No. 17-1678

In The
Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

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

BRIEF OF CARLOS M. VÁZQUEZ AND ANYA BERNSTEIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, when plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars whose research and teaching focus on federal courts, remedies, and this Court's *Bivens* jurisprudence. *Amici* are:

Carlos M. Vázquez is Professor of Law at Georgetown University Law Center. He has written extensively on sovereign immunity and official liability for constitutional violations, including *Bivens* claims, as well as the extraterritorial applicability of federal law. He is a member of the American Law Institute and served as an adviser to the Restatement (Fourth) of Foreign Relations Law. He has also served as chair of the Federal Courts section of the Association of American Law Schools. He teaches Federal Courts and the Federal System, Conflict of Laws, and Transnational Litigation, among other courses.

Anya Bernstein is Associate Professor of Law at SUNY Buffalo Law School. She has written about *Bivens* actions and congressional legislation; statutory interpretation; and administrative law and practice in the United States and in comparative perspective. She teaches civil procedure, administrative law, and legislation.

Amici write to provide needed historical background and context about the common law roots of a *Bivens* remedy for official misconduct of the kind

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[1] Counsel of record for all parties consented to the filing of the brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

at issue here. Far from providing novel relief, the *Bivens* remedy reflects a long tradition of providing compensatory damages to parties injured by unconstitutional acts of federal officers. At the founding, common law damages remedies were routinely available for individuals who were harmed by federal officials' unlawful acts, including when the misconduct took place overseas and the individuals harmed were foreign nationals. These tort remedies were made available by general common law and state law, awarded by state and federal courts, and accepted by Congress (which sometimes, but not always, chose to indemnify the officers). Viewed against this historical backdrop, *Bivens* is best understood as locating the law governing these well-established common-law remedies in federal law, alongside state torts.

Given these common law roots of the *Bivens* remedy, applying *Bivens* here would not be an expansion of *Bivens* to a new context but instead a standard application of a long-available tool. What's more, refusal to recognize a *Bivens* remedy here would be a sharp curtailment of the remedies historically available to victims of federal-officer misconduct under a common law tradition extending back hundreds of years.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit declined to apply *Bivens* to this suit because it framed the case as an extension of a damages remedy to a new context, replete with national security and foreign policy implications. Pet.

App. 13-16. That frame was too narrow. Situating *Bivens* within the common law tradition that preceded it, there is nothing novel about federal courts evaluating whether federal officials violated the law in contexts like this and, if so, remedying that harm with damages.

English common law in the colonial era recognized, as a routine matter, personal liability for public officials who committed tortious acts against citizens and foreign nationals alike, both within and beyond England's borders. This common law tradition was embraced by American courts in the founding era, and federal officers were commonly subject to tort liability in state and federal courts for official acts that were contrary to the Constitution. Customs collectors who insisted on payment of duties that were not due, postal officials who prosecuted crimes that did not occur, and military officers who seized vessels that could not lawfully be taken were subject to personal liability pursuant to common law causes of action. Congress sometimes, but not always, indemnified officers against these judgments. And this indemnification practice, which turned on case-specific questions of who should pay and why, nowhere questioned the courts' authority to award damages against officers. Rather, indemnification reflected Congress's endorsement of the use of the courts to hold federal officers accountable through the imposition of damages remedies. Courts left it to Congress to determine whether or not an officer should pay out of personal funds. But both branches accepted the court's role in determining whether the officer had violated

the law, and if so, the quantum of damages due to the injured party.

This robust framework for official liability applied, moreover, to the actions of federal officers outside the Nation's borders, often in the midst of armed conflict, and where foreign nationals and sensitive diplomatic relationships were involved. For example, and in stark contrast to the Fifth Circuit's reluctance, the Court recognized early on that it could judge whether a naval officer had committed a trespass by seizing a foreign-owned ship outside American waters. The Court also did not balk at deciding whether a military officer's order, during an active military campaign in Mexico, violated a merchant's property rights—despite arguments that such a determination risked supervising the commander's exercise of discretion in military affairs.

