RECORD NOS. 22-5133(L), 22-5139

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

RADIYA BUCHANAN, *et al.*,
***Plaintiffs – Appellants*,**

v.

WILLIAM P. BARR, *et al.*,
***Defendants – Appellees*.**

BLACK LIVES MATTER D.C., *et al.*,
***Plaintiffs – Appellants*,**

v.

WILLIAM P. BARR, *et al.*,
***Defendants – Appellees*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE AND FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Darpana Sheth
FOUNDATION AND INDIVIDUAL RIGHTS AND EXPRESSION
501 Walnut Street, Suite 1250
Philadelphia, Pennsylvania 19106
(215) 717-3474
darpana.sheth@thefire.org

Scott F. Regan
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
sregan@ij.org

Victoria Clark
INSTITUTE FOR JUSTICE
816 Congress Avenue, Suite 960
Austin, Texas 78701
(512) 480-5936
tclark@ij.org

Counsel for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* submit this certificate as to parties, rulings, and related cases.

A. PARTIES AND AMICI

Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants: *amici curiae* the Institute for Justice and Foundation for Individual Rights and Expression, which file this *amici curiae* brief in support of Plaintiffs-Appellants.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

C. RELATED CASES

These cases have not previously been before this Court.

Each of these cases also remains pending before the U.S. District Court for the District of Columbia, where they are both stayed pending the outcome of this appeal.

Counsel for *amici* are aware of one additional related case pending before the U.S. District Court for the District of Columbia: *Carmer v. United States*, No. 1:22-cv-01100 (D.D.C. filed Apr. 21, 2022). Additional related cases previously pending in that Court are now closed.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, (i) *amicus curiae* Institute for Justice is a private, non-profit civil liberties law firm entity operating under Section 501(c)(3) of the Internal Revenue Code, and (ii) *amicus curiae* Foundation for Individual Rights and Expression is a private, non-profit organization operating under Section 501(c)(3) of the Internal Revenue Code whose mission is to defend and sustain the individual rights of all Americans to free speech and free thought. Each *amicus curiae* makes the following disclosures:

1. It is not a publicly held corporation.
2. It does not have any parent corporation.
3. No publicly held corporation or other publicly held entity owns 10 percent or more of its stock.
4. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation.
5. This case does not arise out of a bankruptcy proceeding.
6. This is not a criminal case in which there was an organizational victim.

Dated: November 29, 2022

/s/ Scott F. Regan
Scott F. Regan
Counsel for *Amicus Curiae*
Institute for Justice

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

**Authorities upon which we chiefly rely are marked with asterisks*

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the Brief of Plaintiffs-Appellants.

STATEMENT OF IDENTITY AND INTEREST OF *AMICI*[1]

The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to securing greater protection for individual liberty. IJ has become one of the nation's leading advocates on doctrines that obstruct the enforcement of constitutional rights, including governmental immunity. This includes litigating cases (e.g., *Brownback v. King*, 141 S. Ct. 740 (2021)), filing *amicus* briefs in the Supreme Court and federal circuit courts (e.g., Brief of *Amicus Curiae* Institute for Justice in Support of Respondent, *Egbert v. Boule*, No. 21-147 (S. Ct. Jan. 26, 2022)), publishing scholarship (e.g., Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How* Tanzin v. Tanvir, Taylor v. Riojas, *and* McCoy v. Alamu *Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105 (2022)), and conducting nationwide research (e.g., Institute for Justice, *Constitutional GPA* (June 30, 2022), https://ij.org/report/constitutional-gpa/). Part of IJ's mission is to remove barriers to the enforcement of individual rights. As such, IJ has an interest in this Court's review and reversal of the district court's judgment below, which, among other errors, elides the text and history of the

[1] In accordance with Federal Rule of Appellate Procedure 29, no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person contributed money that was intended to fund preparing and submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this *amicus* brief. *See* Fed. R. App. P. 29(a)(2).

Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act.

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment Rights on campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. *See*, *e.g.*, Brief of Foundation for Individual Rights and Expression as *Amicus Curiae* supporting petitioner, *Keister v. Bell*, (No. 22-388) (*petition for cert. filed* Oct. 21, 2022); Brief of Foundation for Individual Rights in Education as *Amicus Curiae* supporting petitioner, *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (No. 20-1066); Brief of Foundation for Individual Rights in Education as *Amicus Curiae* supporting respondent, *Egbert v. Boule*, 142 S. Ct. 1793 (2022) (No. 21-147). In June 2022, FIRE expanded its mission to protect expression beyond colleges and universities.[2] It currently represents various plaintiffs in lawsuits seeking damages for First Amendment violations.

Because of its decades of experience defending freedom of expression, FIRE is keenly aware of the need for a legal remedy when government officials violate

[2] Formerly known as the Foundation for Individual Rights in Education, FIRE recently changed its name to reflect its expanded mission.

First Amendment rights on- and off-campus. FIRE writes to urge the Court to reverse the district court and reject a two-tier system of constitutional accountability by reinstating plaintiffs' *Bivens* claims. Federal officials should not enjoy greater immunity when they violate federal constitutional rights than do state or local officials.

Pursuant to Circuit Rule 29(d), *amici* certify that a separate brief is necessary because each *amici* has unique expertise regarding issues of governmental accountability, including a track record of pioneering scholarship in this area, and as libertarian non-profit organizations, each *amici* brings a unique perspective regarding the history, legal framework, and societal implications of issues regarding governmental accountability.

