

No. 25-417

**In the
Supreme Court of the United States**

FRANCIS NIELSEN,

Petitioner,

v.

KEKAI WATANABE,

Respondent.

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

**BRIEF OF THE CATO INSTITUTE AS *AMICUS*
CURIAE IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

¹ Rule 37.6 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF THE ARGUMENT

Mr. Watanabe alleges that after being brutally assaulted, and while in 10-out-of-10 pain, a government nurse told him “to stop being a cry baby” and refused to send him to the hospital. Mr. Watanabe’s coccyx was broken. Untreated for years, the bone chips migrated into his soft tissue.

Mr. Watanabe says the nurse’s deliberate indifference to his serious medical need is an Eighth Amendment violation cognizable under *Bivens*. He filed this suit asking for his injuries to be treated by a specialist and damages. The Court of Appeals permitted his suit to proceed.

The nurse disagrees. He wants the Court to grant him—and everyone else in the federal government—sweeping immunity from monetary damages. Page one of his brief, in fact, calls for this case to be “the final installment of the *Bivens* saga.”

As of oral argument before the Court of Appeals, the government had not taken Mr. Watanabe to a specialist.

ARGUMENT

Centuries of law support Mr. Watanabe’s claim for damages. What was plain to Blackstone was incorporated into American law by the Founding Generation. No lens of interpretation—be it originalism, textualism, or even ordinary statutory interpretation—indicates otherwise.

Petitioner would have this Court rewrite these basic principles. His view, if adopted, would render hollow history and precedent, exacerbating the chasm between favored and disfavored constitutional rights

that this Court has been trying to bridge for decades. It is an invitation to engage in policymaking—judicial repeal rather than restraint.

The Cato Institute respectfully asks the Court to reject Petitioner’s invitation.

This brief first explains why settled law supports Mr. Watanabe’s claim. History, text, and precedent all point toward the traditional remedy: monetary damages against the individual who violated the plaintiff’s rights. Because the Constitution already incorporated the tradition of damages in courts of law, the parties’ statutory interpretation arguments are avoidable.

Should the Court find it necessary or helpful to look at the statutory debate, this brief next shows the ways in which Congress has implicitly blessed if not expressly approved suits seeking damages against federal officers.

Lastly, this brief seeks to convey to the Court how divorced Petitioner’s arguments are from the lived experiences of ordinary Americans. “The people themselves” know that the Constitution is already supposed to protect them from the worst government abuses. The Federalist No. 49. It would, candidly, be shocking for the Court to say that a theory of constitutional organization demands further authorizing legislation.

The Court should put its foot down. The “final installment of the *Bivens* saga” should be a return to founding values and constitutional text: a realization that *Bivens* was never necessary in the first place. The People who adopted the Constitution knew money damages were available from those who wronged them, even if they worked for the federal government. The People of today, heirs of that tradition, cannot be

divested of that established remedy without proper amendment of the Constitution.

A. Damages Are the Default Remedy

Centuries of law indicate that money damages are the default remedy for injured persons who seek justice in courts of law.

Blackstone stated the “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.” *Marbury v. Madison*, 5 U.S. 137, 163 (1803). The remedy for personal injuries was plain: a man who is beaten “may have satisfaction by recovering equivalent damages,” he said. 1 William Blackstone, *Commentaries* *131.

Monetary damages were not available from private defendants only. Abusive government officers faced liability as well.

The authority is ancient. Before 1275, English law provided that a government officer who acted without authority “should pay double damages to the plaintiff, and a heavy fine to the king, for doing injury in his name to the subject.” *United States v. Lee*, 106 U.S. 196, 229 (1882) (citing Lord Coke).

In *Mostyn v. Fabrigas*, for example, a British officer was held personally liable for destroying the homes of settlers on Nova Scotia. See 1 Cowp. 180 (1774), as discussed in *Mitchell v. Harmony*, 54 U.S. 115, 135 (1851). Even though the officer had acted on orders, “it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the [settlers] recovered damages against him.” *Mitchell*, 54 U.S. at 136.

