

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 INSTITUTE FOR JUSTICE
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

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Interest of Amicus Curiae¹

The Institute for Justice (IJ) is a nonprofit, public-interest law firm. We defend the foundations of a free society by securing greater protection for individual liberty. That includes Americans’ ability to obtain redress at law, as they have since the Founding, when their rights are violated by government officials (be they federal, state, or local). So we litigate federal accountability cases across the country, including two recent cases before this Court. See *Martin v. United States* (24-362); *Brownback v. King* (19-546). And we file amicus briefs in such cases before the Court. *E.g.*, *Egbert v. Boule*, 2022 WL 296925 (Jan. 26, 2022); *Tanzin v. Tanvir*, 2020 WL 774437 (Feb. 12, 2020); *Hernandez v. Mesa*, 2019 WL 3854459 (Aug. 9, 2019).

In *Hernandez*, we argued that Congress codified “a robust enforcement of *Bivens* remedies.” 589 U.S. 93, 111 n.9 (2020) (quoting IJ amicus brief). But the Court disagreed, holding that Congress “left *Bivens* where it found it,” with no “license to” expand the doctrine to new facts. *Ibid.* That preservation has proved quite narrow. See *Egbert v. Boule*, 596 U.S. 482 (2022). So we focus on another path Congress preserved. It’s the traditional state damages actions that remedied federal employees’ constitutional violations for the nation’s first two centuries. See 28 U.S.C. 2679(b)(2)(A) (preserving “a civil action against an employee of the Government *** which is brought for a violation of the Constitution”).

¹ No counsel for a party authored this brief in whole or in part. No person except amicus or its counsel made a monetary contribution to fund the preparation or submission of this brief.

Introduction

We submit this brief to help ensure a comprehensive reading of the Westfall Act. In addition to preserving *Bivens* and *Carlson* actions (in their limited spheres), we show how the Act also preserves more. Namely, certain state-law damages actions.

Respondent correctly argues that in addition to preserving some scope of *Bivens* actions via the Westfall Act, Congress ratified the *Carlson* action he brings, via the Prison Litigation Reform Act (PLRA). That specific ratification should be enough for him to prevail. But we recognize that the Court may not agree, based on its current approach to implied causes of action, or the factbound nature of the new-context inquiry. And, in any event, the PLRA’s ratification of *Carlson* can’t reach cases of federal abuse arising in Americans’ homes, cars, or businesses—the recurring spheres in which *Bivens* actions are now routinely held unavailable in the lower courts.

So we highlight the availability of another remedial path Congress has preserved: state-law damages actions brought for constitutional violations. That’s “the traditional way in which civil litigation addressed abusive conduct by federal officers.” *Hernandez v. Mesa*, 589 U.S. 93, 110 (2020). And it endures. See 28 U.S.C. 2679(b)(2)(A) (preserving “a civil action against an employee of the Government *** which is brought for a violation of the Constitution”).

That tradition draws on a common law, sustained by state courts, that “is not immutable but flexible.” *Funk v. United States*, 290 U.S. 371, 383 (1933).

Importantly, “the whole point of the common law as it evolved through the centuries was to vindicate fundamental rights,” so it “usually supplies a sound remedy when life, liberty, and property are taken.” *Browder v. City of Albuquerque*, 787 F.3d 1076, 1083 (10th Cir. 2015) (Gorsuch, J., concurring). The question is whether Congress took that remedy away for constitutional violations when it channeled ordinary tort claims to the FTCA. It did not.

Without analyzing the statutory text, respondent and the Government posit that Congress “extinguished the traditional remedy *** for unconstitutional conduct.” Resp. Br. 34; see U.S. Br. 29. Not so. Below, we examine the text. We show that when it comes to state-law damages actions *brought for constitutional violations*, state law’s remedial role remains. The Court should say so.

When this Court recognizes limits on federal judicial “authority”—as it has for *Bivens* actions—it commonly notes that the availability of state law means pleas for redress won’t “echo into a void.” *Rucho v. Common Cause*, 588 U.S. 684, 718–720 (2019); see *Danforth v. Minnesota*, 552 U.S. 264, 291 (2008) (state law can remedy constitutional violations where “no remedy will be provided in federal habeas courts”). Americans seeking redress for unconstitutional harms to their persons and properties should be similarly reassured. The Westfall Act, properly understood, means they can be.

Summary of Argument

Kekai Watanabe alleges that a federal prison employee, Francis Nielsen, was deliberately indifferent to his serious medical needs, causing significant physical harm. If a *state* prison employee or the employee of a *privately operated* federal prison did the same thing, Watanabe would have a cause of action against him, via § 1983 or state tort, respectively. See *Estelle v. Gamble*, 429 U.S. 97 (1976); *Minneci v. Pollard*, 565 U.S. 118 (2012). The question is whether Nielsen’s status as a federal employee means no cause of action exists against him.

As we briefly address in **part I**, Watanabe correctly argues that the cause of action this Court established for such cases in *Carlson v. Green*, 446 U.S. 14 (1980), remains available, given Congress’s considered decision to preserve it (and define its parameters) via the PLRA, 42 U.S.C. 1997e. Resp. Br. 34–38.

But the Court’s “current approach to implied causes of action,” including the factbound nature of the “new context” inquiry, might render *Carlson* unavailable. See *Egbert v. Boule*, 596 U.S. 482, 499–500 (2022). Even assuming the viability of *Carlson* actions thanks to the PLRA, the general approach to *Bivens* actions regularly leaves a “remedial gap” in federal-employee accountability in the lower courts, especially after *Egbert*. *Buchanan v. Barr*, 71 F.4th 1003, 1013 (D.C. Cir. 2023) (Walker, J., concurring).

