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 DOUGLAS LAYCOCK, JAMES E. PFANDER, ALEXANDER A. REINERT AND JOANNA C. SCHWARTZ AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JOSHUA MATZ
Counsel of Record
BENJAMIN D. MARGO
Kaplan Hecker & Fink LLP
350 Fifth Avenue | Suite 7110
New York, NY 10118
(212) 763-0883
jmatz@kaplanhecker.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici are legal scholars whose focus includes remedies, federal courts, the separation of powers, and constitutional law. They have a strong professional interest in the proper development of the law, which includes accounting for the best available empirical evidence and structural legal principles bearing on the questions here at issue.

Amici are **Douglas Laycock**, Robert E. Scott Distinguished Professor of Law at the University of Virginia School of Law; **James E. Pfander**, Owen L. Coon Professor of Law at the Pritzker School of Law at Northwestern University; **Alexander A. Reinert**, Max Freund Professor of Litigation and Advocacy at the Benjamin N. Cardozo School of Law; and **Joanna C. Schwartz**, Professor of Law at UCLA Law School.[1]

SUMMARY OF ARGUMENT

Just as when *Bivens* was decided, so today "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring in the

[1] *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici* and their counsel—contributed money intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief. Sup. Ct. R. 37.3, 37.6. *Amici* join this brief as individuals; institutional affiliation is noted for informational purposes only and does not state endorsement by institutional employers of positions advocated.

judgment). Indeed, this Court has never "cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017). When rogue federal agents violate the Fourth Amendment—and when there is no other legal recourse at hand—courts have fulfilled their institutional responsibility by recognizing a damages remedy. This rule serves to deter official misconduct, compensate victims, and exalt legality over the creeping threat of lawlessness.

Over the past few decades, however, the Court has identified several reasons supporting a more cautious approach to recognizing damages remedies. These include the risk of over-deterring officers and agencies through fear of ruinous liability, as well as the potential separation of powers concerns that arise when courts imply a remedy where Congress has not expressly created one. *See Ziglar*, 137 S. Ct. at 1856-58, 1863; *Bush v. Lucas*, 462 U.S. 367, 389 (1983); *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). On the basis of such anxieties, the Court has withheld remedies for cases arising in a "new context" where "special factors" weigh in favor of hesitation. *See Ziglar*, 137 S. Ct. at 1857.

Some of the Court's recent language about reasons to deny *Bivens* remedies has been quite expansive. *See id.* at 1857-58. But the Court has pointedly declined to overturn *Bivens* or confine it to its facts, notwithstanding calls to do exactly that. *See id.* at 1870 (Thomas, J., concurring in the judgment); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (explaining that *stare decisis* is unusually strong when a party asks this Court "to overrule not a single case, but a long line of precedents—each one reaffirming the rest" (citations omitted)).

Unless this has all been an empty promise, the "new context" and "special factor" limitations on the availability of *Bivens* remedies must not be read as swallowing the doctrine whole. And because these limitations are expressly premised on discrete concerns about *Bivens*, a clearer assessment of those concerns can and should guide the strictness with which the limitations are applied.

Here, we demonstrate that the first concern cited to limit *Bivens*—fear of personal or agency liability—is based on a misunderstanding of how *Bivens* works in practice. We then show that separation of powers concerns support, rather than undermine, a *Bivens* remedy where Congress has failed to provide adequate alternative remedies for a rights violation. The upshot is that one concern cited to narrow *Bivens* is weaker than previously described and another actually cuts in favor of *Bivens* remedies. This should lead the Court to apply the "new context" and "special factors" limitations in a manner that recognizes the important purposes served by *Bivens* and the need for such a remedy in cases like this one.

ARGUMENT

I. THE MYTH OF PERSONAL AND AGENCY FINANCIAL LIABILITY

A. Financial Liability and the Theoretical Risk of Over-Deterring Officers and Agencies

A central purpose of *Bivens* liability is deterrence of unconstitutional conduct by individual officers. *See*, *e.g.*, *Malesko*, 534 U.S. at 70. Individual liability is thus a core feature of *Bivens* liability. *See FDIC v. Meyer*, 510 U.S. 471, 485 (1994). But in a series of cases over the last three decades, the Court has worried that personal liability is actually a bug. *See, e.g., Ziglar*, 137 S. Ct. at 1858.

