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 *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a cause of action exists under *Bivens* for First Amendment retaliation claims.

2. Whether a cause of action exists under *Bivens* for claims against federal officers engaged in immigration-related functions for allegedly violating a Plaintiff's Fourth Amendment rights.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Constitutional and Statutory Provisions

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since its founding in 1999, FIRE has successfully defended the rights of tens of thousands of students and faculty at colleges and universities nationwide, including federal institutions of higher education. To ensure that federal institutions respect First Amendment rights on campus, students and faculty who experience free speech violations must have an available remedy.

FIRE defends student and faculty First Amendment rights through public advocacy, targeted litigation, and participation as *amicus curiae* in relevant cases. Notably, FIRE currently represents student journalists in a suit against Haskell Indian Nations University, a federally operated institution, and its former president who retaliated against them for expression protected by the First Amendment. Compl., *Nally v. Graham*, No. 21-2113-JAR-TJJ (D. Kan. Mar. 2, 2021). The district court dismissed this claim, holding that a *Bivens* remedy is not available for First Amendment retaliation. There is no reason these student journalists should lack a remedy for First Amendment harms available to students and faculty at virtually all other public institutions of higher learning. FIRE has a direct interest in this case

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief. Counsel for both parties have consented to the filing of this brief.

because the Court's resolution of the first question presented—whether there is a *Bivens* claim for First Amendment retaliation—would resolve the *Nally* plaintiffs' *Bivens* claim, which presently remains appealable to the United States Court of Appeals for the Tenth Circuit.

Amicus submits this brief to urge the Court to affirm the Ninth Circuit's decision allowing a damages remedy for First Amendment retaliation, which is consistent with Congressional intent and preserves the only available remedy for completed violations of one of the Constitution's most fundamental enumerated rights, freedom of expression.

SUMMARY OF ARGUMENT

Journalists and other speakers, like Respondent Boule and FIRE plaintiff Jared Nally, suffer the chilling consequences of retaliation by federal officials. These consequences can only be remedied, and violation of constitutional rights by federal officials can only be sufficiently deterred, through backward-looking damages.

Colonial Americans, patriots of the American Revolution, and the Founders relied on free speech as a means of dissent, to advocate for change, and to form a new government. This fundamental right played a critical role in the Founding era, withstood early tests in the form of seditious libel trials, and was ultimately enumerated in the Bill of Rights. Given the foundational nature of the First Amendment's protection, damages should be available under *Bivens* when federal officials retaliate against speakers for exercising their expressive rights. The Framers would have expected it.

Only backward-looking damages can remedy such a violation. Further, Congress has implicitly endorsed a *Bivens* remedy, and cannot reasonably be expected to do so explicitly when even the first Congress did not. Finally, the federal judiciary is well-suited to consider First Amendment retaliation claims, which are a well-settled method of pleading a First Amendment violation in every circuit.

ARGUMENT

I. The Unavailability of Damages for First Amendment Retaliation By Federal Officials Chills Speech.

Without the availability of a First Amendment retaliation claim under *Bivens*, journalists and other speakers will be left without any remedy for the harm they suffer when powerful federal officials retaliate against them for their expression. Jared Nally is one such journalist and speaker.

In October 2020, Nally was editor-in-chief of the oldest Native American student newspaper in the country, *The Indian Leader*, and a student at federally operated Haskell Indian Nations University.[2] After Nally's reporting criticized Haskell, Graham issued a "Directive" forbidding Nally from engaging in standard newsgathering activities like recording interviews or asking questions of public officials. *Id.* Graham's Directive threatened to discipline Nally if he engaged in these and other constitutionally protected activities, or failed to show members of the Haskell community the "highest respect." *Id.* Nally was subject to

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[2] *See* Compl., *Nally*.

Graham's Directive for 90 days—almost his entire fall semester—before Graham rescinded it in response to *amicus* FIRE's intervention.

Around the same time, Graham also interfered with the operations of *The Indian Leader* because of its reporting. The administration stonewalled the paper from ascertaining its available funding for the semester and refused to grant the paper official university recognition. And student journalists feared further retaliation from Graham, like the Directive, if they engaged in reporting critical of Graham or Haskell.

Graham's blatant disregard for the First Amendment extended beyond students. Graham also issued two other directives forbidding all Haskell employees from publicly expressing opinions about Haskell administrators and from referencing their employment when speaking with reporters.[3] These directives followed quickly on the heels of a lawsuit *amicus* FIRE filed against Graham, Haskell, and the Bureau of Indian Education—just when faculty and staff were likely to be approached by reporters about Haskell's dismal record on student speech. The directives chilled dissent from, and criticism of, federal officials at Haskell. The Bureau of Indian Education rescinded

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[3] *Embattled Haskell administration forbids criticism from faculty days after being sued for violating students' First Amendment rights*, FIRE (Mar. 25, 2021), https://www.thefire.org/embattled-haskell-administration-forbids-criticism-from-faculty-days-after-being-sued-for-violating-students-first-amendment-rights/ [https://perma.cc/GX4F-M7FF].

the faculty directives, but Haskell faculty and staff had already been silenced for weeks.[4]

In May, the Bureau announced that, with the support of Haskell's Board of Regents, it had removed Graham as President.[5] The *Bivens* claims of Nally and *The Indian Leader* for First Amendment retaliation against Graham remained pending in the U.S. District Court in Kansas. With the directives rescinded and Graham removed, there was no injunctive or other forward-looking relief available to Nally and *The Indian Leader* for the months-long infringement on their expressive rights—only backward-looking damages. And if any faculty member sought a remedy for Graham's infringement on their First Amendment rights, they would have faced the same circumstances.

