No. 17-1678

IN THE

# Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
*Petitioners*,

v.

JESUS MESA, JR.,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In a culvert on the border between the United States and Mexico that U.S. officials patrol and effectively control, Jesus Mesa, a U.S. Border Patrol agent, shot and killed Sergio Hernández, a 15-year-old Mexican boy, without justification or provocation. Hernández's family, Petitioners here, seek to remedy this abuse of government power and ensure compliance with the limits the Fourth Amendment places on the use of deadly force by federal law enforcement officers. The Constitution's promise of access to the courts ensures that they can do so. Indeed, suits such as this one, cognizable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

(1971), are an indispensable mechanism for ensuring that the government abides by fundamental Fourth Amendment limitations on its authority.

Even at the border, "[n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882). In our constitutional system, when officers abuse their powers, they "are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed." 2 Joseph Story, *Commentaries on the Constitution* § 1676, at 508 (3d ed. 1858). Closing the courthouse doors by foreclosing the only legal remedy available to Hernández's family would effectively give the government the power "to switch the Constitution on or off at will" at the border, *Boumediene v. Bush*, 553 U.S. 723, 765 (2008), thereby allowing the government to abuse its power unchecked.

Three precepts firmly embedded in the Constitution's text and history strongly support permitting an action under *Bivens* here. First, Article III created a federal judiciary with broad power to enforce the Constitution's limitations on the power of government in cases and controversies that come before the courts. When the Framers wrote our Founding charter more than two centuries ago, they gave the judicial branch of the government a critical role to play in our system of separation of powers. Under our Constitution, courts perform an essential checking function on the political branches of government, ensuring fidelity to the Constitution's structure and guarantee of individual rights. The Framers understood that constitutional "[l]imitations . . . can be preserved in practice no other way than through the medium of courts of

justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78*, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In the Framers' constitutional design, when other branches transgress the Constitution's limits, "the judicial department is a constitutional check." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 196 (Jonathan Elliot ed., 1836) [hereinafter *Elliot's Debates*]. *Bivens* enforces this structural constitutional principle.

Second, and related to the first, the Framers wrote Article III to ensure that where there is a legal right, there is also a legal remedy for violation of that right. The Framers, who were steeped in English common law traditions, understood that legal rights were meaningless without the ability to go to court to obtain a remedy when those rights were violated. As this Court recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Id.* at 163 (quoting 3 William Blackstone, *Commentaries on the Laws of England* *23 (1768)). *Marbury* affirmed that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*

Third, these fundamental rule-of-law principles have deep roots, not only in the text and history of Article III, but also in the history of the Fourth Amendment itself. "All the major English cases that inspired the Fourth Amendment were civil jury actions" in which juries awarded damages to prevent abuse of

power by British law enforcement officers. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 775 (1994). The Framing generation that added to the Constitution the Fourth Amendment's right to be secure from unreasonable searches and seizures viewed such suits for damages as a critical bulwark against abuse of power by the government. As one Anti-Federalist essayist made the point, "no remedy has been yet found equal to the task of deter[r]ing and curbing the insolence of office, but a jury—It has become an invariable maxim of English juries, to give ruinous damages whenever an officer has deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression . . . ." *Essays by A Farmer (I)*, Baltimore Md. Gazette, Feb. 15, 1788, *reprinted in* 5 *The Complete Anti-Federalist* at 14 (Herbert J. Storing ed., 1981). "Because officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits . . . ." *Utah v. Strieff*, 136 S. Ct. 2056, 2060-61 (2016).

Consistent with each one of these deeply embedded principles, this Court in *Bivens* held that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials," recognizing that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395. *Bivens* "vindicate[s] the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017). In this context, "[t]he settled law of *Bivens*" is "a fixed principle in the law." *Id.* at 1857. While this Court has refused to extend *Bivens* to "any new context

or new category of defendants," *id.* (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)), this case, like *Bivens* itself, involves the historic remedy for violation of the Fourth Amendment—the civil damages remedy affirmed by the Founding generation and applied by the courts throughout our history. As history teaches, in this context, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

When a federal officer uses lethal force to kill an innocent civilian without justification, the ultimate responsibility to enforce the Constitution and prevent that abuse of governmental power lies with the courts. The decision of the court below, which failed to heed "the continued force" and "necessity, of *Bivens* in the search-and-seizure context," *Ziglar*, 137 S. Ct. at 1856, should be reversed.

