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 *AMICUS CURIAE* THE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Institute for Justice is a nonprofit public interest law center committed to defending the essential foundations of a free society by securing greater protection for individual liberty. Central to that mission is promoting judicial engagement, particularly in cases involving government's infringement on fundamental rights.[1]

SUMMARY OF THE ARGUMENT

This Court should fully embrace the *Bivens* remedy as a means for holding federal officers personally liable when they violate constitutional rights. The *Bivens* remedy not only has a storied common law pedigree and is congressionally authorized, but it is also the only route to recovery now available to individuals like Sergio Hernandez's parents. *See Cordova v. City of Albuquerque*, 816 F.3d 645, 665 (10th Cir. 2016) (Gorsuch, J., concurring) ("there may be some circumstances when federal courts have to act because state courts are unable or unwilling to intervene").

Bivens's pedigree dates back to the English common law, which allowed damages actions for violations of fundamental rights. William Blackstone famously

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[1] The parties have filed blanket consents to filing of *amicus curiae* briefs with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than the *amicus* made a monetary contribution toward the preparation and submission of this brief.

proclaimed that without a method for "recovering and asserting" fundamental rights, "in vain would rights be declared, in vain directed to be observed." 1 William Blackstone, *Commentaries on the Laws of England* 55-56. The Founders were so committed to the common law tradition of holding government agents personally liable that anti-federalists, like Luther Martin and George Mason, opposed ratification of the U.S. Constitution in part because they feared that the newly created federal judiciary would take away this common law remedy. Federalists like John Marshall sought to reassure the delegates that the remedy would most definitely live on. After all, our constitutional rights are meaningless if courts cannot redress their violation.

As a result of this history, individuals, for much of America's existence, could subject federal officers to common law tort liability for violations of constitutional rights. Such cases were heard in state and federal courts (depending on the subject matter), with the common law being the source of the tort remedy in both.

In *Bivens*, the Court allowed a direct constitutional remedy in federal court, as a supplement to common law remedies, concerned that in the post-*Erie* world, "leaving the problem of official liability to the vagaries of common-law actions" would hurt federal interests, such as the need to enforce the Constitution without being bound by state precedent. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 409 (1971) (Harlan, J., concurring). Thus, in the seventeen-year period between the *Bivens* decision and the

passage of the Westfall Act, individuals could vindicate their constitutional rights either directly under the Constitution or through the system of common law remedies.

By passing the Westfall Act, Congress precluded all tort suits, including constitutional ones, against federal officers under state common law. But it preserved the right of aggrieved citizens to bring claims "for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). This language, the Court has found, is an "explicit exception for *Bivens* claims." *Hui v. Castaneda*, 559 U.S. 799, 807 (2010).

In other words, Congress has passed the torch of accountability for constitutional violations from the system of common law remedies to *Bivens*. By shutting the door on recovery under state common law and still authorizing claims for violations of the Constitution in federal court, Congress made *Bivens* into the one and only mechanism for holding federal officers personally liable for unconstitutional conduct. As such, it is now more important than ever to endorse a robust application of *Bivens*, which is the one remaining safeguard litigants like Jesus Hernandez and Maria Bentacour have to vindicate their son's constitutional rights. The Court should reverse the judgment below and allow them to proceed under *Bivens*.

ARGUMENT

Had Sergio Hernandez been killed by a federal agent in the nineteenth century, his parents could have brought a damages claim for the deprivation of Hernandez's constitutional rights at common law.[2] Had he been killed by a federal agent anytime between 1913 and 1988, Hernandez's parents could have recovered under a Texas statute.[3] But because Hernandez was killed by a federal agent after the enactment of the Westfall Act, the courts below are telling his parents that nothing can be done to vindicate Hernandez's Fourth and Fifth Amendment rights.

