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 INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice is a nonprofit public-interest law center committed to defending the essential foundations of a free society by securing greater protection for individual liberty. Central to that mission is promoting accountability for government officials who violate constitutional rights. *See, e.g.*, *Byrd* v. *Lamb*, petition for certiorari pending, No. 21-184 (filed Aug. 6, 2021); *Mohamud* v. *Weyker*, petition for certiorari pending, No. 21-187 (filed Aug. 6, 2021).

SUMMARY OF ARGUMENT

Just last Term, this Court recognized that "[i]n the context of suits against Government officials, damages have long been awarded as appropriate relief." *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 491 (2020). This recognition rested on a rich history, spanning from the Founding to the 20th century, of suits against federal officials for violating individual rights. Common-law suits in the early republic, like those of 18th-century England, served as the mechanism for Americans to vindicate their rights, and federal courts remained an open venue in which to bring them. *Ibid.* ("In the early Republic, 'an array of writs * * * allowed individuals to

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to this filing.

test the legality of government conduct by filing suit against the government officials' for money damages 'payable by the officer.' ") (internal citation omitted).

As this Court explained long ago, two constitutional principles supported the general availability of claims against federal officials. First, that "every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1765)). Second, that the separation of powers limits courts "to the questions, whether the laws have been violated; and if they were," to provide "suitable redress." *The Apollon*, 22 U.S. (9 Wheat) 362, 366–367 (1824). The power to shield officials from liability for policy reasons belonged to Congress. *Ibid*. This Court's decisions in, among others, *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and *Butz* v. *Economou*, 438 U.S. 478 (1978), embodied these principles.

Yet today, federal courts ignore the first principle and use the second—the separation of powers—to forswear their power to grant relief. See *Hernandez* v. *Mesa*, 140 S. Ct. 735, 739 (2020).

Granted, much has happened between then and now. For instance, the Court decided *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64 (1938), and Congress passed the Westfall Act in 1988, 28 U.S.C. 2679. Although both have been used to excuse injuries inflicted by rogue federal officials, neither altered this Court's

constitutional role in applying the law and providing appropriate relief against federal officials. See, *e.g.*, *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.").

Consider *Erie*. Based on its reading of the Rules of Decision Act, *Erie* discredited the notion of "federal *general* common law." 304 U.S. at 78 (emphasis added). But *Erie* did not repudiate federal courts' continued ability to fashion federal common law in areas of specific federal interest or, for that matter, fashion equitable relief for constitutional violations generally. Indeed, federal courts do both all the time. When read in that context, and against two centuries of American history, *Bivens* simply represents a modest variation on an old theme. By recognizing a right of action from the Constitution, this Court was merely continuing a long, unquestioned tradition that embodied the Founders' understanding of the judicial role and separation of powers. *Butz*, 428 U.S. at 485–486, 489–495.

And while the Westfall Act precluded most remedies against federal officials in state courts, it codified *Bivens* as a broadly available constitutional remedy against federal officials in federal courts. *See Hernandez*, 140 S. Ct. at 748 n.9. Indeed, in 1988, the availability of *Bivens* was so well established that just six years earlier, this Court used it to justify its policy-driven creation of qualified immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 805 (1982). By explicitly

recognizing the availability of constitutional remedies against federal officials against this backdrop and removing the ability to sue federal officials in state courts, Congress promoted *Bivens* as the proper avenue through which to pursue remedies for constitutional violations committed by federal officials. 28 U.S.C. 2679(b)(1); 28 U.S.C. 2679(b)(2)(A).

Continuing to restrict the availability of the *Bivens* remedy, well beyond its scope in 1988, would thus not only contravene the intent of Congress, but call the Westfall Act into serious constitutional question. More importantly, each of the thousand cuts to *Bivens* also severs modern jurisprudence from the Founders' constitutional design. This case presents the Court an opportunity to align itself with the intents of both Congress and the Founding generation.[2]

ARGUMENT

I. Judicially applied damages remedies against federal officials have a long historical pedigree and are consistent with the separation of powers.