Nevertheless, on July 29, 2021, the District Court dismissed Nally and *The Indian Leader*'s *Bivens* claims for First Amendment retaliation.[6] The court held the claims arose in a new context and that alternative remedies were available under the Administrative Procedure Act, even though it provides for only

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[4] *FIRE: 2, Haskell: 0 as university rescinds misguided directives muzzling faculty speech*, FIRE (Apr. 7, 2021), https://www.thefire.org/fire-2-haskell-0-as-university-rescinds-misguided-directives-muzzling-faculty-speech/ [https://perma.cc/3RQK-SCFQ].

[5] Chad Lawhorn, *Haskell president removed from office following investigation and concerns about free speech at university*, Lawrence Journal-World, (May 7, 2021), https://www2.ljworld.com/news/general-news/2021/may/07/haskell-president-removed-from-office/ [https://perma.cc/A72D-Q2JP].

[6] *Nally v. Graham*, No. 2:21-cv-2113-JAR-TJJ, 2021 WL 3206348 (D. Kan. July 29, 2021).

injunctive relief—and for Nally, *The Indian Leader*, Haskell faculty, and the many other speakers who experience retaliation at the hands of federal officials, injunctive relief cannot remedy their past harm.

Without a *Bivens* remedy, the guarantees of the First Amendment are toothless against rogue federal officials, like Graham, who retaliate against students and faculty for exercising their expressive rights. This bar on the recovery of damages chills speech of students and student journalists like Nally, who seek to report truthfully on campus news and their university administration; of faculty who wish to speak out on issues of public concern, particularly during times of controversy; and of the millions of Americans nationwide who interact with federal officials on a daily basis. Without a damages remedy, federal officials can violate the First Amendment and chill speech with impunity. This runs counter to the Framers' intent that the First Amendment provide robust free speech protections to encourage full participation in our democracy.

II. Freedom of Speech Was Fundamental to the Founding.

When federal officials retaliate against speakers in violation of the First Amendment, it is particularly ill considered to leave those speakers without a remedy, for two reasons. First, because expressive freedom aided the ultimate establishment of our country free from British rule. Second, because it laid the groundwork for free speech protections enumerated in the First Amendment. Before 1776, American colonists voiced protest against taxes and royal rule. After the Founding, they continued to use their freedoms of speech and press to criticize government officials and

debate legal and policy issues. These freedoms were integral to the Revolution, formation of the United States' earliest government, and early political debates. The Framers' inclusion of the freedoms of speech and of the press in the First Amendment confirms the fundamental nature of these rights, and is the result of a compromise between early elected officials that facilitated ratification of the Constitution.[7]

A. Early Americans relied on freedoms of speech and the press as political tools.

It is a time-honored tradition predating the Founding to criticize government officials.[8] In the years leading to the American Revolution, colonists used speech, both spoken and written, as a means of advocacy, a political tool, and an outlet for dissent.[9] If speakers are to continue to use these tools, there must be a damages remedy to deter federal officials from violating the First Amendment.

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[7] Indeed, representatives of several states did not consider the Constitution complete until the Bill of Rights was added to expressly protect individual rights. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 295–96 (2017).

[8] *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361–62 (1995) (Thomas, J., concurring) (describing the use of pamphleteering during the Revolutionary and Ratification periods for political purposes, including the trial of John Peter Zenger).

[9] Collins, et al., *First Things First: A Modern Coursebook on Free Speech Fundamentals*, at 2–3 (Jackie Farmer ed., 2019) (describing colonial dissent and protests against the Stamp Act).

During the late 1700s, before the American Revolution and ratification of the Constitution, colonists protesting the Stamp Act would gather in Boston under what was called the "Liberty Tree" to air grievances and protest royal rule.[10] The tree itself became such a symbol of colonists' dissent that British officials cut it down. But colonists continued to speak, assembling instead at a "Liberty pole" erected in the tree's place.[11]

Pamphleteering was also an expressive mainstay in early America. Pamphleteers, in fact, were prototypical publishers and acted, much as news outlets do, as a vehicle to inform the public about issues of the day.[12] This method of expression allowed the Revolutionaries to reach more individuals, gaining support for the cause that would eventually become the American Revolution and founding of a new nation.[13] It was also a means by which politicians in the newly formed

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[10] *Id.* at 2.

[11] *Id.* at 2–3.

[12] *See McIntyre*, 514 U.S. at 360–71 (Thomas, J., concurring) (outlining the various ways early Americans used pamphlets to communicate messages concerning particular controversies and political arguments, oftentimes anonymously, from the early colonial period through ratification).

[13] Collins, et al., *supra* note 9, at 4–5; *see also* Eileen Reynolds, *We the Protestors: How America's Founders Forged the Freedom of (Ugly, Vitriolic) Speech*, NYU (June 30, 2016), https://www.nyu.edu/about/news-publications/news/2016/june/stephen-solomon-on-revolutionary-dissent.html [https://perma.cc/TC8L-2MYQ] (interviewing Professor Stephen Solomon about his book Revolutionary Dissent: How the Founding Generation Created the Freedom of Speech).

