Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STEVEN MANNING,

Petitioner,

v.

UNITED STATES OF AMERICA, ROBERT BUCHAN, AND GARY MILLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

AARON S. MANDEL
Counsel of Record
JON LOEVY
DANIEL M. TWETTEN
LOEVY & LOEVY
312 N. May Street Suite 100
Chicago, IL 60607
(312) 243-5900

PHILIP S. BECK.
BARTLIT, BECK, HERMAN,
PALENCHAR & SCOTT
54 West Hubbard Street
Courthouse Place
Chicago, IL 60654
(312) 494-4400

Counsel for Petitioner

June 25, 2009

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COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Whether 28 U.S.C. § 2676, which renders "[t]he judgment in an action" against the United States under the FTCA a bar to "any action" against its employee for the same injury, also bars a plaintiff from pursuing a *Bivens* claim in the same suit, even though this Court has recognized that "Congress views FTCA and *Bivens* as parallel [and] complementary" *Carlson* v. *Green*, 446 U.S. 14, 20 (1980).

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MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Steven Manning respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's decision sought to be reviewed, Appendix ("App.") 1a-18a, is reported at *Manning* v. *United States*, 546 F.3d 430 (7th Cir. 2008). The decision of the United States District Court for the Northern District of Illinois, App. 19a-37a, is unreported.

JURISDICTION

The Seventh Circuit's opinion and judgment was entered on October 6, 2008. The Seventh Circuit's order denying rehearing, App. 38a-39a, was entered on January 26, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

Section § 2676 of the FTCA provides as follows:

> 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.

STATEMENT OF THE CASE

A Northern District of Illinois jury found that two Federal Bureau of Investigation ("FBI") agents framed former Chicago police officer Steven Manning for murder and kidnapping, causing him wrongly to be convicted and imprisoned fourteen years, and awarded him $6.6 million in damages on his claim under *Bivens* v. *Six Unknown Named Fed. Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). This petition concerns the trial court's decision almost two years later to vacate the judgment entered on that *Bivens* verdict and award. The court did not dispute that the FBI agents committed egregious violations of Manning's constitutional rights, causing him grave injury. Rather, the court held, under 28 U.S.C. § 2676 (the so-called "FTCA judgment bar") that Manning's *Bivens* claim was "barred" by the subsequent entry of judgment on his parallel claim under the Federal Tort Claims Act against the United States as the FBI agents' employer. That judgment was in favor of the government, leaving Manning with nothing for his injuries.

This case presents a mature and deep split of authority on an issue of substantial importance: whether the FTCA judgment bar, which renders "[t]he judgment in an action" against the United States under the FTCA a bar to "any action" against its employee for the same injury, bars not only a subsequent lawsuit under *Bivens*, but also a parallel *Bivens* claim in the same suit in which the FTCA judgment is entered. The Circuit Courts invite plaintiffs to allege both FTCA and *Bivens* claims together in the same complaint. *Hoosier Bancorp of Indiana, Inc.* v. *Rasmussen*, 90 F.3d 180, 185 (7th Cir.

1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994). The issue thus arises whenever a plaintiff (who is commonly *pro se*), accepting this invitation, pursues the FTCA claim to judgment.

The courts have split five to one. The Ninth Circuit has held that judgment on an FTCA claim does not bar a *Bivens* claim unless it is brought in a subsequent suit. *Kreines* v. *United States*, 959 F.2d 834, 838 (9th Cir. 1992).

Along with the Seventh Circuit in this case, four other courts have held that judgment on an FTCA claim bars, not only a subsequent lawsuit under *Bivens*, but also a *Bivens* claim brought in the same suit. *Unus* v. *Kane*, 565 F.3d 103, 122 (4th Cir. 2009); *Harris* v. *United States*, 422 F.3d 322, 333-35 (6th Cir. 2005); *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 858 (10th Cir. 2005); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989).