In fact, skepticism of *Bivens* has been driven heavily by a concern that damages claims may cause officers to halt or hesitate rather than act boldly. In *Ziglar*, the Court thus speculated that "[t]he risk of personal damages liability" would be "more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy." 137 S. Ct. at 1861. "If *Bivens* liability were to be imposed," the Court added, "high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis." *Id.* at 1863. Elsewhere, the Court has cautioned against "raising a tide of suits threatening legitimate initiative on the part of the Government's employees," *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007), and against causing federal management personnel to be "deterred from imposing discipline in future cases," *Bush*, 462 U.S. at 389. These and many other *Bivens* precedents evoke "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible

[public officials], in the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (citation omitted, alteration in original).[2]

A distinct but related anxiety involves over-deterrence of federal agencies. In *Ziglar*, the Court theorized that the burdens "of defense and indemnification" might "impact on governmental operations systemwide," inflicting "costs and consequences [on] the Government itself." *Id.* at 1856, 1858; *see also Meyer*, 510 U.S. at 486. Here, the Court appears to be worried that the cost of indemnifying agency personnel could influence agency budgets and policy.

As we will demonstrate, although these concerns may be legitimate in the abstract, they lack an empirical basis. The fear of over-deterring individual officers has no basis in reality because *Bivens* defendants are almost always insulated from paying the costs of defense and damages in successful cases. And there is no evidence that agency budgets are tapped to satisfy judgments or settlements in *Bivens* cases because the United States funnels payments through the general-purpose Judgment Fund.

---

[2] Of course, federal officers enjoy qualified immunity in *Bivens* cases, which can mitigate this concern. After all, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citation omitted); *see also Hui v. Castaneda*, 559 U.S. 799, 807 (2010).

B. Individual Officers and their Agencies Almost Never Incur Personal Liability

1. *Bivens* and the Bureau of Prisons

In a recently-concluded empirical study of the Bureau of Prisons ("BOP"), whose policies do not appear atypical, three of us have found that federal officers are indemnified in the vast majority of cases—and that the Judgment Fund, rather than the BOP itself, pays out successful *Bivens* claims. *See generally* James E. Pfander, Alexander E. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 Stan. L. Rev. (forthcoming 2019) (hereinafter *Myth of Personal Liability*). [3] These litigation and settlement practices conflict with common assumptions about the ways in which *Bivens* cases are resolved; they reveal that *Bivens* lawsuits simply do not threaten individual employees with financial ruin or trigger indemnifying payments from their agencies.

a. Study Design

To better understand how *Bivens* works in practice, we submitted FOIA requests to the BOP, seeking data on *Bivens* claims against BOP employees that resulted in payments of $1000 or more. We obtained documents that revealed payments made in connection with settlements and judgments in 209 cases closed over a ten-year period from 2007 through 2017. We eliminated 101 cases where the plaintiff did not seek to impose liability on individual

[3] *See* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343800.

officers based on *Bivens*. We then conducted a follow-up assessment using aggregated electronic docket records and identified 63 additional successful *Bivens* cases that did not appear in BOP's FOIA disclosures. *Id.* at 50–51. Although there are limits to this dataset—as we explain in the article—*amici* are confident that the 171 cases we found provide a reasonably comprehensive picture of successful *Bivens* cases against BOP over roughly a 10-year period. *Id.* at 51.

b. Results: Individual Officers

In short, the data reveal that individual government officials almost never contribute any personal funds to resolve claims arising from allegations that they violated the constitutional rights of incarcerated people. Of the 171 successful *Bivens* cases in our dataset, we found only *eight* in which the individual officer or an insurer were required to compensate the claimant. *Id.* at 15. Of the more than $18.9 million paid to plaintiffs in these 171 cases, federal employees or their insurers were required to pay approximately $61,163—0.32% of the entire amount required to be paid to plaintiffs. *Id.* at 15-16. Put differently, over the course of 10 years, in an agency of 35,470 employees, only eight cases required contributions by officers or their insurers averaging roughly $7,600 per case. *Id.* at 16, 28. We thus concluded that the federal government—here, the BOP—effectively held its officers harmless in over 95% of the successful cases brought

against them, and paid well over 99% of the compensation received by plaintiffs in these cases.[4] *Id.* at 6.

