No. 25-3386

In the United States Court of Appeals for the Ninth Circuit

RENÉ QUIÑONEZ AND MOVEMENT INK LLC,

Plaintiffs–Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants–Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:22-cv-3195-WHO
Hon. William H. Orrick

APPELLANTS' REPLY BRIEF

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Introduction

This case comes to the Court on two uncontested legal premises: (1) Plaintiffs have plausibly pleaded that Defendant Robin Lee violated their First and Fourth Amendment rights (by unjustifiably seizing their property to suppress their speech); (2) after the Supreme Court's recent decision in *Postal Service v. Konan*, no FTCA claim exists for that unconstitutional seizure (due to the FTCA's postal exception).

So the question is: With the FTCA off the table, can Plaintiffs use the remedies state law has traditionally provided for federal employees' constitutional violations? The Government says no, but it points to no doctrinal support for the notion that the federal government can deprive Americans of those traditional state-law remedies and replace them with nothing. In fact, history and precedent cut decisively against such a departure from practice.

In any event, Congress has not purported to eliminate Plaintiffs' state-law remedies. On the contrary, the Westfall Act *preserves* the right to bring "a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." Such an individual-capacity claim traditionally proceeds via state law. Here, it can take two state-law forms: a claim via California's Bane Act (a statutory cause of action for federal constitutional violations), and a claim for common-law trespass (the traditional, non-statutory version of the same).

Argument

We explain in two parts why Plaintiffs are not remediless for Lee's violation of their constitutional rights. History and the Westfall Act light the state-law way.

First, no doctrine supports the Government's unexplained position that state law is now categorically prohibited from serving its traditional function of remedying federal employees' constitutional violations. Centuries of practice and precedent belie the notion. And no form of Supremacy Clause immunity, or any other, could call that practice into question. (Applying that remedial tradition here is easy, as the Government declines to argue that Lee's seizure was non-tortious or constitutional.)

Second, even if state-law remedies could be eliminated without replacement, no such effort at preemption has occurred. To displace traditional state-law remedies, Congress must clearly say so. The Westfall Act does not do that. It is, instead, a congressional recognition of the state-law remedial tradition: individual-capacity claims against federal employees to remedy constitutional violations.

Separately, Plaintiffs' FTCA claims beyond the seizure and detention of their property survive too. For the property squeeze-and-sniff, the Government cannot defeat a straightforward application of *Jones*'s physical-intrusion search test. For the economic-interference claims, the Government has not met its summary-judgment burden, especially after undoing the district court's improper weighing of evidence.

I. States have the authority to provide civil damages remedies for federal employees' constitutional violations.

Plaintiffs cannot bring an FTCA claim for postal clerk Lee's unjustifiable seizure of their property from the mailstream. *See* Response Br. 23–24; *Postal Service v. Konan*, 146 S. Ct. 736 (2026) (holding the FTCA's postal exception, 28 U.S.C. § 2680(b), bars such a claim).[1] The Government does not dispute that that seizure was a trespass and a constitutional violation. The question, then, is whether that constitutional violation can still be remedied the traditional way: a state-law civil action against the offending official. It can. The Government invokes no doctrine to the contrary. None exists.

1. The Government argues that state-law damages remedies can never apply to federal employees for conduct in the course of their employment, no matter how unlawful or unconstitutional. *See* Response Br. 48–49. But, as Plaintiffs explained, Americans have relied on such state-law claims since the founding. Opening Br. 15–16, 22–23, 32, 35; *see also* Amicus Br. of Professors Vázquez and Vladeck 4 ("From the start, the Framers envisioned that federal constitutional rights would be

[1] The same likely goes for the postal inspectors' unjustifiable subsequent detention of Plaintiffs' property. But *not* for the separate economic-interference and search claims, which are not covered by the postal exception, or any other exception, and should proceed under the FTCA. *See Konan*, 146 S. Ct. at 746 (limiting its holding to "intentional nondelivery of mail"); Opening Br. 40–53; *infra* at 18–24.

vindicated by injured parties filing common-law damages claims against federal officers."). That tradition stems from "the genius of the Founding Fathers to 'split the atom of sovereignty'" between the federal and state governments. *Idaho v. Horiuchi*, 253 F.3d 359, 361 (9th Cir.) (en banc) (citation omitted), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001). The "beneficiaries of these competing sovereignties are the citizens of the United States." *Id.* If their "rights are invaded by either, they can make use of the other as the instrument of redress." *Id.* (quoting The Federalist No. 28 (Alexander Hamilton)).