Although this Court has never squarely ruled on the question, its existing precedent strongly suggests that the majority approach is unsound. Specifically, in holding that the FTCA does not preempt the *Bivens* remedy or create an equally effective remedy for constitutional violations, this Court unequivocally stated that "Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson* v. *Green*, 446 U.S. 14, 20 (1980). On the majority view, the causes of action are not "parallel [and] complementary," but rather mutually exclusive, because the plaintiff may pursue only one to final judgment. Worse yet, a judgment results, not only when a plaintiff pursues his

claim to a ruling on the merits, but whenever he presses his claim *too far*, such that the district court concludes that the government would be prejudiced by allowing him to dismiss it without prejudice. In practical terms, it is impossible for a plaintiff to predict how far is too far, and so he must choose which cause of action he will pursue at the outset.

The depth of the split of authority demonstrates that the issue is recurring and important. The Seventh Circuit's ruling warrants this Court's review.

1. Petitioner Steven Manning is the only Chicago police officer to have served time on Illinois' Death Row. After his convictions were overturned, he brought this civil action, asserting claims under both *Bivens* and the FTCA. The district court properly exercised jurisdiction over Petitioner's claims against the United States under 28 U.S.C. § 1346(b)(1), and over Petitioner's *Bivens* claims, brought pursuant to the Fifth and Sixth Amendments to the United States Constitution, under 28 U.S.C. § 1331.

Respondents moved for summary judgment, which the district court denied, prompting an interlocutory appeal on the issue of qualified immunity. The Seventh Circuit affirmed the denial of qualified immunity. *Manning* v. *Miller*, 355 F.3d 1028 (7th Cir. 2004).

A single, four-week trial was conducted on Petitioner's *Bivens* claim against the FBI agents and his FTCA claim against the United States. The former were tried to a jury and the latter were tried to the bench. After hearing testimony from more than thirty

witnesses, and reviewing hundreds of exhibits, the jury returned a verdict for Petitioner on his *Bivens* claim, and awarded him $6.6 million in damages.

In denying the FBI agents' post-trial motion challenging the sufficiency of the evidence to support the *Bivens* verdict, the district court concluded that "there was, without question, a reasonable basis in the record to support the verdict, and the jury's determination plainly was not against the manifest weight of the evidence." *Manning* v. *Miller*, 2005 WL 3078048, *4 (N.D. Ill. Nov. 14, 2005) ("The jury was a highly educated and sophisticated group, and its verdict – particularly the special verdict form that was given to the jury on defendants' proposal – reflects the careful and discerning job that it did evaluating the evidence and claims during its lengthy deliberations. This was anything but a runaway jury. . ."). On March 23, 2005, the district court entered judgment on the jury's verdict.

On September 28, 2006, the Court ruled in favor of the United States on Petitioner's FTCA claim. In rejecting Petitioner's FTCA claim, the district court specifically noted that it was "persuaded that at various junctures, the two FBI agents whom [Petitioner] sued exceeded their proper roles as investigators." Nevertheless, the Court found that Petitioner had failed to establish the absence of probable cause, an element of his FTCA claim. *Manning* v. *United States*, 2006 WL 3240112, *1 (N.D. Ill. Sep. 28, 2006) ("The Court deplores the agents' improper actions, but it concludes that even absent those actions, probable cause existed to prosecute Manning for both the kidnapping and the murder"). The court was quick to point out, however,

that its conclusion was "in no way inconsistent with the jury's finding on the constitutional law claims against the two FBI agents" because the elements for the FTCA claim, which focused primarily on the existence *vel non* of probable cause, "turn on legal standards that differ from those governing the claims the jury decided." *Id.*

On December 26, 2006, more than 21 months after the jury's verdict in favor of Petitioner on his *Bivens* claims, the district court held that the jury's verdict was "barred" and vacated the prior judgment. The court reasoned that the subsequent judgment for the government on Petitioner's FTCA claim barred the prior judgment. Petitioner, who had won a jury verdict almost two years earlier, was then left with no *Bivens* judgment, and no recovery at all.

