No. 21-147

IN THE
Supreme Court of the United States

ERIK EGBERT,

Petitioner,

v.

ROBERT BOULE,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF PROFESSOR JENNIFER L. MASCOTT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JENNIFER L. MASCOTT
R. TRENT MCCOTTER
Counsel of Record
SEPARATION OF POWERS CLINIC
GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE
ANTONIN SCALIA LAW SCHOOL
GEORGE MASON UNIVERSITY
3301 FAIRFAX DR.
ARLINGTON, VA 22201
(202) 706-5488
rmccotte@gmu.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Jennifer Mascott is an Assistant Professor of Law and Co-Executive Director of The C. Boyden Gray Center for the Study of the Administrative State at the Antonin Scalia Law School of the George Mason University. The *amicus* has an interest in preservation of the U.S. Constitution's separation of powers constraints on the exercise of federal government power. The academic scholarship of *amicus* analyzes the impact of the separation of powers on democratic accountability, the use of originalism as a mode of constitutional interpretation, and the relationship between historical practice and meaning and the proper application of constitutional principles. This brief focuses on the unique constitutional limitations on federal jurisdiction and their implication for assertions of relief under *Bivens*.

Amicus's article *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018), regarding the original meaning of the Appointments Clause, was cited in separate opinions in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021); *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, 140 S. Ct. 1649 (2020); *Ortiz v. United States*, 138 S. Ct. 2165 (2018); *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018); and *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929 (2017).

---

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and her counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

There is no longstanding provenance for judicially implied constitutional causes of action like those created in *Bivens*. Rather, there was a historical tradition of federal courts entertaining state common-law damages claims against federal officials, typically for trespass. The nature and scope of that tradition demonstrates just how far afield from historical practice *Bivens* strayed when it announced a new cause of action assertedly derived from the Constitution itself in 1971.

In the 18th and 19th centuries when federal courts considered cases involving longstanding state common-law causes of action, courts were not "fashioning" or "creating" or even expanding causes of action but instead applying longstanding law to defendants who happened to be federal officials. The suits sought to vindicate those longstanding common-law interests, not a separate category of allegedly constitutional rights. Indeed, from 1789 when lower federal courts under the new Constitution first opened their doors after their creation in the Judiciary Act, through the Civil War, constitutional questions rarely arose in the context of lawsuits against federal officials in Article III courts. Where they did, such constitutional questions tended to arise indirectly, as *defenses*, not as elements of the plaintiffs' actions. The lack of federal question jurisdiction until 1875, *see* Act of Mar. 3, 1875, § 1, 18 Stat. 470, led to this procedural posture, and early suits against federal officers often necessarily arose in state court. Nonetheless, that jurisdictional vacuum facilitated a legal landscape in which there was no widespread early practice of

federal judicial inferences of implied constitutional claims. And even scholars who note originalist support for the existence of federal common law pre-*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), often acknowledge the limited nature of such common-law authority—in contrast to a freewheeling ability for Article III judges to create and recognize developing causes of action as they saw fit based on policy considerations. *See, e.g.*, Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 Va. L. Rev. 1, 1–9 (2015) (suggesting that federal common law would not improperly stray into judicial lawmaking if it incorporated firmly grounded sources of authority "such as widespread customs, traditional principles of common law, or the collective thrust of precedents from across the fifty states"); Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 Va. L. Rev. 609, 610–16 (2015) (distinguishing federal judicial application of "general law" such as transnational legal authorities including "the law merchant, the law maritime, and the law of state-state relations" from the modern concept of "federal common law," which the Supreme Court did not recognize "[f]rom the Founding through the nineteenth century").

Bivens reversed course from the early practice. It created a direct cause of action for damages for violations of asserted constitutional rights—a cause of action unauthorized by any statute and previously unknown to the history and tradition of the federal judiciary. For the first time, federal courts were not just applying longstanding, generally applicable

common-law damages actions to federal officials, but instead were creating new damages actions allegedly under federal law that applied solely to federal defendants. *See* Part I, *infra*. The limited nature of the federal government newly created under the 1788 Constitution is in irreconcilable tension with, and provides no basis for, a new 20th-century, judicially driven federal damages regime like the longstanding common law regime in place at the state level prior to federal constitutional ratification. The very nature of the bargain between state conventions ratifying the U.S. Constitution and the federal government was that the federal government would be constrained by the procedural and subject-matter limitations of the text that the popularly elected conventions ratified. Under that text and constitutional structure, statutes subject to rigorous Article I procedural requirements are the mandated principal source for new legal obligations, not judicially inferred damages actions from newly ratified substantive constitutional text.