United States engaged in debate, particularly between the Federalists and anti-Federalists,[14] including on the issue of whether a Bill of Rights was even necessary.[15]

Freedom of expression won the day in several early tests. In 1735, for example, British officials charged printer John Peter Zenger with seditious libel for publishing political pamphlets that were critical of the loyalist governor of New York.[16] Zenger's ultimate acquittal came to stand for the idea that the government may not punish truthful statements on matters of public concern.[17] That acquittal marked the end of successful seditious libel prosecutions during the colonial period—the people simply did not support

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14 *McIntyre*, 514 U.S. at 362–64 (describing controversy surrounding anonymous pamphlets and essays during the Revolutionary and Ratification periods and concluding that the Federalists engaged in a "hasty retreat before the withering criticism of their assault on the liberty of the press").

15 *See* Campbell, *supra* note 7, 127 Yale L.J. at 295–98 (describing the "public jousting that occurred in newspapers, pamphlets, and state ratification conventions" concerning whether to include a Bill of Rights in the Constitution). Campbell notes that the writings themselves did not highlight freedom of speech, *id.* at 298–99, but those involved in the "public jousting" were availing themselves of the freedom to debate the issue of the day.

16 Michael Kent Curtis, *Free Speech: The People's Darling Privilege: Struggles for Freedom of Expression in American History*, at 41 (2000).

17 *Id.* at 40–41.

censorship by way of seditious libel charges, and refused to convict.[18]

After the revolution, in 1798, President John Adams signed the Alien and Sedition Acts into law, ch.74, 1 Stat. 596, 5th Cong. (1798). The Acts were politically motivated, and censored expression critical of the government.[19] Benjamin Franklin Bache, grandson of Benjamin Franklin, was an anti-Federalist and a prolific and controversial printer at the time. He often published pieces critical of Adams, George Washington, and Alexander Hamilton.[20] Bache was arrested under the Sedition Act, and charged with seditious libel, but he died before he could be tried.[21]

At least one early legislator, James Madison—who, perhaps not coincidentally, authored the Bill of Rights—argued the Act ran afoul of the First Amendment. In a 1799 report to the Virginia legislature, he pointed out both that the federal government was one of enumerated powers, among which was not power over the press, and that the First Amendment further

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[18] Curtis, *supra* note 16, at 46 (citing Harold L. Nelson, 3 Am. J.L. Hist. 160, 170 (1959)); *Beauharnais v. Illinois*, 343 U.S. 250, 289 (1952) (Jackson, J., dissenting) (noting that "political disapproval of the Sedition Act was so emphatic and sustained that federal prosecution of the press ceased for a century").

[19] Collins, et al., *supra* note 9, at 10; Campbell, *supra* note 7, at 283 (explaining that opponents of John Adams' administration "view[ed] the Sedition Act as part of 'a legislative program designed to cripple, if not destroy'" his political opponents).

[20] Collins, et al., *supra* note 9, at 6.

[21] *Id.*

reiterated this point.[22] His concern was with both the impropriety of prior restraints, long disfavored under English common law, and *subsequent punishment* for expression. "It would seem a mockery to say, that no law should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made."[23] When President Jefferson took office in 1801, he let the Alien and Sedition Acts expire and pardoned Bache and others similarly charged.[24]

The Sedition Act was recognized as unlawful in its time and has since been soundly denounced as contrary to the First Amendment. Congress elected to repay fines levied under the Sedition Act on grounds they were unconstitutional.[25] In an 1836 address, Senator John Calhoun noted "no one now doubts" the invalidity of the Act.[26] And Supreme Court Justices have assumed the Sedition Act's invalidity. *Sullivan*,

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[22] Curtis, *supra* note 16, at 95.

[23] *Id.* (quoting James Madison, *The Virginia Report of 1799–1800*, *in* Freedom of the Press from Zenger to Jefferson, 213 (Leonard W. Levy ed., 1966)).

[24] *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (quoting Jefferson as writing, "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity. . .."); Curtis, *supra* note 16, at 88 (citing James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*, at 221–26 (1956)).

[25] Act of July 4, 1840, c. 45, 6 Stat. 802, 26th Cong. (1840).

[26] Report with S. 122, 24th Cong. 1st Sess. (1836).

376 U.S. at 276.[27] This Court never considered the Act, but "the attack upon its validity has carried the day in the court of history . . . These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *Id.*

The Sedition Act's demise—and its denunciation by early Americans and this Court—underscores not only that criminalizing speech critical of the government is inconsistent with the First Amendment, but also the foundational role of free speech in our democracy. The Court in *Sullivan* reckoned with the "awkward history" of seditious libel in the United States and "definitively put to rest the status of the Sedition Act" as having violated the First Amendment.[28] But the Court also "found in the controversy over seditious libel the clue 'to the central meaning of the First Amendment[]' . . . a core protection of speech without which democracy cannot function." Or, as Madison said, without it "'the censorial power' would be in the Government over the people and not 'in the people

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[27] Citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that the United States has "shown its repentance" for the Sedition Act"); *Beauharnais*, 343 U.S. at 288–89 (Jackson, J., dissenting) (noting that political disapproval of the Act was emphatic, and in hindsight it was a breach of the First Amendment); *see also Sullivan*, 376 U.S. at 276 (citing the scholarly work of Supreme Court Justice William O. Douglas, Michigan Supreme Court Justice Thomas M. Cooley, and scholar Zechariah Chaffee, Jr. as examples of the broad consensus that the Acts were unconstitutional).