## ARGUMENT

### I. The Text and History of Article III Give the Federal Courts Broad Judicial Power To Protect Constitutional Rights and Prevent Abuse of Power by the Government.

Article III of the Constitution broadly extends the "judicial Power" to nine categories of cases and controversies, including "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. Article III's plain language empowers the "judicial department" to "decide all cases of every description, arising under the constitution or laws of the United States," extending to the federal courts the obligation "of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).

The Constitution's sweeping grant of judicial power to the newly created federal courts was a direct response to the infirmities of the Articles of Confederation, which established a single branch of the federal government and no independent court system. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (explaining that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). Under the dysfunctional Articles of Confederation government, individuals could not go to court to enforce federal legal protections, prompting Alexander Hamilton to observe that "[l]aws are a dead letter without courts to expound and define their true meaning and operation." *The Federalist No. 22*, *supra*, at 150.

The Framers recognized that "there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? . . . No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them." *Id. No. 80*, at 475-76 (Alexander Hamilton). At the Philadelphia Convention, the Framers extensively debated different possible means to ensure compliance with the Constitution. As the Convention unfolded, the Framers chose judicial review as a critical constitutional check designed to "make Government accountable," and "secure individual liberty." *Boumediene*, 553 U.S. at 742. While the judiciary would not have "the sword or the purse," *The Federalist No. 78*, *supra*, at 465 (Alexander Hamilton), it would have broad powers to enforce

constitutional limitations and maintain the rule of law in adjudicating cases and controversies.

The Virginia Plan proposed at the beginning of the Convention authorized the "National Legislature" to "negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union" and provided for a "council of revision," composed of members of the executive and judicial branches, "to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final," while granting to the courts the power to resolve "questions which may involve the national peace and harmony." 1 *The Records of the Federal Convention of 1787*, at 21, 22 (Max Farrand ed., 1911) [hereinafter *Farrand's Records*]. Over the course of the Convention, both the Council of Revision and the congressional negative were rejected in favor of giving to the judicial branch "the power of construing the constitution and laws of the Union in every case" and "preserving them from all violation from every quarter." *Cohens*, 19 U.S. at 388.

The Framers rejected the Council of Revision because they believed that "the Judges ought to be able to expound the law as it should come before them, free from the bias in having participated in its formation." 1 *Farrand's Records* at 98. As Rufus King explained, "the Judges will . . . expound[] . . . th[e] Laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the [C]onstitution." *Id.* at 109; *see* 2 *id.* at 76 ("[A]s to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative."). As the debate reflects, "the single

most important reason the Council of Revision was rejected derived from the Convention's commitment to judicial review as an integral part of the constitutional structure." Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 J.L. & Pol. 459, 507 (2012).

For similar reasons, the Framers rejected the congressional negative, preferring judicial review to congressional control. As Gouverneur Morris argued, "[a] law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law." 2 *Farrand's Records* at 28. Over the course of the Convention, the Framers expanded the jurisdiction of the federal courts to ensure that the Article III judiciary would be "competent to the decision of any question arising out of the Constitution," 4 *Elliot's Debates* at 156, and federal laws, giving the federal courts the power to decide "all questions arising upon their construction, and in a judicial manner to carry those laws into execution," Luther Martin, *The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention* (Nov. 29, 1787), *reprinted in* 3 *Farrand's Records* at 220.

In the ensuing debates over ratification of the Constitution, Federalists and Anti-Federalists alike agreed that Article III gave the federal courts broad powers to enforce the Constitution's limits on the power of government. In the state ratifying conventions, supporters of the Constitution repeatedly argued that the judicial branch would provide a critical check on the political branches, guaranteeing individual rights and ensuring compliance with the Constitution's structure.

In the Virginia ratifying convention, John Marshall argued, "[t]o what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." 3 *Elliot's Debates* at 554. James Madison explained the Constitution's "new policy" of submitting constitutional questions to the "judiciary of the United States": "[t]hat causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these restrictions." *Id.* at 532. In the Connecticut ratifying convention, Oliver Ellsworth explained that "[i]f the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void." 2 *id.* at 196.