Considering the broader universe of all *Bivens* cases brought against BOP officials—including the unsuccessful ones—the likelihood of a BOP officer being required to contribute to a *Bivens* payment is even more remote. One of us previously found that approximately 15 percent of all *Bivens* actions filed against BOP officials resulted in payments to plaintiffs. *See* Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 Stan. L. Rev. 809, 836 n.138 (2010) (hereinafter *Measuring Success*). Given that only roughly five percent of those cases resulted in financial contributions from officers or their insurers, we can infer that cases in which officers or their insurers contribute money constitute well under one percent of all *Bivens* cases filed. And, given that BOP has 35,470 employees, we can estimate that fewer than 0.1% of all BOP employees will contribute to a *Bivens* settlement or judgment during a twenty-year career. *Myth of Personal Liability* at 28 & nn.110–11.

---

[4] The greatest individual payout was $25,000, contributed by an officer toward a $40,000 settlement for alleged sexual assault. *See Myth of Personal Liability* at 15 & n.59 (citing *Doe v. United States*, 12-cv-00640 (D. Haw. 2015)); *see also id.* (citing *Harrison v. Jackson*, 12-cv-4459 (N.D. Ga. 2012) (sexual assault claim settled for $11,000, paid by the officer)). If we remove the sexual assault cases from the analysis, the average required officer contribution drops to under $4,500.

c. Results: Agencies

Agencies, too, are effectively protected from financial responsibility for constitutional tort claims. The BOP settlement agreements that we reviewed made clear that the government almost always satisfied claims brought under *Bivens* by arranging to have the agreed upon amounts paid through the Judgment Fund, rather than by the BOP itself. *See* 31 U.S.C. § 1304 (appropriating money "to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law"); Paul Figley, *The Judgment Fund: America's Deepest Pocket and Its Susceptibility to Executive Branch Misuse*, 18 U. Pa. J. Const. L. 145 (2015).[5] As a result, the Judgment Fund effectively shields BOP from budgetary accountability for the constitutional torts of its personnel.[6] We have no reason to believe that

---

[5] The Judgment Fund is authorized to pay final judgments and settlements under the FTCA, but not *Bivens*. *See Myth of Personal Liability* at 7. However, in most cases we reviewed, DOJ attorneys either instructed plaintiffs to substitute an FTCA claim for the *Bivens* claim in an amended complaint as a condition of settlement, or framed the settlement as one under the FTCA—even if there was no FTCA claim in the case. *Id.* at 20–24.

[6] BOP appears to maintain patchy and decidedly incomplete information about *Bivens* actions. *See Myth of Personal Liability* at 24–26. Though our data on this point are therefore incomplete, for every settlement documented in our study, the United States Treasury made payments for the government from the standing Judgment Fund appropriation, not from the coffers of the individual agency. *See id.* And even if BOP had paid out of its budget, its share of payments in successful *Bivens* cases (less than $19 million over 10 years) would be negligible in comparison to its annual budget in excess of $7 billion. *See id.* at 15, 31 & n.128.

BOP is atypical in this regard.[7] *Bivens* suits will not affect agency policy, personnel, or priorities by virtue of any impact on agency budgets.

2. The Success Rate of *Bivens* Litigation

Judicial warnings about the risks of financial liability imposed by *Bivens* are occasionally coupled with claims that *Bivens* suits are largely frivolous. *See, e.g.*, *Simpkins v. D.C.*, 108 F.3d 366, 370 (D.C. Cir. 1997); *Crawford-El v. Britton*, 93 F.3d 813, 838 (D.C. Cir. 1996) (Silberman, J., concurring) ("Obviously, the vast majority of these suits are meritless."); *Kimberlin v. Quinlan*, 17 F.3d 1525, 1525–26 (D.C. Cir. 1994) (Williams, J., concurring in denial of rehearing en banc). But these assumptions about the outcome of *Bivens* lawsuits were never based on empirical study. And the numbers that are sometimes bandied about—including the assertion that 12,000 claims were filed between 1971 and 1985 with only four judgments sustained for plaintiffs—are apocryphal.[8] To the extent hard numbers reflecting success are mentioned, they are supported by statements made at legislative hearings or

---

[7] Two other federal law enforcement agencies refused to provide *amici* with data, despite a FOIA request. *See Myth of Personal Liability* at 49 n.191. But these agencies have the same incentives as the BOP to settle only on terms that make the settlement payable through the Judgment Fund.

