements from this Court that should have caused the circuits to reexamine their interpretations of Section 2676.

Things should have changed in 2006, when this Court decided *Will* v. *Hallock*, but they did not. For the first time, *Will* connected the common-law dots and instructed the lower courts that the judgment bar "functions in much the same way as" res judicata. 546 U.S. at 354. Both rules, the Court explained, are concerned with "avoiding duplicative litigation, 'multiple suits[.]'" *Ibid.* (citation omitted). Until then, the circuit courts had failed to see the connection between res judicata and the judgment bar. After *Will*, the connection was clear, but the circuits still ignored it.

In 2008, the Seventh Circuit decided *Manning* v. *United States*. There, a former police officer brought *Bivens* and FTCA claims together in the same action arising from his wrongful murder conviction.[16] 546

Hopper v. *United States*, 122 F. Supp. 181, 183, 190 (E.D. Tenn. 1953) (applying judgment bar to a separate action); *Prechtl* v. *United States*, 84 F. Supp. 889, 890 (W.D.N.Y. 1949) (citing Section 2676 as a basis for prohibiting joinder of defendants in FTCA cases), overruled by *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 556 (1951)). Indeed, most of the pre-*Serra* cases *Harris* cited did not involve multiple claims brought by a plaintiff in a single action.

[16] The plaintiff also brought claims against the officers under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c), but those claims were not at issue on appeal. *Manning*, 546 U.S. at 431.

F.3d at 431–432. A jury awarded Manning $6.5 million for his *Bivens* claim, but, a year and a half later, the district court found for the United States under the FTCA. Citing the judgment bar, the court vacated the earlier *Bivens* award, and the Seventh Circuit affirmed.

In a decision it acknowledged some might call "Kafka-esque," the Seventh Circuit held that the judgment bar applies to claims brought in the same action. *Manning*, 546 F.3d at 438 (citation omitted). Citing *Serra*, the court similarly overread the "broad language" of Section 2676, emphasizing it provides "a *complete* bar to *any* action" without acknowledging the common-law influence. *Manning*, 546 U.S. at 434 (emphasis in original). More troubling, the Seventh Circuit sidestepped *Will*'s guidance: "Manning * * * extrapolates [from *Will*] that Congress incorporated principles of res judicata into § 2676, which, according to Manning, would indicate an intention that the bar not apply to multiple claims within a single suit," given that "the purpose of res judicata is to avoid multiple lawsuits[.]" 546 U.S. at 436. The Seventh Circuit rejected that argument, however, asserting without citation or explanation that "Congress did not import common law res judicata into § 2676." *Id.*

On *Manning*'s telling, the Court's statement in *Will* had no power since the Court specified that the judgment bar was "arguably broader" than res judicata and the two doctrines only functioned in "much the same" way. *Manning*, 546 F.3d at 435–436. The judgment bar was merely "*akin* to res judicata[.]" *Ibid.* And *Manning* further rejected the additional textual evidence the plaintiff provided—it did not

matter that the word "bar" invoked res judicata; that the text precluded "actions," rather than "claims"; or that its interpretation would lead to more lawsuits, not fewer.[17] *Manning*, 546 F.3d at 433–436.

Just as *Serra* was repeated in the lower court decisions through *Manning*, *Manning* has now been repeated since. In 2009, the Fourth Circuit applied the judgment bar to intra-action *Bivens* claims in *Unus* v. *Kane*, 565 F.3d 103 (4th Cir. 2009). Citing *Manning*, the Fourth Circuit also concluded that Section 2676's preclusion of "actions," actually means "claims" because "[t]he term 'action' * * * incorporates all elements of a civil suit, including the claims within that suit." *Unus*, 565 F.3d at 122 (citations omitted). *Unus* neither cited *Will* nor addressed the implications of its statement that the judgment bar operates like common-law res judicata.

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[17] On this final point, the Seventh Circuit acknowledged it had earlier ruled that plaintiffs should bring FTCA and other claims together in a single lawsuit, applying the judgment bar to plaintiffs who brought them separately. *Manning*, 546 F.3d 434 (citing *Hoosier Bancorp of Ind., Inc.* v. *Rasmussen*, 90 F.3d 180, 185 (7th Cir. 1996)). Confronting the inconsistency with its earlier holding and this Court's observations in *Carlson* v. *Green*, 446 U.S. 14, 20 (1980), that the FTCA and *Bivens* are "parallel, complementary causes of action," *Manning* stated that it expected plaintiffs to engage in gamesmanship and waste judicial resources: "A plaintiff may still bring both parallel claims as remedies * * * and the remedies complement each other. * * * [B]ut because of the broad language of the judgment bar, plaintiff's must make strategic choices in pursuing the remedies." 546 F.3d at 434–435. A plaintiff should juggle both claims, trying to first hold the individual official liable, before "decid[ing] whether or not it makes sense to voluntarily withdraw a contemporaneous FTCA claim" at the 25th hour. *Id.* at 435.