Anti-Federalists complained bitterly about Article III's broad sweep, insisting that "[t]he jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude." 3 *id.* at 565. These arguments did not carry the day. Rejecting Anti-Federalist claims that the breadth of judicial power conferred in Article III was too sweeping, the American people ratified the Constitution, giving the newly created federal courts broad judicial power to ensure that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 *id.* at 160. The American people recognized that "[t]hese ends can only be accomplished by a general, paramount judiciary." *Id.*

In 1789, when the Bill of Rights was added to the Constitution, the Framers reaffirmed the role of the federal courts in ensuring that the government respects constitutional limitations. Introducing the Bill of Rights in Congress, James Madison observed that if it were "incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally lead to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 Annals of Cong. 457 (1789) (Joseph Gales ed., 1834).

Just as Madison had recognized that "causes of a federal nature" will arise under those provisions of the Constitution in which "states are laid under restrictions," 3 *Elliot's Debates* at 532, Madison insisted that the federal courts would have the obligation to enforce the rights laid out in the Bill of Rights in cases that came before them. Judicial review was the key to ensuring that the guarantees of the Bill of Rights were not "paper barriers . . . too weak to be worthy of attention," but rather real, enforceable limits on the power of the federal government that would operate "against the majority in favor of the minority." 1 Annals of Cong. 455, 454 (1789).

In creating an independent federal judiciary with the power to enforce constitutional limitations and maintain the rule of law, the Framers incorporated long established common law principles that allowed courts to vindicate individual rights and enforce the rule of law, as the next Section discusses.

## II. The Framers Wrote Article III To Ensure that Where There Is a Legal Right, There Is a Legal Remedy for Infringement of that Right.

The Framers, recognizing that legal rights are meaningless if individuals lack the ability to go to court to obtain a remedy when a right is violated, wrote Article III to ensure that such legal remedies exist. Steeped in the writings of Sir William Blackstone, the Framers understood that rights and remedies must go hand in hand if courts are to play their essential role in the Constitution's system of separation of powers: expounding the law and vindicating individual liberty. *See The Federalist No. 43*, *supra*, at 274 (James Madison) ("[A] right implies a remedy."). As Blackstone had written, it was a "general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 William Blackstone, *Commentaries on the Laws of England* *23 (1768). "[I]n vain would rights be declared, in vain directed to be observed," Blackstone explained, "if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law." 1 *id.* at 56; *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) ("Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more.").

These fundamental rule-of-law values were affirmed by a number of Founding-era state constitutions, which explicitly guaranteed redress for violations of legal rights. For example, the Massachusetts Constitution of 1780 provided that "[e]very

subject . . . ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws." Mass. Const. of 1780, art. XI. Other state constitutions used similar formulations to protect the right of individuals to seek redress in the courts for violations of their legal rights. *See, e.g.*, Md. Const. of 1776, art. XVII; N.H. Const. of 1784, art. XIV; Vt. Const. of 1786, ch. 1, para. 4; Pa. Const. of 1790, art. IX, § 11; Del. Const. of 1792, art. I, § 9; Ky. Const. of 1792, art. XII, § 13; Tenn. Const. of 1796, art. XI, § 17.

In *Marbury v. Madison*, Chief Justice Marshall recognized that these fundamental rule-of-law principles were secured by the U.S. Constitution. Chief Justice Marshall's opinion in *Marbury* explained that, under Article III, the "province of the court is, solely, to decide on the rights of individuals," and he invoked Blackstone's discussion of common law principles that ensure that "'every right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury*, 5 U.S. at 170, 163 (quoting 3 Blackstone, *supra*, at *109). As *Marbury* observed, a broad understanding of the individual's right to go to court to redress violations of personal rights was necessary to ensure "[t]he very essence of civil liberty"—"the right of every individual to claim the protection of the laws, whenever he receives an injury"—and ensure our Constitution's promise of a "government of laws, and not of men." *Id.* at 163.