[28] Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, at 208.

over the Government.'"[29] Freedom of speech survived these early tests because of support for this "central meaning" from the people and many of the Founders.

Over time, the First Amendment of the 1790s gave rise to the robust First Amendment jurisprudence courts apply today. For example, freedom of speech faced another test when the perils of the First World War again resulted in prosecutions of seditious libel—dormant the previous century—under the Espionage Act of 1917 and the Sedition Act of 1918.[30] In the following decades, this Court rejected the reasoning of those cases upholding convictions for seditious libel, and speech-protective jurisprudence arose consistent with the Founding era idea that for democracy to flourish the government should not hold censorial power over the people.[31] Today, consistent with this

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[29] *Id.*

[30] *See, e.g.*, *Masses Publ'g Co. v. Patten*, 246 F. 24 (1917) (overturning Judge Learned Hand's refusal to convict a postmaster under the Espionage Act of 1917); *Schenck v. United States*, 249 U.S. 47 (1919) (affirming convictions under the Espionage Act for obstructing military recruitment and conscription efforts); *Abrams*, 250 U.S. at 616 (upholding the conviction of political leafleteers under the Sedition Act of 1918 over a dissent from Justices Oliver Wendell Holmes and Louis D. Brandeis, who argued that the First Amendment protected the leaflets).

[31] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overturning the clear and present danger test from *Schenck*). Later decisions like *Brandenburg* are consistent with the reasoning of the dissenters in *Abrams* and Justice Brandeis' famous concurrence in *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . .. They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you

"central meaning" of the First Amendment, free speech jurisprudence protects the expression of unpopular ideas by prohibiting both prior restraints and subsequent punishment for expression. "Our representative democracy only works if we protect 'the marketplace of ideas.' This free exchange facilitates an informed public opinion which, when transmitted to lawmakers, helps produce laws that reflect the People's will." *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (holding subsequent punishment of high school student for her speech was unconstitutional). *See also Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) (noting the general rule "has long been established" that the First Amendment bars retaliation for protected speech). Consistent with the original rationale for the First Amendment, speakers should have a damages remedy for retaliation by federal officials to encourage speech and deter retaliation.

Like the First Amendment, the contours of other enumerated rights, including those for which a *Bivens* remedy has been recognized, evolved over time. The Fourth Amendment, for example, evolved significantly during the 20th century and into the 21st.[32]

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think are means indispensable to the discovery and spread of political truth; . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

[32] *See, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967) (establishing the test for when someone has a reasonable expectation of privacy under the Fourth Amendment); *Terry v. Ohio*, 392 U.S. 1 (1968) (creating the "totality of the circumstances" test to evaluate whether officials have probable cause to stop and frisk someone); *Illinois v. Gates*, 462 U.S. 213 (1983) (establishing the probable cause standard); *United States v. Leon*, 468 U.S. 897 (1984) (establishing the good faith exception to the Fourth Amendment); *Riley v. California*, 573 U.S. 373 (2014) (holding

Bivens itself concerned a Fourth Amendment claim for damages for an alleged unlawful search and seizure—an illegal arrest in the petitioner's home. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). In finding that an implied cause of action existed under the Constitution for such a violation, this Court applied then-recent decisions clarifying the scope of the Fourth Amendment. *Id.* at 393–94 (citing *Katz*, 389 U.S. 347; *Berger v. New York*, 388 U.S. 41 (1967); and *Silverman v. United States*, 365 U.S. 505 (1961)). And it did so despite the fact that "the Fourth Amendment"—like the First—"does not in so many words provide for enforcement by an award of money damages for the consequences of its violation." *Bivens*, 403 U.S. at 396.

Expressive freedom during the colonial period was fundamental to establishment of the United States as an independent nation. Further, the Framers' believed freedom of expression and freedom of the press are essential to a healthy democracy—and warranted explicit protection in the Bill of Rights. These fundamental protections should not be toothless against federal officials.

B. The Constitution and Bill of Rights were drafted against the backdrop of the common law.

English and early American courts operated under a traditional common law system that allowed for damages for violation of rights as a matter of course. The Framers drafted the Constitution, and enumerated rights of free speech, freedom of the press, and

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warrantless search and seizure of a cell phone during an arrest violates the constitution).

freedom of assembly therein, against the backdrop of this common law system. As such, damages should remain available for a violation of these rights.

As discussed above, the Framers were influenced by political ideals and lived experience concerning free speech in drafting the Constitution. And they spoke about freedom of speech and the press in practical, not purely philosophical, ways.

Thomas Jefferson explained his view that enumerated rights would be a "legal check . . . in[] the hands of the judiciary."[33] And Federalist Alexander Addison said "[I]t is well known that, as by the *common law* of England, so by the common law of America, and by the Sedition Act, every individual is at liberty to expose, in the strongest terms, consistent with decency and truth all the errors of any department of the government."[34]

When the Constitution and Bill of Rights were drafted, and later, when this Court decided *Bivens* in 1971, individuals could sue federal officers for damages in state court under common law theories of liability. This was true for not only enumerated rights,[35]

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33 Campbell, *supra* note 7, at 267 n. 80 (citing Letter from Thomas Jefferson to James Madison (Mar. 15, 1789) *in* 14 The Papers of Thomas Jefferson (Julian P. Boyd ed., 1971)).