Those “concerned with history and tradition may worry about *Egbert* shutting the door on *Bivens* claims for money damages, given that Founding-era

evidence suggests that damages suits against federal officers were expected to provide a meaningful mechanism for accountability.” Jennifer L. Mascott & R. Trent McCotter, *Egbert v. Boule: Federal Officer Suits by Common Law*, 2022 Cato Sup. Ct. Rev. 111, 128 (Mascott & McCotter, *Federal Officer Suits by Common Law*).²

In light of that tradition, the Court’s sunseting of the *Bivens* doctrine warrants an examination of “the implications that follow” for federal-employee accountability. See *Trump v. Slaughter*, 146 S. Ct. 2283, 2311 (2026) (Gorsuch, J., concurring). To that end, what we outline in **part II** is not an “innovation” akin to what *Bivens* effected “in the latter half of the 20th century,” but a historically rooted “return to form.” See *Learning Resources, Inc. v. Trump*, 607 U.S. 229, 268–269 (2026) (Gorsuch, J., concurring).

That form is the cause of action everyone agreed could *already* be brought for federal employees’ constitutional violations when *Bivens* was decided. It was “an action in tort, under state law, in the state courts,” with the constitutional violation meaning a federal-authority defense “would be lost.” *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390–391 (1971) (recounting the Government’s view of the action available to *Bivens*, then *supplementing* it).

When it comes to damages actions brought for constitutional violations, the state-law tradition endures. Watanabe and the Government think otherwise

² Published before Judge Mascott’s appointment to the Third Circuit Court of Appeals.

(Resp. Br. 34; U.S. Br. 29), because the Westfall Act makes “[t]he remedy against the United States provided by” the Federal Tort Claims Act (FTCA) “exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim.” 28 U.S.C. 2679(b)(1).

But Watanabe and the Government don’t engage with the text of the Westfall Act’s next clause. The Act’s remedial exclusivity “does not extend or apply to a 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) (what we call the constitutional saving clause). Everyone agrees that that clause preserves *Bivens/Carlson* actions (disagreements over their reach notwithstanding). Yet, by its plain terms (“a civil action”), the clause doesn’t *only* preserve *Bivens/Carlson* actions; it also preserves state-law damages actions “brought for” constitutional violations. So, in deciding whether Congress preserved Watanabe’s federal *Carlson* action (it did), the Court should not accept his unnecessary, atextual concession about the limits of the constitutional saving clause as to state actions.

As one analysis put it, “if Congress intended to preserve only *Bivens* and its progeny, Congress could have made that clear. When legislating, Congress can and does cite specific cases by name. But Congress chose not to, and the Court must implement the design Congress chose.” Thomas A. Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights* at 32 (2025 manuscript) (quotation marks and citations omitted), <https://ssrn.com/abstract=4462807>

(Koenig & Moore, *Of State Remedies and Federal Rights*). Tellingly, Congress also chose not to limit the clause to preserving only *federal* actions. See *Texas v. DHS*, 123 F.4th 186, 200 (5th Cir. 2024) (“When Congress wants to add the qualifier ‘federal,’ it knows how.”).

So Congress’s design, “[t]aken on its own terms and read in its historical context, *** counsels in favor of reading [the] exception for civil actions brought for federal constitutional violations to extend to state civil actions brought for federal constitutional violations.” Koenig & Moore, *Of State Remedies and Federal Rights* 32–33. At least, the clause preserves such state *statutory* actions, *id.* at 33 & n.270, known as “converse-1983” statutes. See generally Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. Colo. L. Rev. 159 (1993) (Amar, *Using State Law*).

The only question, really, is whether the state actions preserved by the constitutional saving clause *must* be statutory. Or, whether they can also continue in their traditional tort form *when brought for constitutional violations*. Some favor the converse-1983-only reading. See Koenig & Moore, *Of State Remedies and Federal Rights* at 46–47.³ Others read the preservation to also include tort actions brought for constitutional violations. See Carlos M. Vazquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature*

³ Accord *Bivens*, 403 U.S. at 424 (Burger, C.J., dissenting) (“there is nothing to prevent a state from enacting a *** statutory scheme” for damages actions against federal employees).

of the *Bivens* Question, 161 U. Pa. L. Rev. 509, 570–577 (2013).⁴

Judge Walker cautiously endorsed both the tort-inclusive reading of the clause and the converse-1983 reading. See *Buchanan*, 71 F.4th at 1015–1018 (concurring opinion). In recognizing some preservation of state-law actions, he’s not alone. See *Cross v. Buschman*, 2024 WL 3292756, at *5 n.12 (3d Cir. July 3, 2024) (Matey, J., concurring) (citing Judge Walker’s analysis); *Henry v. Essex County*, 113 F.4th 355, 364 n.7 (3d Cir. 2024) (Judge Porter declining to join the portion of the opinion that rejected the cognizability of a converse-1983 action).

We show that the tort-inclusive reading is where the text of the constitutional saving clause leads. The statutory context eliminates any doubt. And this Court’s precedents support our reading. Constitutional structure, meanwhile, poses no barrier. Finally, the traditional tort action we advocate could reach Watanabe’s claim. That matters, because his case arose in a state with no converse-1983 statute.

Argument

I. Watanabe is right about *Carlson* and the PLRA, but the Westfall Act preserves more than just *Bivens/Carlson* actions.

Watanabe is right that Congress preserved his *Carlson* action via the Westfall Act and the PLRA.

⁴ Accord *Carlson*, 446 U.S. at 42 (Rehnquist, J., dissenting) (“Congress intended to leave this responsibility to state courts in the application of their common law”).

