No. 20-587

In the Supreme Court of the United States

HOPE ANGELIC WHITE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MYRON POLLARD, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, waives the sovereign immunity of the United States and creates a cause of action for damages for certain torts committed by federal employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The FTCA also imposes a judgment bar, which provides that "[t]he 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.

The question presented is whether the judgment in an FTCA action under Section 1346(b)(1) precludes an appeal in an action against an individual federal employee under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that arises from the same factual allegations as the FTCA action, was filed in the same lawsuit, and was brought by the same claimant, acting as personal representative for a deceased family member.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 959 F.3d 328. The memorandum and order of the district court (Pet. App. 12a-42a) are not published in the Federal Supplement but are available at 2019 WL 1426292.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on May 13, 2020. A petition for rehearing was denied on July 28, 2020 (Pet. App. 44a). The petition for a writ of certiorari was filed on October 26, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2012, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in St. Louis, Missouri was investigating several people suspected of committing violent crimes in the area. Pet. App. 2a, 12a.[1] As part of the investigation, an undercover ATF agent posing as a drug courier made plans with the suspects to rob a drug stash house and murder the occupants. *Id.* at 2a. (Unbeknownst to the perpetrators, the stash house was fictitious and part of the sting operation.) A confidential informant who introduced the undercover agent to the suspects told the agent that the suspects also planned to kill the agent once the robbery was over. *Ibid.*

ATF's Special Response Team (SRT)—a specialized unit trained and equipped to apprehend particularly dangerous individuals—was engaged to assist with the suspects' arrests. Pet. App. 2a, 15a. Respondent Bernard Hansen, an ATF Special Agent, was part of the SRT. *Id.* at 2a, 13a. ATF's plan called for Agent Hansen and the other SRT members to emerge from a truck and apprehend the suspects after the undercover agent met them in a parking lot and confirmed their willingness to commit the robbery. *Id.* at 2a-3a. Hansen was assigned to be the first SRT member to emerge from the truck, making him "responsible for identifying * * * threats, announcing 'Police,' * * * engaging the suspects, and providing protection for the other [team] members who [we]re 'jumping out blind.'" *Id.* at 17a.

Upon reaching the parking lot, Agent Hansen and the other SRT members were informed that two suspects had arrived on foot and several others had arrived

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[1] Petitioner's statement of the case (Pet. 3-15) includes disputed allegations and contradicts some of the district court's findings of fact after a trial.

by car. Pet. App. 3a. Because the team members were still inside the truck, they could not see the parking lot or determine the suspects' precise location. *Id.* at 19a. As planned, the undercover agent confirmed that the suspects were ready and willing to commit the robbery, and signaled the SRT to commence the arrests. *Ibid.*

Agent Hansen was the first SRT member to exit the truck and repeatedly shouted something to the effect of "Police. Let me see your hands." Pet. App. 19a. Hansen spotted the suspects' car, which was parked approximately seven yards away from him. *Ibid.* Almost immediately, the car's reverse lights lit up, its engine revved, and it quickly backed up. *Id.* at 19a-20a. Because the officers were "in close proximity to the suspects' car" and "the car had to move backward in order to get out of the parking lot," Hansen feared that the car was going to be driven into him and his fellow team members. *Id.* at 20a. Hansen responded by firing three shots into the driver's side of the car. *Id.* at 3a. Another SRT member, who later testified that he was "confident that the car was going to hit" other team members next to him, fired three rounds at the car with the less-than-lethal weapon that he was carrying. *Id.* at 23a. The car then collided with another vehicle driven by a third SRT member. *Id.* at 22a. The entire encounter, from the time the suspects' car started moving to the time of the collision, lasted four seconds. *Ibid.* The agents later learned that one of Hansen's bullets had fatally wounded Myron Pollard, who was in the passenger seat of the car and was not a suspect in ATF's investigation. *Id.* at 3a.

ATF had set up four video cameras to record the suspects' arrests, but none produced useful footage of the encounter, because the cameras either malfunctioned, had a low frame rate, provided a low-resolution video,

or had their view blocked by the changed location of the SRT vehicle in the collision. Pet. App. 4a, 25a.

2. Petitioner, Pollard's mother and the personal representative of his estate, brought this lawsuit arising from his death. Pet. App. 1a-2a.