Accordingly, "[i]t is well settled that generally applicable state laws can apply to federal agents." *Texas v. DHS*, 123 F.4th 186, 206 (5th Cir. 2024). That includes, per the Fifth Circuit, "state tort law's application to a United States postal worker" and "state tort and property law's application to" other federal workers in the course of their employment. *Id.* at 206 n.23 (collecting cases).

That remedial rule might be subject to one limitation: the use of individual-capacity state remedies to countermand the lawful discharge of lawful federal duties. *Id.* at 206; *but see Martin v. United States*, 605 U.S. 395, 413 n.2 (2025) (suggesting such a limitation may only apply to a state criminal prosecution, not a civil action). Regardless, a *lawful*-discharge exception has, by definition, never shielded federal officials' unconstitutional (or otherwise unauthorized) conduct from individual-

capacity civil remedies. *See* Opening Br. 15 (explaining that a federal employee might defend a state common-law damages claim by invoking federal authority, but that the defense would fail on a showing of unconstitutionality). The 1851 case of *Mitchell v. Harmony* is a powerful illustration of the principle. The plaintiff brought "an action of trespass . . . to recover the value of certain property taken by" the defendant, an American soldier, "in the province of Chihuahua during the late war with Mexico." 54 U.S. 115, 128. Presented with the viability of trespass damages against a soldier in a foreign warzone, the Supreme Court did not hesitate to hold that the claim must proceed against him "for doing an unlawful act." *Id.* at 137.

The same result obtained in the 1882 case of *United States v. Lee*. The plaintiff sued federal employees to stop them from unconstitutionally occupying property in the name of the federal government. He brought the claim in Virginia state court, "in the form prescribed by the statutes of Virginia." 106 U.S. 196, 197. The Supreme Court held that the federal employees could be so sued in their individual capacities, where the claim was premised on an unconstitutional deprivation of property, liberty, process, or compensation. *Id.* at 220. The fact that the officials acted in the federal government's name (indeed, at the federal government's behest) could not shield them from Constitution-enforcing state-law liability. *Id.* "[S]tated in reference to a suit for damages, the rule of the *Lee* line of cases was thus summed up . . . : 'Where

an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred.'" *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 699 n.22 (1949) (citation omitted).

That history shows: "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) (collecting cases, including *Mitchell v. Harmony*).[2] To be sure, in 1988 "the Westfall Act foreclosed common-law claims for damages against federal officials" by occasionally substituting the federal government in their place. *Id.* Crucially, though, consistent with the unbroken tradition, the Act "left open claims for constitutional violations" directly against federal officials. *Id.*; *see* Opening Br. 34 (explaining that the Westfall Act was meant to ensure the government would be substituted as defendant for claims of negligence, not unconstitutionality).

The Westfall Act's preservation of the traditional state-law remedial method helps explain why the Supreme Court said—well after the Act's passage—that a

[2] *See also* Amicus Br. of Professors Vázquez and Vladeck 6 (collecting cases); Amicus Br. of ACLU 8 (same); Amicus Br. of Eleven Law Professors 8 (same); Harrison Stark, *State-created damages remedies against federal officials* (Feb. 9, 2026) at 17 n.76, https://tinyurl.com/4yxx3x8n (collecting cases and explaining that the traditional cause of action against those federal officials was "decidedly not federal").

plaintiff still "had a civil remedy in damages for trespass" via state law against a federal official accused of unconstitutionally trespassing on private property in the course of his employment. *Wilkie v. Robbins*, 551 U.S. 537, 551 (2007). Doubling down: "there is *no question* that one was available to him if he could prove his allegations." *Id.* (emphasis added). Tripling down: those individual-capacity 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* claim for them. *Id.* at 560 (emphasis added). Post-Westfall, the Supreme Court made unambiguously clear that the traditional state-law remedy for federal officials' constitutional violations remains available.