Bivens was decided against the backdrop of this common law tradition and continued it while adjusting the sources of law in a post-*Erie* world. Because tort suits alleging that federal officers committed constitutional violations would otherwise have their sole basis in state law after *Erie*, the *Bivens* court was faced with the question of whether a remedy for unconstitutional conduct ought also to arise out of federal law, given the interests involved. The Court decided that federal law should provide a remedy when federal officers violated the Constitution. But in determining that a federal remedy was available, the *Bivens* court did not invent personal damages liability for federal officers. Far from it. It merely updated the form of a damages remedy that, in substance, has been available since the founding, and even before.

Moreover, that centuries-old remedy was long-understood to reach conduct with cross-border or national security implications. To decline to apply *Bivens* here on account of factors that historically posed no bar to relief would be a sharp break with centuries of law affording such a remedy.

ARGUMENT

Bivens Rests Upon A Centuries-Old Common Law Foundation That Routinely Recognized A Damages Remedy For Official Misconduct.

A. English Common Law Provided a Damages Remedy for Official Misconduct at Home and Abroad.

In the colonial era, English common law provided rights of action against military and government officials whose tortious conduct exceeded official authority. *See* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509, 537–39 (2013) (describing relevant English common law torts); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 1–2 (1963) ("From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown.").

For example, *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (KB)—a "monument of English freedom" with which "every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar," *Boyd v. United States*, 116 U.S. 616, 626 (1886)—was a trespass action seeking

damages for an unlawful search and seizure. In that case, the King's Bench affirmed a damages judgment against the officials who conducted a search under the authority of a general warrant that was held unlawful. *Entick*, 95 Eng. Rep. at 817–18. The case is celebrated for its announcement of limits on searches, and for inspiring the Fourth Amendment, *Boyd*, 116 U.S. at 625–27. It is not celebrated for recognizing a cause of action for official misconduct, because that was already entrenched by the pre-revolutionary period—and went unquestioned in the 1765 decision, *see Entick*, 95 Eng. Rep. at 813, 815 (describing defendants' arguments).

There were several such cases in the pre-revolutionary period, providing remedies against officers in their personal capacity for a variety of unlawful official acts. *See, e.g.*, *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (KB) (trespass damages for search and seizure under authority of an unlawful general warrant); *Chambers v. Robinson*, (1726) 93 Eng. Rep. 787 (KB) (damages awarded for malicious prosecution).

Of note, damages were awarded based not only on harms such as physical injury and loss of wages, but also to remedy the injury to liberty caused by the unauthorized or excessive use of official power. In *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (KB), for example, a printer was awarded £300 in damages for trespass, assault, and imprisonment after he was taken into custody for several hours by a King's messenger on suspicion of having printed an allegedly seditious pamphlet. *Id.* at 768. Rejecting the argument that damages were excessive because the plaintiff was

treated well and confined for only a few hours, the court held the damages were justified because "it was a most daring public attack made upon the liberty of the subject." *Id.* at 769.

During this period, as well, new torts evolved to redress harms that did not involve a physical invasion of a plaintiff's property or person (required for trespass). One, known as "trespass on the case," is the antecedent to modern torts such as defamation and negligence, Vázquez & Vladeck, *supra*, at 538, and was applied to official as well as personal misconduct, *see Leader v. Moxton*, (1733) 95 Eng. Rep. 1157, 1160 (KB) (subjecting paving commissioners to liability under trespass on the case when they acted "arbitrarily and tyrannically" in the way that they exercised their powers, raising the street in front of plaintiff's lodging houses and depriving them of value).

A related tort could be committed only by official misconduct. Known as "action on the statute," it permitted a plaintiff to sue for damages "resulting from activity in violation of a legislatively created duty or standard." Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. Pa. L. Rev. 1, 18 (1968). Although statutory remedies could be substituted for the common law tort when the statutes "themselves provided for damages recovery by injured individuals," Vázquez & Vladeck, *supra*, at 538, the common law tort was otherwise available to recover for a breach of public duty. *See Ashby v. White*, (1703) 92 Eng. Rep. 126, 136 (KB) (Holt, C.J., dissenting) ("Where a new Act of Parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall

have an action against such person who so obstructed him."); Katz, *supra*, at 25 ("The Chief Justice's dissenting opinion [in *Ashby*] was accepted by the House of Lords, which reversed the King's Bench and entered judgment for the plaintiff.").