"From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in

federal court," *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66 (1992), beginning with *Marbury*. In *Marbury*, it did not matter that federal law did not grant an express right of action to Marbury, or even that "the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute." 5 U.S. at 172. Since the refusal to deliver the commission violated his individual right to the office, Marbury had "a right to resort to the laws of his country for a remedy." *Id.* at 166; *id.* at 165 (explaining that such suits are "examinable in a court of justice"). For more than two centuries, the "historic judicial authority to award appropriate relief . . . has been thought necessary to provide an important safeguard against abuses of legislative and executive power . . . as well as to ensure an independent Judiciary." *Franklin*, 503 U.S. at 74; *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 350 (1816) (rejecting a construction of Article III that "would, in many cases," result in "rights without corresponding remedies"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) (explaining that it would be a "monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist").

The Framers' linkage of rights and remedies is directly reflected not only in Article III but in the text and history of the Fourth Amendment as well. As the next Section shows, the Framers of the Fourth Amendment wrote into the Constitution a broad guarantee of freedom from unreasonable searches and seizures against the backdrop of landmark English cases in which juries awarded damages in civil suits to check abuse of authority by the Crown.

## III. The Framers of the Fourth Amendment Viewed Civil Damage Suits Against Government Officers as a Critical Bulwark against Government Overreach.

The Founding generation "crafted the Fourth Amendment as a 'response to the reviled general warrants and writs of assistance of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Riley v. California*, 134 S. Ct. 2473, 2494 (2014) (quotation marks omitted)). The Framers viewed these indiscriminate searches as "'the worst instrument of arbitrary power' . . . because they placed 'the liberty of every man in the hands of every petty officer.'" *Stanford v. Texas*, 379 U.S. 476, 481 (1965) (quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886)). As the history of the Fourth Amendment shows, the Framers viewed civil damage actions—the very kind of suits cognizable under *Bivens*—as a critical check on abuse of power by the government.

The Framers' understanding of the guarantee against unreasonable searches and seizures was shaped by a host of foundational English cases decided in the 1760s, *see Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763); *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765); *Leach v. Money*, 19 How. St. Tr. 1001 (K.B. 1765), in which juries awarded tort damages to individuals whose homes were invaded or whose papers were searched by the King's officers. These cases, all growing out of warrants issued in response to the publication of the *North Briton No. 45*, a pamphlet critical of the King, put center stage the role of the jury in awarding damages and limiting abuse of power by the government.

As an attorney argued in *Wilkes*, the most prominent of these cases, "the constitution of our country had been so fatally wounded, that it called aloud for the redress of a jury of Englishmen." *Wilkes*, 19 How. St. Tr. at 1154. The jury, he argued, should perform its role of "instructing those great officers in their duty, and that they (the jury) would now erect a great sea mark, by which our state pilots might avoid, for the future, those rocks upon which they now lay shipwrecked." *Id.* at 1155. The jury's award of £4,000 in damages, "roughly equivalent to £500,000 today," vindicated these arguments. *See* Hon. M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. Rev. 905, 910 (2010).

*Wilkes* and other cases like it demonstrated to the Framers that civil damage actions were an essential method of protecting individual liberty and limiting abuse of power, preventing "the secret cabinets and bureaus of every subject in this kingdom [from] be[ing] thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit." *Entick*, 19 How. St. Tr. at 1063. Time and again, the British courts rejected the use of general warrants to immunize officers from liability as "totally subversive of the liberty of the subject," *Wilkes*, 19 How. St. Tr. at 1167, instead upholding damage awards that, in some cases, were quite substantial. Amar, *Fourth Amendment First Principles*, *supra*, at 797 ("As civil plaintiffs, John Wilkes and company . . . had recovered a King's ransom from civil juries to teach arrogant officialdom a lesson and to deter future abuse."); George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 Tex. Tech. L. Rev. 199, 215 (2010) ("[T]ort law brought the king, his ministers, and his secretary of state to their knees.").

Indeed, in *Wilkes*, the court specifically affirmed the power of the jury to award damages "not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future." 19 How. St. Tr. at 1167; *see Huckle*, 95 Eng. Rep. at 769 (upholding jury's award of "exemplary damages" in light of the "great point of law touching the liberty of the subject" and the Crown's "exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom").

