No. 17-2101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES KING,

Plaintiff-Appellant,

v.

TODD ALLEN and DOUGLAS BROWNBACK,

Defendants-Appellees.

On Remand from the United States Supreme Court
Case No. 19-546

On Appeal from the United States District Court
for the Western District of Michigan
Case No. 1:16-cv-00343

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITION FOR REHEARING EN BANC

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November 4, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 17-2101 Case Name: King v. Allen

Name of counsel: Allison M. Zieve

Pursuant to 6th Cir. R. 26.1, Public Citizen, Inc.
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I certify that on November 4, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Allison M. Zieve

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization with members in all 50 states. Public Citizen appears before Congress, administrative agencies, and courts on a wide range of issues, and works for the enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in the proper construction of statutory provisions defining access to the federal courts, which often have significant impacts on the efficacy of remedies under both state and federal law. Public Citizen has participated as amicus curiae in many cases involving significant issues of statutory interpretation and federal jurisdiction, including, of particular relevance here, *Brownback v. King*, 141 S. Ct. 740 (2021), and *Simmons v. Himmelreich*, 578 S. Ct. 621 (2016), where the government advocated expansive readings of the judgment bar provision of the Federal Tort Claims Act (FTCA).

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[1] This brief was not authored in whole or part by counsel for a party, and no one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

SUMMARY OF ARGUMENT

In 2021, the Supreme Court took up this case to address whether the district court's order dismissing the FTCA claims against the United States was a judgment "on the merits" that could trigger the FTCA's judgment bar. Although the Court held the district court's order could trigger the judgment bar, it noted that the argument that "the judgment bar does not apply to a dismissal of claims raised in the same lawsuit" had not yet been addressed in this Court. The Supreme Court stated that it would "leave it to the Sixth Circuit to address" this alternative argument on remand. *Brownback*, 141 S. Ct. 747 n.4. The Court should grant the petition for rehearing en banc to address the argument.

Granting the petition for rehearing en banc will enable the Court to align its case law with recent Supreme Court precedent addressing the FTCA's judgment bar, 28 U.S.C. § 2676, and the language and history of section 2676. As Judge Clay explained in his dissent from the panel decision, the judgment bar does not direct dismissal of other claims brought in the same action as an FTCA claim, even when the FTCA claim is disposed of before other claims in the case. This under-

standing of the judgment bar follows directly from its text, which does not bar "claims," but rather an "action" based on the same facts as the FTCA "claim," after "judgment in the action" in which the FTCA claim was brought. The plain-text reading is also consistent with the purpose of section 2676, and it avoids the inequitable results produced by *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005), and the government's interpretation.

ARGUMENT

I. The text of the FTCA judgment bar does not preclude *Bivens* claims brought in the same action as an FTCA claim.

As in any statutory construction case, "[w]e begin with the text," *King v. Burwell*, 576 U.S. 473, 486 (2015), and then "proceed from the understanding that [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning," *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). The judgment bar provides:

> 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.

28 U.S.C. § 2676.

An "action" is the whole of a lawsuit. *See* Black's Law Dictionary (11th ed. 2019) (defining action as "a civil or criminal judicial proceeding"); Black's Law Dictionary 43 (3d ed. 1933) (stating that "[t]he terms 'action' and 'suit' are … nearly, if not entirely, synonymous"); Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); *id*., advisory committee's note ("This rule provides that the first step in an action is the filing of the complaint.").

In contrast, a "claim" is "the part of a complaint in a civil action specifying what relief the plaintiff asks for." Black's Law Dictionary (11th ed. 2019); *see also* Fed. R. Civ. P. 12(b) (setting forth defenses to a "claim for relief"). Federal Rule of Civil Procedure 18, for example, provides for joinder of multiple "claims" in a single civil action. *See* Fed. R. Civ. P. 18 (providing that a "party asserting a claim … may join, as independent or alternative claims, as many claims as it has against an opposing party").

Expressly contrasting "action" and "claim," Federal Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all *the claims* or the rights and liabilities of fewer than all the parties does not end *the action* as to any of *the claims*

or parties" (emphasis added). *See also* 28 U.S.C. § 1332(d)(11)(B)(i) (defining "mass action" as "any civil *action* ... in which monetary *relief claims* of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' *claims* involve common questions of law or fact" (emphasis added)).