Suits for damages against federal officials are neither new nor radical. They have a storied history dating back to the 18th century, and they are firmly rooted in the English common law that informed the

[2] So too do *Byrd* v. *Lamb*, petition for certiorari pending, No. 21-184 (filed Aug. 6, 2021), and *Mohamud* v. *Weyker*, petition for certiorari pending, No. 21-187 (filed Aug. 6, 2021). See *infra* at 26.

Constitution. See, *e.g.*, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1895, at 748 (1833). The Founding-era tradition of subjecting federal officials to money damages continued in federal and state courts uninterrupted through two centuries—until 1988, when the Westfall Act foreclosed state common-law remedies against federal officials acting within the scope of their employment. With the state courthouse doors closed, post-*Erie* plaintiffs were left with the only remedy Congress deliberately left open: *Bivens*. But based on a misunderstanding of *Erie* and this Court's Article III power to recognize such actions, *Bivens* has been significantly cut down, leaving the federal courthouse doors closed too. Now, contrary to centuries' worth of historical practice, federal officials enjoy de facto absolute immunity.

Only by returning to Founding-era doctrine and viewing *Erie* through the proper lens can this Court revive the availability of claims against individual federal officials that the Founders considered essential to constitutional government. The system of unaccountability currently in place—one that sanctions a "Constitution-free zone" for federal officials of all stripes, *Byrd* v. *Lamb*, 990 F.3d 879, 884 (5th Cir. 2020) (Willett, J., concurring)—conflicts with the separation of powers and the Bill of Rights. Both the interpretation and enforceability of the Constitution are the proper province of this Court. It cannot stand by while constitutional rights go "violated but not vindicated." *Ibid.*

A. *Bivens* is supported by a long common-law history.

1. Judge-applied damages remedies against federal officials were born of the tradition and judicial practice that federal courts inherited from English common law. "From time immemorial many claims affecting the Crown could be pursued in the regular courts," and sovereign immunity did not bar relief. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 1–2 (1963). Such relief is illustrated by English cases like *Ashby* v. *White*, 92 Eng. Rep. 126 (K.B. 1703) (Lord Holt, C.J., dissenting) and *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C.P. 1765), both of which track the Blackstonian view that damages remedies against executive officials are essential for vindicating fundamental rights and spring from the rights themselves. See 1 William Blackstone, *Commentaries on the Laws of England* 55–56 (1765) (observing that, without "pay[ing] * * * damages for the invasion" of rights, then "in vain would rights be declared").

Thus, according to Lord Chief Justice Holt, whose dissent in *Ashby* was later upheld by the House of Lords, the ability to bring claims against individual officials would not only "make publick officers more careful" but also vindicate the principle that if "the plaintiff is obstructed of his right, [he] shall therefore have his action." *Ashby*, 92 Eng. Rep. at 137. That principle was evident in one of the famous search-and-seizure cases, *Entick* v. *Carrington*, 19 How. Tr. 1029 (C.P. 1765), in which Lord Chief Justice Camden upheld an award of

damages against the King's Chief Messenger who had broken into the plaintiff's house with a general warrant.

The Framers conceptualized Article III's judicial power against this common-law background, "in which courts created damage remedies as a matter of course." Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1542 (1971); see also Stephen Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1816–1818 (2012) (explaining that subjects on which the Constitution is silent left preexisting rules of common law unchanged). Indeed, "[t]he founding generation inherited a system of * * * law that ensured government accountability through judicial processes and protected the role of the general assembly in the payment of public claims." 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, 1871 (2010). As circuit-riding Justice John Marshall put it, "[w]hen our ancestors migrated to America, they brought with them the common law of their native country." *Livingston* v. *Jefferson*, 15 F. Cas. 660, 665 (Marshall, J.) (C.C.D. Va. 1811) (No. 8,411).

It is thus unsurprising that for most of American history, individuals could subject federal officials to common-law liability for violating their rights. An officer's governmental authority served only as a defense to suit, and even then, the Constitution would override that defense. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1506 (1987).