[8] *See* Michael W. Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U. Rich. L. Rev. 281, 297 & n.108 (1980); *see also* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 Geo. L.J. 65, 66 (1999); Gail Donoghue & Jonathan I. Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. Sch. L. Rev. 447, 452 n.18 (1998).

even more informal reports, and they define "success" far more narrowly than most experts do. *See Measuring Success* at 812 & n.13.

In a recent empirical study, one of us concluded that—depending on procedural posture, presence of counsel, and type of case—success rates for *Bivens* suits actually range from 16% to more than 40%, which is orders of magnitude greater than earlier estimates. *Id.* at 813. These data offer sound reason to doubt yet another argument often advanced to diminish the practical importance of *Bivens* cases.

a. Study Design

This study investigated the outcomes of *Bivens* suits filed from 2001 to 2003 in five federal district courts: the Eastern and Southern Districts of New York, the Southern District of Texas, the Eastern District of Pennsylvania, and the Northern District of Illinois. *Id.* at 832.[9] Great care was taken to ascertain the success of *Bivens* cases by properly defining the numerator (criteria for determining success) and the denominator (criteria for inclusion as a *Bivens* case). *Id.* at 833.

Starting with the numerator, success was defined using a standard definition borrowed from influential

[9] The time period was chosen partly because of the likelihood that cases filed during the period would have been resolved by the time the data were collected. *See Measuring Success* at 832 n.126. Additionally, the law relating to *Bivens* claims remained relatively stable from 2001 to 2003. *Id.* The five districts were chosen largely because they are among the busiest federal courts in the country. *Id.*

empirical studies: success included judgment for the plaintiff, on-the-record settlement, voluntary dismissal, and stipulated dismissal (all of which are common ways of implementing settlements).[10] *Id.* Where both *Bivens* and FTCA claims were brought in parallel, a settlement was considered to indicate a successful *Bivens* case unless the *Bivens* claims had already been dismissed. *Id.*

Turning to the denominator, cases were considered for inclusion only where three factors were present: (1) at least one defendant was an individual federal officer, (2) the Constitution was referenced in the pleadings, and (3) the plaintiff sought monetary damages. *Id.* at 833–34. Dockets were then reviewed to determine whether a *Bivens* claim was present. *Id.* at 834. The study identified nearly 250 *Bivens* suits with final dispositions. *Id.* at 835.[11]

---

[10] *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1592–93 (2003); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 726–27 (1988). Of these three possibilities, the voluntary dismissal is perhaps the most controversial. Although many such dismissals indicate settlement, some result from other causes, including plans to refile elsewhere or the realization that a claim is without merit. *See* Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. Empirical Legal Stud. 111, 115–18 (2009). The author of the *Bivens* study examined individual docket sheets to eliminate, so far as possible, voluntary dismissals for reasons other than settlement. *See Measuring Success* at 833.

[11] Additional detail about study methodology can be found at *Measuring Success* at 832–35.

b. Results

Starting with the numerator and denominator that we have just described, the overall success rate of *Bivens* claims is approximately 16%.[12] *Id.* at 837. That figure rises to 20% if we exclude from the denominator cases that were dismissed *sua sponte* under 28 U.S.C. § 1915—which makes sense, since such cases do not impose any burdens of discovery or pose any risk of personal financial liability. *Id.* at 840–41. Focusing only on cases in which an answer or motion was filed—a step justified for the same reasons just noted—the overall success rate increases to about 30%. *Id.* at 841–42. Finally, looking only to *Bivens* cases where plaintiffs have counsel, the overall success rates equal or exceed 40% in three of the five districts. *See id.* at 839.[13]

3. Implications of the Empirical Findings

The single clearest upshot of the empirical findings is simply summarized: to the extent the Court is worried about over-deterrence, it needn't worry much at all. The best available evidence shows that officers and agencies face virtually no risk of financial liability from *Bivens*

---

[12] Notably, where *Bivens* cases are *not* successful, the data do not show a multitude of cases in which federal officers are put through burdensome litigation. To the contrary, ~21% of cases were screened by district courts on the ground that they were frivolous, ~15% were dismissed for failure to exhaust administrative remedies, and a substantial number were dismissed for failure to prosecute or amend in response to a court order. *See Measuring Success* at 845.