Thus, in the first line of section 2676, the "action" is the lawsuit in which a plaintiff asserts claims—those arising under the FTCA or otherwise. In the last line, the "claim" is the FTCA claim arising from the government employee's act or omission. Accordingly, under section 2676, "[t]he judgment in an action" containing the FTCA claim—not a judgment on one claim in that action—bars any other "action" by the plaintiff based on the acts that gave rise to the FTCA "claim" asserted in the first action. *See Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2054 (2017) ("The term 'action,' however, refers to a judicial 'proceeding,' or perhaps to a 'suit'—not to the general content of claims." (citing Black's Law Dictionary 41 (3d ed. 1933))).

Where, however, an FTCA claim against the United States and *Bivens* claims against government employees are brought in a single

"action," the judgment bar does not preclude the plaintiff from continuing to pursue his *Bivens* claims in that action after dismissal of the FTCA claim in that same action. The dismissal of the FTCA claim does not constitute a "judgment in an action," as is required to trigger the judgment bar, because other claims in the "action" remain pending. *See Krieger v. Dep't of Justice*, 529 F. Supp. 2d 29, 56 (D.D.C. 2008) ("[I]t is not clear to the Court that [section 2676] would extend to a prior *ruling*, as the Court has not entered a final *judgment* in this case.").

Consistent with this plain-language reading, the Supreme Court in *Will v. Hallock*, 546 U.S. 345 (2006), using "case" as a synonym for "action," stated that "the judgment bar can be raised only after a *case* under the [FTCA] has been resolved in the Government's favor." *Id.* at 354 (emphasis added). And in *Simmons*, using the synonym "suit," the Court explained that the judgment bar "forecloses any *future suit* against individual employees" after a final judgment in the FTCA action. *See* 136 S. Ct. at 1846 (emphasis added)); *id.* at 1847 (noting that, if the judgment bar applied, it "would preclude any *future actions*" (emphasis added)). Although *Brownback* held that the district court's order dismissing the FTCA claim could potentially trigger the judgment

bar, the issue before the Court was whether the dismissal was "on the merits" of the FTCA claim, 141 S. Ct. at 748, not whether the dismissal was a "judgment in an action." Indeed, the Court expressly reserved that question. *See id*. 747 n.4.

Put simply, by its plain language, section 2676 does not bar other claims brought in the same "action" as the FTCA "claim." The bar "applies where a plaintiff *first* sues the United States and *then* sues an employee." *Simmons*, 136 S. Ct. at 1849 n.5 (emphasis added).

II. The purpose of section 2676 does not support applying the judgment bar to dismiss additional claims brought in the same action as an FTCA claim.

The plain-language reading of section 2676 is consistent with the purpose of the judgment bar: to extend the res judicata effect of a judgment against the United States in an FTCA case to a case filed against the individual employee. *See* 18 Charles Alan Wright, Arthur Miller & Edward Cooper, *Federal Practice & Procedure* § 4403, at 35 & n.23 (3d ed. 1998) (noting that the FTCA embodies res judicata principles). "[T]he judgment bar was drafted against the backdrop doctrine of res judicata." *Brownback*, 141 S. Ct. at 748. And the

Supreme Court has applied res judicata principles to determine the scope of the bar, including in this case. *Id.*

A. Traditional principles of res judicata, or claim preclusion, "prevent[] parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated." *Lucky Brand Dungarees v. Marcel Fashions Grp.*, 140 S. Ct. 1589, 1594 (2020). Historically, federal courts applied preclusion principles (both claim and issue preclusion) to claims raised in subsequent litigation only when the parties to the second action were also the parties to the first action or in privity with those parties. "Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–27 (1979).

In 1946, when Congress enacted the FTCA, federal courts generally enforced a strict requirement of mutuality of the parties to claim preclusion. *See United States v. Pink*, 315 U.S. 203, 216 (1942); *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912); Restatement (First) of Judgments § 93 (1942). An exception to the mutuality requirement, however, allowed an employer to assert claim

preclusion in a subsequent suit where its employee had prevailed in an earlier suit regarding the same conduct. *See id.* § 96(1)(a) & cmts. b, d. The converse was not true: Exoneration of the employer in an earlier suit generally did not enable the employee to assert claim preclusion in a later suit regarding the same conduct. *Id.* at cmt. j.

As *Simmons* explains, the FTCA's judgment bar "supplements common-law claim preclusion by closing [this] narrow gap." 136 S. Ct. at 1849 n.5. "At the time that 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. The judgment bar provision applies where a plaintiff *first* sues the United States and *then* sues an employee." *Id.* (emphasis added; citation omitted). Thus, the judgment bar extends the res judicata effect of a prior judgment against the United States to an action against a federal employee for the same conduct.

