No. 08-1595

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

PETITIONER'S REPLY BRIEF

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October 6, 2009

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PETITIONER'S REPLY BRIEF

Respondents dispute that a split of authority exists over the question presented in the petition, but ultimately concede that there is a "limited disagreement" among the lower courts. Opp'n 6. The split is not "limited" in any meaningful way, but even if it were so limited, it concerns precisely the question presented on the facts here: whether judgment for the government on an FTCA claim bars the plaintiff's concurrent *Bivens* claim. Respondents concede that in *Kreines* v. *United States*, 959 F.2d 834 (9th Cir. 1992), the Ninth Circuit resolved that issue opposite to the way the Seventh Circuit did below. Opp'n 10.

Respondents' entire argument that a split does not exist is based on their over-reading of the Ninth Circuit's decision in *Gasho* v. *United States*, 959 F.2d 834 (9th Cir. 1995). Opp'n 9-12. But *Gasho* neither raised the issue, nor commented on its resolution in *Kreines*. Further, respondents' suggestion that *Gasho* sounded the death knell for *Kreines* is hard to square with the passage of fourteen years without its demise, and the lower courts' continued application of it. E.g., *Palma* v. *Dent*, No. C 06-6151 PJH, 2007 WL 2023517, *5 (N.D. Cal. July 12, 2007); *Kyei* v. *Beebe*, No. CV01-1266-PA, 2005 WL 30504424, *2 (D. Or. Nov. 5, 2005). The split of authority is unresolved and this case presents an ideal opportunity to resolve it.

Respondents' effort to reconcile the Seventh Circuit's decision with this Court's decision in *Carlson* v. *Green*, 446 U.S. 14 (1980), is strained. Opp'n 12-14. Respondents concede that, under the Seventh Circuit's decision, the only purposes for which a plaintiff may pursue *Bivens* and FTCA claims together are "to determine the relative

strength of the two claims, and ... to test the government's relative willingness to settle." Opp'n 14. And respondents acknowledge that even these "advantages" are available only to one who would risk everything on his ability to "conduct the litigation so as to avoid receiving a judgment on the FTCA claim." Id. Such a regime cannot be squared with this Court's plain statement that "Congress views FTCA and *Bivens* as parallel [and] complementary." *Carlson*, 446 U.S. at 20.

Respondents' remaining arguments rest on their view that the Seventh Circuit's decision was neither erroneous nor inequitable. Opp'n 6-9, 14-15. But those are not reasons for denying a petition for certiorari. S. Ct. Rule 10. In any event, respondents' attempt to reconcile the Seventh Circuit's decision with the plain text of the judgment bar rests on circular logic, which results in the judgment here barring itself. Further, without disputing that the individual respondents framed petitioner for murder and kidnapping, causing him to be wrongly imprisoned for 14 years, respondents contend that the result, which deprived him of any remedy, was nevertheless just because petitioner acknowledged awareness of the judgment bar in the weeks before trial and, by proceeding, assumed the risk it would apply. Respondents' contention depends on the premise that petitioner could have somehow avoided a judgment on his FTCA claim at that late date. As argued in the petition, a judgment on his FTCA claim was already inevitable, and so voluntary dismissal of that claim would not have diminished the risk that his *Bivens* claim would be barred. Pet. 14-16.

In sum, the petition presents an ideal vehicle for reviewing a mature split of authority and for

correcting the misapplication of this Court's decision in *Carlson*. The petition should be granted.

1. The split of authority described in the petition is undeniable. Respondents' efforts to minimize it fail.

Respondents admit that the Ninth Circuit in *Kreines* held that the judgment bar does not apply to a concurrent *Bivens* claim if, as here, the government prevailed on the FTCA claim. Opp'n 6, 10. In other words, under *Kreines*, petitioner would have been entitled to keep his *Bivens* judgment.

