No. 25-729

In The
Supreme Court of the United States

JAMES KING,

Petitioner,

v.

UNITED STATES OF AMERICA;
DOUGLAS BROWNBACK; TODD ALLEN,

Respondents.

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

REPLY IN SUPPORT OF CERTIORARI

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In its earlier decision in this case, this Court explained that when the district court entered its judgment against King in 2017, it "lack[ed] subject-matter jurisdiction over King's FTCA claims." *Brownback* v. *King*, 592 U.S. 209, 217 (2021). At the time King waived his FTCA claim on appeal in 2018, this meant his constitutional claims were safe; under established Sixth Circuit law at the time, "[a] dismissal for lack of subject-matter jurisdiction [did] not trigger the § 2676 judgment bar." *Himmelreich* v. *Fed. Bureau of Prisons*, 766 F.3d 576, 579 (6th Cir. 2014); *King* v. *United States*, 917 F.3d 409, 419 (6th Cir. 2019) (*King 1*); 28 U.S.C. 2676. But this Court reversed the governing Sixth Circuit law, holding, instead, "a ruling that the court lacks subject-matter jurisdiction may simultaneously be a judgment on the merits that triggers the judgment bar," *Brownback*, 592 U.S. at 218–219, and the Sixth Circuit ultimately extended that ruling to bar King's constitutional claims, *King* v. *United States*, 49 F.4th 991 (6th Cir. 2022) (*King 2*).

In the Ninth Circuit, this sort of mid-litigation change in procedural law would support a motion for relief from judgment under Rule 60(b)(6). There, "it is not in [a] Court's institutional interest, or that of the litigants before it, to fault lawyers who proceed on the basis that an established procedural rule will remain intact[.]" *Henson* v. *Fidelity Nat'l Fin., Inc.*, 943 F.3d 434, 448 (9th Cir. 2019); Fed. R. Civ. P. 60(b)(6). But in the Sixth Circuit, litigants rely on established procedural rules at their peril unless, perhaps, the rules are "*clearly* established" or "*well*-settled." Pet. App. 14a (emphasis added). To resolve the circuit split over

this important issue, King has petitioned the Court for review.

The government opposes certiorari for three reasons. It says: *First*, *Brownback* did not change the law. *Second*, there is no circuit split. *Third*, King's case is a poor vehicle. But all three of the government's reasons are misplaced. *Brownback* did change the law; there is a split; and King's case is a good vehicle to address it.

The Court should grant certiorari.

I. King relied on Sixth Circuit procedural law that this Court's decision in *Brownback* v. *King* later changed.

When King waived his FTCA claim, Sixth Circuit law provided a firm footing. *King 1*, 917 F.3d at 419. *Brownback* v. *King* changed that law, retroactively transforming King's reasonable reliance on circuit precedent into a poison pill that killed his independently meritorious constitutional claims. Pet. App. 21a. But the government argues (at 10–12) that King was never on a firm footing to begin with; he simply made a strategic mistake, misread the law, and lost accordingly. What the government leaves out, however, proves otherwise: King relied on settled circuit law; *Brownback* changed that law; and, absent Rule 60(b)(6) relief, King will be left unjustly harmed because he followed that law.

As of 2014, the law of the Sixth Circuit was clear: "A dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar. Put bluntly, in the absence of jurisdiction, the court lacks the

power to enter judgment." *Himmelreich*, 766 F.3d at 579.

1. By the time King waived his FTCA claim on appeal in 2018, multiple courts had cited *Himmelreich* for this holding. In *Stout* v. *United States*, for instance, the court explained that—as here—the judgment bar did not apply because the plaintiffs' claims had failed under 28 U.S.C. 1346(b), and, therefore, deprived it of subject-matter jurisdiction. No. 15-cv-379, 2016 WL 7324087, at *1, *6 (W.D. Okla. Dec. 15, 2016). *Stout* "f[ound] the decision in *Himmelreich*[], which was affirmed by the Supreme Court in *Simmons*, to persuasively shed light on the issue here." *Id.* at *6. Namely, a "dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar." *Ibid.* Other courts similarly invoked *Himmelreich* for this holding until this Court's decision in *Brownback*.[1]