*Wilkes*, as well as other cases, were widely covered in American newspapers, and "the reaction of the colonial press to that controversy was intense, prolonged, and overwhelmingly sympathetic to Wilkes." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791*, at 538 (2009); *see id.* at 539 (discussing the scope of the coverage in the colonial press); *id.* at 538 (noting that a "revulsion to general warrants ensued in the colonies" following the Wilkes controversy). As this Court observed in *Boyd*, "every American statesman, during our revolutionary period and formative period as a nation, was undoubtedly familiar" with these "landmarks of English liberty," *Boyd*, 116 U.S. at 626, which had a powerful effect on the framing of the Fourth Amendment, *see* Michael, *supra*, at 906 ("The early mischief—the British Crown's unbridled power of search—is at the center of the rich history that led to the adoption of the Fourth Amendment.").

The failure to include a Bill of Rights in the original Constitution launched an avalanche of criticism, as many insisted that the Constitution was deficient without guarantees for substantive fundamental rights essential to liberty, including rights of personal security. Anti-Federalists lamented that, without a Bill of Rights, "any man may be seized, any property

may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power." 3 *Elliot's Debates* at 588; *see Maryland v. King*, 569 U.S. 435, 467 (2013) (Scalia, J., dissenting). They feared that "[t]he officers of Congress may come on you now, fortified with all the terrors of paramount federal authority." 3 *Elliot's Debates* at 448. Those who fought to add the Fourth Amendment to the Constitution emphasized, in line with *Wilkes*, the role of the courts in protecting the right to be secure and checking governmental abuse of the power to search and seize. Civil damage actions, they understood, were critical to prevent abuse of power by the government. "To Americans, one lesson of the *Wilkes* Cases was that juries could avert outrageous searches by subjecting those responsible to exemplary, financial damage." Cuddihy, *supra*, at 760.

Those urging new search and seizure protections consistently emphasized the role of, and the need for, civil damage remedies to curb the unbridled discretion of federal officers. For example, a Maryland Anti-Federalist essayist, writing under the name of "A Farmer," insisted on the constitutional checking function performed by civil damages remedies, referring to the role juries had played in the *Wilkes* case. "[N]o remedy has been yet found equal to the task of deter[r]ing and curbing the insolence of office, but a jury—It has become an invariable maxim of English juries, to give ruinous damages whenever an officer has deviated from the rigid letter of the law, or been guilty of an unnecessary act of insolence or oppression . . . ." *Essays by A Farmer (I)*, Baltimore Md. Gazette, Feb. 15, 1788, *reprinted in* 5 *The Complete Anti-Federalist*, *supra*, at 14. Likewise, Marylander Luther Martin emphasized that "jury trials"—which he called "the surest barrier

against arbitrary power, and the palladium of liberty"—were "most essential for our liberty . . . in every case . . . between governments and its officers on the one part, and the subject or citizen on the other." Martin, *supra*, *in* 3 *Farrand's Records* at 221-22 (emphasis omitted). To the Founding generation, "the right to trial by jury" was "'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.'" *United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (opinion of Gorsuch, J.) (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), *in* 1 *Papers of John Adams* 169 (R. Taylor ed., 1977)).

Elsewhere, too, Anti-Federalists seeking to add search and seizure protections to the Constitution highlighted the need for civil damage remedies to prevent abuse of government power, reflecting the lessons of *Wilkes*. During debates in Pennsylvania in 1787, one Anti-Federalist writer argued that, if "a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift . . . a trial by jury would be our safest resource, heavy damages would at once punish the offender, and deter others from committing the same . . . ." *Essay of A Democratic Federalist*, Penn. Herald, Oct. 17, 1787, *reprinted in* 3 *The Complete Anti-Federalist*, *supra*, at 61. Likewise, in Massachusetts, the essayist Hampden insisted that "without [a jury], in civil actions, no relief can be had against the High Officers of State, for abuse of private citizens . . . ." *Essays by Hampden*, Mass. Centinel, Feb. 2, 1788, *reprinted in* 4 *The Complete Anti-Federalist*, *supra*, at 200.

