No. 21-147

In the Supreme Court of the United States

ERIK EGBERT, *Petitioner*

v.

ROBERT BOULE

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

BRIEF OF PROJECT FOR PRIVACY & SURVEILLANCE ACCOUNTABILITY AND PROTECT THE FIRST FOUNDATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
HANNAH C. SMITH
KATHRYN E. TARBERT
ANNIKA M. BOONE*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerrjaffe.com

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INTRODUCTION AND INTEREST OF *AMICI*[1]

The principle that, for there to be a right, there must be a remedy, has been recognized since long before the Founding. Common-law writs have been employed for centuries to remedy violations of foundational law, including Magna Carta. And, under English law, it was common for individuals to receive damages from the Crown's officials who violated their rights. This right to redress was also enforced against the Crown itself.

The Founders—including John Marshall and James Madison—did not view the new Constitution, with its federal government and separation of powers, as abolishing those common-law remedies for abuses of government power. And, during the Founding Era, the courts of the new republic continued to permit suits against government officials, allowing individuals to hold federal officials accountable for unlawful seizures and trespass. In many cases, common law supplied the causes of action against those officials.

In this case, Respondent asserts First and Fourth Amendment violations and seeks redress under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). This Court should affirm

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[1] *Amici* gave the parties timely notice of their intent to file this brief, and all parties have consented to its filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *Amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. *Amici* are not publicly traded and have no parent corporations, and no publicly traded corporation owns 10% or more of either *Amicus*.

the court of appeals' holding that he may pursue those claims.

Without *Bivens* claims, there would be no remedy for many constitutional violations committed by the federal government and its officers. The Westfall Act, passed in 1988, prohibits tort suits against federal officers under state common law. And, in recognition of the *Bivens* remedy, Congress expressly excluded claims for constitutional violations from the Federal Tort Claims Act ("FTCA"). Put simply, for most plaintiffs whose First or Fourth Amendment rights have been violated by federal agents, there is no relief without *Bivens*.

These issues are of special interest to *Amici*, both of which are dedicated to protecting constitutional rights. *Amicus* Project for Privacy & Surveillance Accountability (PPSA) is a nonprofit, nonpartisan organization focused on protecting Fourth Amendment rights in a variety of contexts —from the surveillance of American citizens under the guise of foreign-intelligence gathering, to the monitoring of domestic activities under the guise of law enforcement. *Amicus* Protect the First Foundation ("PT1") is a non-profit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law. PT1 is concerned about all facets of the First Amendment and advocates on behalf of people across the ideological spectrum, including people who may not even agree with the organization's views.

Amici urge the Court to retain a *Bivens* remedy for violations of both the First and Fourth Amendments.

STATEMENT

The facts of this case well illustrate the importance of a *Bivens* remedy. Here, U.S. Border Patrol Agent Erik Egbert wrongly injured Robert Boule, the owner of a bed and breakfast, near the U.S.-Canada border in Washington state. Pet. App. 2a. When Boule and a Turkish guest, who had legally entered the country the day before, drove to the site, Agent Egbert followed them into the driveway of Boule's property and parked behind Boule's car. Pet. App. 10a. Boule exited his car, told Egbert he could not search his car without a warrant, and asked him to leave. *Ibid.* Egbert refused, instead shoving Boule against the car and ultimately pushing him to the ground. Resp. Br. Opp'n 5. Egbert then conducted a search: he opened the car door and asked Boule's guest about his immigration status. *Ibid.* Boule sustained back and hip injuries, which required medical treatment. *Ibid.*

When Boule reported Egbert's behavior to his supervisors and filed an FTCA claim, Egbert retaliated by making meritless reports against Boule to various state and federal authorities. Pet. App. 10a. Formal inquiries were made into Boule's business, including IRS audits that cost him over $5,000 in fees, but no agency found any evidence that Boule had broken the law. Resp. Br. Opp'n 5; Pet. App. 34a.