The Founding Generation knew this principle.

In 1787, for example, Anti-Federalists supported the nascent Seventh Amendment by pointing to a substantial damages award issued against an officer who had engaged in an “outrageous search.” Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 708 (1973). It was taken for granted that if “the military officers of Congress, by a wanton abuse of power, imprison the free citizens of the United States of America,” the author wrote, or “a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift,” then “heavy damages would at once punish the offender and deter others from committing the same.” *Id.* at 708 n.187.

The jurists of the Founding Generation knew this principle too. They applied it faithfully, even despite initial hesitation.

In *Little v. Barreme*, the plaintiff sought money damages from an American ship captain who seized a Danish vessel pursuant to an unlawful order of the president. 6 U.S. 170 (1804), *summarized in Hencely v. Fluor Corp.*, 608 U.S. 31, 146 S. Ct. 1086, 1098 (2026). The U.S. district court let the captain off the hook for damages, and Chief Justice Marshall was (at first) prone to agree. “[T]he first bias of my mind was” to “excuse from damages” the captain, he admitted. 6 U.S. at 179. “But I have been convinced that I was mistaken” by “my brethren,” he wrote. *Id.* Under ordinary operation of law, this Court held, the captain “must be answerable in damages.” *Id.*

In short, for centuries, government officers who violated people's rights were personally liable for monetary damages. *E.g.*, *Tracy v. Swartwout*, 35 U.S. 80, 98–99 (1836) (“Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship.”); *Mitchell*, 54 U.S. at 130 (affirming damages award against federal officers); *see also* Stephen I. Vladeck, *The Inconsistent Originalism of Judgemade Remedies Against Federal Officers*, 96 Notre Dame L. Rev. 1869, 1880 (2021).

Petitioner attempts to avoid the default remedy by claiming that most suits invoked state law, rather than federal law. Opening Brief at 4–5. But those were simply “pleading conventions” used by “the lawyers of the time.” Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1129 (1969). “The common law forms of action prevailed in the state courts as a matter of historic continuity, and in the federal court[s] because Congress had directed conformity with the practice of the state courts.” *Id.* at 1151. In a constitutional tort, however, “it was nevertheless the Constitution that determined the outcome.” *Id.* at 1133.

Professor Akhil Amar’s formulation is functionally identical. “The structure of these pre-*Bivens* cases was quite simple: The ultimate issue before the court concerned the federal Constitution * * * .” Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1506 (1987). They proceeded in traditional serve-and-volley form:

Plaintiff would sue defendant federal officer in trespass; defendant would claim federal

empowerment that trumped the state law of trespass under the principles of the supremacy clause; and plaintiff, by way of reply, would play an even higher supremacy clause trump: Any federal empowerment was ultra vires and void because of Fourth Amendment limitations on federal power itself.

Id. at 1506–07. To prevail on a damages claim required plaintiff to establish “that the Fourth Amendment had been violated,” which meant “defendant’s shield of federal power would dissolve, and he would stand as a naked tortfeasor.” *Id.* at 1507.

No matter the pleading convention of the era, then, damages remedies have always been available against individual federal officers. Petitioner would have this Court bring centuries of tradition to an end.

Petitioner pivots, saying Mr. Watanabe “could (and did) seek nonmonetary relief.” Opening Brief at 2. Set aside for a moment the chutzpah it takes to advance that argument on this record, where the government had not provided any nonmonetary relief even as of oral argument in the Court of Appeals. It simply is not true that damages and injunctive relief are mutually exclusive remedies. In *Little*, for example, this Court held that the injured party was entitled to a court order “direct[ing] a restoration of the vessel and cargo” *and* damages against the responsible officer. 6 U.S. at 176.

It is telling that Petitioner acknowledges federal courts’ equitable power to issue injunctions. Opening Brief at 5. On this, *amicus* agrees. But consider for a moment *how* federal courts obtained that power.