These arguments carried the day, and the Fourth Amendment was added to the Constitution,

establishing broad protections "indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1895, at 748 (1833). As the history of the Fourth Amendment shows, its Framers expected the courts to be an "impenetrable bulwark against every assumption of power in the legislative or executive" and to "resist every encroachment upon [Fourth Amendment] rights," 1 Annals of Cong. 457 (1789), using the time-honored tool of civil damages to prevent individuals from being subject to "all the terrors of paramount federal authority," 3 *Elliot's Debates* at 448.

## IV. Courts in the Founding Generation Vindicated Fourth Amendment Rights by Granting Damages Remedies for Unlawful Seizures in Common Law Tort Suits.

Consistent with this history, Americans courts in the early Republic vindicated Fourth Amendment values through the analogous common law tort actions of trespass, malicious prosecution, and others. *See* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case. W. Res. L. Rev. 396, 399 (1987) ("The predominant method of suing officers in the early nineteenth century was an allegation of common law harm, particularly a physical trespass. The issue of whether the action was authorized by existing statutory or constitutional law was introduced by way of a defense and reply when the officer pleaded justification."). Even in cases that implicated foreign policy concerns, it was the responsibility of the courts to "only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress." *The Appollon*, 22 U.S. (9 Wheat.) 362, 367 (1824). Congress might choose to indemnify the officer after the fact, but

it was the responsibility of the courts in the first instance to uphold the rule of law. *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1868 (2010); Pet. Br. at 10-12.

For example, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), a U.S. naval officer seized a Danish vessel on the high seas, claiming authority to do so based on the Nonintercourse Act and presidential instructions commanding such seizures. *Id.* at 170-71. Chief Justice John Marshall's opinion for the Court held that the federal officer "must be answerable in damages," concluding that the orders Little received could not "legalize an act which without those instructions would have been a plain trespass." *Id.* at 179. Insisting that those injured by abuse of power had a right to go to court, Chief Justice Marshall refused to draw a line "between acts of civil and those of military officers" or "between proceedings within the body of the country and those on the high seas." *Id.*

As *Little* and a host of other cases made clear, even on the high seas, no officer was above the law. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 124 (1804) (describing naval captain who unlawfully seizes a foreign vessel as "a victim of any mistake he commits"); *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 490 (1806) (upholding damage award against naval officer in seizure of a vessel where "circumstances of suspicion . . . were not sufficiently strong to justify the seizure which was made"); *The Appollon*, 22 U.S. at 373 ("The party who seizes seizes at his peril; if condemnation follows, he is justified; if an acquittal, then he must refund in damages for the marine tort . . . ."). As these cases reflect, "suits against officers ensured due process of law for anyone threatened by unlawful

deprivations, regardless of where the deprivation occurred." Nathan Chapman, *Due Process Abroad*, 112 Nw. U. L. Rev. 377, 433 (2017).

This Court's cases permitted individuals to sue to redress a broad range of abuse of power by federal officials. In *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806), this Court permitted an action for trespass *vi et armis* (a trespass action for force resulting in harm) to go forward against a federal militia officer who was seeking to collect fines from Wise, a U.S. justice of the peace. *Id.* at 332. Withers had entered Wise's home and seized his property to satisfy a fine, which had been imposed by a court-martial for failure to serve. *Id.* Finding that a justice of the peace was exempt from militia duty and the court-martial lacked jurisdiction over him, this Court held that Wise was entitled to recover, finding that "[t]he court and the officer are all trespassers." *Id.* at 337.

In *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852), this Court affirmed a jury verdict against a U.S. army officer who unlawfully seized the plaintiff's property pursuant to a superior's orders. *Id.* at 116. Declaring that "mere suspicions of an illegal intention will not authorize a military officer to seize and detain the property of an American citizen," *id.* at 133, this Court held that "the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed," *id.* at 137.