In this context, Chief Justice Marshall's observation in *Marbury* v. *Madison*—"that for every legal right, there is also a remedy"—aligns with fundamental principles of constitutional law. 5 U.S. (1 Cranch) 137, 163 (1803). Consonant with this "general and indisputable rule," *ibid.*, federal courts ordered redress through judgments for money damages payable by the responsible federal official. This remedial regime showed that early American courts, like their English forebears, could not countenance a legal system with unenforceable rights. So much so, in fact, that they "seized [the] principle of personal official liability * * * and applied it with unprecedented vigor." David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14 (1972).

Early cases bear this out. In *Little* v. *Berreme*, for example, a U.S. Navy Captain, acting pursuant to President John Adams's instructions, unlawfully seized a Danish vessel. 6 U.S. (2 Cranch) 170, 178 (1804). Finding that the President's instructions were based on a statutory misreading, the Court, through Chief Justice Marshall, held the captain strictly liable for money damages. *Id.* at 170. Similarly, in *Wise* v. *Withers*, a federal officer entered the plaintiff's home to collect a fine that had been improperly imposed by a court-martial. 7 U.S. (3 Cranch) 331 (1806). Finding that the court-martial had acted without jurisdiction, this Court, again through Chief Justice Marshall, concluded that "[t]he court and the officer [were] all trespassers" subject to liability. *Id.* at 337. And in *The Apollon*, a U.S. Customs officer unlawfully seized a French ship in

Spanish waters. 22 U.S. (9 Wheat) 362 (1824). In holding the officer liable to the plaintiff's common-law damages claim, the Court, through Justice Story, reasoned that the Judiciary "can only look to * * * whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress." *Id.* at 367.

These cases exemplify a tradition of using judge-applied damages remedies to hold federal officials accountable, which "remained available through the 19th century and into the 20th." *Tanzin*, 141 S. Ct. at 491 (citing *Elliot* v. *Swartwout*, 35 U.S. (10 Pet.) 137 (1836); *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1851); *Buck* v. *Colbath*, 70 U.S. (3 Wall.) 334 (1865); *Belknap* v. *Schild*, 161 U.S. 10 (1896); *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912)). In light of this history, the Court observed that "damages have long been awarded as appropriate relief" against government officials.[3]

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[3] Professor Mascott, as amicus in support of petitioner, shrugs off this long line of cases, contending that these suits were merely seeking "to vindicate those longstanding common-law interests, not a separate category of allegedly constitutional rights." Mascott Br. 2. This argument, however, overlooks that "those longstanding common-law interests" were *constitutional* interests. John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 Fla. L. Rev. 849, 874 (2015) (observing that "when drafting the Bill of Rights, [the Framers] did not create new rights out of all whole cloth but simply drew on 'traditional guarantees already recognized in * * * English common law.' "); *Boyd* v. *United States*, 116 U.S. 616, 624–629 (1886) (same). In any event, Mascott seems to concede this in later pages of her brief. Mascott Br. 17 (recognizing that "[t]he early common-law claims were * * * constructs used to claim constitutional rights.").

Tanzin, 141 S. Ct. at 491. See also *Butz*, 438 U.S. at 490–496 (relying on the same line of cases to reject absolute immunity for federal officials).

2. Though courts granted such relief against federal officials in suits at common law, *Erie* did nothing to change the longstanding practice of holding federal officials accountable for violating fundamental rights. Contra *Hernandez*, 140 S. Ct. at 741–742, 748. True, after *Erie*, federal courts were bound by judge-made state law in diversity cases. But suits against federal officials for violating the Constitution do not involve matters of exclusively state law. Indeed, "[t]he understanding that the common-law damage remedy was a state-law remedy was itself only of recent vintage." Carlos M. Vasquez, Bivens *and the* Ancien Régime, 96 Notre Dame L. Rev. 1923, 1931 (2021). Instead, it had an "in-between status," reflecting features of both state and federal law. *Ibid.*; cf. John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 Fla. L. Rev. 849, 873 (2016) (explaining that from the Founding, federal courts exercised their power to vary the terms of state writs, making it "difficult to say with any certainty whether the writ was federal or state law"). More simply, the remedy was general common law.