2. The Seventh Circuit affirmed, announcing a new rule for *Bivens* claimants. According to the Seventh Circuit, plaintiffs who make the "strategic choice" to proceed to verdict against the United States on FTCA claims do so bearing the risk that a judgment will nullify any favorable jury verdicts on related *Bivens* claims. App. 9a. The way that Plaintiff supposedly should have proceeded, and the path the Seventh Circuit instructs future litigants to travel, is to ask the district court to dismiss a pending FTCA claim after it has already been tried but before a verdict is rendered, and then hope that the district court grants such a dismissal without prejudice. App. 10a. The Seventh Circuit's decision acknowledged the circuit split. App. 14a-17a.

Petitioner filed a motion for rehearing, highlighting his argument that neither the district court nor the

Seventh Circuit had addressed, namely that there is no certainty that a court will allow a dismissal without prejudice once the case progresses to the point of trial. In fact, it is highly likely that a court would not allow such a dismissal, making the Seventh Circuit's reconciliation not viable. Without the ability to obtain dismissal without prejudice, the dismissal of the FTCA claim would have resulted in a "judgment," thus triggering the judgment bar. Accordingly, Petitioner argued for rehearing on the grounds that the new rule announced by the Seventh Circuit is not only fatally flawed, but creates enormous uncertainty for all future plaintiffs pursuing *Bivens* and FTCA claims in the same action.

Petitioner's motion for rehearing was denied without comment, and this Petition followed.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision deepens an already substantial split of authority regarding whether 28 U.S.C. § 2676 bars not only a subsequent lawsuit under *Bivens*, but also a *Bivens* claim brought in the same suit. Further, the Seventh Circuit's reason for siding with application of the judgment bar ignores the substantial basis for holding that Congress intended the judgment bar to apply only to claims brought in a subsequent lawsuit.

1. As noted above, circuit courts have split five to one in favor of applying the judgment bar to *Bivens* claims brought in the same suit as the FTCA judgment giving rise to the bar. The Ninth Circuit has declined to

apply the bar in such circumstances, at least when the FTCA judgment is in favor of the defendant. The Fourth, Fifth, Sixth and Tenth, along with the Seventh Circuit here, have all held that the FTCA judgment bar applies to a *Bivens* claim brought in the same suit.

The Seventh Circuit here confronted that issue in a factual context identical to that presented in *Kreines*, 959 F.2d 834: an FTCA judgment for the United States following a *Bivens* judgment for the plaintiff. The Seventh Circuit reached the opposite conclusion to that in *Kreines*.

In *Kreines*, 959 F.2d 834, as here, the plaintiff's *Bivens* and FTCA claims were tried simultaneously and the jury found in favor of the plaintiff on his *Bivens* claim. *Id.* at 836. And as here, the court denied plaintiff's claim under the FTCA months later. *Id.* The court entered judgment on plaintiff's *Bivens* claim and the defendants appealed, arguing that the FTCA judgment barred the *Bivens* award previously entered in the same suit. The Ninth Circuit started its analysis by observing that "[a]lthough the language of the [FTCA judgment bar] refers to a bar of 'any action,' it fails to resolve the question of whether the bar applies to other claims raised in the same action." *Id.* at 838. The court found the statutory language ambiguous, and so proceeded to consider Congress' intent in creating the judgment bar, concluding that "Congress' primary concern in enacting the bar was to prevent multiple lawsuits on the same facts." *Id.* However, because "[t]hat concern is absent when suit is brought contemporaneously for FTCA and other relief," the judgment bar did not apply to the plaintiff's *Bivens* remedy. *Id.* The court also concluded

that, in addition to preventing multiple lawsuits, the FTCA judgment bar prohibits dual recovery against the United States and its employees. *Id.* The facts did not implicate that prohibition, however, because the FTCA judgment was against the plaintiff. *Id.*