2. Despite all that, the Government's position is that any and all state-law remedies against federal employees for constitutional violations in the course of their employment are now eliminated, even where the FTCA is inapplicable. Plaintiffs, though, explained that Congress lacks the power to enact such a radical departure from founding-era state-law practice. Opening Br. 21–26. Tellingly, the Government does not provide any authority to the contrary or argue against Plaintiffs' premise. Instead, the Government mischaracterizes the argument, claiming that Plaintiffs are asking the Court to hold that "damages remedies are constitutionally required," a la *Bivens*. Response Br. 49. No—Plaintiffs are not asking the Court to create any new

remedies. We are asking the Court to hold that Congress cannot *eliminate* (and leave unreplaced) the existing remedies state law provides (indeed, has always provided) for federal employees' constitutional violations.

The reason the Government cites no authority against Plaintiffs' argument is that none exists. Perhaps the closest the Government could come would be to invoke a form of Supremacy Clause immunity. But that would be a clear loser against Constitution-enforcing state-law claims. As the history and precedent discussed above show: "Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment." *Johnson v. Maryland*, 254 U.S. 51, 56 (1920); *see Butz v. Economou*, 438 U.S. 478, 490–91 (1978) ("Since an unconstitutional act, even if authorized by statute, [is] viewed as not authorized in contemplation of law, there [can] be no immunity defense" premised on federal employment in such circumstances.); *Horiuchi*, 253 F.3d at 365–66 (a federal employee cannot escape state-law liability by claiming he was "discharging [his] duties under federal law" if he "acted unlawfully in carrying out [his] duties"); Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights*, 64 U. Colo. L. Rev. 159, 174 (1993) ("[T]hroughout the entire eighteenth and nineteenth centuries, government officials generally enjoyed no immunity whatsoever if they were deemed to have engaged in unconstitutional conduct, even where a *federal*

official was being sued under a *state* law cause of action.") (citations omitted).[3]

The long and short of it is that unconstitutional federal conduct has always been subject to individual-capacity state-law remedies, and the Government is asking this Court to eliminate them with no equivalent alternative for the first time in the country's history. *But see Horiuchi*, 253 F.3d at 361 (extolling "the genius" of our liberty-preserving design of split sovereignty); Amar, *Using State Law*, 64 U. Colo. L. Rev. at 170 (similar).[4] The Court should not accede to such a seismic transformation of our rights. Indeed, if the Government is correct that Congress has created such a paradigm-shifting regime, that regime is unconstitutional. Opening Br. 23 (collecting authorities); *but see* part II, *infra* (that is not what Congress has done).[5]

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[3] No other immunity doctrine could support the Government's remedy-eviscerating position. Not sovereign immunity, because "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388 (1939) (citing *Lee*, 106 U.S. at 213, 221). Nor intergovernmental immunity. *See Texas*, 123 F.4th at 208 ("In addition to allowing conditional access to private lands, § 1357(a)(3) 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.").

[4] Any concern about uneven or unfair application of state law by state courts is blunted by the fact that federal defendants can immediately remove their cases to federal court for full merits determination. 28 U.S.C. § 1442(a).

[5] The Government's view of state-law liability is not only foreclosed by history and precedent. It is also an about-face. Trying to prevent what became the *Bivens*

3. The Government has no response to those historic and doctrinal realities concerning Plaintiffs' individual-capacity state-law claims for the violation of their constitutional rights. And, understandably, it does not argue that Lee's unjustifiable, speech-suppressing seizure was lawful or constitutional.[6] Instead, the Government insists that Plaintiffs abandoned or forfeited some form of that claim. *See* Response Br. 20–21. To start, that argument could only reach Plaintiffs' FTCA trespass claim for Lee's seizure, not any individual-capacity claims. *Contrast* Response Br. 20–21 (arguing Lee's seizure is not preserved as an FTCA trespass claim), *with id.* at 8–9, 11–12 (recognizing the district court addressed and dismissed as a matter of law Plaintiffs' individual-capacity claims against Lee under the Bane Act, state common law, and *Bivens*); *see also id.* at 39–49 (no mention of abandonment of individual-