It is hard to see why the ability to recover for constitutional wrongs committed by federal officers should be any less possible today than it was at the Founding and for most of this country's history. Yet,

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[2] *See*, *e.g.*, *Buck v. Colbath*, 70 U.S. (3 Wall.) 334, 344, 347 (1866) (stating that where a federal officer is "bound to exercise his own judgement," he "is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice," and that acting under color of authority does not "prevent [a federal officer] from being sued in the State court, in trespass for his own tort" when he acts outside this authority); *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 10 (1817) (explaining that an individual whose rights were violated "may proceed, at his election, by a suit at common law . . . for damages for the illegal act").

[3] *See* Tex. Civ. Prac. & Rem. Code Ann. § 71.031; *see also Delgado v. Zaragoza*, 267 F. Supp. 3d 892, 898 (W.D. Tex. 2016) ("Texas state law explicitly provides that, under specified conditions, an individual may bring an action for personal injury damages in Texas although the wrongful act causing this injury took place in a foreign country.").

contemporary courts shun the only available means for doing so: *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. This reluctance to embrace *Bivens* is based on two flawed and dangerous assumptions: first, that holding federal officers personally liable for violations of constitutional rights is a novel, if not radical, development unmoored from the Constitution and its history; second, that this development is an encroachment on the separation of powers, and that Congress should be the one creating remedies for constitutional violations. The assumptions are flawed because they are based on an overly simplistic view of *Bivens* and the common law remedies it intended to complement. The assumptions are dangerous because by relying on them, federal courts are enabling a system of unaccountability, divorced from the founding principles of this nation, among them *Marbury v. Madison*'s promise that where " 'there is a legal right, there is also a legal remedy.' " 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23). To stay faithful to the original "compact made between the society at large and the individual" and avoid "arbitrary" government, with its officials assuming the role of "perpetual dictators," this Court must embrace *Bivens*, instead of shunning it. Alexander Hamilton, *Second Letter from Phocion to the Considerate Citizens of New York, reprinted in* Works of Alexander Hamilton; Comprising His Correspondence, and His Political and Official Writings, Exclusive of the Federalist, Civil and Military 301, 322 (C. John ed., 1851).

I. *BIVENS* IS THE ONLY GENERALLY AVAILABLE MECHANISM TO KEEP FEDERAL OFFICERS ACCOUNTABLE FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS.

Bivens is controversial because, according to the case's critics, it improperly implies a damages cause of action directly under the Constitution. *See, e.g., Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (describing *Bivens* as "a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition"). But the tradition of holding federal officers personally liable for violations of constitutional rights has a storied pedigree. It dates back to the English common law, and it was vigorously embraced by the Founders—Federalists and anti-Federalists alike. This tradition continued for most of America's history, until the Westfall Act shut the door on state common law remedies as a means for vindicating constitutional rights. The only way to continue this founding tradition now is by embracing *Bivens* as its only available manifestation. The alternative is a system of unaccountability, which is not consistent with this Court's precedent or with the English common law precedent.

A. English courts created the foundation for the system of constitutional accountability through common law remedies.

Nothing is new or radical about suits for damages against federal officers who violate individuals' fundamental rights. These suits date back to the English common law. 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. . . . Long before 1789 it was true that sovereign immunity was not a bar to relief."). At the heart of this long tradition is a concern that without enforcement, there is no accountability and there is also no right. After all, "if there were no method of recovering and asserting those rights, when wrongly withheld or invaded," by, for example, "pay[ing] . . . damages for the invasion," then "in vain would rights be declared, in vain directed to be observed." 1 William Blackstone, *Commentaries on the Laws of England* 55-56.

Thus, in *Ashby v. White*, the House of Lords allowed a claim for damages against a commissioner who prevented an individual from voting in a local election. 92 Eng. Rep. 126, 135-36 (K.B. 1703) (Holt, C.J., dissenting). According to the Lord Chief Justice Holt, whose dissent was later upheld by the House of Lords, an ability to file such a claim would not only "make publick officers more careful" but would also vindicate the principle that if "the plaintiff is obstructed of his right,

[he] shall therefore have his action." *Id*. "[I]ndeed it is a vain thing to imagine a right without a remedy." *Id*.