Until the Seventh Circuit's decision here, the Ninth Circuit was the only circuit to have confronted application of the judgment bar in the precise factual context presented here—an FTCA judgment for the government barring a *Bivens* award previously entered in the same suit. The relevant facts presented in *Trentadue* were identical with one exception—there, the United States, not the plaintiff, prevailed on the FTCA claim. The Tenth Circuit found that distinction dispositive. The Tenth Circuit agreed with the Ninth Circuit's *Kreines* analysis that "the language of the [judgment bar] does not speak to situations where FTCA and non-FTCA claims are tried together in the same action." *Id.* at 859. Nonetheless, the Tenth Circuit held that the FTCA judgment bar applied to the parallel *Bivens* claim because its purpose was to preclude not only multiple lawsuits but also multiple recoveries against the United States and its employees. *Id.* Since the plaintiff had won his FTCA claim against the United States, the court determined that the judgment bar precluded a second recovery against its employees. *Trentadue*, 397 F.3d at 859.

Three additional circuits, the Fourth, Fifth, and Sixth, have held that an FTCA judgment bars a simultaneous or subsequent *Bivens* judgment in the same action. *Unus*, 565 F.3d 103, *Harris*, 422 F.3d 322, and *Rodriguez*, 873 F.2d 814. The Seventh Circuit's

Manning decision joined *Unus*, *Harris*, *Trentadue*, and *Rodriguez* – and rejected *Kreines* – in holding that the FTCA judgment bar applies to a *Bivens* claim in the same suit. *Manning* thus deepened an already-existing circuit split on that issue.

Not one of the majority decisions offers any reasoned analysis to support the view that the judgment bar applies to claims brought in the same suit as the claim giving rise to the bar. In particular, no decision even attempts to reconcile its holding with this Court's statement in *Carlson* that the FTCA and *Bivens* are meant to be "parallel" and "complementary." And none engage in any analysis of the judgment bar's language or purpose. Rather, each is directly or indirectly based on citation to dicta contained in *Aetna Cas. & Sur. Co.* v. *United States* 570 F.2d 1197, 1201 (4th Cir. 1978), *Gilman v. United States*, 206 F.2d 846, 848 (9th Cir. 1953) and *United States v. Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952). But these decisions themselves are devoid of any reasoned analysis of the issue. *See* Stefan Sciaraffa, *Section 2676 of the FTCA: Why It Should Not Bar Contemporaneously Filed Bivens Claims* 24 Am. J. Crim. L, 147, 165 & nn.104 07, 170-72 (1996) (tracing string of authorities cited for holding that judgment bar applies to claims in same actions). Indeed, all predate this Court's decision in *Carlson.*

Lower courts are in need of guidance regarding how to manage cases that assert both *Bivens* and FTCA claims in the same lawsuit. This issue arises often. In fact, more than one hundred cases addressing the FTCA judgment bar have arisen, many of which were filed and pursued *pro se.*

The Court should also grant the petition to resolve the circuit split on the narrower issue presented by this case: whether the "valence" of the FTCA judgment (for or against the government) determines the applicability of the FTCA judgment bar. The *Kreines*, *Trentadue*, and *Manning* decisions reach divergent results on these questions, with both *Kreines* (explicitly) and *Trentadue* (implicitly) concluding that whether the FTCA judgment is for or against the government determines the applicability of the judgment bar.

Because the lower courts are deeply divided, this Court should review this case and clarify that the FTCA judgment bar does not apply to *Bivens* claims brought in the same suit.

2. Resolution of the issue whether the judgment bar applies to *Bivens* claims in the same suit determines what remedies are available for every constitutional violation by a federal employee. The decisions of the courts concluding that the FTCA judgment bar applies in the circumstances presented here cannot be reconciled with this Court's precedent. Further, those decisions contravene the purposes of the FTCA in general, and the judgment bar in particular.