But he’s wrong to posit (unnecessarily) that the Westfall Act “extinguished the traditional remedy of using state common law to hold individual federal officers liable in damages for unconstitutional conduct.” See Resp. Br. 34. As we explain in part II, that’s exactly what the Westfall Act’s constitutional saving clause did *not* extinguish.

Watanabe correctly argues that Congress ratified his *Carlson* action. This Court held in *McCarthy v. Madigan*, 503 U.S. 140 (1992), that *Carlson* plaintiffs didn’t need to exhaust administrative remedies. Congress could have responded by eliminating *Carlson* actions or strictly limiting them to their facts. Instead, Congress imposed an exhaustion requirement and a physical-injury requirement. See Resp. Br. 8–9. The PLRA “legislation enacted subsequent to [*Carlson*],” is Congress’s “implicit acknowledgment that damages are available.” *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 78 (1992) (Scalia, J., concurring in the judgment).

That said, the current approach to the “new context” inquiry might mean Watanabe’s claim doesn’t proceed, even if only for minor fact differences from past cases. See *Egbert*, 596 U.S. at 503 (Gorsuch, J., concurring in the judgment) (*Bivens* doctrine no longer even reaches cases whose facts don’t “differ[] meaningfully from those in *Bivens* itself”). And, beyond the context here, the state of the *Bivens* doctrine means that Americans’ reliance “on the continued force *** of *Bivens* in the search-and-seizure context in which it arose” is, at best, on shaky ground. Cf. *Ziglar v. Abbasi*, 582 U.S. 120, 134 (2017); see *Malinowski v. United States*, 2026 WL 1948181, at *2

(E.D. Ark. July 6, 2026) (“The precedent holds out what almost always ends up being the false hope of a successful *Bivens* action.”).

So, the PLRA’s ratification of *Carlson* actions notwithstanding, Americans face a significant “remedial gap” in federal-employee accountability. *Buchanan*, 71 F.4th at 1013 (Walker, J., concurring). Even when federal officers engage in egregious violence or deprivations of liberty.⁵

Against that backdrop, the Government invites the Court to make even *Carlson* actions “a null set.” U.S. Br. 25. Watanabe rightly seeks to head off that strange outcome. But he concedes too much about the scope of the Westfall Act’s constitutional saving clause. He’s right that Congress’s decision to preserve “a civil action *** brought for a violation of the Constitution,” 28 U.S.C. 2679(b)(2)(A), cannot be rendered meaningless. See Resp. Br. 29. But he’s wrong

⁵ See, e.g., *Logsdon v. U.S. Marshal Service*, 91 F.4th 1352, 1356 (10th Cir. 2024) (no *Bivens* action where officers executing arrest warrant “secretly approached [Logsdon] after dark,” one “ran up behind him and kicked him in the face, rendering him unconscious,” and “three officers then stomped on him for two minutes”); *Ahmed v. Weyker*, 984 F.3d 564, 566 (8th Cir. 2020) (no *Bivens* action where officer “fabricated facts, knowingly relayed false information, and withheld exculpatory facts, all with the intention that the three women would continue to be detained for crimes for which she knew there was no *** arguable probable cause,” resulting in “a minor” spending “just short of 25 months in federal custody”) (cleaned up); *Oliva v. Nivar*, 973 F.3d 438, 440 (5th Cir. 2020) (no *Bivens* action where veteran entering VA hospital was “wrestled *** to the ground in a chokehold”); *Malinowski*, 2026 WL 1948181, at *2 n.7 (no *Bivens* action where pre-dawn raid resulted in a “widow who watched the ATF shoot her husband in the head”).

to say that the only way to avoid that is by limiting the clause to *Bivens/Carlson* actions. See Resp. Br. 34. As we show below, that clause does more. It also preserves state-law damages actions *brought for* constitutional violations.

II. The Westfall Act preserves state damages actions brought for federal employees’ constitutional violations.

“In the context of suits against Government officials, damages have long been awarded as appropriate relief.” *Tanzin v. Tanvir*, 592 U.S. 43, 49 (2020). *Bivens* actions were once an extension of that tradition. But with *Bivens* now scarcely, if ever, doing that age-old remedial work, has Congress left open another route? Yes. The Westfall Act preserves state-law damages actions brought for constitutional violations. That’s “the traditional way in which civil litigation addressed abusive conduct by federal officers.” *Hernandez*, 589 U.S. at 110. “So we might expect exceptionally clear language if Congress had wanted to abrogate that regime. Instead, we find statutory text tailored to *preserve* it.” *Buchanan*, 71 F.4th at 1017 (Walker, J., concurring).

Here, (A) we provide an overview of that tradition, (B) we show how the Westfall Act preserves it, and (C) we illustrate how that preservation translates to a state-law action in Watanabe’s circumstances.

A. State damages actions have traditionally been brought for federal employees' constitutional violations.

“In America, both before and after the Revolution, the civil trespass action tried to a jury flourished as the obvious remedy against haughty customs officers, tax collectors, constables, marshals, and the like.” Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 786 (1994). Those tort actions didn’t exist in a vacuum. They were brought to enforce the rights secured by the Constitution, typically the Fourth Amendment. *Ibid.* Indeed, they were a primary method of constitutional enforcement at law. “Because officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help.” *Utah v. Strieff*, 579 U.S. 232, 237 (2016). Federal employees were subject to precisely such “an action in tort, under state law, in the state courts.” *Bivens*, 403 U.S. at 390.

That system of tort actions brought for federal employees’ constitutional violations was expected by the Framers and realized in our courts.