Importantly, English officers were subject to suit in English courts even when they acted abroad and in military capacities. *See* James E. Pfander, *Constitutional Torts and the War on Terror* 4 (2017) (describing a "series of tort claims brought in the superior courts of Westminster to challenge the legality of detention and other military action overseas"). In a leading case, *Mostyn v. Fabrigas*, (1774) 98 Eng. Rep. 1021 (KB), the King's Bench affirmed a damages judgment for a Minorcan who brought a trespass action for assault and false imprisonment against the British military governor of Minorca for beating and imprisoning him without trial in Minorca, and then banishing him. The court rejected the governor's argument that no "action can be maintained in this country for an imprisonment committed at Minorca, upon a native of that place," *id.* at 1023, in part because English courts were the only ones that could exercise jurisdiction over the suit, *id.* at 1028. The court applied English law to find the governor's actions unlawful, while noting that an officer could raise a defense based on local law if he could prove that law authorized his conduct. *Id.* at 1028.

Mostyn was just one of many cases in which English courts entertained suits by victims of official misconduct overseas. *See, e.g.*, *id.* at 1026 (discussing *Comyn v. Sabine*, a case in which a carpenter in

Gibraltar was awarded damages for being flogged after being tried by unlawful court-martial); *id.* at 1032 (describing a case against military officers who tore down buildings of individuals supplying liquor to soldiers in Canada); *Glynn v. Houston*, (1841) 133 Eng. Rep. 775 (CP) (damages judgment against governor of Gibraltar for assault and false imprisonment when a British officer, executing a search authorized by the governor, stopped a British merchant from leaving his house during the search). And although these cases involved the King's subjects, English courts also awarded damages to foreign plaintiffs harmed by official misconduct by British military officers beyond the boundaries of British territory. *See, e.g.*, *Cooke v. Maxwell*, (1817) 171 Eng. Rep. 614 (KB) (holding governor of Sierra Leone liable for damages to an American who was unlawfully arrested, and his property destroyed, beyond the limits of the British colony).

In short, the English common law that infused early American law embodied the principle that English courts were generally available to remedy harms caused by English officers—wherever the misconduct occurred and whomever the officers injured.

B. From the Founding, Common Law Remedies Were Available Against Federal Officers Who Violated the Law.

The English tradition of presumptive personal liability for official misconduct was embraced in the early Republic. "From the beginning of the nation's

history, federal (and state) officials have been subject to common law suits as if they were private individuals, just as English officials were at the time of the Founding." Vázquez & Vladeck, *supra*, at 531; *see also* Pfander, *Constitutional Torts*, *supra*, at 6. Whether under state law or general common law (before *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)), it was well-accepted that the common law provided a remedy for official misconduct, including when a federal official transgressed the Constitution while carrying out his official duties. *See* Pet. Br. 11-17.

For example, in the early years of the Republic, those harmed by official misconduct recovered damages from a federal postal official for a malicious prosecution, *Merriam v. Mitchell*, 13 Me. 439 (1836); from federal customs agents for wrongful seizures of vessels and their cargo, *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818) (affirming New York state court judgment); *Imlay v. Sands*, 1 Cai. 566 (N.Y. Sup. Ct. 1804); from a federal revenue collector for demanding unlawful customs duties, *Kidd v. Swartwout*, 14 F. Cas. 457 (C.C.S.D.N.Y. 1843) (No. 7,756); and from a federal military officer who attempted to collect a fine assessed by a court-martial that did not possess jurisdiction over the plaintiff, *Wise v. Withers*, 7 U.S.

(3 Cranch) 331, 337 (1806) (reversing denial of judgment for plaintiff in trespass action).[2]

Courts in this era were not insensitive to the situation facing federal officers subject to personal liability for acting in good-faith (but erroneous) reliance on federal law or instructions, but they did not think such concerns could or should stop the courts from providing a damages remedy. Rather, courts expected any such concerns to be addressed through the process of indemnification. As a New York court explained, courts were "bound to pronounce the law as we find it, and leave cases of hardship, where any exist, to legislative provision." *Imlay*, 1 Cai. at 573; *see also Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80, 98–99 (1836) (upholding damages awarded against federal revenue collector for demanding unlawful customs duty and noting that if "[s]ome personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior," it could be remedied by indemnification).