2a. It is common for a plaintiff to file a *Bivens* claim and FTCA claim together in the same lawsuit. Indeed, this Court has made it "crystal clear" that the *Bivens* and FTCA causes of action are intended to be "parallel" and "complementary," not exclusive. *Carlson*, 446 U.S. 14, 20 (citing to Sen. Rep. No. 93-588, discussing how FTCA is supposed to be a "counterpart" to the *Bivens* remedy). The FTCA's legislative history discusses this

specifically, as the Supreme Court summarized in *Carlson*: "when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers [], the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 19-20 (emphasis added).

In *Carlson*, this Court explained why *Bivens* and FTCA remedies are intended to be "parallel" and "complementary," namely, because the "FTCA is not a sufficient protector of the citizens' constitutional rights" due to four key differences. *Carlson*, 446 U.S. at 23. First, *Bivens* is a "more effective deterrent" than the FTCA because it entails the threat of personal financial liability on the part of government employees. *Id.* at 21. Second, *Bivens* allows for punitive damages, which "are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." *Id.* at 22. The FTCA, by contrast, expressly prohibits punitive damages. See 28 U.S.C. § 2674. Third, a *Bivens* claim allows the plaintiff to present his evidence to a jury, while an FTCA suit does not. *Id.* at 22 (citing 28 U.S.C. § 2402). Fourth, FTCA actions are governed by state law, as in this case, but "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." *Id.* at 23.[1]

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[1] If there were any doubt whether this Court has correctly analyzed this remedial framework, Congress surely vanquished it when it expressly ratified *Carlson*'s interpretation of the FTCA in the Westfall Act. Section 5 of that Act amended (Cont'd)

If a plaintiff cannot pursue both an FTCA claim and a *Bivens* claim to judgment, then he must choose between them. It follows then that, under the majority approach, the causes of action are neither parallel nor complementary, but rather mutually exclusive. No court applying the FTCA judgment bar to a *Bivens* claim has been able to reconcile such a holding with this Court's recognition that the causes of action are "parallel" and "complementary."

2b. The Seventh Circuit attempted to reconcile its interpretation of the judgment bar with *Carlson*, by positing that a plaintiff who prevails on a *Bivens* claim is then faced with a "strategic" choice. *Manning*, 536 F.3d at 434-35. He may choose, on the one hand, to safeguard his jury award by voluntarily dismissing the FTCA claim or, on the other hand, to discard his jury award by pursuing his FTCA claim to judgment. In common terms, he may opt to keep his award or to "see what's behind door number two." On that view, *Bivens* and FTCA claims thereby remain parallel and complementary because Plaintiffs are free to dismiss the FTCA claim at any time before judgment. See *Manning*, 536 F.3d at 435 ("Both remedies remain as viable causes of action, but because of the broad language of [Section 2676], plaintiffs must make strategic choices in pursuing the remedies").

(Cont'd)

28 U.S.C. § 2679(b) to make clear that a plaintiff's FTCA remedy is not exclusive of his right to sue under *Bivens*. See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564.

The Seventh Circuit's conclusion that plaintiffs face a strategic choice after judgment on their *Bivens* claim rests on the premise that a voluntary dismissal of the FTCA claim following trial, but prior to judgment, would not count as a "judgment" under section 2676, triggering the judgment bar. That premise is false. If a plaintiff moved to voluntarily dismiss his FTCA claim so late in the litigation, the dismissal would almost certainly be one with prejudice, and thus trigger Section 2676 and (on the Seventh Circuit's view) bar the *Bivens* claim, just the same as a verdict would. See, e.g., *Farmer* v. *Pernell*, 275 F.3d 958, 962 (10th Cir. 2001) ("[T]he district court's order dismissing [plaintiff's] FTCA claim . . . stated the dismissal was with prejudice. Hence the FTCA judgment against [plaintiff] bars her *Bivens* claims as a matter of law"). Moreover, the uncertainty that a dismissal could be with prejudice will effectively preclude Plaintiffs from pursuing both of these "parallel" and "complementary" remedies.