1. The “public debates on ratification of the U.S. Constitution [showed] that officer suits were understood as an available mechanism for government accountability that would remain available under the constitutional system.” Mascott & McCotter, *Federal Officer Suits by Common Law* at 131.

To start, it was a damages action brought against the king's messenger that "every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with," and "considered *** *as the true and ultimate expression of constitutional law.*" *Boyd v. United States*, 116 U.S. 616, 626 (1886) (emphasis added) (discussing *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765)).

No surprise, then, that John Marshall emphasized the effectiveness of state-court damages actions to assure his fellow Virginians that federal officers' abuses would be redressed. If a federal officer "will go into a poor man's house and beat him, or abuse his family," the "injured man would trust to a tribunal in his neighborhood. To such a tribunal he would apply for redress, and get it." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (Jonathan Elliot ed., 2d ed. 1836). That assurance would hold even in the face of "a law made to authorize" the abuse, and even if "the federal court [would] protect" the officer. *Ibid.* "There is no clause in the Constitution which bars the individual member injured, from applying to the State Courts to give him redress." *Ibid.* Same would go, of course, for Marshall's hypothetical poor man.

"That background may explain why the Bill of Rights did not contain an express cause of action. The Framers likely expected our newly guaranteed rights to be secured by old common-law actions." *Buchanan*, 71 F.4th at 1015 (Walker, J., concurring). Redressing federal employees' rights violations via state-court damages actions was woven into our constitutional DNA.

2. And it wasn't latent. It was expressed in "[t]he structure of these cases," where a constitutional violation would defeat a federal-authority defense. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1506–1507 (1987). That structure "is illustrative of the myriad ways in which constitutional 'public law' protections are intricately bound up with—indeed, presuppose—a general backdrop of 'private law' protections defining primary rights of personal property and bodily liberty." *Id.* at 1507.

To be sure, traditional tort actions weren't brought *as* constitutional claims, à la *Bivens*. And it was typically enough that the defendant exceeded *statutory* authority. *E.g.*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804).⁶ But still, the Constitution supplied the rule of decision where the plaintiff alleged "an unconstitutional act, even if authorized by statute." *Butz v. Economou*, 438 U.S. 478, 490–491 & n.15 (1978). That is, such cases were *brought for* constitutional violations, even if not *as* constitutional claims.

Take, for example, *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851). It was "an action of trespass brought *** to recover the value of certain property taken by [the defendant] *** during the late war with

⁶ The parties mistakenly posit that "federal officers were generally immune from such tort suits, [and] that immunity dissolved if the challenged conduct violated the Constitution." Resp. Br. 5 (citing Pet. Br. 4–5). There's never been any such general immunity, nor the need for a constitutional violation. See *Martin v. United States*, 605 U.S. 395, 413 n.2 (2025). While the Westfall Act now requires a constitutional violation to bring an individual-capacity action, that wasn't always so. Negligence could suffice. *E.g.*, *Westfall v. Erwin*, 484 U.S. 292, 293–294, 300 (1988). As could an ultra vires act. *E.g.*, *Little*, 6 U.S. (2 Cranch) at 178.

Mexico.” *Mitchell*, 54 U.S. at 128. Notably, the plaintiff argued that trespass in expressly constitutional terms, as recounted by this Court: “Private property cannot be taken for public use without compensation and against the consent of the owner.” *Id.* at 126; see also *id.* at 127 (plaintiff citing “Art. 4 and 5 of Amendments to Constitution”). What’s more, the judge instructed the jury that the case “must probably ultimately turn” on the question of “taking of the goods by the public authorities for public use.” See *id.* at 139 (quoted in opinion of Daniel, J., dissenting). And this Court grounded its analysis in the Constitution too, explaining that because “the rights of private property are” so “securely guarded under the Constitution and laws of the United States,” “therefore *** the instructions of the” lower court were correct on the public-use issue. *Id.* at 136 (majority opinion).

Merriam v. Mitchell, 13 Me. 439 (1836), is another illustrative example. It was a state-court “action for malicious prosecution *** against an agent of the Post Office department.” *Id.* at 439. There too, the plaintiff made his case in expressly constitutional terms: “[W]here an innocent man has been arrested and imprisoned, who has given no occasion for suspicion by his own misconduct, he has a remedy against [the person responsible.] *** The supreme law of the land, the constitution of the United States, art. 4 of the amendments, protects the citizens from unreasonable seizures of their persons, and forbids the arrest of any one, but upon probable cause. If a man proceed to act in such case on his own carelessness and negligence, he is to suffer, and not the innocent victim of his folly and negligence.” *Id.* at 453. The jury instructions, again, sounded in that register. See *id.* at 457 (“The

Judge instructed the jury, that there was, in point of law, no probable cause[.]”). And the state high court held that the jury could find malice “from the want of probable cause.” *Id.* at 458.

Those examples illustrate how tort actions have always been brought for federal employees’ constitutional violations—indeed, expressly argued by plaintiffs as such. “This method of adjudicating constitutional claims made sense: many constitutional guarantees were tied to common law rights.” Koenig & Moore, *Of State Remedies and Federal Rights* at 14.

That tradition endured into the 20th century. See *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.”). Which is why no one disputed that Webster Bivens had, as always, “an action in tort, under state law, in the state courts.” *Bivens*, 403 U.S. at 390.⁷ After the Court supplemented that remedy, *Bivens* actions took center stage, but the traditional state actions continued their remedial work too. See Koenig & Moore, *Of State Remedies and Federal Rights* at 15–16 (collecting cases). This Court, no stranger to such cases, “recognized the continuing viability of state-law tort suits against federal officials as recently as” 1988, in *Westfall v. Erwin. Hernandez*, 589 U.S. at 110.