Petitioner pleaded an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, which waives the sovereign immunity of the United States and creates a cause of action for certain torts committed by federal employees, see *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1845 (2016). Pet. App. 1a. Petitioner claimed that the government was liable for damages because Hansen had wrongfully caused Pollard's death in violation of Missouri tort law. See *id.* at 6a, 35a-36a; see also 28 U.S.C. 1346(b)(1) (providing jurisdiction for a claim against the United States for money damages for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred").

Petitioner also brought an action against Agent Hansen individually under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Pet. App. 1a-2a, claiming that Hansen had used excessive force against Pollard in violation of the Fourth Amendment, see *id.* at 12a. Petitioner pleaded both actions in the same complaint. *Ibid.*

Before trial, petitioner moved for sanctions based on spoliation of the evidence, claiming that ATF personnel had wrongfully deleted data from the video cameras'

original recordings of the encounter. Pet. App. 4a. The district court denied the motion, finding that ATF had not acted in bad faith. *Ibid.*

The district court bifurcated the case for trial, with the *Bivens* action tried before a jury and the FTCA action tried before the court. Pet. App. 2a; see 28 U.S.C. 2402 (providing that FTCA actions must be tried by a court without a jury). After a five-day trial, the jury delivered a verdict rejecting petitioner's *Bivens* action. See Pet. App. 2a. The court denied petitioner's motion for a new trial, see *id.* at 7a, and entered a partial judgment on that count in Agent Hansen's favor, *id.* at 11a. In the FTCA action, the court issued findings of fact and conclusions of law in favor of the United States, *id.* at 12a-42a, and entered judgment for the government, *id.* at 43a. The court determined that petitioner's wrongful-death claim failed under Missouri's public-duty doctrine, which provides that a law-enforcement officer like Agent Hansen will not be liable for actions that "arose from his duties owed to the public generally." *Id.* at 38a. Moreover, even assuming that Hansen owed a duty to Pollard, the court found that petitioner had failed to prove that Hansen's actions were unreasonable—as required by Missouri tort law to establish liability—because the evidence at trial showed that "Hansen's use of deadly force was reasonable under the circumstances" to stop the suspect "from using the car as a deadly weapon." *Id.* at 38a, 41a.

3. The court of appeals affirmed. Pet. App. 1a-9a.

The court of appeals first affirmed the district court's denial of petitioner's pretrial motion for sanctions based on spoliation, finding that petitioner had "proffered no evidence to support an inference that"

ATF agents "intentionally destroyed [evidence] to suppress the truth." Pet. App. 5a.

The court of appeals next affirmed the judgment in the United States' favor in petitioner's FTCA action. Pet. App. 5a-7a. The court explained that Missouri law authorizes deadly force where a person "reasonably believes that such deadly force is necessary to protect himself . . . or another against death, serious physical injury, or any forcible felony." *Id.* at 6a (quoting Mo. Rev. Stat. § 563.031.2(1) (2010)). Here, the court found, the evidence at trial supported the district court's conclusions "that Hansen reasonably believed that deadly force was necessary to protect himself and the other agents from the vehicle" and that Hansen "had acted reasonably by firing his service weapon." *Id.* at 7a. The court of appeals also rejected petitioner's argument that the district court had erred by admitting certain evidence. See *id.* at 8a n.4.

Last, the court of appeals found that the FTCA judgment bar, 28 U.S.C. 2676, made it "unnecessary" to consider petitioner's appeal in her *Bivens* action, which had argued that the district court erred by rejecting her spoliation arguments and "by denying her motion for a new trial on the *Bivens* claim because the jury lacked sufficient evidence to find in favor of [Agent] Hansen." Pet. App. 7a; see *id.* at 5a n.2, 7a-9a. The judgment bar provides that:

> 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. The court of appeals observed that petitioner "does not dispute that [her] FTCA and *Bivens*

claims are predicated on the same conduct and regard the same subject matter." Pet. App. 8a. And the court "join[ed]" five other circuit courts in holding that Section 2676 "precludes a *Bivens* claim regarding the same subject matter, even if the claims arose within the same suit." *Ibid.* (citing cases). Thus, in light of "the district court's entry of judgment for the United States on [petitioner's] FTCA action," the court of appeals remanded the case "with directions to vacate the judgment for Hansen and dismiss the *Bivens* claim." *Ibid.*

The court of appeals denied petitioner's request for rehearing and rehearing en banc. Pet. App. 44a.