To avoid that result, the Seventh Circuit is explicitly assuming that plaintiffs could obtain a dismissal of the FTCA claim without prejudice as of right. Therein lies the glaring flaw in the Seventh Circuit's reasoning. First, it seems clear that no court would or could grant the plaintiff a dismissal of claims without prejudice following a trial, while the fact-finder was in the process of deliberating. *United States* v. *Outboard Marine Corp.*, 789 F.2d 497, 502 (7th Cir. 1986) (dismissal without prejudice is not available once the case proceeds to the point that the defense would suffer legal prejudice); *Tolle* v. *Carroll Touch, Inc.*, 23 F.3d 174, 178 (7th Cir. 1994) ("[u]nfavorable rulings by the district court is not an acceptable basis" to grant a motion to dismiss without

prejudice). Even the uncertainty discussed above prevents plaintiff from taking the risk of pursuing both claims.

Indeed, it would likely have been reversible error here to dismiss the FTCA claim without prejudice had Manning sought to do so after the trial in the manner the Seventh Circuit has now held he should have – particularly where the defense would obviously resist vigorously, having nothing left to lose. *Kapoulas* v. *Williams Ins. Agency*, 11 F.3d 1380, 1385 (7th Cir. 1993) (affirming a refusal to dismiss without prejudice where "discovery had already been well underway" and plaintiff's motion evinced "an intent to avoid further adverse rulings by the district court"). In short, if Petitioner had done exactly what the Seventh Circuit faulted him for not doing, the dismissal of the FTCA claim would have created a judgment on the FTCA claim. And, under the Seventh Circuit's reading of Section 2676, this judgment on the FTCA claim would have required the district court to vacate the *Bivens* verdict under Section 2676, which provides that a judgment on an action gives rise to the judgment bar. *Phillips* v. *Shannon*, 445 F.2d 460, 462 (7th Cir. 1971) ("[A] dismissal with prejudice is a final judgment on the merits"). In other words, even if Petitioner had not made the now-condemned "strategic choice" of proceeding with the FTCA claim, he still would have triggered Section 2676 – no more and no less than the adverse FTCA judgment would have. Plaintiff literally could not win. The *Bivens* judgment was doomed no matter the choice he made.

If a plaintiff makes any "strategic" choice in pursuing his FTCA claim, that choice is made long before a jury rules on his concurrent *Bivens* claim. The necessary implication of the Seventh Circuit's view is that a plaintiff irrevocably chooses to pursue his FTCA remedy, and to forego his *Bivens* remedy, the moment he presses his FTCA claim *too far*. How far is too far? The answer is: when the district court concludes that the government would be prejudiced by granting a dismissal without prejudice. But it is impossible for a plaintiff to know where that line is, and thus he cannot know when the "choice" is upon him. The only choice a plaintiff makes, therefore, is the choice he makes at the outset whether to allege an FTCA claim alongside his *Bivens* claim.

Indeed, the Fourth Circuit expressly adopted the Seventh Circuit's "strategic choice" paradigm in affirming the dismissal of the plaintiffs' *Bivens* claim *on the pleadings*, based on its award of summary judgment for the United States on a concurrent FTCA claim. See *Unus*, 565 F.3d at 122. The Court explained that the plaintiffs "chose to pursue their claims against the federal agent defendants through *Bivens* as well as under the FTCA," and in so doing "risked having a judgment on the FTCA claims operate to bar their *Bivens* theories." *Id.* The Fourth Circuit's decision thus makes explicit the hidden implication of the Seventh Circuit's view—that the only strategic choice involved in pursuing an FTCA claim occurs at the outset.

Condemning that choice cannot be squared with this Court's precedent. Because the Seventh Circuit has adopted an interpretation of 28 U.S.C. § 2676 that is

contrary to this Court's precedent, this Court should review this case and clarify that the FTCA judgment bar does not apply to *Bivens* claims brought in the same suit.

3. This result is not compelled by the judgment bar's purposes or plain language. On the contrary, those decisions applying the judgment bar to *Bivens* claims brought in the same suit undermine the aims of the judgment bar and the FTCA. Further, the interpretation of the statute adopted by those decisions is inconsistent with its plain language.