⁷ Then, as now, the federal employees could remove to federal court. 28 U.S.C. 1442(a). The forum would become federal but the cause of action would remain state.

B. The Westfall Act preserves the tradition of state damages actions brought for federal employees’ constitutional violations.

Congress responded to *Westfall v. Erwin* (a negligence case) by making the FTCA the exclusive remedy for claims within that law’s remedial orbit. But Congress preserved individual-capacity actions “brought for a violation of the Constitution.” Relying on text, context, precedent, and constitutional structure, we show that that preservation includes state damages actions brought for constitutional violations, akin to those recounted in the history above.

1. *Westfall* was a “state-law tort suit” brought “in state court.” 484 U.S. 292, 293 (1988). It didn’t involve a constitutional violation. It arose from a federal employee’s “negligence in performing official acts” (improperly storing “bags of toxic soda ash”). *Id.* at 293–294. This Court held he was not immune from liability unless his conduct was “discretionary in nature.” *Id.* at 300. That narrow term of art meant federal employees would typically be personally responsible for garden-variety negligence.

In response to that negligence decision—and the backend indemnification paperwork it would require⁸—Congress generally just funneled individual-

⁸ 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, 1050–1051 (2025) (federal employees are almost always indemnified after personal liability attaches) (Pfander & Alley, *Restoring the Officer Suit at Common Law*).

capacity actions to the government’s assumption of liability, via the FTCA. In what came to be known as the Westfall Act, Congress made the FTCA “remedy against the United States *** exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim.” 28 U.S.C. 2679(b)(1).

But Congress didn’t channel all federal-employee actions exclusively to the FTCA. The Act’s exclusivity provision “does not extend or apply to a 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 constitutional saving clause). Such *Constitution*-enforcing actions were, of course, not at issue in *Westfall*.

That constitutional saving clause, at a minimum, “left *Bivens* where it found it.” *Hernandez*, 589 U.S. at 111 n.9. But it also preserves more. It preserves *state* actions *brought for* constitutional violations—and not just statutory actions, but also tort actions. “[R]eading the exception as a good-for-*Bivens*-only rule is in tension with the statutory text and context.” *Buchanan*, 71 F.4th at 1017 (Walker, J., concurring).

“We start with the text.” *Thompson v. United States*, 604 U.S. 408, 413 (2024). “Statutory context confirms” our reading. *Id.* at 415. This Court’s precedents “support[]” it too. *Id.* at 416. And constitutional structure doesn’t say otherwise.

2. The text. The constitutional saving clause preserves “a civil action” that’s “brought for” a constitutional violation. The first question is whether “civil action” includes *state* civil action. It does, because Congress included no qualifiers. The second question is whether “brought for” includes only statutory actions or also tort actions. It’s both. Because Congress wrote “brought for” (not “brought under”), what matters is not the source of action, but only whether the plaintiff seeks redress for a constitutional violation.

a. In the constitutional saving clause, “civil action” isn’t limited to *Bivens* actions, or federal actions. It “includes state or common law *** claims.” *Texas v. DHS*, 123 F.4th 186, 200 (5th Cir. 2024) (assessing the scope of “action” as used in another federal statute). “When Congress wants to add the qualifier ‘federal,’ it knows how.” *Ibid.* Here, it didn’t. Let alone the qualifier “*Bivens*.” The Court “cannot rewrite” the statute to insert either qualifier, “when Congress only wrote ‘an action.’” *Ibid.*

That decision is particularly telling given the “presumption of consistent usage.” Koenig & Moore, *Of State Remedies and Federal Rights* at 33. The Act’s exclusivity clause, immediately before the constitutional saving clause, also refers to “any other civil action.” 28 U.S.C. 2679(b)(1). Undoubtedly, *that* use of “civil action” includes state actions, because it’s exactly what the exclusivity clause responded to (the state negligence claim in *Westfall*). “It’s only natural that Congress would use the term [civil action] consistently in the subsequent paragraph—indeed, in the subsequent *sentence*.” Koenig & Moore, *Of State Remedies and Federal Right* at 33. So, “civil action” in the

constitutional saving clause includes state civil actions, just like it does in the exclusivity clause.

b. In the constitutional saving clause, “brought for a violation of the Constitution” includes, as Judge Walker suggested, a claim whose “*purpose* is to remedy a constitutional violation.” *Buchanan*, 71 F.4th at 1016 (concurring opinion). That can come in either state-law form (statutory or tort). “For instance, a state trespass suit could proceed if its goal was to remedy an unconstitutional search. That interpretation arguably tracks the ordinary meaning of the phrase ‘brought for.’ Courts have long used it to describe the goal of a suit, not the cause of action.” *Ibid.* (citation omitted). This boils down to Congress’s choice of the phrase “brought for” instead of the familiar “brought under.”

One might read “brought for a violation of the Constitution” as unmoored from traditional tort actions, and assume it reaches only *statutory* actions—those where “a constitutional violation is part of the plaintiff’s cause of action.” See *Buchanan*, 71 F.4th at 1016 (Walker, J., concurring). But if Congress wanted to impose that source-of-action limitation, it could have eschewed *brought for* and used “brought under,” a phrase “of common legal parlance.” *Pinares v. United Techs. Corp.*, 973 F.3d 1254, 1260 (11th Cir. 2020). A “suit is brought under the law which supplies its cause of action,” typically a statute. *Ibid.*

Congress didn’t use that source-of-action limitation. It used a purpose-of-action phrase. “A ‘civil action . . . brought . . . for’ a certain injury ‘is an action brought for the purpose of remedying that injury.’”