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[1] See, *e.g.*, *Ramirez* v. *Reddish*, No. 2:18-cv-176, 2020 WL 9775788, at *3 (D. Utah Oct. 1, 2020) ("[T]hose claims * * * are not cognizable under the FTCA and, therefore, do not fall within the United States' limited waiver of sovereign immunity under the FTCA. Courts have consistently ruled that dismissing an FTCA claim for lack of subject matter jurisdiction does not trigger the FTCA's judgment bar."); *Lowe* v. *United States*, No. 5:13-ct-3323, 2017 WL 976930, at *6 (E.D.N.C. Mar. 13, 2017) ("[B]ecause the court dismissed plaintiff's FTCA action for lack of subject matter jurisdiction on statute of limitations grounds, the court declines to apply the judgment bar to this action."); *Hayes* v. *Fed. Bureau of Prisons*, No. 12-cv-577, 2015 WL 791248, at *4 n.3 (D. Minn. Feb. 25, 2015) ("[T]he FTCA's judgment bar does not apply when the FTCA claims are dismissed for lack of subject matter jurisdiction."); *Wagner* v. *Jones*, No. 13-cv-771, 2014 WL 12783020, at *5–6 (D.N.M. Dec. 8, 2014) ("These courts hold that the dismissal of an FTCA claim for jurisdictional

2. More directly still, the Sixth Circuit *confirmed* that *Himmelreich* was controlling when it decided *King 1* and held that "the FTCA's judgment bar does not preclude Plaintiff from pursuing" his constitutional claims. Pet. App. 101a. But this Court granted certiorari, changed the law, and reversed the Sixth Circuit. Citing "the unique context of the FTCA," *Brownback* explained that "an on-the-merits judgment can still trigger the judgment bar, even if that determination necessarily deprives the court of subject-matter jurisdiction." 592 U.S. at 217.

3. The government argues (at 11–14) that King's reliance on *Himmelreich*'s broad jurisdictional language was unreasonable because King should have recognized *ex ante* that *Himmelreich* was limited to dismissals under the FTCA's discretionary-function exception and had no application to other jurisdictional dismissals like King's. But see, *e.g.*, *Stout*, 2016 WL 7324087, at *1 (applying *Himmelreich*'s holding to a jurisdictional dismissal like King's); *King 1*, 917 F.3d at 419 (applying *Himmelreich*'s holding to King's case). Although that is the distinction this Court ultimately drew on the merits of King's case in *Brownback* in 2021, it says nothing about the state of the law when King elected to waive his FTCA claim on appeal in 2018. Before *Brownback* was decided, *Himmelreich*'s broad categorical framing—that

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reasons cannot have a preclusive effect on any future constitutional claim because such a dismissal cannot constitute an FTCA judgment."); *Fawcett* v. *United States*, No. 4:13-cv-1828, 2014 WL 6687193, at *3 (N.D. Ohio Nov. 26, 2014) ("[P]ursuant to the rule articulated in *Himmelreich*, 28 U.S.C. § 2676 does not operate as a bar to Fawcett's *Bivens* claim.") (all citing *Himmelreich*, 766 F.3d at 579–580).

jurisdictional dismissals cannot trigger the FTCA's judgment bar—bound Sixth Circuit litigants like King. Even the panel majority below conceded that "*Himmelreich* included some language that facially provides some support for not applying the judgment bar where the judgment relied on the lack of an element of 28 U.S.C. § 1346[(b)](1) (such as King's case)[.]" Pet. App. 16a. (And the fact that the panel majority needed to spend multiple pages defending its view that *Himmelreich*'s facially unambiguous language was nonetheless dicta, Pet. App. 13a–16a, practically confirms that the state of the law justified King's reliance.)

The position of the government and the panel majority below is that King should have foreseen that *Himmelreich* did not mean what it said.[2] But King should not be faulted for failing to second-guess binding Sixth Circuit precedent years *before* this Court ultimately reversed it.[3] Judge Clay said as much in

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[2] Both the government (at 10) and the panel majority (Pet. App. 10a) characterize King's decision as "attorney error or strategic miscalculation" of the kind addressed in *Ackermann* v. *United States*, 340 U.S. 193 (1950). But in *Ackermann*, the Rule 60(b)(6) movant sought relief from failing to appeal an adverse decision on the ground that it was too expensive; he did not rely on circuit precedent. His was a purely practical gamble. *Ackermann*, 340 U.S. at 198. King, by contrast, acted in reliance on binding circuit law that the Sixth Circuit confirmed was correct when it decided *King 1*.