Congress, in turn, commonly granted officers' petitions for indemnification. And in doing so, it made case-specific judgments as to whether the harms should be compensated from the U.S. Treasury or the officers' pockets. *See* James E. Pfander & Jonathan L.

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[2] These cases were sometimes resolved in state court, but they were also often heard in federal court under diversity jurisdiction or through removal of cases involving federal officers. Vázquez & Vladeck, *supra*, at 540. The first federal-officer removal statute (for a particular set of customs officers) was enacted in 1815. *Willingham v. Morgan*, 395 U.S. 402, 405 (1969).

Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1866–68 (2010).

To seek indemnification, federal officers petitioned Congress for a private bill authorizing payment of the judgment against them. *Id.* at 1888–1891. A study of those petitions demonstrates both the widespread acceptance of personal-liability damages judgments against federal officers and the general rule that Congress would indemnify the officers—but not in every case. The study identified nearly 70 cases of officers petitioning for indemnification or plaintiffs petitioning for payment of a judgment between 1789 and 1860. *Id.* at 1904. The majority were "filed on behalf of military officers who had been held legally responsible for some form of trespassory invasion: a wrongful seizure of property or persons." *Id.* The second most common category addressed judgments against federal revenue officers for trespass or conversion. *Id.* at 1905. The remaining petitions involved judgments against federal postal officials and federal marshals, among others. *Id.*[3]

Most of the time (roughly 60%), indemnity was granted. *Id.* But where Congress determined the federal officer had not acted in good faith in exceeding the bounds of his authority, indemnity was denied. *See id.* at 1907 (quoting committee report denying

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[3] The malicious prosecution judgment in *Merriam v. Mitchell*, 13 Me. 439 (1836), discussed above, is one of the cases in which Congress indemnified a postal official. *See* Pfander & Hunt, *supra*, at 1908–09.

indemnity and stating that "it should not be the policy of the United States to screen their officers from making a just remuneration for losses sustained by her citizens, when the acts of such officers are illegal, unjust, and without palliating circumstances").

In sum, during the founding era and throughout the early republic, persons wronged by federal officers who exceeded their statutory or constitutional authority could avail themselves of the same tort remedies available against any other defendant. If courts found the official misconduct unauthorized, they sustained damages awards, regardless of the federal official's good faith. Congress then decided whether the officer had acted in circumstances that suggested the government should bear responsibility for the loss and, if so, indemnified the officer. If not, the officer was responsible to pay for the harm caused by his unlawful official conduct. Whether or not the government chose to indemnify, the courts' role in determining the legality of officer conduct, and awarding relief, went unquestioned.

C. Founding-Era Courts Applied These Remedies to Official Misconduct with Cross-Border and Foreign Policy Implications.

Founding-era state and federal courts' acceptance of tort suits against federal officers for official misconduct did not discriminate across territorial lines. Courts routinely awarded damages for official misconduct for torts committed beyond the borders of the United States, even when foreign nationals suffered the injury. And in early cases, this

Court considered—and rejected—the idea that the transnational nature of a tort should necessarily bar the application of a damages remedy.

A foundational case is *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (Marshall, C.J.). Captain Little was an officer in the U.S. Navy and a commander of a frigate during the Quasi-War with France. *Id.* at 176. During that period, Congress enacted the Non-Intercourse Act, which authorized the seizure of any American vessel caught sailing to a French port (including ports in French colonies). *Id.* at 177. The Secretary of the Navy issued instructions to Captain Little, directing him to help enforce the Act; the instructions, moreover, told him to seize vessels traveling "*to* or *from*" French ports and to be extra vigilant about vessels that were American but covered by (fake) Danish papers. *Id.* at 178.