Hoever v. Marks, 993 F.3d 1353 (11th Cir. 2021) (en banc). More broadly, “whatever object follows the word ‘for’ *** informs what the ‘action’ is brought to accomplish.” *Id.* at 1358. In the constitutional saving clause, that’s “a violation of the Constitution.” So, by writing “brought for a violation of the Constitution,” Congress chose not to limit the civil actions it preserved by the source of authority they’re brought *under*; instead, Congress tied preservation to the purpose for which an action is brought (for a constitutional violation), regardless of source.⁹

That choice wasn’t arbitrary. While certain cases (involving constitutional violations) would satisfy the constitutional saving clause’s preservation, *Westfall*, the case Congress responded to, would not, because it was brought only for negligence, not any purported constitutional violation.

In short, “a civil action *** which is brought for a violation of the Constitution” includes state actions, whether statutory or tort, brought for the purpose of remedying constitutional violations—not just those for which a constitutional violation is an element of

⁹ Two contrasts cement the point. First, in *Bivens*, this Court used the source-of-action formulation: “a cause of action *under* the Fourth Amendment.” 403 U.S. at 397 (emphasis added). If Congress wanted to preserve just that, it could have tracked that language; it chose not to. Second, Congress imposed a source-of-action limitation in the clause immediately following the constitutional saving clause, which preserves certain federal statutory actions. 28 U.S.C. 2679(b)(2)(B) (“brought for a violation of a statute of the United States *under which* such action against an individual is otherwise authorized”) (emphasis added). If Congress wanted to impose a similar limitation on the constitutional saving clause, it could have; but it didn’t.

the action itself. Congress made those textual choices, instead of others equally available.

3. The context. Context confirms that the constitutional saving clause preserves both state statutory and tort actions. Start with background legal conventions (the common-law tradition). Then, the statute’s immediate context (responding to the negligence claim in *Westfall*). Followed by facts on the ground (tort actions). And finally, constitutional avoidance.

a. First, “[b]ackground legal conventions” support the tort-inclusive reading of the constitutional saving clause. See *Learning Resources, Inc.*, 607 U.S. at 301 (Barrett, J., concurring) (citation omitted). Recall that “the traditional way in which civil litigation addressed abusive conduct by federal officers was by subjecting them to liability for *common-law torts*.” *Hernandez*, 589 U.S. at 110 (emphasis added). And they weren’t brought in a vacuum. It was “through tort suits” that “individuals subject to unconstitutional searches or seizures historically enforced their rights.” *Strieff*, 579 U.S. at 237. That’s what everyone agreed was available in *Bivens*. 403 U.S. at 390. It’s what skeptics of *Bivens* pointed to as the appropriate remedy for federal-officer harms. *Carlson*, 446 U.S. at 42 (Rehnquist, J., dissenting) (“Congress intended to leave this responsibility to state courts in the application of their common law”). And it’s how plaintiffs in the illustrative cases of *Mitchell v. Harmony* and *Merriam v. Mitchell* won their Constitution-enforcing claims. *Supra*, 14–16.

So tort actions were, when Congress passed the Westfall Act, fairly described as *brought for*

“unconstitutional act[s]” when the facts called for it. *Butz*, 438 U.S. at 490. And, “[f]or two centuries, state courts have had jurisdiction over these damage cases.” Amar, *Using State Law* at 165. Congress knew all that. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (Congress is “knowledgeable about existing law pertinent to the legislation it enacts”). If Congress purported to preempt that “field which the States have traditionally occupied,” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted), it wouldn’t make sense to do so by *preserving* what that tradition encompassed: civil actions brought for constitutional violations. *Buchanan*, 71 F.4th at 1017 (Walker, J., concurring) (“[W]e find statutory text tailored to *preserve* it[.]”).

b. The “context from which the statute arose” also supports the tort-inclusive reading of the constitutional saving clause. *Fischer v. United States*, 603 U.S. 480, 498 (2024) (citation omitted). The Westfall Act responded to a state negligence case, not a constitutional violation. If Congress wanted to also preclude state actions beyond that underlying context, it could have said so. But it didn’t. It chose a broadly worded exception to the exclusivity clause, preserving what was *not* at issue in *Westfall*: a Constitution-enforcing action. *Buchanan*, 71 F.4th at 1017 (Walker, J., concurring) (“[T]he Westfall Act’s historical context provides no clear evidence that Congress wished to upset the long tradition of using state tort actions to police constitutional violations. *** *Westfall* did not concern a suit brought for a constitutional violation. And Congress enacted an express exception to carve out such suits.”).

c. Facts on the ground at the time also support the tort-inclusive reading of the constitutional saving clause. Unless compelled by the text, it would be strange to read the clause as preserving state converse-1983 actions but not Constitution-enforcing tort actions—because when Congress passed the statute, the tort tradition was well-known and in contemporary use, while the converse-1983 tradition was at best fledgling, limited at the time to one state. See Mass. Gen. Laws Ann. ch. 12, § 11H–11I (1979).¹⁰ The constitutional saving clause, then, is best read as preserving the ubiquitous version of what it described (tort actions brought for constitutional violations), not an untested version contingent on the future acts of state legislatures.

That’s not to say that the converse-1983-inclusive reading of the statute falls away. To the contrary, as Chief Justice Burger anticipated, “there is [still] nothing to prevent a state from enacting a *** statutory scheme” in the converse-1983 mold. See *Bivens*, 403 U.S. at 424 (dissenting opinion). The constitutional saving clause also preserves converse-1983 statutes, as “language that broad [*a civil action brought for a violation of the Constitution*] easily accommodates both known and unknown causes of action.” *Hui v. Castaneda*, 559 U.S. 799, 806 (2010).¹¹

¹⁰ Three more states followed soon. See Cal. Civ. Code § 52.1; Me. Stat. tit. 5, § 4682(1-A); N.J. Stat. Ann. § 10:6-2(c).