[3] The government also invokes *Simmons* v. *Himmelreich*, 578 U.S. 621 (2016), to wrongly suggest that it destabilized the Sixth Circuit's law regarding jurisdictional dismissals and the FTCA's judgment bar. But courts continued to apply *Himmelreich*'s rule after *Simmons*—including in *King 1*—without any suggestion that *Simmons* had narrowed it. *Simmons* gave King

dissent: "At the time of King's appeal, it was well-established that the FTCA's judgment bar did not apply to his [constitutional] claims since his FTCA claims were dismissed for lack of subject matter jurisdiction." Pet. App. 25a (citing *King 1*, 917 F.3d at 419). It was, thus, "perfectly logical for King to narrow the scope of his appeal by waiving his FTCA claims to focus on his [constitutional] claims, which at the time were incontrovertibly safe from the judgment bar." *Id.* at 25a–26a (citing *King 1*, 917 F.3d at 418–421).

So, contrary to the government's claim, *Brownback* did change the law. In fact, it is impossible to understand what else *Brownback* might have accomplished if it was not to change the law of the Sixth Circuit. As Judge Clay explained, "*Brownback* reversed [*King 1*] and forged a new interpretation of the FTCA judgment bar, holding that despite the absence of subject matter jurisdiction, 'the District Court's order was a judgment on the merits of [King's] FTCA claims that can trigger the judgment bar.'" Pet. App. 21a (citing *Brownback*, 592 U.S. at 209).

II. The Sixth and Ninth Circuits are split over the question presented.

If King had sought Rule 60(b)(6) relief in the Ninth Circuit, his reliance on settled circuit law would be one of several factors that weighed in favor of granting him relief. See *Henson*, 943 F.3d at 446–449. But

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no reason to doubt the settled law of the Sixth Circuit. See, *e.g.*, *Stout*, 2016 WL 7324087, at *1 (citing *Simmons* as further support for *Himmelreich*'s holding).

because he seeks relief in the Sixth Circuit, his reliance on binding circuit precedent is deemed "attorney error or strategic miscalculation" that bars relief. Pet. App. 9a–10a (discussing *McCurry ex rel. Turner* v. *Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586 (6th Cir. 2002)). This is the circuit split King petitions the Court to resolve.

The government (at 13–14) attempts to sidestep the split on two grounds: (1) that there was no settled law here, and (2) that the change in law happened in King's own case. Neither resolves the split.

1. The government's first ground repackages the arguments King addresses in Section I above. It fails here for the same reason: King relied on circuit law when he chose to waive his FTCA claim on appeal, and this Court's decision in *Brownback* changed that law.

2. Nor does it matter that King was blindsided by a change of law in his own case. The government argues (at 14) that King "had the opportunity to present his arguments to this Court before it issued that decision." But the merits question King litigated in *Brownback* is entirely different from the reliance-based question he presents here under Rule 60(b)(6). In *Brownback*, King litigated whether "in the unique context of the FTCA," a jurisdictional dismissal is sufficiently on the merits to trigger the FTCA's judgment bar. Pet. App. 83a. This Court answered yes. But here, King is litigating whether his reliance on the Sixth Circuit law *Brownback* reversed was sufficiently reasonable that denying him relief under Rule 60(b)(6) is unjust. King could not have litigated that

question in *Brownback*. To the contrary, these reliance-based considerations are why Rule 60(b)(6) exists.

If anything, the fact that the change in law occurred in King's own case sharpens the split. In addition to weighing a litigant's reliance on settled circuit law, the Ninth Circuit's rule also considers "the closeness of the relationship between the decision resulting in the original judgment and the subsequent decision that represents a change in the law." *Henson*, 943 F.3d at 452 (citation omitted). King's case presents the most direct form of that relationship imaginable: The intervening decision came not from an analogous case, but from this Court's ruling in King's own litigation. Under *Henson*, that closeness would be a reason to grant relief. But the Sixth Circuit disregarded it entirely, and the government cites it as a basis for this Court to do the same.

For purposes of the question presented, the parallels between *Henson* and King's case are striking. *In both cases*, a litigant took a procedural step during his appeal in reliance on settled circuit law. The *Henson* plaintiffs voluntarily dismissed their claims under then-controlling circuit precedent permitting that maneuver to secure appellate review of a class-certification denial; King waived his FTCA claim under then-controlling circuit precedent holding that a subject-matter-jurisdiction-based dismissal could not trigger the FTCA's judgment bar. *In both cases*, the litigants' reliance was reasonable. "Like the plaintiffs in *Henson*, King could not have reasonably foreseen that an intervening decision by the Supreme Court would shatter his reliance on settled law." Pet. App.