Separation of powers principles inherent to that text explain why federal courts historically avoided creating damages actions absent statutory authorization from Congress. *See* Part II, *infra*. The core feature of the federal constitutional system is its character as a government of limited powers. *See* The Federalist No. 45 (James Madison) ("[T]he powers delegated by the . . . Constitution to the federal government are few and defined."). The "legislative power" to create new federal causes of action is vested with Congress pursuant to Article I, not with the courts. Article III's limitation of federal court jurisdiction to "cases" and "controversies" provides an

additional indication that the courts were founded primarily to hear causes of action created via bicameralism and presentment, not to manufacture such actions in the first instance. Moreover, by inserting courts into judgments about sovereign and political trade-offs, *Bivens* claims are especially corrosive to separation of powers protections.

Liberty is best protected by enforcing the Constitution's reservation of limited powers to each branch. "In order to remain faithful to this tripartite structure, the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016). *Bivens* is such an intrusion.

Finally, disavowal of *Bivens* as lacking deep-seated historical origins would have no bearing on the lawfulness of recently reaffirmed equitable doctrines like the negative injunctive power countenanced in *Ex Parte Young*. The injunctive relief available under *Young* has been tied to origins dating back to the Judiciary Act of 1789, and even earlier in English equity history, and involves limited relief to halt unlawful and unauthorized government official actions rather than affirmative implications of private causes of action for monetary damages beyond the scope of clear legal text. *See* Part III, *infra*.

ARGUMENT

I. *Bivens* Sharply Broke from Tradition.

As *Bivens* and its supporters frame the narrative, longstanding American tradition justifies the practice of federal courts fashioning and making damages

actions for "constitutional violations." *See, e.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395–96 (1971); Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 Notre Dame L. Rev. 1869, 1874, 1879–82 (2021) ("[J]udge-made remedies for damages arising out of constitutional violations by federal officers dated all the way back to the Founding."); Carlos M. Vázquez, Bivens *and the* Ancien Régime, 96 Notre Dame L. Rev. 1923, 1929 (2021); Brief of *Amicus Curiae* the Institute for Justice at 1–2, 6–15, *Hernández v. Mesa*, 140 S. Ct. 735 (2020).

That is incorrect. The relevant history involved distinct legal authorities that do not justify the *Bivens* doctrine of inferring causes of action and monetary damages enforceable in Article III courts from the text of the federal Constitution, which created a government of specifically limited powers. *Bivens* and recent scholarship implicitly making the claim that *Bivens* had an originalist foothold do not rely on historical American cases where a court awarded damages against an official pursuant to a cause of action alleging a constitutional violation. *See* Part I.A, *infra*. Instead, they generally cite cases built on long-existing common-law claims. The distinction between application of preexisting state common-law claims and creation of new federal claims is considerable. *See* Part I.B, *infra*. Historical cases where federal defendants were ordered to pay damages pursuant to longstanding generally applicable common-law claims do not provide a constitutional basis for judicial definition of the

contours of a federal cause of action for damages in Article III courts of limited subject-matter jurisdiction. *Cf.* Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1704 (2020) (describing a "federal court's *subject-matter* jurisdiction" as "affirmatively limited by the Constitution" while noting the role of Congress in using enumerated powers to define other aspects of federal jurisdiction). More, traditional common-law causes of action were informed by historical statutory and international laws such that by the time of the Founding, those longstanding forms of relief were no longer truly judicially crafted and expanded, in contrast to *Bivens* claims based on asserted constitutional violations and judicially crafted relief.

For all these reasons, there is no historic tradition justifying *Bivens* claims as a particular mechanism for federal court jurisdiction and provision of relief. The tradition of accountability for federal officer actions outside the scope of their lawful authority is an important one. *See, e.g.*, ARCHIBALD MACLAINE, CONVENTION OF NORTH CAROLINA (July 24, 1788), *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 46, 47 (Jonathan Elliot ed., 1836); JOHN MARSHALL, VIRGINIA RATIFYING CONVENTION (June 20, 1788), *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1430, 1432 (John P. Kaminski et al. eds., 1993) (asserting that an individual could apply for redress in a local tribunal were a federal officer to assault him or trespass on his property). *See generally* Jennifer L. Mascott, *The Ratifiers' Theory of Officer*

Accountability, Part III (2021) (working paper, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3992050). But it does not translate to the federal judiciary's fashioning of new forms of relief within an Article III system that the Constitution assigned to Congress to constitute and regulate. *See* U.S. Const. art. I, § 8, cl. 9; *id.* art. III, § 1.

A. Historically, Officer Damages Suits Pursued Common-Law Claims and Rarely Involved Constitutional Questions.

The tradition in 17th- and 18th-century England and in early America was one of plaintiffs bringing claims for asserted violations of the common law, not for violations of asserted constitutional rights.

1. In historic England, individuals could bring common-law claims for damages against Crown officials who had been acting in their official capacities but assertedly outside the scope of their lawful authority—typically trespass or false imprisonment, claims, for example, to challenge improper arrests or searches. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 134 (2009); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 1–2, 12 (1963) ("From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown. . . . If the subject was the victim of illegal official action, in many cases he could sue the King's

officers for damages. . . . This was the situation in England at the time the American Constitution was drafted."). In defense, the law would recognize an officer's contention that his actions had indeed remained within his legal authority.