¹¹ Since 2025, several more states have passed converse-1983 statutes. See Harrison Stark, *State-Created Damages Remedies Against Federal Officials*, <https://statedemocracy.law.wisc.edu/our-work/state-created-damages-remedies->

d. Finally, constitutional avoidance militates in favor of the tort-inclusive reading of the constitutional saving clause.

Congress’s work shouldn’t be read to leave Americans with zero remedy at law when federal employees violate their constitutional rights. That’s the very outcome the Framers assured their delegates would not happen, and it raises “serious constitutional concerns.” *Byrd v. Lamb*, 990 F.3d 879, 883–884 (5th Cir. 2021) (Willett, J., specially concurring). Indeed, it would violate due process. See *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1885) (“No one would contend that a law of a state, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law.”); *United States v. Lee*, 106 U.S. 196, 220–221 (1882) (a system in which “courts cannot give remedy when the citizen has been deprived of his property by force” would “sanction[] a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights”).

Rejecting the tort-inclusive reading of the constitutional saving clause risks precisely that. The FTCA, where Congress channeled ordinary torts, contains a host of exceptions, including for battery by non-law-enforcement officers and for detention of property by law-enforcement officers. 28 U.S.C. 2680(c), (h). When such an act amounts to a Fourth Amendment

[against-federal-officials](#) (tracking legislation; updated Aug. 26, 2026).

violation (a commonplace overlap), the victim should rest assured that a traditional tort action *brought for that constitutional violation* will fill the gap left by the unavailability of the FTCA (and the presumed unavailability of *Bivens*). Otherwise, if he's in one of the dozens of states without a converse-1983 statute, Congress has left him with *no* remedy at law for the violation of his constitutional rights—indeed, *taken away* the remedy he always had. That's not how Congress's work should be read. And there's no need to, as our textual analysis has shown.

4. Precedent. Read out of context, some of this Court's cases suggest potential roadblocks to our tort-inclusive reading of the constitutional saving clause. On inspection, not so.

a. First, the Court said in January 2007 that the Westfall Act “accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.” *Osborn v. Haley*, 549 U.S. 225, 229. That would seem to suggest that our tort-inclusive reading of the constitutional saving clause is foreclosed. But, that same term, in June 2007, the Court went on to explain that a plaintiff still “had a civil remedy in damages for trespass” against a federal official unconstitutionally trespassing on the plaintiff's property. *Wilkie v. Robbins*, 551 U.S. 537, 551. The Court doubled down, assuring that “there is no question that one was available to him if he could prove his allegations.” *Ibid.* And, lest there be any doubt, the Court reasoned that those trespass “torts by Government employees would be so clearly actionable under the general law that it would

furnish only the weakest argument for recognizing a generally available” *Bivens* action for them. *Id.* at 560.

So *Wilkie*’s description of the law is on all fours with our reading of the constitutional saving clause. And *Osborn*’s and *Wilkie*’s descriptions are easily reconciled. A tort action that’s *not* “brought for a violation of the Constitution” (e.g., the negligence claim in *Westfall*) is subject to the Westfall Act’s FTCA exclusivity clause; but a tort action that *is* “brought for a violation of the Constitution” (e.g., as described in *Wilkie*) remains available against the employee. That distinction is, as we’ve shown, true to the text and context of the Westfall Act, “accords with Founding-era principles of officer accountability,” and accounts for the “remedial gap left by” the sunset of *Bivens*. *Buchanan*, 71 F.4th at 1012–1013 (Walker, J., concurring).

b. For the same reasons, there’s no cause for concern raised by the Court’s tendency to shorthand the constitutional saving clause as the “Westfall Act’s explicit exception for *Bivens* claims.” See *Hui*, 559 U.S. at 807. Certainly, the clause is partly that. But it’s not only that, for all the textual and contextual reasons discussed above. No wonder, then, that the Court has more recently described the clause by its actual, open-ended terms, in a manner tracking the *Osborn–Wilkie* distinction. It “foreclosed common-law claims for damages against federal officials, *** but it left open claims for constitutional violations.” *Tanzin*, 592 U.S. at 49 (citation omitted); see *Simmons v. Himmelreich*, 578 U.S. 621, 628 n.4 (2016) (“There is an exception to [the exclusivity] provision for suits alleging constitutional violations.”).

c. Finally, the Court’s description of the constitutional saving clause in *United States v. Smith*, 499 U.S. 160 (1991), changes none of that. *Smith*, like *Westfall*, was a negligence case with no constitutional violation alleged. *Id.* at 162. So the scope of the constitutional saving clause wasn’t at issue. The question was whether the negligence claim, which couldn’t be brought via the FTCA because it arose abroad, could still be maintained against the employee. *Ibid.*

The Court said no, but it didn’t impact the analysis we’ve put forth. As elsewhere, the Court shorthanded the constitutional saving clause as “a *Bivens* action.” *Id.* at 166. Then, it noted the Westfall Act’s additional preservation of “an action under a federal statute that authorizes recovery against a Government employee.” *Id.* at 167; see 28 U.S.C. 2679(b)(2)(B). Finally, it called those the “two exceptions” to the exclusivity clause and refused to recognize “a third exception.” *Smith*, 499 U.S. at 167.