28a (Clay, J., dissenting). *In both cases*, no petition was pending in this Court on the relevant question when the litigants acted. *In both cases*, the Court then issued an intervening decision during the appeal that reversed the settled rule on which the litigants had relied. And in each, the effect was the same—to strand the litigants with no path to the merits of their claims, through no fault of their own. The Ninth Circuit viewed each of these factors as reasons to grant Rule 60(b)(6) relief. The Sixth Circuit never cited *Henson* or even discussed most of these factors, and those it did it held were reasons to deny relief, rather than grant it. The circuits are split.

III. King's case is a good vehicle.

Finally, the government raises two vehicle objections. Neither holds up.

1. The government observes (at 14) that "the court of appeals in this case did not find that there had been a 'change in settled procedural law'—let alone that petitioner had 'reasonabl[y] reli[ed]' on such law." From this, the government claims that the decision below does not implicate the question presented.

This is incorrect. True, the panel majority characterized King as relying on "fairly arguable" law, as distinguished from "clearly established" or "well-settled" law. Pet. App. 14a. But this rhetorical hairsplitting does not create a vehicle problem; it illustrates the split. As noted above, the panel majority ignored *Henson*. Still, addressing King's framing of the rule in *Henson*, the panel majority created its unexamined distinction between "fairly arguable" and "clearly established" law. In the Sixth Circuit, reliance on the

former leaves a litigant without relief, whereas reliance on the latter *might* permit a motion under Rule 60(b)(6). Pet. App. 14a. This is not how the Rule works in the Ninth Circuit.

Indeed, *Henson* uses *none* of the Sixth Circuit's homespun phrases. Instead, it uses "well-established circuit law" or, in its application, merely "an established procedural rule," when discussing what is needed for Rule 60(b)(6) relief. *Henson*, 943 F.3d at 448. Either is sufficient in the Ninth Circuit if "there was no case pending in the Supreme Court either on a petition for writ of certiorari or on the merits." *Ibid.* As this case shows, the same is not true in the Sixth Circuit after its decision below.

More specifically, neither the government nor the panel majority can argue that *Himmelreich* did not—using the Ninth Circuit parlance—provide "an established procedural rule." Citing *Himmelreich*, *King 1* confirmed that it did, *King 1*, 917 F.3d at 419, and the panel majority concedes in the decision below that *Himmelreich* provided in "broad language" that "[a] dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar," Pet. App. 15a. And while the panel majority now seeks to distinguish *Himmelreich*'s rule, it confirmed it in *King 1*, and multiple courts relied on it just like King. See p. 3–4 n.1, *supra*.

2. The government also argues (at 14–15) that King's motion for relief from judgment was untimely. As an initial matter, this is a question that the Sixth Circuit never reached below. Pet. App. 10a. So, this Court can resolve the question presented and leave the timeliness issue for remand.

But the government is incorrect anyhow. A motion under Rule 60(b)(6) "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). *Brownback* expressly held open whether the judgment bar applied to claims raised in the same lawsuit and remanded for the Sixth Circuit to decide. 592 U.S. at 215 n.4. Until that question was finally resolved—when this Court denied certiorari, *King* v. *Brownback*, 144 S. Ct. 10 (2023) (mem.), and the deadline for rehearing lapsed on Friday, November 24, 2023—it was not clear the bar would actually preclude King's claims. King moved for relief the following Wednesday, November 29. Pet. App. 29a. Whether pegged to the certiorari denial (filed within a month) or the rehearing deadline (filed within three business days), King made his motion under Rule 60(b)(6) within "a reasonable time."

* * *

What has happened to King in and out of court "is a profound and frightening miscarriage of justice." *King 2*, 49 F.4th at 1000 (Clay, J., dissenting). As Judge Clay observed, it "is not compatible with notions of an ordered and civilized society" when "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[.]" *Ibid.*

If Rule 60(b)(6) does not apply here, it is hard to imagine where it might.

CONCLUSION

This Court should grant the petition for a writ of certiorari and resolve the circuit split on this very narrow but important question.

Respectfully submitted,

May 22, 2026

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