Respondents nevertheless struggle to avoid admitting that a split of authority exists, ultimately conceding only that there is a "limited disagreement [which] does not merit this Court's review." Opp'n 6. It is not clear what respondents are arguing. Respondents cannot mean to argue that this Court's review is unwarranted because the split is too one-sided. This Court commonly reviews well-developed splits of authority, notwithstanding that one side has few or one adherents. Instead, respondents appear to contend that this Court should ignore the split because it covers too narrow an issue. But, as already explained, however "limited," the split is fully implicated here.

Respondents attempt to diminish the split by arguing that the Ninth Circuit's decision in *Gasho* undermined *Kreines's* reason for distinguishing *Arevalo*, suggesting that the Ninth Circuit itself is poised to overrule *Kreines*. Opp'n 9-12. A close reading of those decisions does not support respondents' view. It is true that, in *Arevalo*, the court applied the judgment bar to preclude a concurrent claim. But the plaintiff did not argue against the bar's application on the ground that the

claims had been asserted together, arguing instead that claims based on the Constitution are not "claims by reason of the same subject matter" as FTCA claims. 811 F.2d. at 489. The court held that the constitutional nature of *Bivens* claims do not place them beyond the reach of the judgment bar. Id. at 490. The court did not discuss why the bar should apply to a concurrent claim. Id.

In *Kreines*, the Ninth Circuit also faced the government's assertion of the judgment bar to a claim in the same suit, and in that case the court explicitly addressed the issue. 959 F.3d at 838. The court found the statute ambiguous on its application to concurrent claims: "the language of the [judgment bar] ... fails to resolve the question of whether the bar applies to other claims raised in the same action". Id. Turning to the legislative history, the court found that Congress's intent in enacting the bar "was to prevent multiple lawsuits on the same facts." Id. The court then observed "[t]hat concern is absent when suit is brought contemporaneously for FTCA and other relief". Id. Distinguishing *Arevalo*, the court reasoned that the concurrent *Bivens* claim was barred in that case because the plaintiff had prevailed on his FTCA claim, and would otherwise have received a double recovery.[1] Id. Because in *Kreines* (as here) the plaintiff had lost on his FTCA

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[1] Indeed the court in *Arevalo* had explicitly limited its analysis to FTCA judgments against the government, stating the issue before it this way: "whether a judgment entered *against the government* under the FTCA precludes a judgment against a government employee on a *Bivens* claim when the employee's conduct which resulted in the judgment against the government is the same conduct which forms the basis for the *Bivens* claim." Id. at 489 (emphasis added).

claim, that concern was not implicated, and so the court held the bar did not apply. Id. Far from being an "exception" to general application of the FTCA judgment bar, as respondents contend, Opp'n 9, the ruling in *Kreines* evenly divided the world into cases where the judgment bar does (where the FTCA judgment is for the plaintiff) and does not apply (where the FTCA judgment is for the government).

Respondents argue that *Gasho* sounded the death knell for *Kreines*. Opp'n 9. As respondents recognize, however, *Gasho* raised a different issue: whether final judgment on an FTCA claim bars a *Bivens* claim brought for the same injury, not in the same suit, but in a subsequent suit. 39 F.3d at 1436. The court thus had no occasion to consider the statutory interpretation in *Kreines* that led the court to conclude that the bar does not apply to concurrent claims. Rather, the issue in *Gasho* was the plaintiff's call to extend *Kreines's* "quality of the judgment" rationale to claims brought in a subsequent suit. The court determined that the judgment bar's paramount concern is to avoid multiple lawsuits over the same facts, and that the outcome of a prior FTCA action is irrelevant to that concern. Id. Petitioner does not quarrel with that reasoning. It was in the context of establishing that Congress's primary concern in erecting the judgment bar was to avoid multiple lawsuits that the court in *Gasho* stated that "*Kreines* was narrowly confined to its facts." Id. But respondents are wrong to suggest that the statement can be read to cast doubt on the statutory interpretation in *Kreines* that led the court to conclude that the bar does not apply to claims in the

same action, Opp'n 10, because no such claims were presented.[2]