ARGUMENT

Petitioner contends (Pet. 15-23) that the court of appeals erred in declining to consider her appeal of the *Bivens* judgment based on the FTCA judgment bar. The decision below is correct, it does not conflict with any decision of this Court, and petitioner does not identify any conflict with the decision of another court of appeals that would warrant this Court's review. Moreover, even if the question presented warranted further review, this case would be an unsuitable vehicle for considering it, because lifting the judgment bar likely would not affect the outcome of petitioner's *Bivens* action—which the jury rejected. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that 28 U.S.C. 2676 foreclosed petitioner's appeal of the jury's decision rejecting her *Bivens* action. Pet. App. 7a-9a.

The judgment bar provides that a claimant who "receives a judgment (favorable or not) in an FTCA suit * * * generally cannot proceed with a suit against an individual employee based on the same underlying

facts." *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1847 (2016). As this Court explained in *Simmons*, if a plaintiff's FTCA action fails because the federal employee did not commit the tort alleged, or "because [the plaintiff] simply failed to prove h[er] claim, it would make little sense to give [the plaintiff] a second bite at the money-damages apple by allowing suit against the employee[]: [the plaintiff's] first suit would have given h[er] a fair chance to recover damages for h[er] [harm]." *Id.* at 1849.

The judgment bar has been a feature of the FTCA since its inception. See FTCA, Act of Aug. 2, 1946, ch. 753, Title IV, § 410(b), 60 Stat. 844. The provision is an important part of the FTCA's remedial compromise. By waiving sovereign immunity, the FTCA created the opportunity for claimants to sue a solvent defendant, subject to the limitations and exceptions that Congress placed on the liability of the United States. At the same time, the judgment bar provides that, if a claimant chooses to pursue the FTCA remedy against the United States, then the judgment on that claim will be determinative of the entire controversy. See *Unus* v. *Kane*, 565 F.3d 103, 122 (4th Cir. 2009) (applying the judgment bar and explaining that "[l]itigants frequently face tough choices" that come "with[] consequence[s]"), cert. denied, 558 U.S. 1147 (2010).

Congress adopted the judgment bar after hearing that individual-capacity suits against federal employees presented "a very real attack upon the morale of [governmental] services," because most federal employees were "not in a position to stand or defend large damage suits." *United States* v. *Gilman*, 347 U.S. 507, 512 n.2 (1954) (quoting *Tort Claims: Hearings Before the House Comm. on the Judiciary on H.R. 5373 and H.R. 6463*,

77th Cong., 2d Sess. 9 (1942) (statement of Assistant Attorney General Francis Shea)). The judgment bar thus serves both to protect federal employees against the threat and distraction of individual litigation, and to relieve the government of the burden of defending multiple claims arising out of the same incident, once an FTCA claim is resolved. See *Simmons*, 136 S. Ct. at 1849 (the judgment bar "prevents unnecessarily duplicative litigation"); *Will* v. *Hallock*, 546 U.S. 345, 354-355 (2006).

Section 2676 by its terms barred petitioner's appeal in her *Bivens* action. After a bench trial, the district court entered judgment in the United States' favor in petitioner's FTCA action under Section 1346(b)(1), finding that petitioner had failed to prove that the United States would be liable under state law. Pet. App. 43a; see *id.* at 12a-42a. The court of appeals affirmed that judgment, *id.* at 5a-7a, and petitioner has not sought further review. That FTCA judgment "constitute[s] a complete bar to *any action*" by petitioner against Agent Hansen arising from the same subject matter. 28 U.S.C. 2676 (emphasis added). The court of appeals observed that petitioner "d[id] not dispute that [her] FTCA and *Bivens* claims are predicated on the same conduct and regard the same subject matter." Pet. App. 8a. Thus, the judgment bar's text foreclosed petitioner from continuing to pursue her *Bivens* action against Agent Hansen in the court of appeals.[2]

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[2] The court of appeals erred in remanding the case with instructions to vacate the *Bivens* judgment in Agent Hansen's favor and dismiss that claim, Pet. App. 8a; the court should have simply affirmed the *Bivens* judgment based on the judgment bar. See, *e.g.*, *Unus*, 565 F.3d at 121-122. But that aspect of the court of appeals' decision makes no practical difference here.

2. Petitioner principally contends (Pet. 16) that the judgment bar does not "reach a *Bivens* claim brought together with FTCA claims in the same lawsuit." See Pet. 15-23.[3] Petitioner is incorrect.

a. Section 2676 makes the judgment in an FTCA action "a complete bar to *any action* by the claimant" against the federal employee whose conduct was at issue in the FTCA action. 28 U.S.C. 2676 (emphasis added). Congress's decision to use that sweeping language in the judgment bar makes it "inconsequential" that a plaintiff has brought individual and FTCA actions "together in the same suit." *Serra* v. *Pichardo*, 786 F.2d 237, 241 (6th Cir.), cert. denied, 479 U.S. 826 (1986).