The famous search-and-seizure cases involving Lord Halifax's general warrants issued to crack down on John Wilkes and his associates reaffirmed this precedent. *See Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765); *Leach v. Money*, 19 How. St. Tr. 1001 (K.B. 1765); *Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763). They upheld jury verdicts in suits for damages to redress injuries caused by King's officers' abuses of fundamental rights, which "violat[ed] Magna Charta, and attempt[ed] to destroy the liberty of the kingdom." *Huckle*, 95 Eng. Rep. at 768-69.

In *Entick v. Carrington*, the King's Chief Messenger broke into the house of John Wilkes's associate and under the power of a general warrant searched through the associate's home and looked through his papers. 19 How. St. Tr. at 1030. The associate sued for trespass. *Id*. In defense, the King's messenger argued that the general warrant authorized him "to seize and apprehend [the associate] and bring him together with his books and papers in safe custody before the earl of Halifax." *Id*. at 1031. The court dismissed the general-warrant defense and upheld the award of damages against both the messenger and Lord Halifax. *See Boyd v. United States*, 116 U.S. 616, 626 (1886) (describing the outcome of the decision). After all, the general warrant "to seize and carry away the party's papers . . . is illegal and void" and allowing it "would be subversive of all the comforts of society" and would

violate liberty by subjecting individuals to "the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even suspect, a person to be the author . . . of a seditious label." *Carrington*, 19 How. St. Tr. at 1066.

In short, during the years leading up to the Founding, English courts allowed claims for damages in individual-rights cases. Just like their American descendants years later, they could not countenance a legal system with rights but no remedies, seeing civil damages actions as a way to protect fundamental liberties and check the Crown's power.

B. The founding generation embraced this English tradition and created a common law framework reflecting it.

Entick v. Carrington became an instant sensation: "[E]very American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law." *Boyd*, 116 U.S. at 626. The opinion's pronouncements against general warrants were seen as affecting "the very essence of constitutional liberty and security" and applying "to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life," with "the fourth and fifth amendments run[ning] almost into each other." *Id*. at 630.

The ability to recover damages against abusive government officers through jury trials was so important to the Founders that the possibility of this option being taken away motivated anti-Federalists, like Luther Martin, to oppose the ratification of the Constitution. He called such trials "most essential to our liberty" in "every case . . . between governments and its officers on the one part, and the subject or citizen on the other." Luther Martin, *The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention* (Nov. 29, 1787), *reprinted in* 3 The Records of the Federal Convention of 1787 221, 222 (Max Farrand ed., 1911). In response to similar concerns by George Mason, John Marshall sought to reassure the delegates in Virginia that federal officers who violate fundamental rights would be held individually accountable in court. If a federal marshal were to violate an individual's constitutional rights by, for example, "go[ing] to a poor man's house, and beat[ing] him, or abus[ing] his family," he would be able to "trust to a tribunal in his neighborhood . . . . apply for redress, and get it." John Marshall, *Virginia Ratifying Convention* (June 20, 1788), *reprinted in* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 554 (Jonathan Elliot ed., 1836). After all, "such great insults on the people of this country" will not be "allowable." *Id*. "Were a law made to authorize them, it would be void." *Id*.