For example, a false-imprisonment claim might be met with the defense that the officer had acted pursuant to a lawfully valid warrant. But if the asserted source of authority subsequently turned out to be void, the defense would not succeed. *See, e.g.*, II MATTHEW HALE, HISTORIA PLACITORUM CORONAE: HISTORY OF THE PLEAS OF THE CROWN 112 (1736) (writing that where a "warrant to apprehend all persons suspected" of a robbery was later determined to be "a void warrant," the official could not raise it as a "sufficient justification" against a common-law claim for "false imprisonment").

Similarly, in the 18th-century case of *Entick v. Carrington*, the plaintiff John Entick brought a claim for trespass against the King's Chief Messenger and three others who "with force and arms" had broken into Entick's home, ransacked it, and carried away hundreds of documents. *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) 807. Carrington had acted pursuant to a general warrant issued by Lord Halifax. *Id.* at 808. Because the warrant was deemed illegal, Entick prevailed and recovered substantial sums against Halifax and the officers who had conducted the search. *See Boyd v. United States*, 116 U.S. 616, 626 (1886) (describing *Entick*).

These English precedents were not premised on a right to sue directly for violating prohibitions against

invalid warrants. Rather, the cases applied established common-law causes of action to defendants who happened to be government officials. *See* Brief for the Respondents at 9–11, *Bivens*, 403 U.S. 388 (outlining the English tradition). "Against this background of English law, . . . it is not at all surprising that there is nothing in the Fourth Amendment to indicate that a new, federal cause of action for damages was being created." *Id.* at 10.

From the very start of the new federal government in America, similar to those English practices, government officers were subject to generally applicable common-law damages actions like private parties. *See id.* at 10–11; JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 26–27 (2012) (describing the relatively routine nature of suits against federal officials with relevant statutory authority claimed in defense, such as in suits against customs collectors for improper seizures and the collection of excessive duties); *Hernández v. Mesa*, 140 S. Ct. 735, 748 (2020) ("[T]he traditional way in which civil litigation addressed abusive conduct by federal officers was by subjecting them to liability for common-law torts" and such claims could be brought in state or federal court for many years). *See also, e.g.*, Judiciary Act of 1789, § 28, 1 Stat. 73, 87–88 (discussing remedies for "the defaults and misfeasances in office" committed by a marshal's deputy and the degree to which marshals are held answerable for fulfilling certain duties). Federal officials in turn introduced questions about the legality of government actions as a *defense*. *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (observing that

federal law "supplie[d] the defense, if the conduct complained of was done pursuant to a federally imposed duty"). *See also, e.g.*, An Act to Regulate the Collection of Duties, § 36, 1 Stat. 29, 48 (1789) (providing that reasonableness of a seizure of goods would provide the basis for a defense against "liab[ility] to action, judgment or suit, on account of such seizure").

Indeed, the mechanism of common-law liability to ensure federal officer accountability in lawfully performing their duties arose during the public debates on ratification of the U.S. Constitution. During the North Carolina ratification debates, for example, there was extensive discussion revealing an expectation that the preexisting practice of bringing common-law suits against officers would continue under the Constitution. When Joseph Taylor argued that impeachment would be impracticable for rank-and-file executive officers dispersed throughout the country, Archibald Maclaine replied that citizens harmed by such officers' behavior "would have redress in the ordinary courts of common law." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 45–47 (Jonathan Elliot ed., Washington, Jonathan Elliot 2d ed. 1836). Richard Dobbs Spaight observed that "it was very certain and clear that, if any man was injured by an officer of the United States, he could get redress by a suit at law," and future Supreme Court Justice James Iredell agreed that "it is evident that an officer may be tried by a court of common law." *Id.* at 36–37.

During the First Congress, it was apparent that Members understood that under the new federal system, litigants would, and should, be able to file common-law claims against federal officials for wrongdoing in the course of their duties. Congress enacted several provisions assuming the personal liability of various deputy officials and the principals to whom they reported. For example, Congress provided that in the event a customs collector died or became unable to perform his responsibilities, his duties would "devolve on his deputy . . . (for whose conduct the estate of such disabled or deceased collector shall be liable)." Act of Aug. 4, 1790, § 8, Ch. 35, 1 Stat. 145, 155. Similarly, federal marshals "had to assume personal liability for the misdeeds of their deputies." Judiciary Act of 1789, § 27, 1 Stat. 73, 87. But these provisions were built upon preexisting common-law causes of action. *See also* Jennifer L. Mascott, *Who are "Officers of the United States"?*, 73 Stan. L. Rev. 443, 515–20 (2018) (discussing the statutory provisions); *Hernández*, 140 S. Ct. at 742 (highlighting the distinction between "a common-law court, which exercises a degree of lawmaking authority, flesh[ing] out the remedies available for a common-law tort," and the inference of authorization for a private damages suit from a lawmaking body's enactment of a "provision that creates a right or prohibits specified conduct" but does not specify the availability of monetary relief).