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remedy, the Government did "not argue that [Mr. Bivens] should be entirely without remedy for an unconstitutional invasion of his rights by federal agents." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 390 (1971); *contra* Response Br. 48–49 (embracing the prospect of leaving Plaintiffs remediless for violations of their constitutional rights). Instead, the Government urged that Mr. Bivens could "obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts." *Bivens*, 403 U.S. at 390; *contra* Response Br. 44–47 (insisting state law cannot touch federal employees). All of that only underscores just how much of a sea change the Government is now asking this Court to engineer.

[6] *See* 4-ER-848–849 (¶¶ 26–35 of Plaintiffs' operative complaint, detailing that: Lee knew Plaintiffs, knew the activist nature of their business, knew their packages exhibited no suspicious characteristics, defied his superiors' orders to not seize packages unless they had a strong odor of marijuana, and knew that his defiant seizure was likely to result in a business-disrupting detention by law enforcement).

capacity claims). The Court need not decide if the Government is right about abandonment of the FTCA trespass claim for Lee's seizure, as *Konan* makes it a moot point. *See* Response Br. 21–22.[7]

If, however, the Government means to stretch its abandonment argument to Plaintiffs' individual-capacity claims against Lee too, it is plainly wrong. Plaintiffs pleaded those claims in every form (Bane Act, common law, and *Bivens*). 5-ER-1052–1095. The district court expressly considered and dismissed each one with prejudice, on the theory that individual-capacity claims against federal officials are prohibited as a matter of law. *See* Opening Br. 22; Response Br. 8–9, 11–12 (citing the record). Plaintiffs expressly preserved those legal conclusions for appeal. 4-ER-817 n.1, 831 n.2. And Plaintiffs made those preserved arguments the centerpiece of their appeal. Opening Br. 21–26, 28–40. So the cognizability of every individual-capacity claim against Lee is squarely before this Court. *See Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc) ("For claims dismissed with prejudice and without leave to amend, we will not require that they be repled in a subsequent amended complaint to preserve them for appeal.").[8]

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[7] *But see* 5-ER-930–931 (detailing Lee's seizure), 5-ER-943–944 (FTCA claim for "tortious acts" by Lee, including "seizing . . . Plaintiffs' personal property").

[8] If the Government is indeed trying to remove Lee's seizure entirely from the scope of this Court's review, it still cannot avoid the issue of individual state-law liability. The postal inspectors' subsequent detentions of Plaintiffs' property (1) were

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Plaintiffs' individual-capacity claims for Defendants' unconstitutional seizure and detention of their property are well-pleaded, uncontested on the merits, exempt from the FTCA, and within the nation's tradition of state-law liability for federal officials' constitutional violations. They must proceed via that traditional route, both by the Bane Act (Cal. Civil Code § 52.1) and by common-law tort.

II. Congress has not preempted states' civil damages remedies for federal employees' constitutional violations.

The Government argues that Congress has preempted the centuries-long tradition of state-law remedies for federal officials' constitutional violations. *See* Response Br. 47. It has not. To preempt traditional state-law remedies, Congress must speak clearly. The Westfall Act's broad language *preserving* individual-capacity constitutional claims does not meet that standard. Rather, it cuts decidedly the other way. And any doubt on the issue must be resolved against preemption, to avoid eliminating all judicial review of Plaintiffs' well-pleaded constitutional claims. Such

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also unconstitutional trespasses (which the Government does not contest) and (2) are also foreclosed from FTCA liability by the detention-of-goods exception (28 U.S.C. § 2680(c)) or the postal exception. *See* Response Br. 19–20. The Government concedes that Plaintiffs abandoned nothing as to those separate detentions. *Id.* at 20. And Plaintiffs' individual-capacity state-law claims encompass them. *See* 4-ER-817 n.1, 831 n.2 (preserving the claims after dismissal with prejudice); 5-ER-946–989 (pleading them).

a reading would call into question the Westfall Act's constitutionality at least in cases like this one, where the FTCA cannot reach those constitutional violations.