Captain Little did as he was instructed and seized the *Flying Fish*, a vessel caught sailing from a French port that appeared to be American, notwithstanding its Danish papers. *Id.* at 176. Captain Little instituted forfeiture proceedings in Boston and the *Flying Fish*'s owner counter-claimed for damages. *Id.* The Court held that the seizure was unlawful. *Id.* at 177–78. It turned out that the vessel was not American, and it fell outside the scope of the act, regardless, because it was seized sailing *from* a French port, rather than *to* one—despite the executive instructions that attempted to broaden the authority to seize. *Id.*

The primary question on appeal, though, was not the lawfulness of the seizure, but the question of

damages. Chief Justice Marshall "confess[ed]" that "the first bias of [his] mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages." *Id.* at 179. He considered whether the law ought to draw a distinction on this question between acts "within the body of the country and those on the high seas," or between military and civil officials in light of the obedience to orders that is "indispensably necessary to every military system." *Id*. But he became "convinced that [he] was mistaken," and agreed with the rest of the Court that "the instructions cannot . . . legalize an act which without those instructions would have been a plain trespass." *Id.* Accordingly, Captain Little "must be answerable in damages to the owner of this neutral vessel." *Id.* Captain Little, in turn, sought indemnification from Congress, which granted his petition. Act for the Relief of George Little, Priv. L. No. 09-02, ch. 4, 6 Stat. 63 (1807).

Little is but one of several cases from the late 18th and early 19th centuries in which the Court affirmed a damages award to a foreign national resulting from unlawful seizure of a vessel on the high seas or in another nation's waters. *See, e.g.*, *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458 (1806) (upholding award of damages against U.S. naval officer for unlawful seizure of vessel owned by foreign national when it was entering a Haitian port); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (same for vessel seized near Martinique).

Although the high seas might be considered unique, the application of tort remedies to

extraterritorial conduct was not. Under a broader common law rule, state and federal courts alike welcomed suits for certain personal harms, called transitory torts, occurring outside of their jurisdictions. As the Court explained, "when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected." *Dennick v. R.R. Co.*, 103 U.S. 11, 17 (1881); *see* Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 Bos. U. L. Rev. 397, 430–34 (2018).

The courts were not alone in blessing the personal liability of federal officers who exceeded their authority overseas; the executive branch, too, approved of such suits. *See* Letter from James Madison, Secretary of State, to Peder Blicherolsen (Apr. 23, 1802), *in* 3 *The Papers of James Madison, Secretary of State Series* 152 (D.B. Mattern et al. eds., 1995) (insisting that "injuries committed on aliens as well as citizens, ought to be carried in the first instance at least, before the tribunals to which the aggressors are responsible," referring to federal courts in the case he was discussing involving a federal officer). And, as in domestic cases, Congress judged whether such damages awards should be paid from the public fisc. *See Charming Betsy*, 6 U.S. at 126 (reporter's note that the defendant officer was reimbursed by act of Congress); Act for the Relief of

Jared Shattuck, Priv. L. No. 12-02, ch. 19, 6 Stat. 116 (1813) (paying the damages award from *Maley*).

Justice Story summarized the separation of powers principles underlying this common law tradition in a case involving the seizure of a French ship in Spanish waters on the ground that the ship was attempting to avoid a tonnage fee. *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824). Remarking that the arguments before the Court "embrace[d] some considerations, which belong more properly to another department of the government," Justice Story wrote that if the executive took summary measures to address an emergency, then "if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity." *Id.* at 366–67. But that should not stop the Court from "look[ing] to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress." *Id.* at 367.

Throughout this period, the courts adhered to their responsibility to determine whether the laws had been violated and to provide suitable redress—even in cases requiring the evaluation of military judgments made during the heat of a campaign outside America's borders. For example, in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), the Court affirmed a damages judgment exceeding $90,000 against a U.S. Army colonel, Colonel Mitchell, for the forcible taking of the plaintiff's property and for compelling the plaintiff to travel with the army during parts of a campaign in the Mexican-American war. The plaintiff was a merchant who had set out on a trading expedition to Mexico

before the declaration of war. *Id.* at 129. At first, he and other merchants followed behind army lines as troops invaded Mexican territories and traded in areas that had become occupied by U.S. forces. *Id.* at 129. But when the army reached the town of San Elisario, the trader wanted to leave rather than continue on the dangerous expedition to Chihuahua. *Id.* The commander of the campaign determined that the trader needed to stay to "prevent the property from falling into the hands of the enemy." *Id.* at 129, 132. He gave an order to this effect to Colonel Mitchell, who executed the order; "and the plaintiff was forced, against his will, to accompany the American forces with his wagons, mules and goods, in that hazardous expedition." *Id.* at 129.