2. Despite generally applicable, preexisting common-law claims serving as the mechanism for officer accountability in English and early American federal practice, *Bivens* and related scholarship

suggests this early practice provides precedent for judicial creation of federal causes of action for damages based on rights derived directly from the Constitution. *See Bivens*, 403 U.S. at 395–96; *e.g.*, Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 19 Cato Sup. Ct. Rev. 263, 270 (2020) (asserting a historical "pattern of judge-made tort remedies" including "cases in which the plaintiff's underlying claim was that the defendant had violated the Constitution."). But officer suits premised on longstanding common-law actions are significantly distinct from judicial inferences of legal claims to entitlement to damages based on a raw violation of the federal Constitution. *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."); *Gamble v. United States*, 139 S. Ct. 1960, 1981–82 (2019) (Thomas, J., concurring) (contrasting "a common-law legal system in which courts systematically developed the law through judicial decisions apart from written law" from "our federal system" in which "[t]he Constitution tasks the political branches—not the Judiciary—with systematically developing the laws that govern our society").

Only two of the historic cases that *Bivens* itself claimed for support were cases involving a federal cause of action. *See* 403 U.S. at 395–96 (describing just two cases decided prior to 1900 involving such federal claims). Both were premised on a federal *statutory* cause of action that required marshals to post a bond and expressly permitted suits against that

bond for breach of duties. *See Lammon v. Feusier*, 111 U.S. 17, 17–18 (1884); *West v. Cabell*, 153 U.S. 78, 84–85 (1894). Far from supporting *Bivens*, these cases demonstrate that Congress was aware of how to create express statutory damages actions and had a prior practice of operating accordingly.

Scholarly works analyzing *Bivens*'s own lack of historical lineage identify a handful of additional early American cases involving federal law that assertedly support the creation of a direct cause of action for violations of the Constitution. *See, e.g.*, Vladeck, *Disingenuous Demise*, 19 Cato Sup. Ct. Rev. at 267–70. But the invoked cases typically involved established common-law causes of action where the defendants raised questions of the scope of their federal *statutory* authority to act as defenses, meaning constitutional claims did not directly arise, let alone as elements of the plaintiffs' claims. *Cf.* Sachs, *Unlimited Jurisdiction*, 106 Va. L. Rev. at 1712 ("Jurisdictional questions at the Founding were fundamentally questions of powers, not rights, and nothing has happened since to change that.).

Scholars often invoke *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), as providing historical precedent for *Bivens*, *cf., e.g.,* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 Cal. L. Rev. 933, 943 (2019), but the cause of action in *Little* was for common-law trespass, not for any violation of federal law, let alone the Constitution itself. Captain George Little captured a Danish boat pursuant to President Adams's order to seize boats coming from French ports, and the ship's owner sued for trespass, seeking damages, and the Court held that the relevant federal

statute permitted the seizure only of ships going *to* a French port. *Id.* at 170, 177–78. Therefore, the ship's seizure lacked a legal basis. Without the defense of a lawfully authorized seizure, Little was found liable for a "plain trespass." *Id.* at 179.

Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806), has also been cited as providing historical support for the category of relief made available in *Bivens*. *Cf, e.g.*, Pfander & Baltmanis, *Rethinking* Bivens, 98 Geo. L.J. at 124 & n.28 (listing numerous early cases involving common-law actions such as trespass, mandamus, assumpsit, and ejectment and contending their history lends support to the manifestation of *Bivens* in the 20th century). But this case, too, involved no federal cause of action premised on violation of a federal right. Rather, this Court concluded that the plaintiff's "action [for] trespass" succeeded against federal defendants because they had entered the plaintiff's house to collect a fine pursuant to a court-martial that this Court later deemed statutorily invalid. *Wise*, 7 U.S. at 335, 337.

Other cited early cases, *cf.* Vladeck, *Disingenuous Demise*, 19 Cato Sup. Ct. Rev. at 267–70 (cataloguing cases), fare no better. Claims brought against a federal official pursuant to a common-law cause of action, with no contention that a federal official violated the complainant's constitutional rights, do not justify the *Bivens* regime. As explained above, the question of the lawfulness of the challenged federal action in such cases arose only in the course of the officials' claimed defenses, and typically relied on statutory authorization for the relevant action—not authority allegedly directly derived from the

Constitution. *See, e.g.*, *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 2 (1817) (action for "replevin . . . for the restoration of the [plaintiff's] property," and the defense turned on whether the seizure of cargo was proper under the Embargo Act of 1808); *The Apollon*, 22 U.S. (9 Wheat.) 362, 363–64 (1824) (libel for *in rem* seizure of ship, and the defense turned on whether the Collection Act of 1799 authorized the seizure); *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 138 (1836) ("action of assumpsit" for overpaid duties, and the defense turned on whether the goods qualified as wool shawls under the federal import statute); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 128, 137 (1852) ("action of trespass," and the defense turned on whether the defendant could seize property pursuant to military commander's order during war with Mexico); *Buck v. Colbath*, 70 U.S. (3 Wall.) 334, 334–37, 342, 346–47 (1866) (an action for trespass, and the defense turned on whether the property had been properly seized pursuant to a writ of attachment); *Bates v. Clark*, 95 U.S. 204, 204–05 (1877) (an action for trespass, and the defense turned on whether "this whiskey was seized in Indian country, within the meaning of the act of 1834 and the amendment of 1864"); *Belknap v. Schid*, 161 U.S. 10, 18 (1896) (involving a federal suit for patent infringement).