34 *Id.* at 284 (citing Alexander Addison, *Analysis of the Report of the Committee of the Virginia Assembly, on the Proceedings of Sundry and of the Other States in Answer to their Resolutions*, at 42 (Philadelphia, Zachary Poulson Jr. ed. 1800)).

35 *See, e.g.*, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (recognizing a cause of action for collection of an illegal tax); *Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1872)

but also unenumerated rights.[36] Against the backdrop of this established historical practice, there is "no reason to believe the draftsmen of the Constitution gave specific attention to the problems of implementation... [T]he Constitution was to be implemented in accordance with the remedial institutions of the common law."[37]

Further, general federal question jurisdiction was not codified until 1875.[38] Absent diversity of the parties, therefore, before 1875, vindication of *any* constitutional right was litigated at the state level using the common law system of remedies, which, as discussed above, routinely allowed for damages to remedy past harm. This Court's decision in *Erie Railroad Co. v. Tompkins* eliminating the "federal general common

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(finding illegal authorization of settlers on land violated the Contracts Clause and warranted personal liability for the officers involved).

[36] *See, e.g.*, *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (K.B.) (finding by an English common law court that a claim for trespass against the King's messengers warranted damages where they broke into the plaintiff's home without lawful authority); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (awarding damages against an American captain for the illegal seizure of a Danish ship); *Bates v. Clark*, 95 U.S. (5 Otto) 204, 204–05 (1877) (awarding damages to a whiskey merchant after army officials illegally confiscated his wares).

[37] Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. Rev. 132, 150 n. 71 (2012).

[38] Act of Mar. 3, 1875, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331 (1994)).

law"[39] muddied the proper forum in which to bring causes of action with roots in federal law that were historically litigated in state court under the common law system.[40]

It is against that backdrop that this Court considered supplementing common law remedies with a federal damages remedy, and ultimately decided to do so by recognizing an implied damages remedy for constitutional violations in *Bivens*, 403 U.S. at 396–97. Doing so was consistent with a common-sense and historical view of the Framers' expectations when they adopted the Bill of Rights, which would have assumed the rights therein to be fully enforceable.

III. Retaliation in Violation of the Fundamental Right to Free Speech Is a Proper *Bivens* Claim.

Historically, as discussed above, individuals could sue federal officials for damages for violating their rights—constitutional or otherwise—often in state court. "In the early Republic, 'an array of writs . . . allowed individuals to test the legality of government conduct by filing suit against government officials' for money damages 'payable by the officer.' These

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[39] 304 U.S. 64, 78 (1938).

[40] *See* Carlos Manuel Vázquez, *Bivens and the Ancien Régime*, 96 Notre Dame L. Rev. 1923, 1931–32 (2021) (explaining how after *Erie* the old regime of remedies for rights violations was essentially "downgraded" to state law, like the rest of the former federal common law). The Westfall Act both complicated matters by eliminating state actions against federal officials, *id.* at 1937, and clarified them by carving out an exception for constitutional claims, *see infra* Section III.C.

common-law causes of action remained available through the 19th century and into the 20th." *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020). Availability of a First Amendment *Bivens* claim, therefore, would rightly continue the common law approach to remedies for speakers who suffer government retaliation, who could recover money damages payable by that official.

Under *Bivens* and its progeny, however, suing federal officials for damages directly under the Constitution has come to require a two-step inquiry: (1) whether the claim arises in a new context; and, if so, (2) whether "there are any special factors that counsel hesitation" in recognizing a damages claim directly under the Constitution. *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020). Central to this inquiry is "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." *Id.* Under this framework, the Ninth Circuit determined that Respondent Boule's First Amendment retaliation claim arises in a new context. Based on the Court's prior decisions, it is far from clear that First Amendment retaliation claims against federal officials arise in a new context. Further, none of the special factors counsel hesitation in recognizing a *Bivens* remedy for First Amendment retaliation.

A. The Court's current rule does not foreclose a *Bivens* remedy for First Amendment retaliation.

The Ninth Circuit ruled that Respondent Boule's First Amendment retaliation claim arises in a new context. *Boule v. Egbert*, 998 F.3d 370, 390 (9th Cir. 2021). As an initial matter, it's not clear a First

Amendment retaliation claim arises in a new context for the purposes of *Bivens*, as this Court has been willing to assume, without deciding, that *Bivens* extends to First Amendment claims. *See Wood v. Moss*, 572 U.S. 744, 757 (2014) (assuming a *Bivens* remedy was available for plaintiff's First Amendment retaliation claims); *Harlow v. Fitzgerald,* 457 U.S. 800, 820 n.36 (1982) (deciding whether defendants were entitled to immunity without disputing whether plaintiffs properly alleged a damages claim under *Bivens*). Nevertheless, even if the Court determines that First Amendment retaliation claims under *Bivens* arise in a new context, a remedy is available because no special factors—including separation of powers, alternative remedies, and the suitability of the judiciary to evaluate the claim—counsel hesitation. Indeed, the fundamental nature of expressive rights to American democracy, and the deterrent effect damages provide against federal officials violating those rights, urge the availability of a remedy.