Boule sued, alleging that Egbert violated his Fourth Amendment rights by conducting a warrantless search of his property and that he had unlawfully retaliated against Boule for engaging in First Amendment-protected speech. Pet. App. 10a. The District Court granted summary judgment to Egbert on both

claims. *Ibid.* Boule appealed, and the Ninth Circuit reversed, recognizing that Boule had a *Bivens* right to sue Egbert for damages for violating his First and Fourth Amendment rights. *Ibid.*

SUMMARY OF ARGUMENT

Bivens is not, as Petitioner would have it, a relic of a disfavored jurisprudential era. It is a critical bulwark of constitutional rights against abuses of federal power by rogue agents like Egbert. And it is consistent with centuries of English and American tradition: Since Magna Carta we have recognized that individuals are entitled to enforce the rights contained in foundational law through common-law writs. And, before the Founding, English citizens had the right to sue government officials for damages. Many of the Founders, including James Madison and John Marshall, expected that such a right would continue in their new nation. They were right: Even before any statutory authorization, early American courts often heard suits for damages against federal officers.

Today, *Bivens* is necessary to vindicate the long-settled principle that for any right to meaningfully exist, there must be a remedy. The Westfall Act has foreclosed state common-law remedies for federal officers' misconduct. And the FTCA does not apply to constitutional violations. So, for many plaintiffs, including Boule, there simply are no alternatives to a *Bivens* claim to obtain redress for federal agents' abuses of power. *Bivens* claims are necessary to make these plaintiffs whole. This Court should recognize that Boule has a valid *Bivens* claim under the Fourth Amendment. And the Court should hold, as it has long

assumed, that *Bivens* applies to remedy violations of the First Amendment as well. See *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006).

ARGUMENT

I. The Original Public Meaning of the Federal Judicial Power Encompassed the Traditional Common-Law Ability To Entertain Suits Against Government Officials for Violations of Fundamental Law.

Petitioner attempts to paint the *Bivens* remedy as an error in this Court's judgment and argues it should be narrowed to effective nonexistence. See Pet. Br. 14–17. Petitioner is wrong. Viewed in historic context, *Bivens's* recognition of a common-law right to sue for damages federal officers who violate the Constitution is consistent with the original public meaning of the Constitution and of the "judicial power" to provide remedies for violations of foundational rights.

The lack of an explicit authorization for such common-law remedies in the Constitution's text does not mean the judiciary is foreclosed from granting such remedies. In the analogous area of state sovereign immunity, this Court has held that "the Constitution's structure, its history, and the authoritative interpretations by this Court make clear" that "immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999).

A similar principle operates here: the Constitution's structure, its history, and the authoritative interpretations by this Court make clear that common-law remedies for violations of foundational law are a fundamental aspect of "the judicial power" conferred by Article III of the Constitution—a power that common-law courts possessed before ratification, and which they necessarily retain today.[2]

A. The Common-Law Right To Seek Damages Against Government Officials Is Rooted in Pre-Founding English Law.

Prior to the Founding, individuals could sue the English government in common-law courts for violations of their rights. At common law, rights implied remedies—as they do now, see *infra* section II.A, and that was no different when the right was violated by government. In fact, such suits were frequently—and often successfully—brought against the Crown's officials. And, though less common, individuals could also sue the Crown itself to recover for violated rights. Such suits were readily understood to be part of the judicial power of common-law courts.

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[2] And, as Justice Scalia recognized in the state sovereign immunity context, where "the question is at least close," as it is here, "the mere venerability of an answer consistently adhered to for almost a century *** strongly argue[s] against a change." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 34 (1989) (Scalia, J., concurring in part), *overruled by Seminole Tribe of Fla.* v. *Fla.*, 517 U.S. 44 (1996). As discussed *infra*, common-law courts have granted common-law remedies for violations of foundational law since Magna Carta, and two centuries of American history likewise show that federal courts retained the power to grant damages against federal officers for violations of fundamental rights.