[13] Further explanations for—and qualifications of—these figures are set forth in the article. *See Measuring Success* at 839–45.

lawsuits. *Bivens* cases are also more meritorious—and thus more important to victim compensation, vindication of constitutional rights, and the rule of law—than had been previously assumed by some jurists. Hostility to *Bivens* cannot justifiably be predicated on concerns about over-deterrence or lack of merit.

In truth, the existence of *Bivens* liability for individual federal officers imposes exceedingly limited "burdens on Government employees who are sued personally," few "costs and consequences to the Government itself," and limited "impact on governmental operations systemwide." *Ziglar*, 137 S. Ct. at 1858. With the specter of financial ruin taken out of the equation, federal officers need not fear a lawsuit so much that they "second-guess difficult but necessary decisions" or "refrain from taking urgent and lawful action." *Id.* at 1861, 1863. Instead, deterrence comes in more modest form, from the risk of discovery and exposure, trial, and a finding of liability by a neutral decisionmaker. "[T]he threat of litigation and liability will adequately deter federal officers for *Bivens* purposes, no matter that they . . . are indemnified by the employing agency." *Malesko*, 534 U.S. at 70 (citing *Meyer*, 510 U.S. at 486). This baseline level of deterrence, without a realistic threat of paying damages, does not create any credible risk of scaring federal officers into paralysis.

Nor are agencies' budgets affected by the risk of *Bivens* liability, because agencies and their lawyers creatively invoke the Judgment Fund to cover payments. With a central government fund available, "the tort and monetary liability mechanisms of the legal system" will not unduly affect the "formulation and implementation of public policies." *Ziglar*, 137 S. Ct. at 1858.

These conclusions have important implications for the Court's "new context" and "special factors" limitations on *Bivens* remedies. At a general level, to the extent either limitation may be applied with exceptional strictness due to fear of personal or agency financial liability, there is no empirical foundation for such a harsh implementation (which could effectively read *Bivens* out of existence). More narrowly, and perhaps more pressing here, some of the "special factors" that the Court has described are expressly entangled with unfounded assumptions about the dangers of individual liability. For example, the Court has warned against extending *Bivens* to certain national security contexts because "[t]he risk of personal damages liability" is "more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy" than "a claim seeking injunctive or other equitable relief." *Id.* at 1861. The *en banc* Fifth Circuit, in turn, articulated the same concern below in its "special factors" analysis. *See Hernandez v. Mesa*, 885 F.3d 811, 819 (5th Cir. 2018) (en banc) ("Implying a private right of action for damages in this transnational context increases the likelihood that Border Patrol agents will 'hesitate in making split second decisions.'" (citation omitted)).

Both of these analyses rest on a doubtful factual proposition: namely, that federal officials actually face a risk of financial liability and will, as a result, alter their conduct on the ground. There is no empirical evidence that allowing a damages remedy against rogue federal agents will stunt the initiative of their more responsible colleagues—and there is now evidence that it won't pose any credible threat to their financial well-being. Because *Bivens* has little appreciable financial impact on federal

officers or agencies, there is no need for a rigid approach to "special factors" driven by fear of over-deterrence.

II. THE SEPARATION OF POWERS AND FEDERAL CONFLICTS OF INTEREST

In addition to personal financial risk, the Court has repeatedly invoked separation of powers concerns as a basis for limiting *Bivens* remedies. *See Ziglar*, 137 S. Ct. at 1857 ("When a party seeks to assert an implied cause of action under the Constitution itself . . . separation-of-powers principles are or should be central to the analysis."); *Bush*, 462 U.S. at 390. The Court has further explained that separation of powers concerns are central to the "special factors" analysis: "[T]he inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Ziglar*, 137 S. Ct. at 1857–58.

Properly understood, however, separation of powers principles cut decisively in favor of recognizing a *Bivens* remedy in cases like this one—where, to borrow Justice Harlan's deservedly famous phrase, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment). When the political branches fail to provide an adequate alternative remedy for the violation of constitutional rights by a rogue federal agent, it is up to the courts to ensure that checks and balances prevail.