When Congress chose in 1946 to bar any individual "action" following an FTCA judgment, its use of that word naturally meant that it was precluding any "legal and formal demand of one's right from another person or party made and insisted on in a court of justice." *Black's Law Dictionary* 41 (3d ed. 1933) (defining "action"); see *Bouvier's Law Dictionary* 41 (William Ed-

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[3] In *Brownback* v. *King*, No. 19-546 (argued Nov. 9, 2020), this Court granted two federal officers' petition for a writ of certiorari to review the Sixth Circuit's conclusion that an FTCA judgment in favor of the United States deprives the district court of subject-matter jurisdiction and, for that reason, does not trigger the judgment bar. See *King* v. *United States*, 917 F.3d 409, 419-421 (2019), cert. granted, 140 S. Ct. 2563, cert. denied, 140 S. Ct. 2565 (2020). This case does not present that issue, as petitioner neither pressed that argument before the court of appeals nor raises it in her petition. See Pet. 22. In *Brownback*, however, the respondent has separately contended in this Court, as an alternative to the Sixth Circuit's reasoning, that the judgment bar does not preclude an action against an individual federal employee that is filed in the same lawsuit as an FTCA action. See Resp. Br. at 12-34, *Brownback*, *supra* (No. 19-546).

ward Baldwin ed., 1934) (similar); *Cyclopedic Law Dictionary* 23 (2d ed. 1922) (similar). Those contemporary definitions are easily broad enough to encompass a demand for relief against an individual federal employee that was pleaded in the same lawsuit with the claimant's FTCA action. Congress then reinforced the extent of the judgment bar's prohibitive force by adding the word "any," which "suggests a broad meaning." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 218-219 (2008) (emphasis omitted); see *Citizens' Bank* v. *Parker*, 192 U.S. 73, 81 (1904) ("The word *any* excludes selection or distinction. It declares the [subject] without limitation."); see also 1 *The Oxford English Dictionary* 378 (1933) (defining "any" as "no matter which"); *Webster's New International Dictionary of the English Language* 121 (2d ed. 1934) (defining "any" as "[o]ne indifferently out of a number"; "one * * * indiscriminately of whatever kind"). Thus, by modifying the word "action" with "any," Congress precluded *all* individual claims for relief against federal employees—in this or any other court proceeding—once the claimant's FTCA action has gone to judgment. Cf. *Ex parte Collett*, 337 U.S. 55, 58 (1949) ("The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded.") (footnote omitted).

Petitioner contends (Pet. 15) that Section 2676 precludes only "a separate lawsuit." But that is not the import of the provision's reference to precluding "any [individual] action" after an FTCA judgment, rather than any "claim." Some legal sources used the term "action" in 1946 in a way that was not materially different from the word "claim." Compare pp. 10-11, *supra*, with *Cyclopedic Law Dictionary* 171 (defining "claim" as

"[t]he assertion of a liability to the party making it to do some service or pay a sum of money"), and *United States* v. *Cohn*, 270 U.S. 339, 345 (1926) (the word "claim" generally refers to "'a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty'") (citation omitted). Section 2676 itself uses "claim" and "action" interchangeably, by providing that "[t]he judgment in an *action* under section 1346(b)" constitutes a complete bar to any action against the federal employee "whose act or omission gave rise to the [FTCA] *claim*." 28 U.S.C. 2676 (emphases added). Other FTCA provisions similarly use the term "action" to preclude both a separate lawsuit and other non-FTCA claims in the same lawsuit. See 28 U.S.C. 2679(b)(1) (providing that the FTCA remedy "is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter"); see also *United States* v. *Smith*, 499 U.S. 160, 163 (1991) (observing that Section 2679(b)(1) "establishes * * * absolute immunity for Government employees" covered by its terms). And multiple other federal statutes use "action" in a similar way.[4]

Petitioner disregards the statutory text by asking this Court to read Section 2676 as if it prohibited "any *subsequent* action" following an FTCA judgment. But "[h]ad Congress intended to * * * narrow" the judg-