1. English common law assumed that rights implied remedies. Thus, since Magna Carta, common-law writs were available to enforce foundational law. Before the Founding, "it was well recognized" that the Crown was "subject to the law" and "morally bound to do the same justice to his subjects as they could be compelled to do to one another."[3] In particular, writs were available to enforce the Magna Carta's guarantee of the right to be free from illegal imprisonment.[4]

The writ of habeas corpus[5] became the "preferred legal mechanism to enforce" Magna Carta's law of the land provision.[6] It was a "writ of right," issuing upon a prima facie showing of entitlement.[7] As such, it was an invaluable means of protecting the right against imprisonment guaranteed by Magna Carta. While

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[3] 9 William Holdsworth, A History of English Law 10 (3d ed. 1944). See also Fritz Schulz, *Bracton on Kingship*, 60 Engl. Hist. Rev. 136, 165, 168 (1945) (noting Bracton thought, since "[t]he law makes the king," "the king must make a return present to the law by subjecting himself to its rules."); I William Blackstone, Commentaries on the Laws of England 41, 54 (1765) (noting natural rights bound government).

[4] Magna Carta ¶ 29 (the "law of the land provision") (Nicholas Vincent trans.) (1297), available at https://tinyurl.com/MagnaCartaVincent.

[5] Although the Constitution forbids the suspension of the writ of habeas corpus, U.S. Const. art. 1, § 9, cl. 2, it did not create the writ. This is further evidence that the Founders understood such common-law writs to be an inherent part of the judicial power.

[6] Justin J. Wert, *With a Little Help from a Friend: Habeas Corpus and the Magna Carta after Runnymede*, 43 Political Science & Politics 475, 475 (2010).

[7] Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. Chi. L. Rev. 243, 244 (1965).

there were other writs available to enforce the law of the land provision, "the readiest way of all [was] by *habeas corpus*."[8]

An action of false imprisonment was also available: "If treason or felony be done, and one hath just cause of suspicion, this is a good cause, and warrant in law, for him to arrest any man, but he must shew in certainty the cause of his suspicion: and whether the suspicion be just, or lawfull, shall be determined by the justices in an action of false imprisonment brought by the party grieved, or upon a habeas corpus."[9]

2. Common law also provided a remedy for injuries caused by the Crown's officials. As Professor Moore puts it, "officers could be sued personally for trespasses committed by them in the name of the Crown."[10] Officers' liability often took the form of damages awarded in common-law courts.[11]

In fact, suits for damages against officials were common, at least against those local officers who interacted more with the people.[12] For example, English courts affirmed multiple damages awards after Lord Halifax's infamous searches and seizures of John Wilkes and his associates. *Entick* v. *Carrington*, 19

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[8] IV Edward Coke, Institutes of the Laws of England 182 (Garland Pub. ed., 1979) (1628).

[9] *Id.* at 52.

[10] 17A Moore's Federal Practice § 123App.01.

[11] See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 9-10 (1963).

[12] *Id.* at 9-15 (quoting A.V. Dicey, The Law of the Constitution 189 (8th ed. 1923)).

How. St. Tr. 1029, 1029-1031 (C.P. 1765) (Camden, C.J.) (calling warrant "illegal and void" and upholding damages award for trespass against federal officials); *Leach* v. *Money*, 19 How. St. Tr. 1001, 1027-1028 (K.B. 1765) (affirming damages award); *Huckle* v. *Money*, 95 Eng. Rep. 768, 768-769 (K.B. 1763) (Murray C.J.) (same). Halifax had granted general warrants for the search and seizure of papers alleged to be seditious, but the courts upheld the damages because the "magistrate over all the King's subjects [had] exercise[ed] arbitrary power, violat[ed] Magna Charta, and attempt[ed] to destroy the liberty of the kingdom." *Huckle*, 95 Eng. Rep. at 768-769. These cases, which were greatly celebrated in America, see *Boyd* v. *United States*, 116 U.S. 616, 626 (1886) (discussing the outcome of *Entick*), affirmed a common-law right to seek damages against government officials who violated fundamental rights.