Respondents' s uggestion that *Gasho* sign aled the end of any part of *Kreines* is belied by the passage of fourteen years without its demise. Certainly, the lower courts continue to apply it. E.g., *Palma*, 2007 WL 2023517, at *5; *Kyei*, 2005 WL 30504424, at *2. If *Gasho* cast doubt on any aspect of *Kreines* it was only *Kreines*'s "quality of the judgment" rationale for distinguishing *Arevalo*. But even had *Gasho* completely tore down the veil between *Arevalo* and *Kreines*, respondents would be wrong to conclude that *Kreines*, rather than *Arevalo*, is the decision in jeopardy. As the more recent decision, and the only decision with any analysis of the judgment bar's application to concurrent claims, *Kreines* more likely reflects the Ninth Circuit's current view on the issue.

Indeed, in a decision up for this Court's review this term, the Ninth Circuit gave reason to doubt that *Arevalo* remains good law. In *Castaneda* v. *United States*, 546 F.3d 682 (9th Cir. 2008) cert. granted No. 08-1529, 2009 WL 1649115 (Sep. 30, 2009), the Ninth Circuit decided an interlocutory appeal on the issue that this court will decide: whether 42 U.S.C. § 233(a) makes the FTCA the exclusive remedy for claims arising from medical care provided by Public Health Service personnel, thus barring *Bivens* actions.

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[2] Likewise, when respondents contend that "*Gasho* casts doubt on the validity of *Kreines*'s reasoning that Section 2676 is ambiguous," Opp'n 11, that is true only insofar as *Kreines* found the bar ambiguous as to the "quality of judgment." As already discussed, *Gasho* is simply irrelevant to the *Kreines* court's reasoning that the bar is ambiguous as to its potential application to concurrent claims.

However, while that appeal was pending, the government admitted liability on the FTCA claim, making an eventual judgment in plaintiff's favor on that claim inevitable. If *Arevalo* were still good law, the Ninth Circuit presumably would have dismissed the appeal and remanded for a determination of damages because the ensuing judgment on the FTCA claim would have barred the disputed *Bivens* claims, and thus mooted the need to decide the interlocutory appeal. That the court instead decided the issue suggests that *Arevalo* does not mean what the government here contends. And by pressing forward with its interlocutory appeal in *Castaneda*, even so far as urging this Court to accept review, the government has implicitly acknowledged that *Arevalo* will not govern on remand.

The split of authority is real and fully implicated here. Its depth and persistence belies respondents' contention that the courts will achieve uniformity without this Court's intervention.

2. Respondents' attempt to reconcile the Seventh Circuit's decision with this Court's decision in *Carlson* fails. Respondents do not dispute that, under the Seventh Circuit's holding, a plaintiff is permitted to allege *Bivens* and FTCA claims together, but must elect before an unspecified deadline which to pursue to judgment. Opp'n 12-14. Respondents suggest two "strategic advantages" that a plaintiff might see in nonetheless pursuing the claims concurrently: "to utilize discovery to determine the relative strength of the two claims,[3] and ... to test the government's

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[3] Respondents argue elsewhere, however, that the mere burden of engaging in discovery on both the *Bivens* and FTCA

relative willingness to settle either claim." Opp'n 14. According to respondents, a plaintiff who would avail himself of these "strategic advantages," however, must "conduct the litigation so as to avoid receiving a judgment on the FTCA claim." Id. Respondents do not deny, as detailed in the petition, Pet. 14-16, that it is impossible for even an experienced litigant (much less, as is common in these cases, a *pro se*) to know how far he may press his FTCA claim before a judgment will result. On respondents' view, that uncertainty and "risk is simply the trade-off" for pursuing the strategic advantages a plaintiff may see in pursuing the claims together for a time. Opp'n 14.