State courts, too, permitted tort actions to go forward against federal officers who abused their authority to search and seize in a number of different contexts. In *Imlay v. Sands*, 1 Cai. R. 566 (N.Y. Sup. Ct. 1804), the New York Supreme Court granted judgment to the plaintiff in a trespass action arising out of the seizure of goods by a federal customs collector. *Id.*

at 573. Observing that the "officer seizes at his peril" and that "there was no real ground for the seizure," the court insisted that its duty was to "pronounce the law as we find it, and leave cases of hardship, where any exist, to legislative provision." *Id.*; *see Wilson v. McKenzie*, 7 Hill 95, 95 (N.Y. Sup. Ct. 1845) (permitting trespass action against a naval officer for assaulting and imprisoning one of his subordinates).

In *Merriam v. Mitchell*, 13 Me. 439 (1836), the Maine Supreme Court upheld a damage award against a federal postal inspector for malicious prosecution. Finding no basis for bringing "a prosecution against an innocent and unoffending man, who had given no color for suspicion against him," the court concluded that "[r]eparation is demanded in such a case, by the plainest dictates of common justice." *Id.* at 457. The court upheld the jury's finding of malice, concluding that it had "a right to do so, from the want of probable cause." *Id.* at 458; *see Bauduc's Syndic v. Nicholson*, 2 La. 200, 203 (1831) (holding that a federal court marshal "is not perhaps amenable to the State Court, in his official capacity, as marshal," but "if in that capacity, he wrongs a citizen of the State, he is individually answerable, and in her courts"); *Hirsch v. Rand*, 39 Cal. 315, 318 (1870) (reinstating trespass suit where a U.S. marshal "arrested and imprisoned the plaintiff without probable cause, or lawful authority to do so").

These Founding-era principles, which make plain that "[n]o officer of the law may set that law at defiance with impunity," *Lee*, 106 U.S. at 220, are deeply rooted in this Court's case law, *see, e.g.*, *Bates v. Clark*, 95 U.S. 204, 209 (1877); *Belknap v. Schild*, 161 U.S. 10, 19 (1896); *Phila. Co. v. Stimson*, 223 U.S. 605, 619-20 (1912); *Butz v. Economou*, 438 U.S. 478, 489-90 (1978); *see also* Pet. Br. at 13-17, and form the

backdrop for this Court's decision in *Bivens*, as the next Section discusses.

## V. A *Bivens* Action is Appropriate To Enforce the Fourth Amendment When There Are No Alternative Remedies Available.

Consistent with the text and history of both Article III and the Fourth Amendment, and with the rich history of common law actions for unlawful seizures by federal officers, this Court in *Bivens* held that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials." *Bivens*, 403 U.S. at 395. As this Court explained, "damages have been regarded as an ordinary remedy for an invasion of personal interests in liberty." *Id.*; *Bush v. Lucas*, 462 U.S. 367, 378 (1983) (explaining that, under *Bivens*, in the Fourth Amendment context, "[t]he federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation"). In reaching that result, the Justices embraced Founding-era principles recognizing that "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment," *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in the judgment), and that "'rights' and 'remedies'" are "link[ed]" in "a 1:1 correlation," *id.* at 400 n.3.

Under *Bivens*, when federal law supplies a basis for jurisdiction and when "some form of damages is the only possible remedy," *id.* at 409, "a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment," *id.* at 399. The government in *Bivens* argued that a plaintiff seeking damages for an unconstitutional search and seizure may only bring a state common law tort action, relying on the historical

pedigree of such suits. But *Bivens* rejected that approach, recognizing that "[t]he interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable search and seizures, may be inconsistent or even hostile." *Id.* at 394 (majority opinion). Given "the limitations on state remedies for violation of common-law rights," *Bivens* permitted a federal claim for violation of the Fourth Amendment's federal constitutional guarantee against unreasonable searches and seizures, insisting that these kinds of constitutional "injuries be compensable according to uniform rules of federal law." *Id.* at 409 (Harlan, J., concurring in the judgment).

*Bivens* reflects the Framers' view that some kind of civil remedy was necessary to prevent individuals from being subjected to "all the terrors of paramount federal authority." 3 *Elliot's Debates* at 448. Otherwise, federal officers would have the untrammeled authority to search and seize, producing the unchecked concentration of power the Framers feared. *See Boumediene*, 553 U.S. at 742 (noting the Framers' "view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power"). While the Court has been reluctant to apply *Bivens* outside this context, its cases have reaffirmed *Bivens*' "continued force" and "necessity" in the "search-and-seizure context in which it arose." *Ziglar*, 137 S. Ct. at 1856.