This Court has not outlined an exhaustive list of special factors, instead explaining that "sometimes there will be doubt because some other feature of a case—difficult to predict in advance—causes a court to pause before acting without express congressional authorization." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017). However, this Court's emphasis on "whether the Judiciary is well-suited, absent congressional action, or instruction," *id.*, to consider a *Bivens* claim, emphasizes the importance of one special factor: separation of powers concerns.[41]

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[41] *See Hernandez*, 140 S. Ct. at 749–50 (summarizing all of the special factors as relating to concerns about separation of powers).

In the context of a typical First Amendment retaliation claim, separation of powers concerns do not counsel hesitation because the Framers and early congressmen would not have doubted the availability of effective enforcement of the enumerated rights in the Constitution. Congress has also implicitly endorsed a damages remedy for constitutional violations, and it is unreasonable to expect the modern Congress to do what the first Congress did not.

Further, separation of powers is just one of the several "special factors" to be considered before recognizing a *Bivens* remedy. Another special factor that counsels hesitation is when "there is an alternative remedial structure present" in the case. *Abbasi*, 137 S. Ct. at 1858. The unavailability of any other remedy for completed First Amendment violations weighs strongly in favor of a remedy for speakers alleging First Amendment retaliation claims against federal officials. Only backward-looking damages can remedy such deprivations of First Amendment rights. There is no adequate alternative remedy for these past harms.[42]

Because recognizing a *Bivens* remedy for First Amendment retaliation does not interfere with an honest evaluation of separation of powers, because no remedy other than damages can repair past harm to speakers, and because the federal judiciary regularly evaluates First Amendment retaliation claims, this

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[42] Nally's case illustrates why forward-looking injunctive relief is often inadequate in First Amendment retaliation cases. Rescission of Graham's Directive and his removal as President of Haskell would have been appropriate injunctive relief, but those already occurred. Without damages, Nally was left without a remedy for the 90 days he was silenced under the Directive.

Court should recognize a *Bivens* remedy for First Amendment retaliation.

B. A damages claim is the only available remedy for past harms to speakers subjected to retaliation by federal officials.

While availability of alternative remedies to vindicate a plaintiff's harm counsels hesitation before recognizing a damages remedy under *Bivens*, *see Abbasi*, 137 S. Ct. at 1858; *Hernandez*, 140 S. Ct. at 750, such hesitation is not warranted for First Amendment retaliation. No alternative remedial structure can address past harm to speakers when federal officials retaliate against them for exercising First Amendment rights. In *Abbasi,* this Court emphasized that a damages remedy against federal officials was appropriate where, as in *Bivens* and *Davis v. Passman*, it was "damages or nothing." 137 S. Ct. at 1862 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment)); *Davis v. Passman*, 442 U.S. 228, 245 (1979). First Amendment retaliation claims like Respondent Boule's and the plaintiffs' in *Nally* seek a remedy for past harm, which can be remedied *only* by way of damages.

In another recent case, *Himmelreich v. Federal Bureau of Prisons*, a federal inmate alleged a corrections officer retaliated against him for filing a grievance against prison staff. No. 4:10CV2404, 2019 WL 4694217 (N.D. Ohio Sept. 25, 2019). Federal officials argued a *Bivens* remedy was inappropriate because, instead, the inmate could petition for a writ of *habeas corpus*. *Id.* at *11. But the writ would be insufficient; even if it could have relieved the prisoner "from the

tangible *consequences* of the alleged retaliation, it would not itself have cured the intangible First Amendment injury he endured the moment he was punished for engaging in protected activity." *Id.* (emphasis in original). *See also Jerra v. United States*, No. 2:12-cv-01907-ODW, 2018 WL 1605563, at *5–6 (C.D. Cal. Mar. 29, 2018) ("Injunctive relief . . . does not compensate [the plaintiff] for the harm he suffered, and does not present an adequate alternative.").

And in *Dyer v. Smith*, a traveler asserted both First Amendment and Fourth Amendment damages claims after a Transportation Security Administration agent ordered plaintiff to delete a recording of the agent patting down plaintiff's husband. No. 3:19-cv-921, 2021 WL 694811, at *1–2 (E.D. Va. Feb. 23, 2021). The Court found there was no alternative remedy for the traveler because the TSA's administrative complaints process allowed traveler complaints about denied or delayed boarding only when they are wrongly identified as a "threat"; this was insufficient to remedy the past harm caused by First Amendment retaliation. *Id.* at *5.

In some cases, like *Himmelreich*, there will be an additional remedy to relieve a speaker from ongoing harm caused by a censor, like injunctive relief or, for federal inmates, a writ of *habeas corpus*. But none of these remedies can address the "intangible First Amendment injury," *Himmelreich*, 2021 WL 469217, at *11, that occurs the moment an official engages in retaliation. Only damages, looking backward to that moment, can do so. To foreclose these damages for speakers who happen to experience retaliation at the hands of a federal official is inconsistent with the rationale that "[b]ecause 'every violation [of a right]

imports damage,' nominal damages can redress [a speaker]'s injury. . . ." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (holding nominal damages for a First Amendment retaliation claim sufficed to confer standing). However quantified, past harms caused by First Amendment retaliation are remedied only by damages. And if federal officials can escape liability for completed violations of the First Amendment, they will not be deterred from continuing to retaliate.