Respondents fail to explain how the described remedial scheme is compatible with the court's conclusion in *Carlson* that "Congress views FTCA and *Bivens* as parallel [and] complementary," *Carlson*, 446 U.S. at 20. In coming to that conclusion, the Court relied on the Senate Committee Report explaining the amendment that expanded the FTCA's waiver of sovereign immunity to cover intentional torts. S. Rep. No. 93-588, at 3 (1973). The Committee explained that the amendment was prompted by a number of unconstitutional "no-knock" raids by federal officers, the "most notorious" of which occurred in Collinsville, Illinois. Id. at 2. The Committee observed that "there is no effective legal remedy against the Federal Government" for such abuses and, against that background, described the amendment's effect:

> Thus, after the date of enactment of this measure, innocent individuals who are subjected

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claims justifies the Seventh Circuit's application of the judgment bar to a concurrent *Bivens* claim. Opp'n p. 7.

> to raids of the type conducted in Collinsville, Illinois, will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progeny.

Id. at 3.

On respondents' view, however, the Committee should have said that, after the amendment's effective date, "innocent individuals ... will have a cause of action against the individual Federal agents and the Federal Government," *but a remedy against only one or the other*, and should they unwittingly pursue their new FTCA claim for an unspecified length of time that results in a judgment, they will forfeit their *Bivens* claim.

Simply put, it defies belief that the Congress would have foisted such a regime, fraught with traps for the unwary, upon victims in the guise of trying to help them.

3. Respondents' remaining arguments that the Seventh Circuit's decision was right, and did not result in a miscarriage of justice, rest on considerations that are not part of the Court's decision whether to grant review, and thus not reasons to deny the petition. S. Ct. Rule 10. In any event both arguments are wrong.

In respondents' lead argument, they contend that the Seventh Circuit correctly found that the judgment bar's plain text compels its application to concurrent claims. Opp'n 6-9. Petitioner pointed out that construing the barred "action" to include the same action giving rise to the bar results in a vicious

circle.[4] Pet. 19. Respondents defend the Seventh Circuit's attempt to extricate itself from this paradox by reading the barred "action" to mean any "claims" comprising the action. Opp'n 6.

Reading "bar to any action" to mean the claims within the action does not avoid the circularity, but simply shifts the problem to the predicate "judgment." An action gives rise to only one final judgment, and that judgment is "the judgment" in the action. "The judgment in an action [under the FTCA]" thus plainly means final judgment. Final judgment does not arise until all the claims of the parties have been adjudicated. Fed. R. Civ. P. 54(b). Under the doctrine of "merger," final judgment in turn extinguishes the action, including all its component claims. Restatement (Second) of Judgments § 18 (1982). Thus, "the judgment in an action under [the FTCA]" arises only after the FTCA claim *and all claims brought in the same action* have been adjudicated. And the instant that occurs, all claims comprising the action and the action itself are extinguished. Under the statute's plain meaning then, no bar can arise until after the FTCA claim and any concurrent *Bivens* claim have been both adjudicated and extinguished. This one and final judgment can no more bar the *Bivens* claim than it can bar the FTCA claim.

Finally, respondents try to defend the fairness of the result in this case by suggesting that petitioner's own "strategic decision" is to blame. Opp'n 14-15. But there is no dispute here that the individual

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[4] The judgment bar provides: "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action" by the claimant for the same injury. 28 U.S.C. § 2676.

respondents framed petitioner for murder and kidnapping, causing him to be wrongly imprisoned for 14 years. Respondents rely on a pretrial order as putting petitioner on notice, and petitioner's motion for entry of judgment on the jury verdict as acknowledging the risk, that a judgment on the FTCA claim might trigger the bar. Opp'n 3, 14-15. As detailed in the petition, by the time of the pretrial order and motion for judgment, it was too late to avoid a judgment on the FTCA claim. Pet 14-16. Tellingly, respondents do not dispute this is true, or claim that they would not have vigorously opposed voluntary dismissal of the FTCA claim without prejudice. At that point, then, petitioner's only hope for saving his *Bivens* claim was that the Court would construe the bar not to apply. Nothing petitioner did from that point on could or did increase that risk.

* * *

Judgment on petitioner's FTCA claim was held to bar his parallel *Bivens* claim. This case thus presents an ideal vehicle for resolving a mature split of authority on an important question affecting the rights of every individual injured by the intentional conduct of federal employees.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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