3a. As the Ninth Circuit noted in *Kreines* v. *United States*, "[t]he statutory bar was conceived by Congress primarily to prevent dual recoveries *arising from additional, subsequent litigation*." 959 F.2d 834, 838 (9th Cir. 1992) (emphasis added); see also *Will* v. *Hallock*, 546 U.S. 345, 354-55 (2006) (noting that Section 2676 was designed to "avoi[d] duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4402, p. 9 (2d ed. 2002)). This is precisely the concern that motivates the doctrine of *res judicata*. And, as the Ninth Circuit noted in *Kreines*, it is "absent when suit is brought contemporaneously for FTCA and other relief." 959 F.2d at 838.

This Court, too, has previously recognized – and legislative history confirms – that the statute is "analogous" to "the defense of claim preclusion, or *res judicata*." *Will*, 546 U.S. at 354. As with its *res judicata* analogue, Section 2676 is designed to "avoi[d]

duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" *Id.* at 354-55 (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4402, p. 9 (2d ed. 2002)). The threat of multiple lawsuits is not remotely implicated where, as here, the plaintiff raises all of his claims in a single action.

Further, the FTCA's principal purpose is to channel litigation over government wrongdoing away from individual employees. *Melo* v. *Hafer*, 13 F.3d 736, 744 (3d Cir. 1994). As discussed above, those courts applying the judgment bar to *Bivens* claims in the same suit, however, force plaintiffs to choose at the outset which remedy to pursue. Forced to choose, many plaintiffs will choose *Bivens* over the FTCA in order to preserve their rights to a jury and punitive damages, neither of which is available in a claim under the FTCA. *See, e.g., Cochran* v. *Barnes*, Slip Op., 2009 WL 790192, *2 (N.D. Ind. Mar. 20, 2009) (noting that *pro se* plaintiff bringing a claim under *Bivens* "emphasize[d] in his complaint that he does not wish [his] action to be construed as . . . seeking relief under the [FTCA]" in order to avoid the effect of judgment bar as interpreted by *Manning*). Furthermore, once they have pursued a *Bivens* claim to judgment, they can then file an FTCA claim against the government as employer by way of a subsequent lawsuit because no court would apply the FTCA judgment bar to a *Bivens* judgment entered in a prior lawsuit. Thus, to the extent the purpose of the FTCA is to channel litigation over government wrongdoing away from individual employees, that purpose is not served by the majority view.

3b. The decisions applying the judgment bar to *Bivens* claims brought in the same suit is contrary to the judgment bar's plain language which, by its terms bars "action[s]," not claims. The only coherent reading of the bar is that the two "action[s]" – one creating the bar and one being barred – are brought in separate lawsuits. An "action" is "[a] civil or criminal judicial proceeding." Black's Law Dictionary 31 (8th ed. 2004), quoted in *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 95 n. 3 (2006). The word "action" is "nearly if not quite synonymous" with the word "suit." Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3 (2d ed. 1899); cf. Fed. R. Civ. P. 3. The judgment bar thus establishes the preclusive effect of a judgment in one suit on another: The judgment in a suit raising FTCA claims precludes other, distinct suits against the government employee.

To read the text of Section 2676 as applying where both FTCA and *Bivens* claims are raised in the same action, the Seventh Circuit decided that the judgment in an action raising FTCA claims operates as a bar *with respect to that same action*. On this bizarre reading of the text, the judgment, "[l]ike the Ouroboros swallowing its tail," *Youngblood* v. *West Virginia*, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting), operates as a bar unto itself.

The lower court tried to avoid this manifest absurdity, but only by reading Section 2676 to provide, in effect, that the judgment on a claim under the FTCA bars any claim against the government employee. App. 20a ("Once judgment is entered on the FTCA *claim*, that judgment nullifies the parallel non-FTCA

claim. . . .") (emphases added). But this interpretation of the statute is impossible to square with the statutory text, which expressly distinguishes between an "action" and a "claim," in the same sentence no less. 28 U.S.C. § 2676 (barring "any action . . . against the employee of the government whose act or omission gave rise to the claim"). Indeed, the FTCA makes the same distinction elsewhere: The very provision cited in Section 2676 provides the district courts with "exclusive jurisdiction of civil *actions on claims* against the United States." 28 U.S.C. § 1346(b)(1) (emphasis added).