Under *Erie*, of course, "[t]here is no federal general common law." 304 U.S. at 78. But this does not mean that the remedies awarded against *federal* officials for violating the *federal* Constitution are relegated to the vagaries of state law. It simply put federal courts to a choice: whether, in light of the interests involved,

federal common law would govern the matter at hand. See Vasquez, *supra*, at 1931–1932. On the same day it decided *Erie*, the Court made such a choice, ruling that federal common law would govern interstate disputes. *Hinderlander* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). The post-*Erie* question, then, became whether a case implicated "uniquely federal interests." If so, federal common law controls. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 505 (1988) (internal quotations omitted).

As applied to civil claims against federal officials, the Court answered that question affirmatively in *Boyle*, holding that federal common law displaced the state-tort liability of a contractor that sold a malfunctioning product to the U.S. military. In so holding, the Court recognized that "the civil liability of federal officials for actions taken in the course of their duty" was "[a]n area * * * of peculiarly federal concern." *Id.* Thus, the *Erie* question in *Boyle* was "whether federal common-law remedies *should* be recognized in lieu of state ones," not whether *Erie* foreclosed the option altogether. Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies*, 96 Notre Dame L. Rev. 1869, 1887 (2021).

That question can also be easily answered in *Bivens* actions. The federal interests identified in *Boyle*—the civil liability of federal officials for actions taken in the course of their duty—are nearly identical to the federal interests implicated in *Bivens* suits. Indeed, the federal interests in *Bivens* are even more acute, given that liability turns on the violation of the

federal Constitution—an issue on which this Court, not Congress or the States, has the final word. *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958). That is true today, just as it was at the Founding. The very nature of a *Bivens* claim (seeking redress for a constitutional injury), and the fact that these injuries were historically litigated in federal court, makes it a matter of unique federal concern. And since Congress's passage of the Westfall Act means that plaintiffs cannot seek recourse under state law, the Court's recognition of *Bivens* is imperative.

In short, *Erie* is entirely consistent with *Bivens*. The "demise of federal general common law" did not bring down with it "a federal court's authority to recognize a damages remedy" under the Constitution. *Hernandez*, 140 S. Ct. at 742. Properly understood, *Bivens* is simply "the post-*Erie* manifestation of the pre-*Erie* general common law regime," which everyone, including the Solicitor General in *Bivens*, had accepted as "consistent with the original understanding." Vasquez, *supra*, at 1931.

B. *Bivens* is consistent with the separation of powers.

Based on a misunderstanding of *Erie* and its purported effect on federal courts' common-law powers, constitutionally aggrieved plaintiffs have been rerouted toward Congress. But this is a strange route to take. Simply passing the buck to Congress in this way contradicts historical practice. For at least a century

and a half after the Founding, the allocation of responsibility for violations of individual rights was simple: Courts did law by analyzing whether the conduct by the government officer was illegal, and if so, ordering damages; and Congress did policy by carefully adjusting incentives that led to the best policy outcomes. Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How* Tanzin v. Tanvir, Taylor v. Riojas*, and* McCoy v. Alumu *Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity*, 112 J. Crim. L. & Criminology 105, 110, 115–118 (2022). It was only once federal courts began usurping Congress's policymaking prerogative that plaintiffs began having trouble vindicating their constitutional rights in federal court. *Id.* at 121–125.

The Founding-era distinction between the judicial and legislative roles affirms a bedrock truth about early common-law suits: that the enforcement of antimajoritarian rights would not be left to the majoritarian branch of government meant to be restrained by those rights. Indeed, even the Founders did not rely on Congress to establish damages remedies against federal officials. They instead "understood that such remedies would be available absent congressional action via the general common law," Vasquez, *supra*, at 1924, which served as "the primary tool for the maintenance of liberty in England," Preis, *supra*, at 874.