To start with first principles, judicial authority to recognize damages remedies for constitutional torts has a strong statutory and historical pedigree. The Court's power to "imply a new constitutional tort . . . is anchored in [its] general jurisdiction to decide all cases 'arising

under the Constitution, laws, or treaties of the United States.'" *Malesko*, 534 U.S. at 66 (quoting 28 U.S.C. § 1331). Moreover, as one of us (and a co-author) have shown, there is a potent case that Congress has knowingly ratified the *Bivens* decision and its early progeny:

> Congress has taken steps to preserve and ratify the *Bivens* remedy with amendments to the Federal Tort Claims Act (FTCA) that took effect in 1974 and 1988.
>
> In 1974, responding to concerns with the adequacy of a *Bivens* remedy, Congress expanded the right of individuals to sue the government itself for certain law enforcement torts. At the time, Congress deliberately chose to retain the right of individuals to sue government officers for constitutional torts and rejected draft legislation from the Department of Justice that would have substituted the government as a defendant on such claims.
>
> Similarly, in the Westfall Act of 1988, Congress took further steps to solidify the *Bivens* remedy. The Westfall Act virtually immunizes federal government officials from state common law tort liability, substituting the government as a defendant under the FTCA for these claims. In the course of doing so, it declares that the remedy provided against the federal government shall be deemed "exclusive of any other civil action or proceeding for money damages . . . against the employee

> whose act or omission gave rise to the claim." In order to preserve the *Bivens* action, Congress declared the exclusivity rule inapplicable to suits brought against government officials "for a violation of the Constitution of the United States."

James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 121–22 (2009) (citations omitted). It is thus beyond doubt that federal courts are empowered to recognize *Bivens* remedies in appropriate cases.

Of course, the Court has always held that the judicial power to recognize remedies for constitutional torts must be exercised with due respect for congressional decisions about appropriate redress for unconstitutional acts. *See, e.g.*, *Bush*, 462 U.S. at 378 ("When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised."); *see also Ziglar*, 137 S. Ct. at 1858 ("[I]f there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action."); *Schweiker*, 487 U.S. at 423 ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."). These cases hold that "both branches are constitutionally empowered, within the limits of their institutional capabilities, to create remedial systems for fully effectuating the substantive protection afforded by [the Constitution]." Walter E.

Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1552 (1972); *see Missouri, Kansas & Texas R. Co. of Texas v. May*, 194 U.S. 267, 270 (1904) ("[I]t must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.").

But the very nature of constitutional rights is that they are, at times, counter-majoritarian. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1136 (2016) (Thomas, J., concurring in the judgment) ("The Framers understood the tension between majority rule and protecting fundamental rights from majorities."). There may be circumstances in which the political branches—for reasons ranging from approval to apathy—are unwilling to afford remedies for rights violations by federal agents. When that occurs, "and where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens*, 403 U.S. at 392 (citation omitted).

This rule partly reflects our longstanding national commitment to affording remedies for the violation of constitutional rights. *See Marbury v. Madison*, 5 U.S. 137, 163, 1 Cranch 137 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *see also Malesko*, 534 U.S. at 70 (observing that the Court has allowed *Bivens* causes of action to plaintiffs "who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct"). For those "substantive legal norms . . . declared to be in the Constitution, there is much to be said for a judicial prerogative to fashion remedies

that give flesh to the word and fulfillment to the promise those norms embody." Dellinger, 85 Harv. L. Rev. at 1534; *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1427 (1987) (explaining that governments that act unconstitutionally "must in some way undo the violation by ensuring that victims are made whole"). Although redress may at times be imperfect, "effective remedies have always been available for most violations of legal rights, and of constitutional rights in particular." Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1786 (1991); *see also id.* at 1778.