The power of injunctive relief was vested in the judiciary when the People ratified Article III, section 2: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution * * * .” Courts of equity, of course, have the power to issue injunctions. *E.g.*, *Trump v. Cook*, 609 U.S. ---, 146 S. Ct. 2234, 2250 (2026); *Ex parte Young*, 209 U.S. 123, 156 (1908). The Constitution therefore did not need *more* text granting federal courts the power to issue injunctions. The word “injunction” does not appear because it was encompassed by the word “Equity.”

The problem with Petitioner’s argument is that the same clause of the Constitution *also* extends the judicial power to all cases “in Law.” An award of damages “is the traditional form of relief offered in the *courts of law*.” *Curtis v. Loether*, 415 U.S. 189, 196 (1974) (emphasis added); *see also* Suja A. Thomas, *A Limitation on Congress: “In Suits at Common Law”*, 71 Ohio St. L.J. 1071, 1074 (2010). So the Constitution did not need to add the word “damages” to make the remedy available. It was encompassed by the word “Law.”

Petitioner does not mention this text. He does not cite Article III at all, in fact. But that is the place where the remedy of damages was incorporated into the Constitution. And just as equity does not require “a congressionally-provided cause of action to *prevent* an injurious act by a public officer,” *Trump*, 146 S. Ct. at 2251 n.2 (emphasis added), law does not require a congressionally-provided cause of action to make that person whole *after* an injury.

Congress cannot, by its inaction, exempt federal employees from the reach of the Eighth Amendment. “Constitutional rights are enshrined with the scope they were understood to have when the people adopted

them.” *Dist. of Columbia v. Heller*, 554 U.S. 570, 634 (2008). That enumeration “takes out of the hands of government”—be it the Legislative or Judicial Branch of Government—“the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” *Id.*; see also *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 23 (2022) (same); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (same). The principle is as true for the Eighth Amendment as it is for the Second.²

* * *

History and text point in the same direction: the Constitution incorporates an 800-year-old tradition establishing money damages as the default remedy for a government official’s violation of rights. Congressional action or inaction cannot change that. Petitioner’s favored remedy must await proposal and ratification as set forth in Article V.

² There is no good reason to limit this rationale to Second Amendment cases. The Eighth Amendment is no less worthy of respect than its brethren: there are no “second class” constitutional rights. And the Eighth Amendment is no less rooted in history than the right to bear arms. “In fact, the entire text of the Eighth Amendment is taken almost verbatim from the English Declaration of Rights” of 1689, which itself was based upon “the knowne Lawes and Statutes and Freedome of this Realme.” *Harmelin v. Michigan*, 501 U.S. 957, 966, 969 (1991).

B. Congress Ratified and Never Repudiated the Availability of Damages

Should constitutional text, history, and tradition fail to persuade, the Court may also ground Mr. Watanabe’s damages remedy in the actions of the legislative branch.

Congress has repeatedly legislated on—and ratified—the premise that the *Bivens* action exists. Congress has legislated three times on the express understanding that damages actions against individual federal officers exist.

First, the FTCA (1946) supplemented the officer suit with a claim against the United States itself. It displaced nothing; officer liability continued as before. See James E. Pfander & Rex N. Alley, *Federal Tort Liability After Egbert v. Boule: The Case for Restoring the Officer Suit at Common Law*, 138 Harv. L. Rev. 985, 1034 (2025) (discussing *Carlson v. Green*, 446 U.S. 14, 33 (1980)); see also 28 U.S.C. § 2676 (FTCA judgment bar expressly contemplating existence of simultaneous claim against individual officers).