Echoing the same belief almost two centuries later, Justice Harlan II rightly concluded that it would be "anomalous" for the federal courts to be "powerless

to accord a damages remedy" for constitutional violations. *Bivens*, 403 U.S. at 403–404 (Harlan, J., concurring). After all, he observed, the Constitution is "aimed predominantly at restraining the Government as an instrument of the popular will." *Id.* at 404. Leaving the enforcement of individual rights to the branch that represents the popular will, therefore, gets the separation-of-powers calculus exactly backward.[4]

Yet the solution to the anomaly Justice Harlan identified—allowing damages suits against federal officials—has now become a "'disfavored' judicial activity," *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017), driven by this Court's jaundiced view of implied *statutory* rights of action. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 293 (2001). That is especially troubling since, at the time *Bivens* was decided, plaintiffs could still turn to state courts for redress. Today, however, the Westfall Act forecloses that option, leaving *Bivens* as the only damages remedy against federal officials acting within the scope of their employment.

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[4] In his testimony before the Senate Judiciary Committee a decade ago, Justice Scalia remarked that "[e]very banana republic has a bill of rights," but it was the structure of the American Constitution—the separation of powers—that ensured those rights would not become "just words on paper, what our Framers would have called 'a parchment guarantee.'" *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the Committee on the Judiciary*, 112th Congress 6–7 (2011) (statement of Antonin Scalia, Assoc. Justice of the United States Supreme Court). Now the separation of powers is being invoked to make constitutional rights just that—parchment guarantees, unenforceable against the very officials the Bill of Rights was created to restrain.

In any case, implying rights of action under federal statutes is fundamentally different than implying them under the Constitution. As this Court has reasoned, the former "arrogat[es] legislative power," because "no law pursues its purpose at all costs," and the means by which a statute carries out its purpose "involves balancing interests and * * * compromise." *Hernandez*, 140 S. Ct. at 741–742 (internal quotations and citations omitted). The Court has acknowledged that the reasoning against statutory remedies does not apply to Constitutional remedies, but it has treated them identically anyhow. See *Abbasi*, 137 S. Ct. at 1856; but see *Davis* v. *Passman*, 442 U.S. 228, 241 (1979) ("[T]he question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution.").

Justice Powell, whose dissent in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), laid the groundwork for the statutory approach ultimately adopted in *Sandoval*, agreed. "[T]his Court's traditional responsibility to safeguard constitutionally protected rights," he wrote, "permits greater judicial creativity with respect to implied constitutional causes of action." *Id.* at 733 n.3 (Powell, J., dissenting). "[T]he implication of remedies to enforce constitutional provisions," he continued, "does not interfere with the legislative process in the way that the implication of remedies from statutes can." *Ibid.* This is so for at least three reasons.

First, unlike statutes, constitutional compromise concerned only the substance of certain provisions, not their enforceability. Vasquez, *supra*, at 1927. Again, the Framers drafted the Bill of Rights against the "British history of subjecting government officials exceeding their powers to common-law remedies." *Id.* at 1928. So by omitting remedial details in the Constitution itself, the Framers were not somehow "calibrating the degree of effectiveness they wanted those provisions to have." *Id.* at 1927. They instead expected judge-applied remedies to remain available for the enforcement of constitutional rights. See *Boyd* v. *United States*, 116 U.S. 616, 624–629 (1886) ("Every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with [*Entick* v. *Carrington*], and considered it as the true and ultimate expression of constitutional law[.]").

Second, though determining the scope and effectiveness of statutory rights is a prerogative left solely to Congress, the same is not true for constitutional rights. In a noted departure from our "parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches[.]" *United States* v. *Morrison*, 529 U.S. 598, 616 n.7 (2000). Thus, leaving the availability of a constitutional cause of action to Congress alone would jettison a "permanent and indispensable feature of our constitutional system": that "the federal judiciary is supreme in the exposition of the law of the Constitution." *Ibid.* (cleaned up). As with its

interpretation, the Constitution's enforceability is not, and cannot be, merely a matter of legislative grace. Cf. *Evenwel* v. *Abbott*, 578 U.S. 54, 82 (2016) (Thomas, J., concurring in the judgment) ("The Framers understood the tension between majority rule and protecting fundamental rights from majorities.").