The importance of *Bivens* remedies also arises from the clear conflict of interest that would exist if Congress could insulate the federal government from liability for its own unconstitutional acts. In 42 U.S.C. § 1983, Congress statutorily enforced the Constitution against state and local officials. As we explain above, there is a strong case that it did the same at the federal level by ratifying *Bivens* through the FTCA and the Westfall Act. *See* Pfander & Baltmanis, 98 Geo. L.J. at 121–22. But were the Court to conclude that Congress did not do so—or that Congress would be free to undo such remedies—then it would invite a dangerous form of self-dealing, in which Congress subjects state and local officials to damages for constitutional violations but allows their federal counterparts to flout the Constitution with impunity. *See Harlow*, 457 U.S. at 814 ("In situations of abuse of office, an action for damages may offer the only realistic avenue

for vindication of constitutional guarantees." (citations omitted)).[14]

If congressional failure to create a damages remedy were the end of the matter, Congress could render the Constitution wholly unenforceable in a major category of cases: namely, those in which a federal official can simply act, without sufficient warning to permit a suit for injunctive relief and without initiating a lawsuit in which the constitutional claim could be raised defensively. Members of this Court have warned that an entity with sovereign immunity can defy applicable laws and regulations, *Michigan v. Bay Mills Indian Community*, 582 U.S. 782, 823–24 (2014) (Thomas, J., dissenting), or "seize property with impunity, even without a colorable claim of right," *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1655 (2018) (Roberts, C.J., concurring). The same is true of governmental employees who will suffer no other sanction for wrongdoing and against whom no cause of action for damages is recognized. Such officers can shoot a child—and no court can do anything about it, or even inquire into the surrounding circumstances. If there is no *Bivens* action, the complaint must be summarily dismissed immediately after filing; the shooter need not even file an answer.

---

[14] Before the Westfall Act, there was a tradition of state law tort claims against federal officers for rights-violating actions within the scope of their employment. Officers could defend such tort claims on the basis of their federal authority, but that defense failed if their acts had been unconstitutional. *See* Amicus Br. of Carlos M. Vásquez and Anya Bernstein in Support of Petitioners. The Westfall Act largely preempted such claims. In the post-Westfall world, it will sometimes be *Bivens* or nothing when bad-faith actors violate the Constitution.

To enable constitutional rights to achieve their purpose and be fully enforced, the judiciary—the hoped-for "impenetrable bulwark against every assumption of power in the legislative or executive"—must ensure the availability of constitutional remedies. James Madison, 1 *Annals of Congress* 439 (1789). This response to the risk of federal lawlessness respects both federalism and the separation of powers by ensuring that the Constitution remains the supreme law of the land for all officials. As Professors Fallon and Meltzer have observed:

> Within the constitutional scheme, an important role of the judiciary is to represent the people's continuing interest in the protection of long-term values, of which popular majorities, no less than their elected representatives, might sometimes lose sight. The Constitution thus contemplates a judicial "check" on the political branches not merely to redress particular violations, but to ensure that government generally respects constitutional values—one of the hallmarks of the rule of law.

Fallon & Meltzer, 104 Harv. L. Rev at 1788.

In that respect, the constitutional plan protects itself through remedies recognized by an independent judiciary when the political branches stand silent. The judiciary thus vindicates the "very purpose of a Bill of Rights . . . to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638 (1943).

To be sure, courts must pay "particular heed" to "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Bush*, 462 U.S. at 378. It is often imprudent for judges to disrupt delicate remedial schemes. *Id.* at 388. But where Congress has provided no remedial scheme *at all* and has thus effectively immunized rogue federal agents from constitutional constraint, the Court vindicates rather than undermines separation of powers principles by invoking *Bivens*. While "special factors" deserve a place in the analysis, they should not be read to disable the Judiciary from playing its traditional role in addressing the constitutionality of official conduct.

* * * * *

It is no secret that the Court now looks skeptically on *Bivens* remedies. That skepticism has most recently been expressed in a sweeping view of the "new context" and "special factors" limitations. To the extent this outlook is grounded in fear of timidity induced by the risk of personal or agency financial liability, it lacks empirical support. And to the extent it is grounded in separation of powers principles, it unduly minimizes the structural importance of a judicial check on lawlessness at the federal level.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that this Court should reverse the judgment below.

Dated: August 9, 2019

Respectfully submitted

JOSHUA MATZ
Counsel of Record
BENJAMIN D. MARGO
Kaplan Hecker & Fink LLP
350 Fifth Avenue
Suite 7110
New York, NY 10118
(212) 763-0883
jmatz@kaplanhecker.com

Counsel for Amici Curiae