Reflecting these rule-of-law moorings, this Court's cases have also made clear that *Bivens* "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest," *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007), and, in a number of cases, this Court has declined to extend *Bivens*, finding that other remedies were available. *See Ziglar*, 137 S.

Ct. at 1862 (no *Bivens* claim to "challenge large-scale policy decisions" because "detainees may seek injunctive relief"); *Minneci v. Pollard*, 565 U.S. 118, 126-31 (2012) (no *Bivens* action available because of possibility of state tort suit); *Corr. Servs. Corp.*, 534 U.S. at 72 (no *Bivens* action where "alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*"); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 485 (1994) (no *Bivens* action against federal agency because *Bivens* permits a suit against a federal officer "to deter *the officer*").

In *Wilkie*, this Court synthesized its precedents applying *Bivens*, setting out two basic considerations. First, "there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550 (citing *Bush*, 462 U.S. at 378). Second, "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* (quoting *Bush*, 462 U.S. at 378); *see Minneci*, 565 U.S. at 123 (explaining that these dual inquiries "seek to reflect and to reconcile the Court's reasoning set forth in earlier cases"). Both considerations point decisively toward permitting Hernández to sue in this case to redress the killing of his 15-year-old son.

First, here, as in *Bivens*, "it is damages or nothing." *Bivens*, 403 U.S. at 410. This is the archetypal case of "law enforcement overreach, which due to [its] very nature [is] difficult to address except by way of damages actions after the fact." *Ziglar*, 137 S. Ct. at 1862. A *Bivens* suit here is the only means to ensure that federal officers respect the constitutional limits

on their authority. Mesa cannot be sued in Texas state courts, because Congress has preempted that tort suit, leaving plaintiffs no recourse but this *Bivens* action. *See* Pet. Br. at 19-20, 34-37. If this Court closes the courthouse door in this case, the government will have the unchecked power to "switch the Constitution on or off at will" at the border, eliminating "an indispensable mechanism for monitoring the separation of powers." *Boumediene*, 553 U.S. at 765.

Second, "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done," also makes clear that a *Bivens* action is appropriate here. *Wilkie*, 551 U.S. at 554. As history shows, civil damage actions against government officers who unlawfully search and seize persons, such as this one, is the quintessential method used "to implement [the Fourth Amendment's] guarantee." *Id.* at 550. Permitting this suit to go forward under *Bivens* would not be fashioning a newly minted cause of action, *cf. Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1414 (2018) (Gorsuch, J., concurring in part and concurring in the judgment), but simply recognizing what the text and history of the Fourth Amendment reflect: its Framers understood that civil damage suits were an appropriate method of redressing violations of the Fourth Amendment by federal officers. At the Founding, trespass actions encompassed the unlawful use of force. *See* 5 Matthew Bacon, *A New Abridgment of Law* 157 (6th ed. 1793) ("[T]he Person guilty of a Trespass accompanied with actual Force, which has been injurious to one or a few Persons, is liable to an Action of Trespass."). The Framers viewed courts as the frontline defense against "all the terrors of paramount federal authority," 3 *Elliot's Debates* at 448, including violent, deadly seizures such as occurred in this case.

The fact that the arbitrary and unreasonable use of deadly force in this case occurred at the U.S.-Mexico border and resulted in the death of a 15-year-old Mexican boy does not lessen this Court's duty to enforce the Constitution. "Because the Constitution's separation-of-powers structure . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." *Boumediene*, 553 U.S. at 743. As Founding-era cases make clear, *see supra* at 19-21, civil suits were recognized as appropriate to enforce limits on government authority "for anyone threatened by unlawful deprivations, regardless of where the deprivation occurred," Chapman, *supra*, at 433. Thus, even at the border, when federal officers use lethal force in the "most arbitrary manner, without any evidence or reason," 3 *Elliot's Debates* at 588, courts have an obligation to hold them to account, ensuring that "[n]o officer of the law may set that law at defiance with impunity," *Lee*, 106 U.S. at 220.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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