Second, after federal agents’ notorious wrong-house raids in Collinsville, Illinois, Congress enacted the 1974 law-enforcement proviso, 28 U.S.C. § 2680(h), waiving sovereign immunity for intentional torts by federal law enforcement officers. See *Martin v. United States*, 605 U.S. 395, 419–20 (2025) (Sotomayor, J., concurring). The accompanying committee report “made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.” *Carlson*, 446 U.S. at 19–20. In Congress’s own words: “after the date of enactment of this measure, innocent individuals who are subjected to raids [like that in

Bivens] will have a cause of action against the individual Federal agents *and* the Federal Government,” and the provision “should be viewed as a counterpart to the *Bivens* case and its progen[y].” *Id.* at 20 (quoting S. Rep. No. 93-588, at 3 (1973)).

Third, the Westfall Act (1988) decisively reflects congressional approval of *Bivens*. After *Westfall v. Erwin*, Congress let ordinary negligence claims against federal employees proceed only against the United States, § 2679(b)(1), but expressly carved out and preserved constitutional claims against individual officers, § 2679(b)(2)(A). The exclusivity provisions do not apply to any “civil action against an employee of the Government * * * which is brought for a violation of the Constitution of the United States.” 28 U.S.C. § 2679(b)(2)(A).

The carveout is intelligible only as ratification: Congress altered the administration of negligence claims *while preserving* the traditional remedy for constitutional claims. 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 (2013). A Congress that believed damages suits against federal officers for unconstitutional conduct illegitimate does not write a statutory safe harbor for those suits.

Courts enforce the ordinary meaning of statutes. *E.g.*, *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011). A Court that is faithful to Congressional text interprets the law to “ensure that the statutory scheme is coherent and consistent” and cannot “rewrite the statute to reflect a meaning [it] deem[s] more desirable.” *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222, 227 (2008) (reinstating FTCA claim in BOP context). Here, that means Petitioner cannot

wave away congressional protection of constitutional damages actions. *Cf. Bufkin v. Collins*, 604 U.S. 369, 386 (2025) (“We are reluctant to treat statutory terms as surplusage in any setting. Our reluctance increases when Congress amends a statute * * *.”).

Petitioner’s brief nevertheless describes “grave separation-of-powers concerns” if the *Bivens* remedy is permitted to continue in present form. Opening Brief at 32. He wants the Court to believe that Congress has “to step into the field itself.” *Id.* at 17. Yet Congress already has. Petitioner would require the Court to turn a blind eye to all the things that Congress did to streamline the traditional remedy by accommodating parallel *Bivens* claims.

The *full* understanding of statutory history disproves the tale of *Bivens* as lawless judicial improvisation. If *Bivens* broke new ground it simply collapsed the Founding Era two-step—common-law writ, then constitutional reply—into a single claim arising under the Constitution itself, so that the constitutional violation that once defeated the officer’s justification argument now states the cause of action directly. *See Amar, supra*, at 1506–07; James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 121 (2009) (proposing that courts treat the *Bivens* action as presumptively available and ask only “whether Congress deliberately displaced the *Bivens* remedy through the adoption of an alternative remedial scheme”).

The *full* understanding of statutory history also reveals that overruling or hollowing *Carlson* and *Bivens* would not restore some pre-1971 baseline. It would knock out the pillar of relief Congress deliberately left standing. That is judicial repeal rather than true

respect for separation of powers concerns. It would be a judicial rug-pull of the constitutional order and a stark departure from the original understanding of the remedies the People held against federal lawlessness. And, as the below section reveals, it would further encourage federal officer impunity.

C. Unaccountability Would Not Have Been Justifiable to the Founders—and Should Not Be to Their Descendants

Americans tell ourselves stories of how our laws set us apart from other systems that are insufficiently protective of liberty, freedom, and the self-evident truth that all men are created equal.

Our Founders were uniquely concerned with the dangers—to liberty, freedom, and equality—presented by an unaccountable governing class. John Adams famously intoned, “the very definition of a Republic, is ‘an Empire of Laws, and not of Men.’” John Adams, *Thoughts on Government* (Apr. 1776); see also Mass. Const. pt. 1, art. XXX (drafted by John Adams, 1780) (“[T]o the end it may be a government of laws, and not of men.”). Our second president’s second cousin said much the same: “There shall be one rule of Justice for rich and poor, for the favorite in Court, and the Countryman at the Plough.” Samuel Adams (for the Boston Committee of Correspondence), *The Rights of the Colonists* (Nov. 20, 1772) (quoting John Locke, *Two Treatises of Government*).