Indeed, the Framers believed so strongly in the need for judicial enforcement of individual rights that they extended this opportunity to foreign

nationals. James Madison, for example, believed that foreign citizens injured abroad by federal officials must be allowed to seek redress in U.S. courts. In a context involving a U.S. naval officer seizing a ship belonging to a Danish national, then-Secretary of State Madison was adamant that "injuries committed on aliens as well as citizens, ought to be carried in the first instance at least, before the tribunal to which the aggressors are responsible." *Letter from James Madison to Peder Blicherolsen* (Apr. 23, 1802), *reprinted in* 3 The Papers of James Madison, Secretary of State Series 152 (D.B. Mattern et al. eds., 1995). The Danish national was eventually able to file his claims in a U.S. court, ending up before John Marshall, who subjected the naval officer to damages and costs for the value of the seized ship. *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 491 (1806). In the process, Justice Marshall reiterated that the owner of the ship "had certainly a right . . . to resort to the captor for damages." *Id*.

C. For most of this nation's history, individuals could hold federal officers personally liable for violations of constitutional rights.

As the result of this history, individuals, for much of America's existence, could subject federal officers to common law tort liability for violations of their constitutional rights. Such cases were heard in state and even federal courts (for example, when disputes sounded in admiralty), with the common law being the source of the tort remedy in both. A case involving an

unlawful seizure by federal officers, for example, would begin as an action in trespass. James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 97 Georgetown L. J. 117, 134 (2009); *see also* Carlos M. Vazquez & Steven I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509, 532 (2013); Sina Kian, *The Path of the Constitution: The Original System of Remedies, How it Changed, and How the Court Responded*, 87 N.Y.U. L. Rev. 132, 144 (2012). The officers would respond that they acted within their authority when seizing the property. *Id*. The individual could then reply that the officers exceeded their authority, since no constitutional act of the government authorized the seizure.[4] Vazquez, *supra*, at 531 n.104. If the individual's challenge were successful and the seizure were declared unlawful, the officers would have been required to pay damages for seizing the property. *Yearsley v. W.A. Ross Const. Co*., 309 U.S. 18, 21 (1940) (stating that if authority is not validly conferred, "an agent or officer of the Government purporting to act on its behalf [can] be held liable for his conduct causing injury to another"). This outcome would have been driven by the courts' strict observance of the principle that the federal government can only

[4] It could be that the act that authorized the seizure was unconstitutional. Or it could be that the act was constitutional, but did not apply to the actions of the officer. *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940) ("the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred," meaning it was not within the Constitutional power of Congress to grant this authority).

invoke powers enumerated in the Constitution. Kian, *supra*, at 144 n.39. Therefore, if there is no constitutional act of the government to authorize the officer's actions—either because he exceeded the valid authorization or because the authorization itself is unconstitutional—then the officer exceeded his authority and must be held personally liable. Kian, *supra*, at 144.

Thus, for example, in *Bates v. Clark*, the Court upheld a damages verdict against an army captain and his lieutenant for seizing whiskey from merchants on the ground that the merchants were trying to sell it in Indian Territory. 95 U.S. 204, 205 (1877). The merchants brought an action for trespass and the government officers "pleaded their official character," namely that they acted pursuant to Congressional authorization and an order from a U.S. Attorney. *Id*. at 205. The Court concluded that the U.S. Attorney could not have provided a valid order, since the statute "conferred no authority whatever on the defendants to seize the property." *Id*. at 209. As such, "orders emanating from a source which is itself without authority" cannot provide protection to officers, leaving them open to personal liability. *Id*. This result might at first seem harsh. As Justice John Marshall admitted in *Little v. Barreme*, his "first bias" in the case was "in favor of the opinion that though instructions of the executive could not give a right, they might yet excuse from damages." 6 U.S. (2 Cranch) 170, 179 (1804). But upon further examination, he concluded that authority invalidly given cannot "change the nature of the transaction, or legalize an act which without [such authority] would have

been a plain trespass." *Id*. To the same point, Justice Story reasoned in *The Apollon* that "[t]he Legislature will doubtless apply a proper indemnity. But 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."). 22 U.S. 362, 366-67 (1824).[5] After all, "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220-21 (1882). An alternative framework, in which "courts cannot give remedy when the citizen has been deprived [of his rights] by force" simply because of authority emanating from a higher source 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." *Id*. at 221.