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[4] See, *e.g.*, 10 U.S.C. 1054(a) ("The remedy against the United States * * * is exclusive of any other civil action[.]"); 22 U.S.C. 6082(f)(1)(A) ("[A]ny United States national that brings an action under this section may not bring any other civil action[.]"); 42 U.S.C. 2000aa-6(d) ("The remedy provided * * * is exclusive of any other civil action[.]"); 46 U.S.C. 30904 ("If a remedy is provided by this chapter, it shall be exclusive of any other action arising out of the same subject matter against the officer * * * of the United States * * * whose act or omission gave rise to the claim.").

ment bar in that way, it could easily have copied "similar limitations in" this Court's cases or common-law sources. *Millbrook* v. *United States*, 569 U.S. 50, 57 (2013). Indeed, Congress's decision in the judgment bar to preclude "any action" following an FTCA judgment is particularly revealing because it was an express departure from the common-law rule of res judicata. See *Simmons*, 136 S. Ct. at 1849 n.5 (observing that Congress crafted the judgment bar by drawing "roughly" on concepts of common-law claim preclusion, and expanding them). This Court's res judicata cases before 1946 had repeatedly stated that a judgment "constitutes an absolute bar to a *subsequent* action." *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1877) (emphasis added); see, *e.g.*, *Johnson Co.* v. *Wharton*, 152 U.S. 252, 258 (1894) (same); *Wilson's Executor* v. *Deen*, 121 U.S. 525, 532-533 (1887) (same); *Lumber Co.* v. *Buchtel*, 101 U.S. 638, 639 (1879) (same). The First Restatement of Judgments, adopted just a few years before the FTCA, similarly stated that res judicata established "a bar to a *subsequent* action on the claim." Restatement (First) of Judgments § 45 cmt. b, at 175 (1942) (emphasis modified). In the judgment bar, by contrast, Congress departed from the common-law rule by providing that an FTCA judgment would constitute "a complete bar to *any* action" against the federal employee involved in the claim. 28 U.S.C. 2676 (emphasis added). Congress in the FTCA presumably "says what it means and means what it says." *Simmons*, 136 S. Ct. at 1848.

Petitioner's interpretation of Section 2676 is also fundamentally inconsistent with the purposes of the judgment bar, which Congress adopted to limit claims against federal employees that burdened the government. See *Gilman*, 347 U.S. at 512 n.2. Assistant At-

torney General Shea had explained that, if "the claimant has obtained satisfaction of his claim from the Government," including "by a judgment," then "that should, in our judgment, be the end of it." *Ibid.* (citation omitted). Congress would have been just as concerned with prohibiting duplicative litigation against (and potentially double recoveries from) the government's employees, regardless of whether a plaintiff pleaded her individual claim in the same lawsuit or a separate lawsuit. Yet petitioner's interpretation of Section 2676 would permit a plaintiff to *win* a judgment under the FTCA, and then continue pursuing individual federal employees for additional damages from the same incident—including "punitive damages," Pet. 18—so long as the plaintiff brought both actions together in one lawsuit.

That is exactly the result that Congress enacted the judgment bar to avoid. The FTCA's release bar, which is similarly worded and serves similar purposes, see *Gilman*, 347 U.S. at 512 n.2, cuts off all individual claims as soon as an FTCA judgment is resolved by settlement. 28 U.S.C. 2672. Petitioner offers no explanation why Congress would have wanted broader preclusion for an FTCA settlement than for a court judgment.

b. Petitioner contends (Pet. 16-18) that the decision below, by applying the judgment bar to preclude an individual action filed in the same lawsuit with an FTCA action, conflicts with this Court's decision in *Carlson* v. *Green*, 446 U.S. 14 (1980), which held that Congress "view[ed] FTCA and *Bivens* as parallel, complementary causes of action." 446 U.S. at 20. Petitioner is incorrect.

This Court in *Carlson* held only that the FTCA *generally* does not displace *Bivens* actions, while recognizing that a particular *Bivens* action might be foreclosed by a specific statutory provision. See 446 U.S. at 20 (the

FTCA does not displace *Bivens* "[i]n the absence of a contrary expression from Congress"). The judgment bar is just such a specific provision. It provides that, when a plaintiff has received an FTCA judgment, that judgment will resolve the entire controversy, and will completely bar the plaintiff from pursuing any individual action against a federal employee arising from the same facts. This Court in *Hui* v. *Castaneda*, 559 U.S. 799 (2010), considered similar statutory language and found that, notwithstanding *Carlson*, it explicitly precluded a *Bivens* action. See *id.* at 805-806 (examining 42 U.S.C. 233(a), which provides that, in cases against certain federal officers and employees, "[t]he remedy against the United States provided by sections 1346(b) and 2672 of title 28 * * * shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim").[5]

The history of the FTCA confirms that Congress expected that the judgment bar *would* preclude a *Bivens* action like petitioner's here. In 1974, in the wake of this Court's decision in *Bivens*, Congress amended the FTCA to allow a plaintiff to sue under both the FTCA and *Bivens* for certain intentional torts by federal law-enforcement officers. See 28 U.S.C. 2680(h); *Millbrook*, 569 U.S. at 52-53. In that same amendment, however, Congress provided that "the provisions of [Chapter 171] * * * shall apply to" such FTCA claims. 28 U.S.C.