1. "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action, and particularly in those cases in which Congress has 'legislated . . . in a field which the States have traditionally occupied.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted). Indeed, "the assumption [is] that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (citation omitted). As recounted by Plaintiffs and our amici, providing civil remedies for federal officials' constitutional violations is a traditional state power. *Supra* at 3–7. So the question is whether the Westfall Act evinces a clear and manifest purpose to displace that power. It does not. On the contrary, the Act expressly preserves that Constitution-enforcing state-law tradition. *See* 28 U.S.C. § 2679(b)(2)(A).

The state-law remedial tradition can take two forms. One is statutory. *See Lee*, 106 U.S. at 197 (claims against federal officials "in the form prescribed by the statutes of Virginia"); *Bivens*, 403 U.S. at 424 (Burger, C.J., dissenting) ("there is nothing to prevent a state from enacting a . . . statutory scheme" for damages for federal officials' constitutional violations). The second is non-statutory. *See Mitchell*, 54 U.S.

at 128 ("an action of trespass"); *Buchanan v. Barr*, 71 F.4th 1003, 1016 (D.C. Cir. 2023) (Walker, J., concurring) (explaining how state common-law torts have traditionally been used to vindicate constitutional rights against federal officials). Both traditional forms have two key features: federal employees can be sued in their individual capacity, if their conduct violates the Constitution (or otherwise exceeds their authority). *Supra* at 4–7. "For two centuries, state courts have had jurisdiction over these damage cases." Amar, *Using State Law*, 64 U. Colo. L. Rev. at 165.

When Congress passed the Westfall Act, it knew all of that. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (Congress is presumed to be "knowledgeable about existing law pertinent to the legislation it enacts"). And it chose to write the Act's preservation of individual-capacity damages claims broadly and capaciously, not restrictively—thereby evincing no intention to narrow, let alone eliminate, Americans' well-trod state-law paths. *See* 28 U.S.C. § 2679(b)(2)(A). First, Congress preserved the right to bring "a civil action"—not limited to federal, state, statutory, or common-law actions, but encompassing any combination thereof. Second, Congress preserved the viability of those actions whenever "*brought for* a violation of the Constitution"—which encompasses the tradition of using common-law torts to redress constitutional violations indirectly (not just the more recent innovation of *Bivens* claims "brought under" the Constitution directly). *See*

Buchanan, 71 F.4th at 1016 (Walker, J., concurring) ("brought for" has long been used "to describe the goal of a suit, not the cause of action," thereby suggesting its application to Constitution-enforcing state-law claims); Amicus Br. of ACLU 25–28 (a constitutional claim brought via the Bane Act is *brought for* a constitutional violation because that is an element of the claim).

In short, far from displacing the traditional state-law remedial scheme, the Westfall Act's sweeping language "provides the requisite clear congressional authorization for" preserving it. *Goodyear Atomic Corp.*, 486 U.S. at 182.

2. Instead of doing the textual analysis demanded by the preemption inquiry, the Government insists that stray lines in cases that did not address the issue presented here have locked § 2679(b)(2)(A) into a *Bivens*-only straitjacket. *See* Response Br. 46. But that fails to account for Plaintiffs' extensive treatment of the actual statutory text, explanation that the Supreme Court has never addressed the full scope of the provision, and reminder that the Supreme Court most recently referred to the provision in the capacious terms in which Congress wrote it (not the restrictive terms the Government insists on). Opening Br. 30–32 (quoting *Tanzin*, 592 U.S. at 49 (§ 2679(b)(2)(A) "left open claims for constitutional violations")). Plaintiffs' amici expand on those points of text and precedent, cementing the error of the Government's reading. *See* Amicus Br. of Professors Vázquez and Vladeck 18–

22; Amicus Br. of ACLU 20–25; Amicus Br. of Eleven Law Professors 16–17.[9]

To the extent the Court finds ambiguity between prior cases' reference to § 2679(b)(2)(A) as a *Bivens* provision (which, to be sure, it is in part) and *Tanzin*'s more recent use of the statute's own expansive language to describe it, the federalism concerns undergirding the preemption analysis require resolving the tension in favor of *preserving* the states' traditional remedial role, not intruding on it. *See Bond v. United States*, 572 U.S. 844, 860 (2014); *id.* at 863 ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.") (cleaned up).