This survey demonstrates a noticeable absence of historical cases in which federal courts recognized non-statutory damages actions alleging violations of constitutional rights. This absence is telling. If litigants challenging federal officer action prior to the challenge brought in *Bivens* had "thought the Fourth Amendment [or any other constitutional provision]

created a federal damage remedy, . . . they would have had no trouble in stating it in their complaint and would not have relied upon state law." Brief for the Respondents at 19, *Bivens*, 403 U.S. 388. But apparently no one did.[2]

B. Common-Law Suits Do Not Justify the *Bivens* Regime.

Given all of this, it is difficult to contend there is a long history of courts making or fashioning remedies for unconstitutional conduct by federal officials.

The historical fact of damages relief for harm or misconduct by federal officials, under the entirely distinct construct of state common-law claims with the lawfulness of actions adjudicated as a defense, in no way stretches to demonstrate a historical practice justifying the new regime of *Bivens* under the rubric of implied federal constitutional law. Not only do the elements of common-law claims differ substantially from *Bivens* claims, but the accountability interests sought to be vindicated differ as well. The early common-law claims were not just constructs used to claim constitutional rights. The plaintiffs in those

---

[2] Historical research on judgments supports this contention. One study looked at decades' worth of congressional records where early federal officials sought indemnification from Congress after losing individual lawsuits for liability based on their official actions—and found that almost all of those incidents involving an official being "subjected to liability in trespass" in one form or another. 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, 1904–05 (2010).

cases wanted recovery for governmental official actions taken outside the scope of lawful authority and recovery under common-law tort theories. *See* Sachs, *Unlimited Jurisdiction*, 106 Va. L. Rev. at 1712 (noting the distinction between questions of federal power versus individual rights and that the former, not the latter, formed the basis for federal "[j]urisdictional questions at the founding"). *Cf. id.* at 1767–68 (distinguishing between constitutional limits derived from Congress's restricted "enumerated powers" versus assertions of due process rights).

The availability of the suits was directed to accountability for government officials to remain within lawful constraints. *See, e.g.*, Brief for the Respondents at 10–11, *Bivens*, 403 U.S. 388 (reporting on the ratification debate discussion about the importance of common-law causes of action for providing government officer accountability). But more importantly, they were authorized by preexisting law in place at the time of the ratification of the Constitution, not attempts to assert new federal mechanisms for jurisdiction outside of the constitutionally constrained process for the creation of federal law under the federal constitution of limited enumerated powers.

Moreover, it is not fully accurate to rely on the characterization of "early republic damages liability doctrines" as "'judge-made'" to support *Bivens*'s creation of a cause of action, as those common-law rights had been created by "statutes, international treaties, and executive practice" that had been around for "centuries" and, thus, were already part of the preexisting legal landscape when the new federal

Constitution was ratified in 1788. Andrew Kent, *Lessons for* Bivens *and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers*, 96 Notre Dame L. Rev. 1755, 1777–78 (2021). At the very least, by the time of the Founding, such common-law claims could no longer be described as ongoing federal judicial creations. And as described further below, the separation of powers structural and procedural constraints embodied within the U.S. Constitution mean that federal courts are constrained in ways that would make their ongoing fashioning of new, or more expansive, implied causes of action inappropriate as the Article III judiciary's role within the constitutional system is distinct from the authority of earlier common-law courts, in any event. *See infra* Part II. *See also Alexander*, 532 U.S. at 286–87 (addressing the distinct powers and functions of Article III courts versus common-law courts).

Because of the significant differences demonstrated above, *Bivens* marked a dramatic sea change. *See Hernández*, 140 S. Ct. at 751. As Judge Bumatay summarized in his dissent below, after nearly two centuries of contrary practice, the Court in 1971 "concluded for the first time that the violation of a constitutional protection . . . could give rise to a cause of action for money damages against federal agents." Pet.App.11a–13a (Bumatay, J., dissenting from the denial of rehearing *en banc*). Justice Blackmun, too, in dissent at the time of *Bivens*, referenced the unique nature of the Court's creation of implied constitutional relief through monetary damages. *See Bivens*, 403 U.S. at 430 (Blackmun, J.,

dissenting) ("The Fourth Amendment was adopted in 1791, and in all the intervening years neither the Congress nor the Court has seen fit to take this step.").