Damages suits against Crown officials were not limited to searches and seizures. In a 1703 case, after an official wrongfully prevented an individual from voting, a jury awarded damages against him. The majority of the Queen's Bench reversed the damages award, but one judge, Lord Holt, voted to uphold the verdict. *Ashby* v. *White*, 92 Eng. Rep. 126, 135-136 (K.B. 1703) (Holt, C.J., dissenting). Holt's position ultimately prevailed, with both Holt and the House of Lords reasoning that, since "right and remedy are reciprocal," the plaintiff "shall have his action" when there is injury. *Ibid.*

Thus, individuals could seek damages at common law when government officials violated both personal and civil rights. There was a rich tradition of "private

relief in damages" against government officers that "caused injury by defaulting in their official duties or exceeding their lawful powers."[13]

3. Common law additionally provided a remedy against the Crown itself. For reasons of historical "accident" (because there was no higher authority to enforce the writ), ordinary writs would not lie against the Crown.[14] But that did not mean litigants were left without remedy. Instead, injured individuals could assert their claim through a petition of right.[15]

Moreover, relief was awarded on petitions of right "follow[ing] the nature of the ordinary remedies provided by law."[16] In other words, if the petitioner could show that the law would have entitled him to relief had the defendant been a private party instead, his petition against the King would be granted.[17] Indeed, while the King could rightfully refuse to grant a petition of grace, "he could not rightfully refuse to do what justice required when judgment had been got on a

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[13] David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 4 (1972). See also Jaffe, *supra* note 11, at 9-10.

[14] Jaffe, *supra* note 11, at 3, 3 n.4 (discussing the notion that the King had to consent before being sued) (quoting Frederick Pollock & Frederic William Maitland, The History of English Law 518 (2d ed. 1898)).

[15] Holdsworth, *supra* note 3, at 12 (noting the petition became the primary means of suing the King).

[16] *Ibid.*

[17] *Ibid.*

petition of right."[18] The petition was granted whenever a petitioner could show he had an applicable remedy at law.[19]

B. The Framers Recognized a Common-Law Right To Seek Damages Against Federal Officials Who Violated Constitutional Provisions.

One reason such remedies were so widely available is that the Founding generation feared abuses of federal power. Luther Martin, a well-known antifederalist, even opposed ratification of the Constitution out of fear that it would abolish such remedies. In Martin's opinion, trials against government officials were "most essential to our liberty" in "every case *** between

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[18] *Id.* at 15. See also Jaffe, *supra* note 11, at 5 (noting petitions of right were granted "not on the basis of expediency, but of law"); John F. Duffy, *Sovereign Immunity, the Officer Suit Fiction, and Entitlement Benefits*, 56 U. Chi. L. Rev. 295, 297 n.14 (1989) (quoting Clyde E. Jacobs, The Eleventh Amendment and Sovereign Immunity 7 (1972) (noting petitions were granted "as a matter of course")). Blackstone called recovery on petitions of right a "matter of grace," I Blackstone, *supra* note 3, at 236, but this was "historically inaccurate," Engdahl, *supra* note 13, at 5.