3. In a similar vein, the Government's reading of § 2679(b)(2)(A) suffers from yet another problem in this case: the elimination of any judicial forum for the violation of Plaintiffs' constitutional rights. "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). That helps avoid the "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a

[9] By contrast, neither the Third nor Sixth Circuit cases the Government cites for its contrary view grappled seriously with these issues, and along the way Judge Porter joined Judges Walker and Matey (Opening Br. 30, 35) in expressing doubt about the Government's view that states have suddenly become powerless to pass Constitution-enforcing statutory causes of action. *See Henry v. Essex County*, 113 F.4th 355, 363–64 & n.7 (3d Cir. 2024); *Pompy v. First Merchants Bank*, 2025 WL 2694801, at *10 (6th Cir. May 23, 2025).

colorable constitutional claim." *Id.* (cleaned up). With such a constitutional claim presented here for Lee's unjustifiable, speech-suppressing seizure of Plaintiffs' property (and the postal inspectors' subsequent unjustifiable detention of the property), the Government cannot enlist the Court in cutting off every judicial forum for Plaintiffs' constitutional rights without calling into question the Westfall Act's constitutionality as applied. Luckily, § 2679(b)(2)(A) points a neon sign to Plaintiffs' traditional state-law relief, via both the Bane Act and common-law trespass.[10]

* * *

Plaintiffs' claims for the unconstitutional, speech-suppressing seizure and detention of their property are unreachable by the FTCA. Yet they fit squarely within the tradition of Constitution-enforcing, individual-capacity state-law claims. If that

[10] We have focused here on Plaintiffs' two *state-law* routes for Westfall-preserved claims. But if the Act truly "left *Bivens* where it found it" in 1988, then Plaintiffs' Fourth Amendment *Bivens* claims, at least, should also proceed. Opening Br. 36–40. If the Court agrees, that does not obviate the need to address and approve the state-law claims too. First, "the remedial role of state governments is one of constitutional entitlement, not congressional suffrance." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1519 n.366 (1987); *see* Opening Br. 22–24 (collecting authorities for the constitutional dimension of the founding-era state-law tradition). Second, before displacing Constitution-enforcing state-law remedies, "Congress should be obliged to provide an exclusive federal remedy that is as effective as the fullest state remedy it seeks to displace," Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. at 1519—which a Fourth Amendment *Bivens* remedy would not do here, because it would leave Plaintiffs' *First* Amendment Bane Act claims by the wayside *and* would have to overcome a qualified immunity defense the Bane Act lacks, *see Reese v. County of Sacramento*, 888 F.3d 1030, 1040–41 (9th Cir. 2018).

tradition is suddenly deemed eliminated (and *Bivens* is off the table too), we have stumbled into an unprecedented era of absolute impunity for federal lawlessness.

III. Plaintiffs' FTCA claims going beyond Lee's seizure and the postal inspectors' detention of their property should also proceed.

Beyond Lee's unconstitutional seizure and the subsequent unconstitutional detention of Plaintiffs' property by postal inspectors discussed above, the district court also erroneously foreclosed Plaintiffs' two separately viable FTCA claims.

The first claim is for an unconstitutional search of Plaintiffs' property by those postal inspectors (before they unjustifiably and indefinitely detained it). Opening Br. 41–46. The Government offers no reason that physical intrusion is unlike the others this Court treats as a Fourth Amendment search under *Jones*, and no reason to depart from this Court's caselaw holding that the precise conduct at issue here constitutes a search. The Government's attempt to avoid that outcome by rewriting this Court's discretionary-function-exception rule concerning unconstitutional acts must fail.