The origins of *Bivens* claims and the theory underlying the implied causes of action are distinct from the claims' asserted historical tradition. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 727–29 (2004) (observing limitations on the authority of federal courts "to derive 'general' common law" and concluding that under the constitutional system "a decision to create a private right of action is one better left to legislative judgment in the vast majority of cases"). And the judicial management of *Bivens* claims is in significant tension with the federal constitutional structure of separated powers, which had long caused federal courts to avoid creating new damages actions absent congressional authorization. *See Alexander*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").

II. By Creating a New Federal Damages Action, *Bivens* Violated Key Separation of Powers Principles.

Judicial creation of *Bivens* actions is in tension with the foundational federal constitutional structure. *See Hernández*, 140 S. Ct. at 741 (observing that judicial recognition of implied causes of action creates "tension" with "the Constitution's separation of legislative and judicial power"). The fundamental nature of the newly created constitutional federal government in 1789 was that of limited, enumerated powers separated among three branches. *See* The

Federalist No. 45 (James Madison) ("[T]he powers delegated by the . . . Constitution to the federal government are few and defined."). *See also* U.S. Const. art. I, § 1 (legislative vesting clause); *id.* art. II, § 1, cl. 1 (vesting the executive power); *id.* art. III, § 1 (vesting just "judicial Power" in the federal courts including "such inferior courts as the Congress may from time to time establish").

New federal obligations and laws were limited by the Constitution to specific subject matters. *See, e.g.*, *id.* art. I, § 8 (specifying congressional powers); *id.* art. III, § 2 (allocating just the power to resolve "Cases" and "Controversies"). *See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."); Sachs, *Unlimited Jurisdiction*, 106 Va. L. Rev. at 1704 ("A federal court's writ may run as far as Congress, within its enumerated powers, would have it go."). And those new federal powers could be exercised only subject to certain stringent and precise procedural requirements such as bicameralism and presentment, subject to veto override procedures. U.S. Const. art. I, § 7. Congress through those procedural requirements is assigned the responsibility for enacting statutes creating federal jurisdiction over particular claims pursuant to specific terms. *See* U.S. Const. art. I, § 8, cl. 9; *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1015 (2020) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress . . . ." (internal quotation omitted)).

A hallmark of federal jurisdiction is therefore the existence of specific statutory authority for a court to hear a particular cause of action with the availability of certain relief. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander*, 532 U.S. at 286. A "cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter." *Id.* at 286–87.

By creating a new federal cause of action, *Bivens* violated the Constitution's division of powers by arrogating to the Court a power the Constitution vests solely with Congress. *See* Part II.A, *infra*. *Bivens* also violated a second core structural feature of the Constitution, which limits federal courts to the resolution of "cases" and "controversies." U.S. Const., art. III, § 1. Federal courts are in the business of *hearing* cases and controversies, not creating them. *See* Part II.B, *infra*.

Moreover, *Bivens* causes especially corrosive harms for separation of powers because it requires courts to make political value judgments about trade-offs between sovereign interests in finances and political goals. *See* Part II.C, *infra*. Finally, the correctness of *Bivens* cannot turn on the availability *vel non* of damages pursuant to other remedial schemes like the Westfall Act. *See* Part II.D, *infra*.

A. Under Article I, Congress Alone Is Vested With The Legislative Power.

Most fundamentally, the reason that the historical practice of federal courts has traditionally avoided the creation of new damages actions absent congressional

authority is rooted in Article I's exclusive vesting of "legislative Powers" in Congress alone. U.S. Const., art. I, § 1. The parameters of legislative power extend not just to the announcement of new substantive federal law but also to the methods of enforcement of federal law. *Alexander*, 532 U.S. at 286. *Cf. Marbury*, 5 U.S. at 176–77 (addressing the limited nature of the powers of the federal government and the importance of remaining within those constraints under a written Constitution).

Under the Constitution, the power to "[r]aise up causes of action" was vested solely with Congress, which acted accordingly from its earliest days. The Judiciary Act of 1789 specified in great detail the creation of several tiers of federal courts and delineated which courts could hear certain causes of action. Judiciary Act of 1789, 1 Stat. 73. For example, specific federal courts were created and then given jurisdiction to hear "civil causes of admiralty and maritime jurisdiction," "suits for penalties and forfeitures incurred[] under the laws of the United States," certain "alien su[its] for a tort," "suits at common law where the United States sue," *id.* § 9, suits against ambassadors and other public ministers, *id.* § 13, certain forfeitures of bonds, *id.* § 26, as well as removal jurisdiction from state courts, *id.* § 12, and appeals from state court cases that "draw[] in question the validity of a treaty or statute of, or an authority exercised under the United States," *id.* § 25.

The first Congress also created statutory damages actions for protections that were expressly mentioned in the Constitution itself. For example, the Patent Act of 1790 expressly created "an action . . . founded on

this act" whereby patent holders could sue for infringement and recover "such damages as shall be assessed by a jury," as well as forfeiture of any infringing creations. Patent Act of 1790, § 4, 1 Stat. 109. The Act established elements and defenses for an infringement claim. *Id.* § 6.