The trader's fears proved justified, and due to various events thereafter, his property was destroyed or lost. *Id.* at 130. The trader sued for trespass, and the jury determined that no danger or necessity existed to justify the seizure. *Id.* at 133–34. On appeal, the Court held that the jury had been properly instructed that danger or necessity was required to justify the seizure and affirmed the damages judgment. *Id.* at 134, 136. The Court rejected the defendant officer's argument that "an expedition into the enemy's country" with "dangers that . . . cannot always be foreseen" absolved the court of the responsibility to protect property rights, explaining that "where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own." *Id.* at 134.

And *Mitchell* was but one of several cases to make it to the Supreme Court in which military officers were subject to liability for official acts that infringed on plaintiffs' rights. *See, e.g.*, *Bates v. Clark*, 95 U.S. 204 (1877) (holding personally liable military officials who followed orders and wrongly seized private property they mistakenly believed was within Indian country); *Wise*, 7 U.S. at 337; *Maley*, 7 U.S. at 490; *Little*, 6 U.S. at 179.

As these cases show, the jurists in the generation that framed the Constitution did not hesitate to exercise their judicial obligation to determine what the law required when federal officers infringed on liberty or property rights abroad. Confident in the courts' ability—indeed, duty—to determine the law, they rejected the idea that declaring whether a military commander had infringed a person's rights risks supervision of "the discretion he may exercise in his military operations," *Mitchell*, 54 U.S. at 134, and dismissed the suggestion that military officers should be exempt from damages to avoid undermining their ability to perform duties essential to national security, *Little*, 6 U.S. at 179.

D. *Bivens* Continued this Common Law Tradition, Merely Recognizing a Federal Law Basis for the Remedy.

Bivens was decided more than one hundred and fifty years after *Little v. Barreme*, 6 U.S. 170 (1804), and is properly viewed against the backdrop of this rich common law tradition. Throughout the intervening century and a half, damages remedies against federal officers for their wrongful official acts

continued to be widely available, albeit generally under state law after *Erie* put to rest the notion of a general common law. *See, e.g.*, *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) ("When it comes to suits for damages for abuse of power, federal officials are usually governed by local law."); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940) (noting that federal officers can be personally liable for damages when they exceed their authority or "it was not validly conferred"); *Phila. Co. v. Stimson*, 223 U.S. 605, 619–20 (1912) ("The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.") (citations omitted); *Belknap v. Schild*, 161 U.S. 10, 18 (1896) ("But the exemption of the United States from judicial process does not protect their officers and agents . . . from being personally liable to an action of tort by a private person whose rights or property they have wrongfully invaded or injured, even by authority of the United States.") (citations omitted).[4]

Twentieth-century cases seeking redress for unlawful (*i.e.*, unconstitutional) searches and seizures—whether directed against federal or state officers—were strikingly similar to their common law antecedents. *Entick* and *Huckle* were actions for

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[4] Perhaps because many of the cases in which officer liability was recognized were decided before *Erie*, the Court did not always expressly situate them in state law, referring to the officer as being liable in "'tort,' or under the 'general law' or 'common law.'" Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1124 & nn.59–63 (1969) (footnotes omitted) (collecting cases).

trespass, false imprisonment, and assault based on law enforcement overreach, and state cases, including those discussed in the briefing in *Bivens*, followed similar patterns. *See, e.g.*, *Tierney v. State*, 42 N.Y.S.2d 877, 880 (N.Y. App. Div. 1943), *aff'd*, 54 N.E.2d 207 (N.Y. 1944) (increasing damages award for false imprisonment claim because the plaintiff "was subjected to an intolerable indignity; his constitutional rights were ruthlessly invaded"); *Saurel v. Sellick*, 279 N.Y.S. 323 (N.Y. App. Div. 1935) (awarding $1,500 actual damages and $500 exemplary damages when the police, without warrants, searched plaintiff's premises, arrested him, and held him in custody for five hours); Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493, 497 & nn.26–29 (1955) (collecting cases in which damages were awarded for false imprisonment claims).