Similarly, in *Bivens* itself, Bivens sought damages for his arrest, in his home, by federal agents on November 26, 1965. *Bivens*, 403 U.S. at 390. That arrest and search were completed when, on July 7, 1967, Bivens filed suit, and on June 21, 1971, when this Court reversed the dismissal of his claim for damages. *Id.* For Bivens, it was "damages or nothing," because no other remedy looked back at the harm caused when federal officials entered his home and arrested him. *Id.* at 410.

The primary remedy for First Amendment retaliation in all cases is similarly backward-looking money damages.[43] This is because no other remedy will do. To prohibit recovery of damages against federal officials, the original persons restricted by the First Amendment, guts the protections of this fundamental right by rendering it virtually toothless to vindicate past harms.

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43 *See, e.g.*, *Jennings v. Town of Stratford*, 263 F. Supp. 3d 391 (D. Conn. 2017) (affirming jury award of $1 million in compensatory damages for First Amendment retaliation); *Pucci v. Somers*, 834 F. Supp. 2d 690 (E.D. Mich. 2011) (affirming jury award of over $500,000 in compensatory damages for First Amendment retaliation).

C. Allowing *Bivens* claims for First Amendment retaliation does not run afoul of the separation of powers.

Judge Bumatay's dissent in the Ninth Circuit's decision in favor of Respondent Boule leads with the argument that separation of powers, not fundamental rights, is the "radical innovation" of the Constitution, and allowing Respondent to recover damages for violation of his First Amendment rights would undermine this innovation.[44] However, allowing speakers to recover for violations of their fundamental rights in court via First Amendment retaliation claims—which by their nature typically involve individual instances of unlawful action, not high-level government policy—does not interfere with separation of powers. And the Constitution embodying these principles of separation of powers may not have even been ratified without the individual rights enumerated in the Bill of Rights.[45]

The Framers themselves would not have drafted an explicit enforcement mechanism because they would not have doubted the rights they enumerated were enforceable. *See supra* Section II.B. This Court should not expect Congress to have done so, either. There are, however, a number of other explanations for why Congress has not explicitly endorsed a damages remedy for First Amendment retaliation.

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[44] *Boule*, 998 F.3d at 373–74 (Bumatay, J., dissenting).

[45] *See supra* note 7.

First, as many litigants, *amici*, and scholars have argued[46]—correctly—Congress already implicitly endorsed damages remedies for constitutional violations in the Westfall Act. In the Act, Congress pre-empted state tort remedies and made the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671–2680, the exclusive remedy against federal officers acting within the scope of their employment. This broad pre-emption included an exception for *Bivens* remedies by exempting cases where litigants bring claims "for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A).

In *Hernandez*, however, this Court interpreted the Westfall Act's exemption for constitutional violations to mean Congress "left *Bivens* where it found it." *Hernandez*, 140 S. Ct. at 748 n.9. In 1988, when Congress passed the Act, the Court had only recognized a damages remedy against federal officials for violations of the Fourth Amendment search and seizure clause, *Bivens*, the Fifth Amendment due process clause, *Davis*, 442 U.S. at 243–44, and the Eighth Amendment cruel and unusual punishment clause, *Carlson v. Green*, 446 U.S. 14, 19–20 (1980).

As an initial matter, this interpretation of the Westfall Act runs counter to the plain language of the

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[46] *See, e.g.*, Br. for Institute for Justice as *Amicus Curiae*, *Hernandez v. Mesa*, 17-1678 (Aug. 9, 2019); Br. for Carlos M. Vázquez and Anya Bernstein as *Amici Curiae*, *Hernandez v. Mesa*, 17-1678 (Aug. 9, 2019); Carlos Manuel Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. Penn. L. Rev. 509 (2013); Pls. Mem. of Law In Opp'n. To Def. Ronald Graham's Mot. to Dismiss. Pls. Third Cause of Action, *Nally v. Graham*, No. 2:21-cv-2113-JAR-TJJ (D. Kan. June 22, 2021).

statute, which broadly contemplates damages for "a violation of the Constitution of the United States." Further, Congress was aware of the Court's decisions in *Bivens*, *Carlson*, and *Davis* when it passed the Westfall Act, the latest of which was decided eight years prior. Congress could have easily specified if it indeed intended to "leave *Bivens* where it found it" in 1988, but did not.

Second, it would be inconsistent with the Framers' intent to leave the enforceability of the fundamental protections contained in the Bill of Rights, and related limits on government authority, to the government itself.[47] A government unbound by these protections was what Jefferson and Madison feared—a government that could readily deny Americans their liberties. *See supra* note 7. For hundreds of years, dating back to the Founding, speech has been used as a tool for dissent and criticism of government, as the Framers intended.[48] Here, Respondent Boule criticized Petitioner Egbert, a federal official, by filing complaints about him.[49] In *Nally v. Graham*, students, student journalists, and faculty were all chilled from engaging in expression critical of the university administration.[50] Speakers exercise their rights to free speech to criticize everyone from the President of the United

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47 Vázquez, *supra* note 40, at 1934. This concern is not similarly salient when the question is whether a remedy is available for a statutory right because Congress, not the Framers, created the right.

48 *See supra* Section I.A.