The second claim is for interference with Plaintiffs' prospective economic relations by Lee and the other postal inspectors (Hodges and Doo) who perpetrated a yearslong lie to keep Plaintiffs from clearing their name of the law-enforcement activity Defendants unjustifiably visited upon them and broadcast to their customers. Opening Br. 47–53. On that, the Government cannot meet its summary-judgment burden where Mr. Quiñonez has competently testified as to both contested elements

of the tort (an ongoing economic relationship and its disruption by Defendants' acts). The Government's attempt to foreclose that claim by treating it as the distinct tort of contract interference (which would be subject to an FTCA exception) must fail.

1. The Government makes two arguments concerning Plaintiffs' trespass claim for law-enforcement's physical squeezing and manipulation of their property to learn what the feel and the escaping air would reveal about the contents. One argument is about the FTCA; one is about the Fourth Amendment. Both are wrong.

First, the Government argues that even if the physical intrusion of Plaintiffs' property was an unconstitutional search, it can be shielded from FTCA liability by the discretionary-function exception, 28 U.S.C. § 2680(a). Response Br. 24–28. It cannot. The Government accuses the district court of "rel[ying] on out-of-circuit precedent taking the view that the discretionary function exception is categorically inapplicable to claims of constitutional violations." *Id.* at 28 n.7. But the district court relied, correctly, on *this* Circuit's clear precedent to that effect. 1-ER-53 ("The Ninth Circuit has written that even if a federal agent's action 'involved elements of discretion, agents do not have discretion to violate the Constitution.'") (quoting *Nieves Martinez v. United States*, 997 F.3d 867, 877 (9th Cir. 2021)). In this Circuit, that is a blackletter limitation on the discretionary-function exception. *See Xi v. Haugen*, 68 F.4th 824, 838 n.10 (3d Cir. 2023) (citing *Nieves Martinez* and, like the

district court, quoting its clearcut rule).[11]

As to the constitutionality of squeezing Plaintiffs' packages to learn what they contained, the Government insists that "physical intrusions on a car . . . qualify as searches" but physical intrusions on other personal property with a potentially diminished expectation of privacy do not. *See* Response Br. 30. That is wrong. Unless expected by social mores (a showing the Government cannot make on these facts, which go well beyond routine handling for delivery), any "physical intrusion . . . for the express purpose of obtaining information" satisfies the *Jones* search standard, including—as closely analogous to the manipulation of Plaintiffs' packages to learn what was inside—an "officer pushing his finger against the defendant's tire to learn what was inside." *United States v. Dixon*, 984 F.3d 814, 821 (9th Cir. 2020) (citation omitted); *see Corngold v. United States*, 367 F.2d 1, 7 (9th Cir. 1966) (en banc) ("mere surrender of custody to a carrier did not forfeit appellant's right to privacy," where it was given over "solely for transportation").

And that is to say nothing of this Court's on-all-fours holding that a law-enforcement squeeze-and-sniff of property given over for delivery was an unconstitutional search. *See Hernandez v. United States*, 353 F.2d 624 (9th Cir. 1965);

[11] Even if the unconstitutional search could be foreclosed from FTCA liability, it would remain viable via the individual-capacity state-law routes discussed above.

Opening Br. 41–46. So, even though *Jones* makes clear that the physical manipulation of Plaintiffs' property alone was a search, *Hernandez* and subsequent cases put the lie to the Government's assertion that the human sniffing accompanying the physical intrusion is the same as the sui-generis nature of dog sniffs, which are not treated as Fourth Amendment searches solely because they are designed to uncover nothing but contraband. It is well established that "no other investigative procedure" is like a dog sniff. *United States v. Place*, 462 U.S. 696, 707 (1983). That includes an officer's physically investigative squeeze-and-sniffs to uncover the contents of Plaintiffs' property (by feel and smell), conduct that goes well beyond the societal expectation of routine handling or exterior viewing by postal employees in the course of mail delivery. *Cf. United States v. Hernandez*, 313 F.3d 1206, 1209–10 (9th Cir. 2002).