A claim, unlike an action, is "[t]he aggregate of operative facts giving rise to a right enforceable by a court." *Black's Law Dictionary* 264 (8th ed. 2004). As numerous federal statutes make clear, an "action" – i.e., a lawsuit – can include many different "claims." The district courts are granted supplemental jurisdiction, for instance, "over all other claims that are so related to *claims in the action* . . . that they form part of the same case or controversy." 28 U.S.C. § 1367(a) (emphasis added). Similarly, the Federal Rules of Civil Procedure expressly allow a party to join "multiple claims . . . in a single action. Fed. R. Civ. P. 18(a). Rule 54(b), in turn, addresses how judgments are entered "[w]hen more than one claim for relief" is presented in an action, providing that "any order . . . which adjudicates fewer than all the claims . . . does not end the action." *Id.*

This Court has likewise endorsed the distinction between an "action" and a "claim." In *Exxon Mobil Corp.* v. *Allapattah Serv.*, the Court rejected the view "that a district court lacks original jurisdiction over a civil action unless the court has original jurisdiction over every

claim in the complaint." 545 U.S. 546, 560 (2005). It instead reaffirmed its reasoning in *City of Chicago* v. *Int'l College of Surgeons*, 522 U.S. 156 (1997), that "a district court has original jurisdiction of a civil action for purposes of § 1441 (a) as long as it has original jurisdiction over a subset of the *claims constituting the action*." 545 U.S. at 563 (emphasis added).

Given this clear distinction between an "action" and a "claim," Section 2676 cannot properly be interpreted to provide that judgment on an FTCA claim bars a *Bivens* claim. Because the statute cannot sensibly be read to mean that judgment in an action raising an FTCA claim somehow bars itself, the only proper reading is that Section 2676 applies only to bar *Bivens* claims raised in a separate, subsequent action.[2]

* * *

[2] Indeed, the statute appears to assume that FTCA claims will always be raised separately from other actions. This assumption is consistent with the fact that, when the FTCA was adopted, it was widely believed that plaintiffs could not join any party other than the government as a defendant in an action raising FTCA claims. See, e.g., *Drummond* v. *United States*, 78 F. Supp. 730, 730 (E.D. Va. 1948) (holding that the FTCA does not "permi[t] a plaintiff in such an action to join a co-defendant with the United States without the latter's consent"); *Donovan* v. *McKenna*, 80 F. Supp. 690, 690 (D. Mass. 1948) (same); Note, Federal Tort Claims Act, 56 Yale LJ. 534, 544-45 (1947) (same); see also Sciaraffa, 24 Am. J. Crim. L at 165 & nn.104-07 (discussing early cases and legislative history indicating that joinder was impermissible and procedurally impractical). It is now clear that a plaintiff may combine both FTCA claims and claims against individual government employees in a single action. See, e.g., *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 555-56 (1951).

In the end, numerous factors favor this Court's review. The Circuit courts are deeply split on the question. The issue is important because it affects every *Bivens* and FTCA plaintiff, a number of whom are *pro se*. The issue will continue to recur until this Court intervenes. And this case provides an ideal vehicle to address the issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

AARON S. MANDEL
Counsel of Record
JON LOEVY
DANIEL M. TWETTEN
LOEVY & LOEVY
312 N. May Street Suite 100
Chicago, IL 60607
(312) 243-5900

PHILIP S. BECK.
BARTLIT, BECK, HERMAN,
PALENCHAR & SCOTT
54 West Hubbard Street
Courthouse Place
Chicago, IL 60654
(312) 494-4400

Counsel for Petitioner

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