Had Sergio Hernandez's parents brought his claims for damages in the nineteenth rather than twenty-first century, they could have turned to common law remedies as a means of enforcing Hernandez's constitutional rights. Their case would have been one more example of the well-established practice of holding government officers personally liable, so the

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[5] *See generally* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1865-66 (2012) (discussing the practice of indemnification).

injured party can be compensated.[6] This was the state of the law leading up to the *Bivens* decision. *Bivens* can only be understood in this historical light.

D. *Bivens* initially complemented common law remedies, but after the passage of the Westfall Act, it is the only generally available route to recovery.

When *Bivens* was first decided, the Court's main interest was in ensuring that federal prerogatives, such as the need to enforce the Constitution without being bound by state precedent, are protected. With the Westfall Act eliminating common law remedies for violations of individual rights, however, the main concern is that individuals with constitutional injuries may have no way of redressing them.

i. When it was decided, Bivens *was fundamentally about federalism.*

There is no question that Webster Bivens, had he chosen to do so, could have brought his suit against

[6] *See, e.g., Yearsley*, 309 U.S. at 20-21 (1940) (admitting that plaintiffs can sue federal officers for damages if the officers exceed their authority or this authority is not within the government's constitutional power to confer); *Phila. Co. v. Stimson*, 223 U.S. 605, 619-20 (1912) (stating that "[t]he 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"); *Belknap v. Schild*, 161 U.S. 10, 18 (1896) (reasoning that federal officers can be "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"); *Bates*, 95 U.S. at 204 (holding federal officers personally liable for wrongfully seizing private property, even if under official orders).

federal officers directly under the common law. To vindicate his Fourth Amendment rights, Mr. Bivens, just like individuals in the two centuries before him, could have taken advantage of common law remedies and sought damages for trespass. Thus, when Mr. Bivens filed his case in federal court, seeking damages directly under the Constitution, the question was whether existing common law remedies should be supplemented with a federal one, not whether individuals who suffered at the hands of federal agents should be able to recover money damages from the agents for violations of their constitutional rights.[7]

The Court answered in the affirmative, recognizing an "independent" federal damages claim against federal officers directly under the Constitution. *Bivens*, 403 U.S. at 395. This answer was influenced by *Erie Railroad Co. v. Tompkins*, which famously overturned *Swift v. Tyson* and eliminated general common law, requiring federal courts to follow state precedent when adjudicating common law cases. 304 U.S. 64, 71-73 (1938). With the possibility of divergent remedies for Constitutional violations in the background, the Court

[7] The government's brief in *Bivens* framed the question to the Court as whether an "additional" damages remedy should be recognized and argued that the "plan envisaged when the Bill of Rights was passed" was that individuals would be able to vindicate their constitutional rights by proceeding in "a suit at common law . . . for damages for the illegal act." Brief for the Respondents, *Bivens*, 403 U.S. 388 (1971) (No. 301), 1970 WL 116900. Thus, the government not only acknowledged that the question was one of federalism, but also admitted that the Founders intended for individuals to recover damages from federal officers who violated constitutional rights.

reasoned that "the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." *Bivens*, 403 U.S. at 392. After all, there is one "absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority." *Id*. Justice Harlan in his concurrence seconded the point, highlighting that "leaving the problem of federal official liability to the vagaries of common-law actions" would be undesirable and emphasizing that "there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs." *Id*. at 409.

ii. In the post-Westfall Act era, Bivens *is about keeping federal officers accountable when they violate constitutional rights.*

While *Bivens* did not begin its life as the safeguard of accountability, it certainly became one. Today, *Bivens* is the only generally available way to effectuate this nation's history and tradition of holding federal officers to account by allowing claims for damages for violations of constitutional rights. This is because in 1988, Congress foreclosed all tort suits against federal officers under state common law.[8] For non-constitutional

[8] 28 U.S.C. § 2679(b)(1) (noting that the Federal Tort Claims Act is "exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim"); *Minecci v. Pollard*, 565 U.S. 118, 126 (2012)

tort suits, Congress substituted the federal government as a defendant.[9] For constitutional tort suits, Congress allowed "a civil action against an employee of the government," but, in light of the blanket prohibition on common law suits, that could be achieved only through *Bivens*. 28 U.S.C. § 2679(b)(2)(A); *see also Hui,* 559 U.S. at 807 (noting "[t]he Westfall Act's explicit exception for *Bivens* claims").