[19] See I Blackstone, *supra* note 3, at 23, 55-56, 109 (noting common law provided a remedy for any violated positive right). Petitions of right were not frequently invoked, but this was because of procedural intricacies, not because the petition did not remedy a wide swath of wrongs. Holdsworth, *supra* note 3, at 8-10 (noting later enactments that facilitated the procedure "in no way changed the law as to when the remedy by petition of right [was] available").

governments and its officers on the one part, and the subject or citizen on the other."[20]

In response to these concerns, John Marshall assured the delegates at the Virginia Ratifying Convention that federal officers who violate constitutional rights of citizens would be held accountable in court. If an official were to "go to a poor man's house, and beat him, or abuse his family," the victim could "trust to a tribunal in his neighborhood *** apply for redress, and get it."[21]

James Madison also believed individuals had a right to seek damages against federal officials, and even advocated for that protection to extend to aliens. Discussing the facts of *Maley* v. *Shattuck,* 7 U.S. (3 Cranch) 458, 491 (1806), see *infra* section I.C, Madison wrote that "injuries committed on aliens as well as citizens, ought to be carried in the first instance at least, before the tribunal to which the aggressors are responsible."[22] Given that Article III provided jurisdiction in federal court over suits between aliens and U.S. citizens, see US Const. art. 3, § 2, this statement

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[20] Luther Martin, *The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention* (Nov. 29, 1787), *reprinted in* 3 The Records of the Federal Convention of 1787, at 221, 222 (Max Farrand ed., 1911).

[21] John Marshall, *Virginia Ratifying Convention* (June 20, 1788), *reprinted in* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 554 (Jonathan Elliot ed., 1836).

[22] *Letter from James Madison to Peder Blicherolsen* (Apr. 23, 1802), *reprinted in* 3 The Papers of James Madison, Secretary of State Series 152 (D.B. Mattern et al. eds., 1995).

obviously meant that such actions for damages could be "carried" to federal courts.

C. A Tradition of Common-Law Suits for Damages Against Federal Officials Existed During the Founding Era.

Consistent with the Framers' vision, Founding-era American courts adopted the English law model permitting lawsuits against government officials. Until the Revolutionary War, colonists, like other English subjects, had the right to sue English officials.[23] Following American independence, courts continued to entertain suits against government officials, including officials of the new federal government.[24] The Founders "expected that common law *** would supply forms of action to contest many kinds of misconduct by federal officers."[25] The "judicial power," even of state courts, thus was understood to encompass the power to remedy violations of various rights by federal agents and officers.

During that early period, judges possessed power to determine the remedy for the federal official's offense, and often awarded monetary damages.[26] For example, in 1804, this Court upheld the decision of a circuit

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[23] See Andrew Kent, *Lessons for* Bivens *and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers*, 96 Notre Dame L. Rev. 1755, 1764 (2021).

[24] Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 Notre Dame L. Rev. 1869, 1880 (2021).

[25] Kent, *supra* note 23, at 1758.

[26] Vladeck, *supra* note 24, at 1880.

court to award monetary damages to the owner of a Danish ship, which a U.S. naval officer unlawfully seized during its voyage from a French port. *Little* v. *Barreme*, 6 U.S. 170, 179 (1804). Similarly, in 1806, the Court again required a naval officer to pay damages for his misconduct. *Maley*, 7 U.S. at 491. A similar case was brought in 1824, and monetary damages were awarded to a ship owner for the "asserted illegal seizure of the ship and cargo" by the collector of St. Mary's port. *The Apollon*, 22 U.S. 362, 363 (1824).[27]

That suit could be brought against federal officials was evident from the fact that officials were "strictly liable for constitutional violations that gave rise to common-law torts."[28] When federal officers acted beyond the scope of "the constitutional limits of their governmental authority," they were liable for trespass, and the common-law right of property received full protection.[29] For example, this Court held a plaintiff could bring a claim when federal officers wrongfully took possession of his land, claiming the government

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[27] Federal courts continue to grant common-law remedies when hearing admiralty cases. Admiralty is a particularly federal area of the law and is especially suited for the exercise of the judicial power of the United States. A similar principle operates when federal agents violate constitutional rights. Such cases are also particularly federal in nature, both because the Constitution is a federal document and because the Westfall Act has prohibited state courts from applying tort law to federal officers. The judicial power must be broad enough to provide a remedy in such circumstances, and federal *Bivens* actions are the means for doing so.