49 *Boul*e, 998 F.3d at 386.

50 *Nally*, 2021 WL 3206348 at *2–3.

States to federal law enforcement officials to members of Congress themselves. A damages remedy for violation of the fundamental right to free speech is supported by the common law and consistent with free speech's foundational role in a democracy—Congress need not explicitly open the door.

Third, Congress cannot rationally be expected to explicitly authorize a damages remedy for First Amendment retaliation claims. Congress, in fact, can be *expected* to "underprotect the constitutional limits on federal officials" because those limits restrict the ability of officials to enforce the laws Congress itself enacts.[51] Opponents of expanding *Bivens* might argue this structural reality means special factors do counsel hesitation before recognizing an implied cause of action, because a damages remedy may hinder the execution of federal laws. But this argument, too, fails to consider the fundamental role of free speech in democratic governance because it effectively leaves the fox in charge of the henhouse—Congress is certainly not likely to protect the expressive rights of its critics. It runs counter to the very nature of the First Amendment's protections and to rational expectations of Congress to forbid the recovery of damages when federal officials engage in retaliation against speech.

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[51] Vázquez, *supra* note 40, at 1934–35.

D. The judiciary is well-suited to evaluate First Amendment retaliation claims to remedy the deprivation of a fundamental right.

Recognizing a *Bivens* remedy for First Amendment retaliation will not charge the federal judiciary with the evaluation of new or inappropriate claims because First Amendment retaliation claims are a settled way to plead past violations of a speaker's First Amendment rights.[52]

In *Hernandez*, the Court reasoned that the universe of statutorily available remedies reflects the grand compromise of Congress, the outcome of the American political process. *Hernandez*, 140 S. Ct. at 741–42. But the Founders drafted the Bill of Rights without the benefit of today's universe of jurisprudence on First Amendment claims. And Congress was unlikely to take the affirmative step of explicitly recognizing a damages claim for First Amendment retaliation, *see supra* Section III.C.

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[52] *Crawford-El*, 523 U.S. at 592; *D.B. v. Esposito*, 675 F.3d 26, 43 (1st Cir. 2012); *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 272 (2d Cir. 2011); *Lauren W.* ex rel. *Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685–86 (4th Cir. 2000); *Brown v. Jones Cnty. Junior Coll.*, 463 F.Supp.3d 742, 760 (S.D. Miss. 2020) (citing *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002)); *Anders v. Cuevas*, 984 F.3d 1166, 1175 (6th Cir. 2021); *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009); *Bennie v. Munn*, 822 F.3d 392, 397 (8th Cir. 2016); *Koala v. Khosla*, 931 F.3d 887, 905 (9th Cir. 2019); *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000); *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005); *Aref v. Lynch*, 833 F.3d 242, 250 (D.C. Cir. 2016).

This well-settled claim provides a workable standard for the judiciary, which will continue to preside over litigation of First Amendment claims against state actors regardless of the outcome of this case. The first two elements of a First Amendment retaliation claim are that the speaker engaged in constitutionally protected activity and that a state actor takes adverse action against the speaker. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). In most circuits, the adverse action must be such that it would chill a person of ordinary firmness from continuing to engage in protected activity.[53] The third element requires that the speaker establish a causal connection between the official's retaliatory motive and their injury. *Nieves*, 139 S. Ct. at 1722 (citing *Hartman*, 547 U.S. at 259).

The first prong is an objective standard that can be measured against established bodies of law. The second prong, including the "ordinary firmness" test, involves a mixed question of fact and law but can also be measured against established bodies of case law concerning that test and what constitutes an "adverse action." Unlike the first two elements, the determination of whether the state actor's conduct was substantially motivated by the speaker's protected activity requires fact-intensive inquiry—although in some cases it is straightforward. *Id.*

Further, courts have developed a number of forms of objective evidence from which to determine whether

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[53] *See, e.g.*, *Bennie*, 822 F.3d at 397; *Worrell*, 219 F.3d at 1212. This Court's decisions in *Nieves* and *Hartman* to not address the ordinary firmness test.

a speaker has satisfied the causation element.[54] Just like the district courts in *Dyer*, *Himmelreich*, and *Jerra*, the district court in this case evaluated Respondent Boule's First Amendment claim without apparent issue.

Judicial hostility towards a speaker's First Amendment retaliation claim—not necessarily on its merits, but by virtue of the fact that it is not one of the claims litigants raised in *Bivens*, *Davis*, or *Carlson*—should not preclude a remedy for an enumerated right. Recognizing a remedy here will not present an undue burden on the judiciary to consider a "new" *Bivens* claim, because First Amendment retaliation is a long-settled and familiar cause of action.

CONCLUSION

For the above reasons, and those presented by Respondent, this Court should affirm the Ninth Circuit and recognize a *Bivens* claim for First Amendment retaliation where a speaker faces retaliation from a federal government official because of their speech, and the harm is not ongoing but completed and therefore cannot be remedied by injunctive or other non-monetary relief.

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54 *See, e.g.*, *Lauren W.* ex rel. *Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007) ("[A] plaintiff usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link.") (citations omitted); *Wenk v. O'Reilly*, 783 F.3d 585, 595–600 (6th Cir. 2015) (finding causation could be inferred from plaintiffs' evidence that defendant took adverse action shortly after protected speech).

Dated: January 26, 2022

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