And from the start, our judiciary recognized its role in jealously guarding liberty, freedom, and the promise of equality by enforcing the law even against the executive. “The 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. One of the first duties of government is to afford that protection.” *Marbury*, 5 U.S. at 163. This is because “[t]he government of the United States has been emphatically termed a government of laws, and not of men.” *Id.* The alternative—immunity and impunity—would lead to universal diminishment. “It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” *Id.*; see also *The Apollon*, 22 U.S. 362, 367 (1824) (permitting damages claim against federal official for unlawful seizure: “this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.”).

Even in exceptionally difficult moments, and even for particularly disfavored plaintiffs, the federal judiciary has seen fit to provide for accountability against federal officer misconduct. See, e.g., *Lee*, 106 U.S. at 220 (affirming jury verdict for family of General Robert E. Lee finding unconstitutional conduct by federal officials at the Department of War and elsewhere that required return of land containing Arlington National Cemetery).

The *Lee* Court’s promise of accountability sang the same song as the Founders:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its

functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Id.

In war as at peace, there is no alternative to accountability for a government that respects freedom. “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law * * * .” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

Amicus respectfully submits that just as the Founders would have been shocked to learn that federal officials are purportedly immune from accountability at law, Americans today should find such impunity inconsistent with the foundational promise and premise of our nation. Hollowing out the only meaningful remedy ordinary Americans have when a federal officer violates the Constitution would only exacerbate their fears, further weakening the social compact.

The end of damages suits for unconstitutional acts of federal officials would not just be surprising, it would have far-reaching consequences. To see why, take a look at *Bivens* cases in the Courts of Appeals.

Donald Vance and Nathan Ertel plausibly alleged that “members of the United States military tortured them in violation of the United States Constitution,” in retaliation for bringing illegal arms trafficking activity to the attention of the FBI. *Vance v. Rumsfeld*, 701 F.3d 193, 211 (7th Cir. 2012) (en banc) (Hamilton, dissenting). The Seventh Circuit, sitting en banc,

rejected the availability of a *Bivens* remedy. Three judges noted that this left no remedy for “civilian U.S. citizens who are tortured or worse by our own military,” reflecting “a degree of hypocrisy that is breathtaking.” *Id.*

In 2011, Hawo Ahmed and Hamdi Mohamud were framed by a federally deputized officer. Although they had committed no crime, the officer knowingly lied and fabricated evidence against them. *Ahmed v. Weyker*, 984 F.3d 564, 565 (8th Cir. 2020); *Mohamud v. Weyker*, No. 17-CV-2069 (JNE/TNL), 2018 WL 4469251, at *3 (D. Minn. Sept. 18, 2018). Ahmed and Mohamud were jailed for more than two years before the officer’s lies unraveled. Ahmed was forced to give birth in jail before her acquittal. But the Eighth Circuit found no *Bivens* remedy because, while *Bivens* involved an entry into a home, “[h]ere, by contrast, [the defendant federal official] did not enter a home, even if the actions she allegedly took—like manufacturing evidence and lying—were just as pernicious.” 984 F.3d at 568.

Kevin Byrd alleged that a Homeland Security agent “physically threatened him with a gun,” “verbally threatened to ‘put a bullet through his f—king skull’ and that ‘he would blow his head off,’” and “attempted to smash the window of his car.” *Byrd v. Lamb*, 990 F.3d 879, 880 (5th Cir. 2021). Surveillance video apparently supported his claims, because after reviewing it, local police arrested the federal agent on charges of “aggravated assault with a deadly weapon and misdemeanor criminal mischief.” *Id.* at 880–81. But Byrd’s claim was tossed because the force happened “in a parking lot, not a private home as was the case in *Bivens*.” *Id.* at 882.