As a result, since 1988, litigants aggrieved by federal officers can only bring suits for damages in federal courts directly under the Constitution. The tried and true common law route to remedies for rights violations, available for the first two hundred years, is no longer there. It would have been one thing to argue that litigants should be prevented from recovering directly under the Constitution, if they were permitted to file their individual-right claims in state courts. After all, "when we have state courts ready and willing to vindicate [fundamental] rights using a deep and rich common law that's been battle tested through the centuries," there is "no need to turn federal courts into common law courts and imagine a whole new tort jurisprudence." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1084 (10th Cir. 2015) (Gorsuch, J., concurring). But this is not a route available to Sergio Hernandez's

(reading the Westfall Act to preempt all state tort remedies against federal officials acting within the scope of their employment).

[9] 28 U.S.C. § 2679(d)(1) ("[A]ny civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant").

parents or other litigants. Since the enactment of the Westfall Act, the only way for his parents to bring a constitutional claim is under *Bivens*. And "if a plaintiff can establish that state law won't remedy a constitutional injury . . . the doors of the federal courthouse should remain open to him." *Id.* at 1084; *Cordova*, 816 F.3d at 665 (Gorsuch, J., concurring) ("there may be some circumstances when federal courts have to act because state courts are unable or unwilling to intervene").

There is no need for the Court to be skeptical of *Bivens*. Grounded in history, *Bivens* is a fundamental protection. Indeed, for individuals like Sergio Hernandez's parents, it is now the only remedy available to vindicate constitutional rights. As such, the choice for this Court is simple: either stay true to the Founders' vision of the Constitution by allowing damages claims against federal officers who violate it or let the constitutional violations go unaddressed. The latter option is completely inconsistent with this nation's proud history and tradition and with 200-years' worth of common law jurisprudence.

II. *BIVENS* POSES NO THREAT TO THE SEPARATION OF POWERS, AS CONGRESS ENDORSED IT IN THE WESTFALL ACT.

In addition to having its roots in this nation's rich history and tradition, *Bivens* is a congressionally authorized remedy. This authorization can be found in the text of the Westfall Act, as well as in its structure. *Bivens*'s solid heritage is obscured by the case's most

prominent critique, which is that it encroaches on the separation of powers. This critique gained strength in the wake of the Westfall Act's passage, when litigants could no longer choose between common law or federal remedies.

A. The separation-of-powers critique of *Bivens* became prominent after the passage of the Westfall Act.

In the seventeen-year period between the *Bivens* decision and the passage of the Westfall Act, litigants bringing constitutional claims against federal officers had a choice to make: they could either bring their claims in state courts and request common law remedies or they could go straight to a federal court and request a remedy directly under the Constitution. Since federal officers could remove suits against them from state to federal courts upon their assertion of federal defenses, federal courts would generally be the ones making decisions in either case.[10]

In the current post-Westfall Act world, there is no longer a choice between state common law remedies or *Bivens*. Now *Bivens* is the only generally available

[10] Since 1948, every federal officer sued in state court has had the statutory right to the removal of the suit based on federal defense. Vazquez, *supra*, at 539; 28 U.S.C. § 1442(a)(3). Certain federal officials could remove as early as the nineteenth century. Customs officers, for example, could remove starting in 1815. Elizabeth M. Johnson, *Removal of Suits Against Federal Officers: Does the Malfeasant Mailman Merit a Federal Forum?*, 88 Colum. L. Rev. 1098, 1100 (1988).

means to seek an award of damages for federal violations of constitutional rights. Taking common law remedies out of equation shifted the conversation on *Bivens*, making it into a bogeyman for the separation of powers concerns rather than an answer to the post-*Erie* federalism problem.