B. "The rules of res judicata are applicable only when a final judgment is rendered." Restatement (Second) of Judgments § 13. Prior to a judgment terminating an action, there is no conclusive determination of any issue between the parties that could give rise to

preclusion. *See* Fed. R. Civ. P. 54(b) (stating that adjudication of "fewer than all the claims" in an action "does not end the action as to any of the claims … and may be revised at any time before the entry of a judgment adjudicating all the claims"). Thus, res judicata bars a second suit after final judgment involving the same parties and causes of action; it does not bar claims brought in the first suit. *See Wilkins v. Jakeway*, 183 F.3d 528, 532 (6th Cir. 1999) (explaining that res judicata applies to an issue "in a subsequent action which should have been litigated in the prior action"); *Lalowski v. City of Des Plaines*, 789 F.3d 784, 789 (7th Cir. 2015).

Reflecting the purpose for which it was enacted, the judgment bar "functions in much the same way" as res judicata. *Will*, 546 U.S. at 354. Section 2676 applies "as between separate actions, not within the confines of a single action on trial or appeal." 18 *Federal Practice & Procedure* § 4404 (discussing res judicata); *see Will*, 546 U.S. at 354 (stating that both the judgment bar and traditional res judicata "depend[] on a prior judgment as a condition precedent" for application; "neither reflect[s] a policy that a defendant should be scot free of any liability").

III. Applying the judgment bar to dismiss claims brought in the same case as an FTCA claim has inequitable consequences.

Interpreting the judgment bar according to its plain text and the principles of res judicata serves the purpose of section 2676 and avoids unjust results. This Court's decision in *Harris*, however, transforms the judgment bar from a tool for fairness and efficiency into a trap for plaintiffs who, consistent with the judgment bar's purpose, seek to resolve their claims against the United States and its employees in the most efficient manner: by bringing the claims in a single lawsuit. *See Kreider v. Breault*, 2012 WL 3518470, at *1 (E.D. Pa. 2012) (declining to apply the judgment bar within a single lawsuit because of "common sense, an ambiguous statute, and the likelihood of an absurd result").

In *Harris*, the district court had "incorrectly dismissed Harris's *Bivens* claims," 422 F.3d at 333, based on the statute of limitations and later entered judgment in favor of the United States on the FTCA claim. On appeal, this Court upheld the ruling on the FTCA claim and, on that basis, applied the judgment bar to the *Bivens* claim. That conclusion cannot be reconciled with the Supreme Court's later recognition in *Will* that FTCA and *Bivens* claims may be brought simultaneously. 546 U.S. at 354. It is also inconsistent with Congress's "crystal clear" intention

that FTCA and *Bivens* exist "as parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980); *see United States v. Smith*, 499 U.S. 160, 166–67 (1991) ("Section 5 declares that the FTCA is *not* the exclusive remedy for torts committed by Government employees in the scope of their employment when an injured plaintiff brings … a *Bivens* action, seeking damages for a constitutional violation by a Government employee[.]" (footnote omitted)); *see also Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (noting the Westfall Act's explicit exception from the exclusivity of the FTCA remedy for *Bivens* claims).

Under *Harris*, a plaintiff who relies on the FTCA's preservation of *Bivens* claims against employees, 5 U.S.C. § 2679(b)(2), and seeks to pursue an FTCA claim in the alternative to her *Bivens* claim in the most efficient manner—by asserting the claims in the same action—will have doomed her *Bivens* claim, regardless of its merits or those of her FTCA claim: As soon as an FTCA claim is pleaded, dismissal of the *Bivens* claim is inevitable. *See, e.g.*, *Estate of Trentadue v. United States*, 397 F.3d 840, 859 (10th Cir. 2005) (instructing the district court, "upon entry of a final judgment in the FTCA action" to "dismiss the *Bivens* action" and rejecting as immaterial that the district court's

disposition of the *Bivens* claims prior to the appeal would *precede* the anticipated judgment on the FTCA claims). Extending the judgment bar to cover claims brought in the same action as an FTCA claim thus transforms a sensible preclusion provision into a "Kafka-esque" dilemma. *McCabe v. Macaulay*, 2008 WL 2980013, at *14 (N.D. Iowa 2008). This Court should reconsider its precedent en banc to avoid these draconian consequences.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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November 4, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing brief complies with the typeface and volume limitations set forth in Federal Rules of Appellate Procedure 29(b)(4), 32(a)(5), and 32(a)(6), as follows: The proportionally spaced typeface is 14-point Century Schoolbook and, as calculated by my word processing software (Microsoft Word for Office 365), the brief contains 2,596 words, exclusive of those parts of the brief not required to be included in the calculation by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Allison M. Zieve
Allison M. Zieve

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

November 4, 2022

/s/ Allison M. Zieve
Allison M. Zieve