Mandriez Spivey alleged that employees of the Bureau of Prisons denied him medical care for painful conditions and, separately, slammed his head into a wall for something his cellmate admitted to doing. *Spivey v. Breckon*, 173 F.4th 174, 176 (4th Cir. 2026). Spivey’s case ended because his claims were less severe than those blessed by the *Bivens* trilogy. The Court of Appeals reasoned that that “even ‘quite minor’ differences between a proposed claim and the claims in the three existing *Bivens* cases can amount to a new context.” 173 F.4th at 180.

If proven by the evidence, all of these cases feature constitutional violations that, under the traditional remedy, were eligible for monetary damages. Yet all of these plaintiffs’ claims were dismissed by the lower courts—each of which claimed to act pursuant to this Court’s instructions.

These cases did not rise to national attention like the recent ICE killings of Renée Good and Alex Pretti. Yet they illustrate how the lower courts apply *Bivens*, and in some instances how federal judges are looking to this Court for guidance and leadership. As Judge Willett put it, “I am certainly not the first to express unease that individuals whose constitutional rights are violated at the hands of federal officers are essentially remedy-less. A written constitution is mere meringue when rights can be violated with nonchalance.” *Byrd*, 990 F.3d at 884–85 (Willett, J., concurring). He wrote to “add my voice to those lamenting today’s rights-without-remedies regime, hoping (against hope) that as the chorus grows louder, change comes sooner.” *Id.* at 885.

If in this moment in history, the Court decides that the People have no damages remedy at law against

wayward federal officers, the consequences will be unpredictable and perhaps severe.³

Citizens will have less trust that the Constitution protects them. Federal agents will have more confidence that the Constitution does *not* impose consequences for their lawlessness.⁴ There will be more excessive force and denial of medical care cases like Mr. Vance’s, Mr. Byrd’s, and Mr. Watanabe’s. And federal agents will have more “freedom” to innovate with newer forms of constitutional violations like jawboning—even those this Court has already held to be unconstitutional. *See Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175 (2024) (holding, in case against state officials, that “the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries.”); *Murthy v. Missouri*, 603 U.S. 43, 55 (2024) (describing Fifth Circuit’s

³ The doctrinal consequences could be significant as well. Should the Court decide that the *Bivens* damages remedy cannot continue without further congressional action, *a fortiori* it should also immediately terminate the judge-made doctrine of qualified immunity, which is likewise unauthorized by Congress—and lacks the historical pedigree of the damages remedy.

⁴ *See Smith v. Kind*, 609 U.S. ---, 146 S. Ct. 2346, 2351 (2026) (Sotomayor, J., dissenting from denial of certiorari) (criticizing this Court’s “asymmetrical trend of declining to intervene when courts wrongly afford officers the benefit of qualified immunity, but unflinchingly summarily reversing” decisions holding officers accountable: “Reversing only denials of qualified immunity sends the regrettable message that, when choosing between shielding government officials from liability and vindicating individuals’ constitutional rights, this Court will almost always choose the former. Because this decision emboldens government officials, like the correctional officers here, to act with impunity, I respectfully dissent from the Court’s refusal to summarily reverse.”).

finding “that White House officials, in conjunction with the Surgeon General’s Office, likely both coerced *and* significantly encouraged the platforms to moderate content” in violation of the First Amendment, before dismissing case on standing grounds).

There is no need for the judiciary to acquiesce to this. History, text, and tradition do not require it. It would be a legal and cultural own-goal.

Amicus respectfully submits that the People and the lower courts need something else from this Court: a full-throated affirmation of federal accountability. They need to hear that an agent of the government who is entrusted with public power is not immune from consequences at law for abusing it. And they need to see firsthand that the principles and values adopted at ratification are still operative today.

CONCLUSION

This Court should affirm.

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