From the earliest days of the Republic, therefore, it has been Congress—not the Courts—that creates new damages actions. But *Bivens* arrogated to the Court that power, in violation of Article I.

B. Under Article III, Federal Courts Are Limited to Matters "of a Judiciary Nature."

A second core structural feature of the federal government is the constitutionally limited role of federal courts to the resolution of only certain enumerated matters. U.S. Const., art. III, § 1 (noting the congressional responsibility for creation of lower federal courts). The original constitutional structure relied so heavily on the limited nature of the federal governmental role, particularly in the only federal branch not electorally accountable to the people, that Article III permitted federal courts to hear only certain limited categories of matters—"Cases" and "Controversies." *See Marbury*, 5 U.S. at 177 (describing the role of the federal courts to "say what the law is" within the context of specific cases).

The "law of Art. III standing is built on a single basic idea—the idea of separation of powers." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Article III's limits ensure that "federal courts exercise 'their proper function in a limited and

separated government.'" *Id.* "Under Article III, . . . [f]ederal courts do not possess a roving commission to publicly opine on every legal question," nor do they have power to "exercise general legal oversight of the Legislative and Executive Branches, or of private entities." *Id.* Rather, "federal courts instead decide only matters 'of a Judiciary Nature.'" *Id.* (Madison, J.) (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (M. Farrand ed. 1966)). This structural reality, combined with the constitutionally ordained role of Congress and the President in the establishment of courts, causes of action, and permissible relief through statutory enactments, suggests that the entire *Bivens* enterprise of squinting to discern a cause of action from bare constitutional text is not only ahistoric but at odds with the Constitution's limited role for the judiciary. *Cf. Marbury*, 5 U.S. at 180 (emphasizing the importance of textual constraints in a "written constitution[]" that binds courts by law).

C. Courts Traditionally Disfavor Creating Damages Actions in Cases Raising Sovereign Interests, and *Bivens* Claims in Particular Thrust the Judiciary into the Political Sphere.

By imposing money damages in particular, *Bivens* claims potentially indirectly implicate constitutional doctrines providing strong protections for sovereign fiscs, a concept most clearly embodied in the Appropriations Clause. *Cf.* U.S. Const. art. I, § 7, cl. 1 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

Even though *Bivens* damages are payable by the officer personally and not by the Treasury, at least as a legal matter, such claims still "often create substantial costs, in the form of defense and indemnification," for the federal government itself. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017).

In other contexts, the Court has invoked the Appropriations Clause as a basis for steering clear of imposing damages actions in cases raising government interests, absent statutory authorization. For example, in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), the Court held that even "judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized" pursuant to the Appropriations Clause, which "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Id.* at 426, 428. *See also Pullman Const. Indus., Inc. v. United States*, 23 F.3d 1166, 1168 (7th Cir. 1994) (Easterbrook, J.) ("[M]onetary relief is permissible only to the extent Congress has authorized it, in line with Art. I, § 9, cl. 7 . . . ."). The same concern animated the Court's refusal to extend *Bivens* to claims against agencies. *See FDIC v. Meyer*, 510 U.S. 471, 486 (1994).[3]

---

[3] Even outside the federal context, the Court has resisted creating damages actions that may impose on sovereign fiscs, as demonstrated by the bar on using *Ex Parte Young* to obtain damages in potential conflict with the Eleventh Amendment,

Thus, notwithstanding *Bivens* itself, the Court has historically treaded particularly carefully when it comes to creating *damages* actions where sovereign interests are so clearly at stake. Imposing liability in such cases implicates especially heightened separation of powers concerns.

As this Court noted in *Ziglar*, "[c]laims against federal officials often create substantial costs, in the form of defense and indemnification." 137 S. Ct. at 1856. Resolution of the scope and contours of *Bivens* claims therefore is a question particularly well suited for consideration by Congress, which "has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government." *Id.* The consequences of breaching separation of powers are present whenever federal courts create causes of actions without congressional approval. But *Bivens* claims have heightened potential for breaching constitutional structural protections because they have the potential to insert the Court into political judgment-making.

Congress is most responsive to the people and represents the widest array of interests—and is accordingly most entitled to resolve these sorts of complex value judgments. Indeed, that is a key reason why the Constitution vests the legislative

---

despite the fact that *Ex Parte Young* suits are brought against government officials, not States directly. *See, e.g.*, *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

power with Congress and not with the insulated, unelected judiciary.

D. Relying on the Westfall Act to Retain *Bivens* Would Yield Another Violation of Separation of Powers.

Passed in 1988, the Westfall Act has been interpreted to preempt state common-law claims against federal officials for their official actions. 28 U.S.C. § 2679(b); *Minneci v. Pollard*, 565 U.S. 118, 126 (2012). The Court has also stated that the Westfall Act neither endorsed nor enshrined *Bivens* but rather "simply left *Bivens* where it found it." *Hernández*, 140 S. Ct. at 748 n.9.