[28] Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Policy Analysis CATO Institute, (Sept. 14, 2020) at 4, available at https://tinyurl.com/CATOpolicy.

[29] Duffy, *supra* note 18, at 303.

held title under an Indian treaty. *Meigs* v. *McClung's Lessee*, 13 U.S. (9 Cranch) 11, 18 (1815). The Court reasoned that the government "cannot have intended to deprive [the plaintiff] of [his land] *** without compensation," and thus sustained a common-law claim against the federal officers. *Ibid.*

Suits were also commonly brought against federal customs collectors, mainly challenging "the legality of import duties or other taxes paid to the collectors" but also arising from "seizures of goods or vessels by federal customs collectors."[30] Importers in such cases sued federal collectors personally for damages.[31] See, *e.g.*, *Sands* v. *Knox*, 7 U.S. (3 Cranch) 499 (1806); *United States* v. *Riddle*, 9 U.S. (5 Cranch) 311 (1809)); *Crowell* v. *M'Fadon*, 12 U.S. (8 Cranch) 94 (1814). And, when goods or vessels were unjustly seized by federal customs collectors, the owners could file claims for money damages after the United States sought to condemn the property through *in rem* litigation.[32] Sometimes the owners themselves filed suit for trespass.[33]

In sum, a close review of American history refutes any contention that the *Bivens* remedy was cut from whole cloth by judges fifty years ago. Rather, the right to seek damages against a federal officer has its roots in the English courts, was recognized by the Founders,

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[30] Kent, *supra* note 23, at 1763.

[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid.*

and has been reaffirmed throughout American legal history.[34]

II. Without a *Bivens* Right, There Would Be No Recourse for Many First and Fourth Amendment Violations.

Yet another reason to recognize and/or retain *Bivens* claims for violations of First and Fourth Amendment violations is the reality that, without a remedy, a supposed right is meaningless. If the Court narrows *Bivens* such that it applies only in the precise circumstances in which it has already been recognized, it will essentially eliminate Fourth Amendment *Bivens* claims altogether, leaving injured plaintiffs without redress. And if the Court categorically forecloses *Bivens* claims for violations of the First Amendment, it will eliminate the only remedy through which plaintiffs in many circumstances can seek vindication of their constitutional rights.

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[34] *Amici* focus their discussion on cases from the Founding era to confirm that the *Bivens* remedy is consistent with an originalist understanding of the Constitution. But the common-law right to sue federal officials under the Fourth Amendment can also be traced throughout much of the nineteenth and twentieth centuries. In 1877, the Court required an officer of the Army to pay damages for unlawfully seizing whiskey from merchants. *Bates* v. *Clark*, 95 U.S. 204 (1877). And in 1940, the Court reaffirmed that an agent or officer of the Government may be held liable for causing injury, and "the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred." *Yearsley* v. *W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940).

A. Without A Remedy, There Is No Genuine Right.

This Court has recognized for over two centuries that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). It is thus "a settled and invariable principle, that every right, when withheld, must have a remedy[.]" *Id.* at 147.

If that is true of statutory rights, surely it must also be true when government officials violate the protections of the First and Fourth Amendments—protections which lie at "the very essence of constitutional liberty and security." See *Boyd* v. *United States*, 116 U.S. 616, 630 (1886). Without a remedy, nothing is left but "an abstract right—of no practical value—[which] render[s] the protection of the Constitution a shadow and a delusion." *Von Hoffman* v. *City of Quincy*, 71 U.S. 535, 555 (1866).[35]

As Blackstone reasoned, "it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress."[36] Blackstone wrote that a right existed without a remedy only when "the only possible legal remedy

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[35] In *Von Hoffman*, the Court held that, when a state government violated article 1, section 10 of the Constitution by reneging on an agreement that allowed a municipal government to collect a special tax to pay for municipal bond payments, it was obligated to provide a remedy, else article 1, section 10 would be meaningless. 71 U.S. at 555.