Third, no separation-of-powers issues arise with respect to prospective remedies for constitutional violations, so none should arise with retrospective ones either. "Both [remedies] are exercises of judicial power that were both commonplace and significant to patterns of official accountability at (and after) the Founding." Vladeck, *supra*, at 1883. If anything, courts should prefer legal rather than equitable relief, given the "canonical view that 'equity follows the law,'" *ibid.*, and the more intrusive, burdensome, and extraordinary nature of injunctions compared to money damages.[5] And *Erie* is no answer for the now current preference of equity over law, at least for constitutional redress. As this Court "explained seven years after *Erie*, even before the merger of law and equity, federal courts applied the Rules of Decision Act *without* distinguishing between the two systems." *Id.* at 1889 (citing *Guaranty Tr. Co.* v. *York*, 326 U.S. 99, 103–104 (1945)). In other words, equitable relief for constitutional violations "is a judge-made remedy" that this Court regularly provides, *Armstrong* v. *Exceptional Child Ctr.,*

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[5] *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983) (intrusive); *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000) (burdensome); *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (extraordinary).

Inc., 135 S. Ct. 1378, 1384 (2015), and nothing about *Erie*'s statutory holding justifies a double standard for judge-made damages remedies at common law, which this Court provided in *Bivens*.

At the end of the day, and consistent with its role in our constitutional system, this Court can simply determine whether a legal violation has occurred and award the appropriate relief. It did so in the early Republic, *see, e.g.*, *The Apollon*, 22 U.S. at 367, and it should again now.

II. *Bivens*, the Westfall Act, and the creation of qualified immunity all support the availability of damages remedies against federal officials.

When the Court properly conceptualized its judicial power, it recognized that individuals could bring suits for damages against federal officials directly under the Constitution. Though it applied the remedy under the Fourth Amendment, *Bivens* established more broadly "that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official." *Butz*, 438 U.S. at 504.

Bivens was never limited to Fourth Amendment claims or any set of specific facts or circumstances. See *Davis*, 442 U.S. 228; *Carlson* v. *Green*, 446 U.S. 14 (1980). Indeed, in 1982, when this Court created the

modern doctrine of qualified immunity in *Harlow* v. *Fitzgerald*, it did so in reliance on the wide availability of *Bivens* claims. 457 U.S. at 808 (noting that most federal officials will not be entitled to absolute immunity). So to shield federal officials from the burdens of litigation in *Harlow*, the Court announced a new objective test that required plaintiffs to show, right at the outset, that any constitutional violation they alleged was clearly established.

It was against this background that Congress, through the Federal Tort and Compensation Act of 1988 (*i.e.*, the Westfall Act), codified *Bivens* and eliminated state-court remedies. To shrink or discard the *Bivens* remedy now, decades later, would therefore not only upset the remedial balance Congress struck in 1988 but, for the first time in this nation's history, leave plaintiffs with no venue in which to vindicate their rights. For many plaintiffs now, it's no longer "*Bivens* or nothing." *Hernandez*, 140 S. Ct. at 760 (Ginsburg, J., dissenting). It's just "nothing." *See*, *e.g.*, *Oliva* v. *Nivar*, 973 F.3d 438 (5th Cir. 2020); *Ahmed* v. *Weyker*, 984 F.3d 564 (8th Cir. 2020).

A. Before the Westfall Act, this Court repeatedly recognized the availability of *Bivens* claims.

In the years leading up to 1988, the Court developed *Bivens* into a meaningful avenue of relief. So meaningful, in fact, that the Court built the robust regime of qualified immunity—an issue that *Bivens*

precedes—on the back of *Bivens* claims. The Court first applied a good-faith, *Pierson* immunity to federal officials in *Butz*. Then, years later in *Harlow*, it created the objective, clearly-established test, all to ensure that federal officials are not overexposed to liability through *Bivens*.

In *Butz*, the plaintiff brought *Bivens* claims against various high-level federal officials, including the Secretary of Agriculture, for First Amendment retaliation, alleging that after criticizing the Department of Agriculture, the officials instituted an investigation and administrative proceeding against him. 438 U.S. at 480–482. In assuming the viability of the plaintiff's First Amendment claim, the Court proceeded to hold that, like state officials sued under Section 1983, federal officials sued under *Bivens* are entitled to qualified immunity. *Id.* at 504. The Court reasoned that affording executive officials absolute immunity from the plaintiff's First Amendment claim, as the government requested, would result in *Bivens* being "drained of meaning." *Id.* at 501 (internal quotations omitted). So rather than let absolute immunity swallow *Bivens*, the Court ensured parity between state and federal officials and held them to the same qualified-immunity standard.