When this Court decided *Bivens* in 1971, it did so against the backdrop of this unbroken line of cases, in state and federal court, recognizing that federal officers were routinely subject to personal damages liability for unconstitutional conduct. The only question facing the Court was thus *where* a right to sue federal officers for unconstitutional conduct should be located (federal law or no), not *whether* it should exist. No one argued that there should be *no* remedy; issue was joined only on whether the state law remedy was inadequate and should be supplemented by a federal remedy when federal official misconduct was at stake. *Bivens*, 403 U.S. at 390 ("Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights

by federal agents."). The federal government agreed that "[i]n America, as in England, government officers were to be subject to the same common-law actions for damages as those applicable to private persons." Br. for the Resp'ts at 10, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (No. 301), 1970 WL 136799. It simply argued that those actions should proceed under state law. *Id.*

Indeed, *Bivens* can be best understood as providing a federal right to sue that builds on the common law past and tailors the common law suit for use in a post-*Erie* world. *See* James E. Pfander, Iqbal, Bivens, *and the Role of Judge-Made Law in Constitutional Litigation*, 114 Penn St. L. Rev. 1387, 1415 (2010) ("*Erie* created the very real possibility that in tort suits aimed at enforcing constitutional rights, both the right to sue the federal official and the incidents of official liability would be governed by state law."); Vázquez & Vladeck, *supra*, at 541 (noting that the decision to frame remedial issues in state law terms after *Erie* "tied" the federal courts to "state precedents" and prevented them from taking account of "the federal interests involved, including the need to give efficacy to the Constitution").

In the pre-*Erie* era, courts—including this Court—had not been particularly careful about pinning down the locus of common law rights to sue federal officers for official misconduct. *See* Hill, *supra*, at 1124. After *Erie*, when pushed to resolve the question whether a remedy arose under federal law in addition to state tort law, the *Bivens* court said yes, calling it "hardly . . . a surprising proposition" because "[h]istorically, damages have been regarded as the

ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395.

Congress quickly accepted and ratified the *Bivens* remedy. In 1974, Congress amended the Federal Tort Claims Act (FTCA) to add the federal government as a defendant in certain law-enforcement tort suits, while making clear that any FTCA suit would operate in parallel with the right to bring a suit for damages under *Bivens*. 28 U.S.C. § 2680(h); *see Carlson v. Green*, 446 U.S. 14, 19–20 & n.5 (1980) ("[T]he congressional comments accompanying [the FTCA] amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action."); James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 133 (2009) (noting that Congress rejected language proposed by the Department of Justice that "would have eliminated the *Bivens* action altogether in favor of suits against the government for constitutional violations").

Moreover, in a reprise of its antebellum indemnification acts, Congress made a judgment, after *Bivens*, as to when damages caused by federal official misconduct should be paid out of the officers' pockets, and when they should not. In 1988, responding to a ruling recognizing the continued viability of state tort claims against federal officers, *Westfall v. Erwin*, 484 U.S. 292 (1988), Congress passed the Westfall Act. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. The Act grants immunity to federal officers for claims not based on federal law and substitutes the federal government as a defendant

under the FTCA. But the Act carved out a significant exception for claims "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A).

By exempting claims "brought for a violation of the Constitution of the United States" from this immunity/substitution regime, the Act allowed *Bivens* claims to proceed against the responsible officer. *See* H.R. Rep. No. 100-700 at 6 (1988) ("Since the Supreme Court's decision in *Bivens*, . . . the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, [the Act] would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights."); Anya Bernstein, *Catch-All Doctrinalism and Judicial Desire*, 161 U. Pa. L. Rev. Online 221, 223–30 (2013) (exploring the interplay of Westfall Act transformation, substitution, and immunity). Whatever its effect in terms of reinforcing the need for a *Bivens* remedy here, *see* Petr. Br. 40-42, the Westfall Act is a clear congressional endorsement of the *Bivens* remedy. *See* Pfander & Baltmanis, *supra*, at 122 ("T]he Westfall Act supports our argument for the routine availability of *Bivens* claims."). By excluding *Bivens* suits from substitution and immunity, Congress effectively chose the officer suit, a remedy reflected in centuries of common law development, as the mechanism best suited to remedy alleged constitutional tort violations.

At bottom, this case raises no spectre of judicial expansion of a newly-begotten right. Nor does it trace

new ground in providing for a judicial remedy to a foreign national against a federal officer acting (arguably) extraterritorially. On the contrary, to refuse to allow a *Bivens* remedy here would dramatically curtail a remedy that has been available since the very first days of the Republic.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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