2. The Government makes several arguments as to Plaintiffs' economic-interference claims. One is about the FTCA; the rest are about the legal import of the summary-judgment evidence. None justify granting summary judgment.

First, the Government argues that Plaintiffs' prospective-interference claims are foreclosed by the FTCA's exception for "[a]ny claim arising out of . . . interference with contract rights," 28 U.S.C. § 2680(h). Response Br. 31. But those two torts, even if sometimes related, are "distinct." *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th 1130, 1141 (2020). Importantly, for purposes of assessing the reach of

the contract-rights exception invoked here: "Tortious interference with prospective economic advantage . . . does not depend on the existence of a legally binding contract." *Id.* And "partial overlap between these two tort actions does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well." *Block v. Neal*, 460 U.S. 289, 298 (1983) (applying that rationale to the "misrepresentation" portion of the same FTCA exception). Because the two torts have different elements, they are not coextensive, so the exception cannot reach beyond its terms. *See Sheehan v. United States*, 896 F.2d 1168, 1171 (9th Cir. 1990) ("Regardless of the plaintiff's characterization of the cause of action, § 2680(h) bars suit for claims based on conduct which constitutes one of the excepted torts, and bars suit for no other claims.").

The Government goes on to argue that Plaintiffs' interference claims cannot survive summary judgment even though, *at best* for the Government's case, Mr. Quiñonez and M4BL have provided conflicting testimony about what happened in June 2020, as to both the existence of an ongoing economic relationship evincing the expectation of at least one more order of any size, as well as the cutting off of that relationship based on M4BL's receipt of notifications that their Movement Ink protest apparel had been "seized by law enforcement." *See* Opening Br. 48–49 (quoting Mr. Quiñonez's firsthand testimony as to both).

To start, the Government argues that Mr. Quiñonez's testimony about "the circumstances of the negotiation and the intent of the parties"—as to which he has "personal knowledge and competence to testify," *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990)—cannot be credited (i.e., that his credibility must be discounted at summary judgment). *See* Response Br. 33–34. That is not the law. "[I]t is axiomatic that disputes about material facts and credibility determinations must be resolved at trial, not on summary judgment." *Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1036 (9th Cir. 2005).

The Government goes on to posit that the Court must ignore (as hearsay) Mr. Quiñonez's testimony that *the stated reason* M4BL terminated their relationship was Defendants' conduct. Response. Br. 35–39. That, too, is wrong. *See* Opening Br. 52. Regardless, the point is a red herring. Even if the Court ignores Mr. Quiñonez's testimony about a smoking-gun admission of economic disruption from M4BL's representative, the undisputed fact is that discussions between Movement Ink and M4BL were ongoing but suddenly got "cut off"—right after Defendants' law-enforcement seizure. Opening Br. 48–49. Viewing that sequence in the light most favorable to Plaintiffs, a reasonable factfinder can conclude that the law-enforcement action was the reason for the fracturing of the economic relationship. Especially when accounting for all the surrounding circumstances testified to by M4BL: a group

that viewed Movement Ink as a values-aligned organization, headed by a person who had previously worked with Mr. Quiñonez; a group that was happy with his work, price, and speed; a group that was in active talks to do more business with him; a group that needed plenty more screen-printing work that year; and a group that, bucking all that, suddenly went radio-silent—right after receiving official notifications that their law-enforcement protest apparel was seized by law enforcement, a development that admittedly had the group's leaders and members "concerned." *See* Opening Br. 52–53 & n.15. That is an unexpected, actual disruption of Plaintiffs' economic relationship unexplained by anything but Defendants' violations of Plaintiffs' rights.

Conclusion

The Court should reverse and remand. All of Plaintiffs' constitutional claims against the individual defendants should proceed under at least the Bane Act and common-law tort, but also *Bivens*. Plaintiffs' claims against the Government for searches of their property and interference with their prospective economic relations should proceed under at least the FTCA, but also against the individual defendants where those torts amount to constitutional violations.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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