In 2016, the Court again confirmed the judgment bar's common-law background in *Simmons* v. *Himmelreich* and explained that it functions like res judicata. 578 U.S. at 630 n.5. *Simmons* went further than *Will* in addressing the judgment bar's purpose of preventing multiple lawsuits. *Simmons* explained that Section 2676 should be interpreted to prevent the "strange result" that *Manning, Harris*, and others countenanced. *Id.* at 630. "[T]he viability of a plaintiff's meritorious suit against the individual employee[s]" should not turn on "the order in which the district court chooses to address" claims. *Id.* at 630–631. *Simmons* warned that such an interpretation would cause more litigation. *Ibid.*

After *Simmons*, the circuit courts forged ahead with the same lack of analysis and indifference to the judgment bar's foundation and purpose. In 2020, the Eighth Circuit decided *White* v. *United States*, 959 F.3d 328 (8th Cir. 2020). Without analyzing the statutory text or mentioning common-law res judicata, *White* "join[ed] other circuits in holding that the FTCA's judgment bar provision precludes a *Bivens* claim * * * even if the claims arose in the same suit." 959 F.3d at 333 (citing *Manning*, *Harris*, *et al.*). *White* nowhere acknowledged this Court's observations that the judgment bar works like res judicata.

The same year, the Ninth Circuit again confirmed the continued existence of the circuit split that has existed since *Kreines*. *Fazaga* v. *Federal Bureau of Investigation*, 965 F.3d 1015, 1064 (9th Cir. 2020) (citing *Kreines*, 959 F.3d at 838; *Gasho*, 39 F.3d at 1438), rev'd on other grounds 142 S. Ct. 1051 (2022). In the Ninth Circuit today, just as in 1992, the judgment bar

does not apply when an unsuccessful FTCA claim is brought in the same action as claims against individual government employees. *Ibid.*; see also *Quintero Perez* v. *United States*, 8 F.4th 1095, 1103 (9th Cir. 2021).

And even after this Court explained that the judgment bar operates like res judicata for a *third* time in *Brownback* v. *King* and directed the Sixth Circuit to address the common-law implications of applying the judgment bar to claims in a single action, the Sixth Circuit declined to do so below. Instead, it returned to *Serra*'s tired analysis, which is oblivious to the judgment bar's common-law backdrop and was provided long before this Court explained that the judgment bar operates like res judicata.

Just as before *Brownback*, *Simmons*, and *Will*, the lower courts are split. And just as before *Brownback*, *Simmons*, and *Will*, the "lower courts have uncritically held that the FTCA's judgment bar applies to claims brought in the same action[.]" Pet. App. 38a (Sotomayor, J., concurring). As Justice Sotomayor explained in *Brownback*, "[t]his issue merits far closer consideration than it has thus far received." *Ibid.* Thirty years' worth of circuit decisions show that only this Court can bring the circuits into line with one another and the common-law. It should use this case to do so.

II. This case is a good vehicle to resolve the circuit split and correct the long-running misinterpretation of Section 2676.

This case is a good vehicle to address the question presented for several reasons. First, the circuits disagree over whether the judgment bar precludes King's claims against the officers. Second, this Court has flagged the issue as worthy of consideration, Pet. App. 32a n.4, and the parties have already briefed and argued it. And third, this case yields the strange results against which *Simmons* warned.

James King has meritorious constitutional claims against the officers who hospitalized him for their egregious violation of his constitutional rights. King is innocent of any crime, unreasonably misidentified by federal task force members inexplicably enforcing Michigan law far from any state border. The Sixth Circuit reviewed the officers' interaction with King and found that, at each step, they violated King's clearly established rights such that even the doctrine of qualified immunity could not shield them from liability. Pet. App. 58a–82a.

Still, the Sixth Circuit applied the judgment bar to deny King his day in court. According to the Sixth Circuit and its sisters, save the Ninth, plaintiffs who want to avail themselves of the parallel constitutional and FTCA remedies available, 28 U.S.C. 2679(b), must bring, litigate and "appeal FTCA claims as a matter of course, regardless of merit" in an "absurd waste of judicial resources." Pet. App. 22a (Clay, J., dissenting).

Unless this Court addresses the lower courts' recalcitrance on the question presented, an absurd result obtains. As Justice Sotomayor wrote in *Brownback*: "King's constitutional claims require only a showing that the officers' behavior was objectively unreasonable, while the District Court held that the state torts underlying King's FTCA claims require subjective bad faith." Pet. App. 42a. If the circuit court consensus is allowed to remain in place, "King's failure to show bad faith, which is irrelevant to his constitutional claims, means a jury will never decide whether the officers violated King's constitutional rights when they stopped, searched, and hospitalized him." *Ibid*.

As dissenting Judge Clay concluded below, that sanctions a "profound and frightening miscarriage of justice." Pet. App. 22a. "That federal officers who refuse to identify themselves can spontaneously, and unprovoked, beat an individual nearly to death and be entirely free from civil liability simply because the individual chooses *not* to waste judicial resources on a frivolous appeal is not compatible with notions of an ordered and civilized society." *Ibid.* Nor is it compatible with this Court's observation that Section 2676 functions like common-law res judicata.

The background of this issue shows that, unless this Court shines its light on the question presented, the lower courts will remain blind to the common-law language Congress enacted, and innocent people like King will continue to suffer for the wrongdoing of others. And the question presented is unlikely to arise in the future because plaintiffs will know that pleading additional claims—even meritorious ones—will be

futile considering the consensus interpretation of the judgment bar.

The circuit courts have ignored *Simmons* and *Will*, and the Sixth Circuit has now relied on pre-*Will* precedent to ignore *Brownback* too. Contrary to those decisions, the lower courts have interpreted the judgment bar to function nothing like common-law res judicata. And history shows that the circuit split will continue over the question presented. Accordingly, this Court should use this case as a vehicle to settle this important issue.

CONCLUSION

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

Respectfully submitted,

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