Four years later, the Court decided *Harlow*, in which the plaintiff similarly sued high-level executive officials, this time presidential aides, for retaliation because they had allegedly fired him for exercising his First Amendment rights. *Harlow*, 457 U.S. at 802–805. Adopting "public policy" arguments to protect the

government defendants, *id.* at 813, the Court reformulated qualified immunity into an objective test, asking whether the federal officials violated "clearly established statutory or constitutional rights of which a reasonable person would have known," *id.* at 818. This new formulation, the Court said, rested on an overarching objective: to ensure that (federal) officials avoid the "social costs" of litigation while they devote their "official energy to pressing public issues." *Id.* at 814.

By engaging in policy-oriented reasoning, the Court's presumption of a viable *Bivens* claim in *Harlow* was crucial. If the plaintiff had no such claim, the Court's concern for federal officials facing the prospect of litigation would have been unfounded. And if that concern was indeed unfounded, there would have been no need to recalibrate federal-official immunity for constitutional violations. In other words, but for the general availability of *Bivens*, *Harlow* would have been erecting a hurdle for an obstacle course that never existed in the first place.

When read in the proper context, then, the Court's decision to recast the qualified-immunity test into an objective one was not a mere academic exercise. *Harlow*'s new, more protective test rested on a capacious understanding of *Bivens*. In the intervening years between *Butz* and *Harlow*, the Court had allowed suits against federal officials under the Fifth Amendment, *Passman*, 442 U.S. at 244, and under the Eighth, *Carlson*, 446 U.S. at 25. So while *Harlow*'s test may have been untethered to any immunity that existed at

common law, the underlying reality justifying the new test—that the plaintiff had a cognizable *Bivens* claim under the First Amendment—was not.

B. Just as the Court was aware of this reality, so was Congress, when in 1988 it legislated against the background of a robust *Bivens* regime.

The Federal Tort Claims Act of course predates *Bivens*. But when Congress amended it in 1974 to include intentional torts committed by federal law-enforcement officers, it sought to preserve *Bivens* for instances of law-enforcement overreach. See, *e.g.*, S. Rep. 93-588, 93rd Cong., 2 Sess. 3 (1973) (citing police raids as its motivation to hold federal officials accountable for unreasonable searches and seizures). It was thus "crystal clear," the Court said, "that Congress view[ed the] FTCA and *Bivens* as parallel, complementary causes of action." *Carlson*, 446 U.S. at 20 (citing S. Rep. 93-588, *supra*).

Then, after this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), Congress again amended the FTCA. Relying on the robust protection provided by *Bivens*, Congress codified the availability of "civil action[s] against an employee of the [federal] Government * * * brought for a violation of the Constitution of the United States," 28 U.S.C. 2679(b)(2)(A), while at the same time prohibiting suits against federal officials in state courts, *Hui* v. *Castaneda*, 559 U.S. 799, 806 (2010) (discussing how the FTCA was made "the

exclusive remedy for most claims against Government employees arising out of their official conduct").

In other words, Congress's 1988 amendment struck a compromise: it removed plaintiffs' right to sue in state courts—a right that existed since the Founding—but at the same time codified *Bivens* as the proper route for suing federal officials who violate individuals' constitutional rights. See James E. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 132–138 (2009). This Court has acknowledged the codification, stating that Congress "left *Bivens* where it found it" in 1988. *Hernandez*, 140 S. Ct. at 748 n.9.[6]

Where Congress found *Bivens* in 1988 is therefore key. By that time, the Court applied *Bivens* to claims under the Fifth and Eighth Amendments and, as mentioned above, built a doctrine of immunity around the assumption that *Bivens* applied to constitutional claims against federal officials generally, including to claims under the First Amendment. Moreover, at the time Congress codified the availability of constitutional claims against federal officials, *Bivens* was subject only to three limited exceptions: regulation of