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[5] Petitioner relatedly contends that the decision below "conflicts with" other decisions of the Eighth Circuit that reiterated the holding of *Carlson*. Pet. 31-32 (citing *Arcoren* v. *Farmers Home Admin.*, 770 F.2d 137, 140 n.6 (1985), and *Loge* v. *United States*, 662 F.2d 1268, 1275 n.8 (1981), cert. denied, 456 U.S. 944 (1982)). But neither of those decisions even mentioned the judgment bar.

2680(h). And "[t]he judgment bar is a provision of Chapter 171." *Simmons*, 136 S. Ct. at 1847. Congress thus confirmed that a plaintiff who litigates an FTCA claim to judgment cannot thereafter pursue any individual claims against the officers involved.

Congress would not have thought in 1974 that the judgment bar would exempt *Bivens* claims in the same lawsuit. By that point, the courts of appeals had recognized that Section 2676 "explicit[ly]" precludes individual claims "in the same action" after the judgment on an FTCA claim. *United States* v. *Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952); see, *e.g.*, *Gilman* v. *United States*, 206 F.2d 846, 848 (9th Cir. 1953) ("[T]he moment judgment was entered against the Government [in the FTCA action], then by virtue of [Section] 2676, * * * the employee * * * was not answerable at all" to the claimant.) (footnote omitted), aff'd, 347 U.S. 507 (1954).

c. Petitioner identifies no meaningful conflict among the courts of appeals that warrants this Court's review.

Since the judgment bar was enacted in 1946, every court of appeals to consider the issue has rejected the argument that a plaintiff is permitted to sue the United States under the FTCA, litigate that claim to judgment, and then—win or lose—continue litigating individual claims against federal employees in the same lawsuit. See Pet. App. 8a ("join[ing] other circuits"); *Unus*, 565 F.3d at 121-122 (4th Cir.); *Manning* v. *United States*, 546 F.3d 430, 437 (7th Cir. 2008), cert. denied, 558 U.S. 1011 (2009); *Harris* v. *United States*, 422 F.3d 322, 335-336 (6th Cir. 2005); *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 858-859 (10th Cir. 2005); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989). As mentioned, that consensus dates back to the judgment bar's earliest years. See *Lushbough*, 200 F.2d at

721. Petitioner says that other circuits' decisions are "easily * * * distinguished," Pet. 27, but she merely disagrees with those courts' analysis or else points to irrelevant factual differences, Pet. 27-31.

Petitioner contends that the decision below conflicts with two Ninth Circuit decisions holding that the judgment bar does not preclude an individual action brought in the same lawsuit with an FTCA action if—and only if—the United States prevailed in the FTCA action. Pet. 24-26 (discussing *Fazaga* v. *FBI*, 965 F.3d 1015, 1064, petition for cert. pending, No. 20-828 (filed Dec. 17, 2020), and *Kreines* v. *United States*, 959 F.2d 834, 838 (1992)). But even the Ninth Circuit has held that, when a plaintiff has prevailed in an FTCA action, Section 2676 prevents the plaintiff from continuing to pursue related claims against an individual federal employee, even if she brought the individual action in the same lawsuit with her FTCA action. See *Arevalo* v. *Woods*, 811 F.2d 487, 490 (1987). That conclusion is correct, and petitioner's contrary interpretation would thwart Congress's purposes for the judgment bar by enabling the plaintiff to demand duplicative litigation and pursue duplicative recovery. See, *e.g.*, *Kreines*, 959 F.2d at 838.

The courts of appeals are therefore unanimous in their rejection of petitioner's argument that the phrase "complete bar to any action" in Section 2676 never precludes individual claims brought in the same lawsuit with FTCA claims. 28 U.S.C. 2676. And the Ninth Circuit's idiosyncratic position—which makes the judgment bar's application turn on which party prevailed in the FTCA action—was abrogated by this Court's decision in *Simmons*, which recognized that the judgment bars applies "once a plaintiff receives a judgment

(*favorable or not*) in an FTCA suit." 136 S. Ct. at 1847 (emphasis added); accord *Will*, 546 U.S. at 354 (explaining that "the judgment bar can be raised" after an FTCA action "has been resolved in the Government's favor"). That conclusion follows directly from the text of Section 2676, which "speaks of 'judgment' and suggests no distinction between judgments favorable and judgments unfavorable to the government." *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995).