Smith did not purport to establish the full scope of the constitutional saving clause, because it wasn’t at issue. And, as we’ve shown, the state-law actions preserved by the clause are not a third exception—they’re just additional versions of the first exception (unlike the negligence claim in *Smith*). See *Blanche v. Lau*, 609 U.S. 1, 11–12 (2026) (this Court’s prior underinclusive description of a statutory term, in dicta, cannot overcome the actual text).¹²

¹² Beyond *Smith*’s overly narrow description of the constitutional saving clause in dicta, scholars have pointed out that *Smith* was wrongly decided on the issue presented, on two statutory grounds. See Pfander & Alley, *Restoring the Officer Suit at*

The Westfall Act’s text, context, and precedent support our reading of the constitutional saving clause. It preserves both state converse-1983 actions and tort actions brought for constitutional violations.

5. Constitutional structure. The Constitution imposes no obstacles to either converse-1983 actions or state tort actions against federal employees. To the contrary, the constitutional design presupposes that if Americans’ “rights are invaded by either” level of government, “they can make use of the other as the instrument of redress.” The Federalist No. 28 (Alexander Hamilton).

Federal employees have never had a free-floating immunity from state law, as the Founding-era history discussed above shows. And, beyond what preemptive reach a federal *statute* might encompass, any immunity *implicitly* derived from Supremacy Clause principles has been limited to “state criminal prosecution, not (as here) state tort liability.” *Martin v. United States*, 605 U.S. 395, 413 n.2 (2025).

Similarly, “structural constitutional law” doesn’t generally bar tort actions against federal agents, “regardless of the source of the tort principles,” including

Common Law at 1039–1044 (*Smith* ignored the “shall not apply” language of 28 U.S.C. 2680, and the “by reason of the same subject matter” language of 28 U.S.C. 2679(b)(1)). Regardless, *Smith* doesn’t need to be revisited to give appropriate effect to the constitutional saving clause.

“state law.” *Hencely v. Fluor Corp.*, 146 S. Ct. 1086, 1097–1099 & n.3 (2026).

Sovereign immunity, likewise, doesn’t reach individual-capacity claims. *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388 (1939) (“[T]he government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.”). Nor does, generally, intergovernmental immunity. See *Texas*, 123 F.4th at 208 (Federal law “flatly forbids agents from accessing ‘dwellings’ to prevent illegal entries. Suppose agents were nonetheless barging into dwellings in violation of the statute. Would intergovernmental immunity prevent a homeowner’s trespass suit? Of course not. And that would be true even if the agents argued the suit sought to ‘control’ how they were carrying out their duties.”).

So it’s no wonder that, “[i]n the context of suits against Government officials, damages have long been awarded as appropriate relief.” *Tanzin*, 592 U.S. at 49. Including in state courts, via state law. *E.g.*, *Merriam*, 13 Me. 439; *Westfall*, 484 U.S. 292.

C. Claims like Watanabe’s fit the traditional mold.

We close with a proof of concept. It’s simple. Watanabe brought this case for a violation of his constitutional rights, via the *Carlson* cause of action. But he could also have brought it, for that same constitutional purpose, via state tort law, as preserved by the Westfall Act’s constitutional saving clause. The tort law of Hawaii, where this case arose, recognizes

medical negligence claims by prisoners (to say nothing of general medical negligence claims). See, *e.g.*, *Persin v. State*, 143 Haw. 283 (Ct. App. 2018). As Watanabe recounts, such claims have historically been available to prisoners. Resp. Br. 40–41. The only additional requirement, now imposed by the constitutional saving clause, is that his claim be “brought for a violation of the Constitution”—which it is. See *id.* at 39–40 (citing *Estelle*, 429 U.S. 97). That’s similar to how this has long worked. Accord *Cross*, 2024 WL 3292756, at *5 n.12 (Matey, J., concurring) (“at least some Eighth Amendment claims may be actionable as medical negligence claims”). It still can.¹³

“We shouldn’t be surprised that the common law usually supplies a sound remedy when life, liberty, and property are taken. After all, the whole point of the common law as it evolved through the centuries was to vindicate fundamental rights like these.” *Browder*, 787 F.3d at 1083 (Gorsuch, J., concurring). The Court should let those actions do their traditional work.

Historically, there’s been nothing unusual about holding federal employees accountable via damages. Or doing so by common-law tort, in state court. Or relying on those mechanisms to vindicate constitutional rights. Indeed, when Congress passed the Westfall Act, it knew all of that was quite *usual*. If it wanted

¹³ It’s no barrier that the claim could also be brought via the FTCA, *without* needing to show the constitutional violation. Congress preserved that dual-track option, subject to the FTCA’s judgment bar. See 28 U.S.C. 2676.

to suddenly limit that storied tradition of individual-capacity damages actions to the novel *Bivens* action, it could have said so. But it chose otherwise. After channeling tort actions *not* brought for constitutional violations exclusively to the FTCA, Congress made sure that “a civil action *** brought for a violation of the Constitution” remained available in its traditional form. 28 U.S.C. 2679(b)(2)(A). Not “a *Bivens* action,” and not “a federal action,” but “a civil action.” Not even “a statutory civil action,” but *simply* “a civil action.” As long as it’s “brought for a violation of the Constitution.” Respecting those choices means recognizing the continued availability of state damages actions for federal employees’ unconstitutional acts. By doing so, the Court does not “fill any hiatus Congress has left in this area.” Cf. *Hernandez*, 589 U.S. at 118 (Thomas, J., concurring) (citation omitted). Rather, it exhibits “utmost deference to Congress’ preeminent authority in this area.” *Egbert*, 596 U.S. at 492.

Conclusion

The Court should affirm because Congress chose not to disturb the availability of Watanabe's *Carlson* action. In any event, and especially if it reverses, the Court should make clear that the nation's traditional, state-law default for vindicating constitutional rights remains available and effective.

Respectfully submitted,

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