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[6] See also *Tanzin*, 141 S. Ct. at 491 ("In 1988 the Westfall Act foreclosed common-law claims for damages against federal officials * * * but it left open claims for constitutional violations and certain statutory violations."); *Abbasi*, 137 S. Ct. at 1856 (mentioning that Congress decided "not to substitute the Government as defendant in suits seeking damages for constitutional violations"); *United States* v. *Smith*, 499 U.S. 160, 166–167, 173 (1991) (noting that through the Westfall Act Congress expressly "preserv[ed] employee liability for *Bivens* actions").

federal employment, military policy, and welfare benefits. See*, e.g.*, *Bush* v. *Lucas*, 462 U.S. 367 (1983) (employment); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (military); *United States* v. *Stanley*, 483 U.S. 669 (1985) (military); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988) (welfare).

To be sure, when Congress passed the Westfall Act, it did not speak directly to the scope of *Bivens*. But it didn't need to. When Congress is silent, it "means that ordinary background law applies," *New Jersey* v. *New York*, 523 U.S. 767, 813 (1998) (Breyer, J., concurring), or, even more, that Congress affirmatively approves of the status quo, see *Flood* v. *Kuhn*, 407 U.S. 258, 283–284 (1972). The background law and status quo in 1988 consisted of Supreme Court decisions generally recognizing *Bivens* claims in many different contexts, as well as multiple lower court decisions doing the same.

In the First Amendment context, for example, *Harlow* established immunity for federal officials because there was no question about the merit of the underlying *Bivens* claims. See also *Butz*, 438 U.S. at 505–506. Even lower courts at the time recognized this and accordingly permitted similar First Amendment claims against federal officials. See, *e.g.*, *Dellums* v. *Powell*, 566 F.2d 167, 194–196 (D.C. Cir. 1977); *Yiamouyiannis* v. *Chemical Abstracts Serv.*, 521 F.2d 1392, 1393 (6th Cir. 1975); *Paton* v. *La Prade*, 524 F.2d 862, 869–870 (3d Cir. 1975); *Milhouse* v. *Carlson*, 652 F.2d 371 (3d Cir. 1981).

When Congress legislated against the backdrop of *Bivens* in 1974 and 1988, it was not aiming at a moving target. See *Dixon* v. *United States*, 548 U.S. 1, 19–20 (2006) (Alito, J., concurring). So if the Court were to move the target on *Bivens* claims now, it would disrupt the remedial scheme Congress carefully implemented when it last visited the law governing federal-official accountability. Such a disruption requires greater reluctance not only in terms of stare decisis, cf. *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 455–460 (2015), but also because of the more consequential effect on constitutional rights generally. In the Westfall Act, Congress preempted suits under state tort law for injuries inflicted by federal officials acting within the scope of their employment. 28 U.S.C. 2679(b)(1). Thus, without *Bivens*, many plaintiffs will have no recourse for violations of their constitutional rights. That prospect alone should give the Court pause.

In his concurring opinion in *Byrd* v. *Lamb*, Judge Don Willett asked: "If *Bivens* is off the table * * * and if the Westfall Act preempts all previously available state-law constitutional tort claims against federal officers acting within the scope of their employment, do victims of unconstitutional conduct have any judicial forum whatsoever?" *Byrd*, 909 F.3d at 883–884. The answer to this question is currently no. It is up to this Court, however, to make clear that the question was wrongly premised. *Bivens* is not off the table. Victims of unconstitutional conduct by federal officials do have a remedy.

The Court should affirm the Ninth Circuit's decision below and confirm the availability of *Bivens* claims under the First and Fourth Amendments in the context of immigration law enforcement. It should likewise grant certiorari in *Byrd* v. *Lamb*, petition for certiorari pending, No. 21-184 (filed Aug. 6, 2021), and *Mohamud* v. *Weyker*, petition for certiorari pending, No. 21-187 (filed Aug. 6, 2021), reverse the Fifth and Eighth Circuits' decisions, and embrace the availability of *Bivens* claims under the Fourth Amendment in the context of domestic law enforcement.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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