In sum, in the 74 years since the judgment bar was enacted, no court of appeals has accepted petitioner's contention that the judgment bar is categorically inapplicable to individual claims brought in the same lawsuit with FTCA claims, and she has not demonstrated that the issue warrants this Court's review.

3. Petitioner raises—though barely develops—two additional arguments opposing the court of appeals' application of the judgment bar in her case. Those arguments similarly provide no basis for this Court's review.

a. Petitioner suggests in passing (Pet. 20-21, 31) that the judgment bar should not apply here because her *Bivens* action was resolved first, in August 2018, before the district court entered judgment in her FTCA action in March 2019. See Pet. 20 (stating that "an FTCA judgment" does not "retroactively void[] a prior *Bivens* claim judgment"). That argument reflects a misunderstanding of Section 2676.

The judgment bar was triggered by "[t]he judgment" in petitioner's "action under section 1346(b)." 28 U.S.C. 2676. At that point, the FTCA judgment imposed a "complete bar" to "any" action by petitioner against Agent Hansen individually. *Ibid.* The FTCA judgment thus precluded petitioner from pursuing her *Bivens* ac-

tion any further, including in the court of appeals or on remand after her appeal. The court of appeals therefore correctly declined to consider petitioner's argument that the evidence was insufficient to support the jury's verdict rejecting her *Bivens* claim. Pet. App. 7a.

Petitioner relatedly asserts that the court of appeals erred by endorsing the Seventh Circuit's conclusion that Section 2676 requires a court "to invalidate a jury's [*Bivens*] verdict" for the plaintiff when an FTCA judgment is subsequently entered based on the same subject matter. Pet. 28 (citing *Manning*, 546 F.3d at 431). But this case does not present that issue because, unlike in *Manning*, the jury's verdict *rejected* petitioner's *Bivens* claim. Petitioner does not identify any court of appeals that would interpret Section 2676 to permit her to appeal her adverse *Bivens* judgment based on "the order of" that judgment relative to the FTCA judgment. Pet. 20; cf. *Harris*, 422 F.3d at 326, 333-337 (affirming FTCA judgment and then, based on the judgment bar, affirming dismissal of the plaintiff's related *Bivens* claims, which had been resolved before entry of the FTCA judgment).[6]

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[6] Petitioner says that "[n]either the government nor [Agent] Hansen plead[ed] [the FTCA judgment] bar as an affirmative defense or raised the issue in the district court." Pet. 5. Petitioner is mistaken; the government alerted the district court to the judgment bar in its pre-trial brief. See D. Ct. Doc. 93, at 10-11 (July 3, 2018). To the extent petitioner suggests that Agent Hansen forfeited an argument based on the judgment bar, she is incorrect. Again, the judgment bar was triggered by "[t]he judgment" in the FTCA action. 28 U.S.C. 2676. When the district court entered that judgment in April 2019, Agent Hansen had already received a judgment in his favor in petitioner's *Bivens* action, so he had no reason to raise the judgment bar in the district court at that point. Agent Hansen

b. Last of all, petitioner contends (Pet. 18) that her FTCA and *Bivens* actions "do not regard the same subject matter," because the two actions sought "different damages," raised "different causes of action," and were asserted by petitioner "in different capacities." Petitioner is incorrect.

In the first place, petitioner "d[id] not dispute" in the court of appeals that her "FTCA and *Bivens* claims are predicated on the same conduct and regard the same subject matter." Pet. App. 8a.[7] And in any event, this Court has explained that two cases involve "the same subject matter" for purposes of Section 2676 when they are "based on the same underlying facts." *Simmons*, 136 S. Ct. at 1847.

Every court of appeals to consider the question has agreed that Section 2676 precludes a *Bivens* action arising from the same facts as an FTCA action, even though the *Bivens* action will not present exactly the same cause of action or seek exactly the same remedies as the FTCA action. See, *e.g.*, *Unus*, 565 F.3d at 121-122; *Manning*, 546 F.3d at 432-436; *Harris*, 422 F.3d at 333-337; *Estate of Trentadue*, 397 F.3d at 858-859; *Arevalo*, 811 F.2d 487, 489-490. That consensus reflects the breadth of the judgment bar's text, which makes the FTCA judgment "a *complete* bar to *any* action" by the claimant arising from the same subject matter. 28 U.S.C. 2676 (emphases added).