[36] I Blackstone, *supra* note 3, at 237.

would be directed against the very person himself who seeks remedy."[37] "In all other cases, it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."[38] Indeed, one might argue that such a rule is the very core of judicial power: to adjudicate rights and dispense remedies where there are violations of those rights.

This fundamental principle lies at the heart of the *Bivens* remedy. Without a remedy, constitutional rights would routinely fall prey to government overreach. What protection do the First and Fourth Amendments offer if an American citizen has no recourse when a rogue federal agent shoves him to the ground, searches his car without a warrant, and then retaliates when the victim exercises his First Amendment right to report such unlawful behavior and petition for redress of his grievance? There must be a remedy to deter federal employees from engaging in such egregious violations of constitutional rights—else those "rights," in this Court's words, are merely a "shadow and a delusion." *Van Hoffman,* 71 U.S. at 555.

B. In Many First and Fourth Amendment Contexts, There Is No Alternative Remedy to *Bivens*.

Indeed, for many First and Fourth Amendment violations, *Bivens* is the only remedy by which plaintiffs may receive redress. The FTCA does not cover

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[37] *Id.* at 23.

[38] *Id.* at 23, 237.

constitutional claims, and the Westfall Act prevents plaintiffs from seeking redress under state common law.

The Westfall Act prohibits tort suits, including suits for violations of constitutional rights, against federal officers under state common law. See 28 U.S.C. §2679(d)(2). Plaintiffs may therefore no longer avail themselves of state common-law causes of action against federal officers.[39] As Respondent correctly notes, following the enactment of the Westfall Act, the FTCA is ordinarily the exclusive remedy for wrongful acts committed by government employees. Resp.'s Br. at 38. But the FTCA does not apply to violations of constitutional rights, and thus provides no remedy for those who, like Respondent, have had their First and Fourth Amendment rights violated. This Court has construed that exemption as an "explicit exception for *Bivens* claims." *Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010). That a *Bivens* claim has become the first—and last—resort when federal officers violate constitutional rights, apparently by design of Congress, lays bare the crucial importance of the *Bivens* claim as a means of vindicating First and Fourth Amendment rights.

Where statutory remedies do not achieve wholeness or justice under the Constitution, the *Bivens* remedy may be a plaintiff's only path towards redress. *Bivens* was designed to provide a remedy in such

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[39] While the Supremacy Clause may permit such a diminution of the judicial power of the states, Congress cannot similarly usurp or suppress the inherent judicial power of the United States. That would violate the separation of powers.

circumstances: "For people in Bivens' shoes, it is damages or nothing." *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410, (1971) (Harlan, J., concurring). This Court should decline to narrow *Bivens* to its facts. And it should explicitly recognize, as it has previously assumed,[40] that *Bivens* is available to remedy violations, not only of the Fourth Amendment, but the First Amendment as well.

CONCLUSION

Bivens claims for constitutional violations, including violations of the First and Fourth Amendments, are consistent with a longstanding tradition of common-law damages suits against federal officers, and are readily understood to be part of the "judicial power." That tradition has been a buttress against governmental abuses of power, and a vindication of the principle that for every right, there is a remedy. If the Court narrows *Bivens* to the point that it is essentially overruled, or shuts the door on *Bivens* claims for First or Fourth Amendment violations, federal agents will be permitted to act lawlessly and with impunity from constitutional restraints, and those they harm will have no means to seek redress. This Court should affirm the court of appeals and recognize Boule's *Bivens* claims to prevent such an incongruous result.

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[40] See *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006).

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
HANNAH C. SMITH
KATHRYN E. TARBERT
ANNIKA M. BOONE*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerrjaffe.com
Counsel for Amici Curiae

*Not yet admitted in D.C. Practicing under the supervision of D.C. attorneys under Rule 49(c)(8).

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