B. *Bivens* does not encroach on the separation of powers.

The language and structure of the Westfall Act demonstrate that Congress intended for a robust enforcement of *Bivens* remedies, as it wished for there to be an opportunity for litigants to recover for violations of constitutional rights and it understood that without *Bivens*, such an opportunity would not exist.

According to the text of the Westfall Act's broad preclusion provision that eliminates common law theories of recovery, the remedy against the United States is "exclusive of any other civil action . . . for money damages." 28 U.S.C. § 2679(b)(1). This provision is not without exceptions, however, including when litigants bring claims "for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). Such an express preservation of claims for constitutional violations has been interpreted by the Court as an "explicit exception for *Bivens* claims." *Hui*, 559 U.S. at 807.

Furthermore, the structure of the Westfall Act shows that Congress's intent was to allow individuals to proceed under *Bivens* to recover against federal officers for violations of constitutional rights. Pfander &

Baltmanis, *supra*, at 123. To begin with, the Westfall Act eliminates state common law remedies as a source of relief for litigants' constitutional injuries. *See Minecci v. Pollard*, 565 U.S. 118, 126 (2012) (reading the Westfall Act to immunize federal officials from state law tort actions "through removal and substitution of United States as defendant"). In addition, the Federal Tort Claims Act route is also unavailable, since in 1974, Congress declined the Department of Justice's proposal to substitute the United States as a defendant in cases involving constitutional violations.[11] As a result, the only generally available way to recover money damages for constitutional violations is *Bivens*. Indeed, according to legislative history, it was Congress's intention that the Westfall Act "would not affect the ability of victims of constitutional torts to seek personal redress from federal employees who allegedly violate their Constitutional rights." 29 H.R.

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[11] When amending the FTCA in 1974, Congress rejected the Department of Justice's proposal to substitute the government as the defendant in suits for intentional torts committed by law enforcement officers, including those arising "under the Constitution or statutes of the United States." S. Bill 2558, 93d Cong., 1st Sess., 119 Cong. Rec. 33499 (1973); *see also* Jack Boger, *The Federal Tort Claims Act Intentional Tort Amendment: An Interpretive Analysis*, 54 N.C. L. Rev. 497, 510-17 (1976) (discussing the DOJ proposal). DOJ was particularly interested in making sure there is a uniform recovery mechanism for violations of constitutional rights. *Id*. Instead, Congress chose to expand FTCA only to certain intentional torts, in light of the Collinsville incident, when in April of 1973, federal and state narcotics agents mistakenly stormed the homes of two Collinsville, Ill. families in an attempt to apprehend suspected cocaine dealers. Boger, *supra*, at 500.

Rep. No. 100-700, at 6 (1988). The only way for this ability to not be affected is if there is robust examination of *Bivens* claims, instead of the near non-recognition of such claims that typically prevails in courts today.

In addition to being firmly rooted in this nation's history and tradition, the *Bivens* remedy is also congressionally authorized. This Court has already endorsed this view when it reasoned in *Hui* that the Westfall Act provides an explicit exception for *Bivens* claims and when it agreed in *Minecci* that the Westfall Act foreclosed common law remedies for tort violations by federal officers. The reading that *Bivens* does not provide a robust remedy for individuals seeking to vindicate their constitutional rights is inconsistent with Congressional endorsement of this cause of action and with its intent that litigants who suffered constitutional violations can seek personal redress.

CONCLUSION

For the foregoing reasons, the Court should hold that this case was properly brought under *Bivens*.

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Respectfully submitted,

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