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properly invoked the judgment bar in the court of appeals when petitioner attempted to appeal her adverse *Bivens* judgment.

[7] Even now, petitioner tacitly concedes at one point that her FTCA and *Bivens* claims would be duplicative, suggesting that if "a favorable verdict" had been "returned in the *Bivens* case," then "the FTCA claim could have been dismissed." Pet. 27.

Nor does it matter for purposes of the judgment bar that petitioner purportedly brought her FTCA and *Bivens* actions in "different capacities." Pet. 18; see Pet. 21-23, 28, 31. Petitioner was indisputably "the claimant" in her action under Section 1346(b)(1), so Section 2676 precludes "any" action "by [her]" based on the same facts. 28 U.S.C. 2676. Petitioner's *Bivens* action is barred because it was pleaded "by" her, irrespective of the capacity in which she pleaded that action. *Ibid.* Petitioner does not identify any court of appeals that would hold that the judgment bar ceases to apply merely because the FTCA claimant files a *Bivens* claim as personal representative for the estate of a deceased family member. Cf. *Estate of Trentadue*, 397 F.3d at 851, 858-859 (applying the judgment bar after an FTCA judgment to preclude *Bivens* claims brought by family members representing the estate of a deceased person).

4. Even if the question presented warranted further review, this case would be a poor vehicle for considering it, because lifting the judgment bar likely would not affect the outcome of petitioner's case. The jury rejected petitioner's *Bivens* action, and petitioner has not demonstrated any reasonable prospect that she could overturn that verdict even if Section 2676 did not apply.

Petitioner's appeal in her *Bivens* action first argued that the district court had "abused its discretion" in denying her motion for sanctions and refusing to issue "an adverse inference instruction" to the jury based on spoliation. Pet. App. 5a n.2. But the court of appeals explained why those arguments are meritless in the course of resolving petitioner's FTCA appeal. See *id.* at 5a (holding that "[t]he district court's finding that the ATF did not act in bad faith is supported by [the] evidence"). Petitioner offers no explanation why the court

would have reached a different conclusion and found an abuse of discretion if the judgment bar did not apply and the court had considered petitioner's materially identical arguments in the context of her *Bivens* appeal.

Petitioner's *Bivens* appeal also challenged the district court's denial of her motion for a new trial, which had argued that the jury lacked sufficient evidence to find in Agent Hansen's favor. See Pet. App. 7a. But "[t]he authority to grant" such a motion "is within the discretion of the district court," and "will not be reviewed unless there was a 'clear abuse of discretion.'" *Douglas County Bank & Trust Co.* v. *United Financial Inc.*, 207 F.3d 473, 478 (8th Cir. 2000) (citation omitted). Here, the court determined that "the evidence supports that Hansen's use of deadly force was reasonable." D. Ct. Doc. 147, at 4 (Apr. 8, 2019); see Pet. App. 39a-41a (explaining why the evidence showed that "Hansen's use of deadly force was reasonable under the circumstances"). The court therefore found that petitioner had failed to establish that the jury's verdict was against the "great, clear, or overwhelming weight of the evidence." D. Ct. Doc. 147, at 2 (quoting *Frumkin* v. *Mayo Clinic*, 965 F.2d 620, 624 (8th Cir. 1992)). In the Eighth Circuit, "[w]here a district court's ruling is that the verdict was not against the weight of the evidence, the district court's denial of [such a] motion is virtually unassailable." *Douglas County Bank*, 207 F.3d at 478. And especially in light of the court of appeals' conclusion in petitioner's FTCA action that "the district court properly determined that Hansen * * * acted reasonably by firing his service weapon," Pet. App. 7a, there is no reasonable prospect that the court of appeals would have remanded petitioner's *Bivens* action for a new trial even if the judgment bar did not apply.

If this Court is inclined to review the courts of appeals' construction of Section 2676 when multiple claims are brought in a single suit, it should do so in a case—unlike this one—where the application of the judgment bar appears to have altered the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.[8]

Respectfully submitted.

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[8] If this Court elects to address the alternative ground for a potential affirmance raised by the respondent in *Brownback*, see note 3, *supra*, then it may be appropriate to grant this petition, vacate the judgment below, and remand for further proceedings.