As a result, in certain cases raising claims that are not covered by other provisions of the Westfall Act, the avenue for relief may be "*Bivens* or bust." Vladeck, *Disingenuous Demise*, 19 Cato Sup. Ct. Rev. at 279–81. But Congress's post-*Bivens* decision to "pre-empt[] the state tort suits that traditionally served as the mechanism by which damages were recovered from federal officers" does not justify retaining *Bivens* as a mode of judicial creation of constitutional causes of action. *Hernández*, 140 S. Ct. at 752 (Thomas, J., concurring). The pragmatic consideration of whether causes of action are meaningfully available to challenge federal officer action in certain circumstances—as a result of a statute enacted 17 years after *Bivens*—cannot alter the legal or constitutional correctness of *Bivens* itself.

To the extent that *some* remedy is perhaps deemed constitutionally necessary to address government official actions taken without any lawful scope of

authority, *see, e.g.*, Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509, 575–76 (2013) (due process justification); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77, 148–49 (1997) (suggesting the potential constitutional necessity of trespass remedies for unlawful state official actions); *but cf.* Sachs, *Unlimited Jurisdiction*, 106 Va. L. Rev. at 1711–12 (distinguishing due process claims from claims asserting a lack of enumerated authority), the solution is not to rely on a mode of judicial creation of relief that is in tension with underlying constitutional requirements for the creation and regulation of federal subject-matter jurisdiction. Rather, the more appropriate reconsideration would be of the constitutionally proper scope of Westfall Act limitations on relief and preemption of traditional common-law damages actions against federal officials. *Cf.* Michael Ramsey, "Don't Fear *Bivens*," The Originalism Blog (Nov. 12, 2019), https://originalismblog.typepad.com/the-originalism-blog/2019/11/dont-fear-bivensmichael-ramsey.html (contending that "absent a *Bivens* remedy the Westfall Act would be unconstitutional, as applied to state law claims," in analysis contending for the constitutionality of *Bivens*).

There is no justification for continued reliance on a 20th-century mode of judicial creation of damages remedies outside of the constitutionally mandated framework for statutory regulation of federal court jurisdiction.

III. Disavowal of *Bivens* Extensions Has No Bearing on the Lawfulness of *Ex Parte Young*.

Assertions of historical justifications for *Bivens* further contend that the historical provenance of *Bivens* rises and falls along with the legitimacy of the historical basis for other equitable doctrines such as the availability of injunctive relief under *Ex Parte Young*. That is incorrect.

The absence of historical tradition supporting *Bivens* does not disturb the "negative injunction remedy against state officials countenanced in *Ex Parte Young*," which is a "'standard tool of equity' that federal courts have authority to entertain under their traditional equitable jurisdiction." *Whole Woman's Health v. Jackson*, No. 21-463, ___ S. Ct. ___, 2021 WL 5855551, at *13 (U.S. Dec. 10, 2021) (Thomas, J., concurring in part) (citation omitted).

This Court has indicated that a federal court's jurisdiction in equity extends to just "the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (internal quotation marks omitted). Federal courts therefore lack "power to create remedies previously unknown to equity jurisprudence." *Id.* at 332. But the narrow, negative power used in *Ex Parte Young* has roots in American equity dating back to the Judiciary Act of 1789, *see* § 11, 1 Stat. 78, which itself "reflects a long history of judicial review of illegal

executive action, tracing back to England," *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015). *See also* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 Stan. L. Rev. 1269, 1296–97, 1301, 1333–35 (2020).

Therefore, in contrast to the late 20th-century *Bivens* doctrine, there is a logical basis for the longstanding survival of the limited injunctive power acknowledged in *Ex Parte Young*, despite federal courts not identifying an implied damages action to remedy constitutional violations until the 1970s, *Hernández*, 140 S. Ct. at 751 (Thomas, J., concurring). The power described in *Ex Parte Young* is described as narrow and applicable when such pre-enforcement injunctive relief is truly "necessary" to stop an ongoing, active violation of federal law or there is a "credible threat" of such action. *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011); *Whole Woman's Health*, ___ S. Ct. at ___, 2021 WL 5855551, at *13 (opinion of Gorsuch, J.). *Bivens*, by contrast, created the blunt instrument of a supplementary scheme of tort law, in derogation of historical tradition and constitutional separation of powers, and—in exchange for those significant transgressions—*Bivens* deters illegal conduct, if at all, only indirectly, by awarding damages after the violation has already ceased and only in the relatively few scenarios where a serious violation would otherwise go unaddressed by other mechanisms.

For these reasons, disavowing *Bivens* would not affect the Court's *Ex Parte Young* jurisprudence.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JENNIFER L. MASCOTT
R. TRENT MCCOTTER
Counsel of Record
SEPARATION OF POWERS CLINIC
GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE
ANTONIN SCALIA LAW SCHOOL
GEORGE MASON UNIVERSITY
3301 FAIRFAX DR.
ARLINGTON, VA 22201
(202) 706-5488
rmccotte@gmu.edu

December 27, 2021