SUMMARY OF ARGUMENT

Demonstrators whose constitutional rights were violated while they peacefully exercised their protected liberty at the seat of a branch of the federal government are entitled to vindication of those rights. This should be true regardless of whether the violations occurred at the hands of federal, state, or local officials—and yet federal officials here, unlike their state and local counterparts against whom the district court has permitted Plaintiffs-Appellants' claims to proceed, would avoid accountability under the district court's view of *Bivens* causes of action. In *Egbert v. Boule*, 142 S. Ct. 1793 (2022), the Supreme Court confirmed that whether Congress has sanctioned a damages remedy in a given context is a determinative factor in assessing the availability of a *Bivens* cause of action. *Id.* at 1803 (explaining the necessity of "utmost deference to Congress' preeminent authority" in providing a damages remedy). Where Congress has acted to allow a *Bivens* cause of action, the inquiry ends—there is no need to assess any "special factors" counseling hesitation in allowing this remedy because Congress has already made the definitive assessment. *See Egbert*, 142 S. Ct. at 1803. Therefore, in a case like this, the principal question is whether Congress has spoken on the issue. And in this case, contrary to the analysis of the district court—which did not have the benefit of the Supreme Court's clarifying opinion in *Egbert*—Congress has spoken by endorsing exactly the type of claim brought by Appellants.

Part I of this brief explains the Westfall Act's preservation of *Bivens* claims. With the Westfall Act, Congress exercised its "preeminent authority" in preserving 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." Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. § 2679(b)) (Westfall Act); 28 U.S.C. § 2679(b)(2)(A). In so doing, as the Supreme Court recently recognized, Congress "left *Bivens* where it found it," *Hernandez v. Mesa*, 140 S. Ct. 735, 748 n.9 (2020), maintaining the availability of these constitutionally essential remedies. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017). Indeed, the Westfall Act's "explicit exception for *Bivens* claims," *Hui v. Castaneda*, 559 U.S. 799, 807 (2010), cemented the fact that these causes of action, insofar as they existed at the time of the Act's passage, would persist undiminished until a further act of Congress. The question, therefore, is what *Bivens* claims Congress effectively endorsed in the Westfall Act.

Part II explains how this Court's decision in *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), recognizing the availability of *Bivens* remedies in First and Fourth Amendment claims brought by protestors at the seat of a branch of the federal government, remains relevant today because Congress preserved these claims in the Westfall Act. In interpreting a statute like the Westfall Act, courts must "presume that Congress was thoroughly familiar with . . . unusually important precedents from

[the Supreme Court] and other federal courts and that it expected its enactment to be interpreted in conformity with them." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979). Any collection of "unusually important precedents" from that time must include *Dellums*. There, this Court held that political demonstrators subjected to unlawful police interference while assembled at a seat of the federal government could assert valid *Bivens* claims for violations of their rights under the First and Fourth Amendment. *Dellums*, 566 F.2d at 175. Notably, the case involved high-profile protesting activities on the literal doorstep of Congress and a Congressman as the named plaintiff who still held that office when the House passed the Act by voice vote in 1988. *Id*. at 173–74. No less important, it was decided by this Court—the highest Court besides the Supreme Court likely to have the opportunity to address the question. In short, a fair interpretation of the Act can only lead to the conclusion that Congress preserved a *Bivens* remedy in the circumstances animating *Dellums*. Those circumstances are conspicuously echoed here.

Part III describes the scope of *Bivens* as articulated in 1988 and explains how this scope should be a salient factor in determining how to vindicate violations of a party's constitutional rights via a *Bivens* cause of action, as specifically preserved by Congress in the Westfall Act. By the time the House of Representatives received the Westfall Act's text, the Supreme Court had addressed only eight cases involving *Bivens* causes of action. These cases far from represented a congeries of discordant

outcomes. Rather, the Supreme Court's precedents at that time demonstrated that the availability of a *Bivens* claim to remedy constitutional violations should be assumed, except in the rare cases directly implicating the scope and nature of the federal employment relationship. *See*, *e.g.*, *Chappell v. Wallace*, 462 U.S. 296 (1983); *United States v. Stanley*, 483 U.S. 669 (1987). But outside of this specific employment context, the Court had, before Congress enacted the Westfall Act, applied *Bivens* without hesitation. And this is the background to Congress's decision to preserve *Bivens* in the Westfall Act. At that time, Congress could not have predicted the specific facts with which the Court might grapple in future *Bivens* claims, but Congress certainly knew that the universe of constitutional violations far exceeded the skeletal constellation of unique cases then examined by the Court.

Because Congress affirmatively secured *Bivens* claims in the Act, including the claims recognized in *Dellums*, and has not acted to retrench these rights, the district court erred in concluding that the Appellants' First and Fourth Amendment claims must be dismissed. To align itself with Congress's evident intent and ensure that constitutional rights do not go "violated but not vindicated," *Byrd v. Lamb*, 990 F.3d 879, 884 (5th Cir. 2020) (Willett, J., specially concurring), this Court should reverse the district court's dismissal of Appellants' claims.

ARGUMENT

I. The Westfall Act "left *Bivens* where it found it" in 1988.

The latter half of the twentieth century saw a flurry of activity concerning federal officials' liability. By the 1980s, an injured individual could simultaneously pursue three different avenues for relief: (1) a claim under the Federal Tort Claims Act, 28 U.S.C. § 2674 (FTCA) against the federal government; (2) a *Bivens* claim against federal officers for constitutional violations; and (3) state-law tort claims, also against these officers, for either ordinary or constitutional torts. Carlos M. Vázquez & Stephen I. Vladeck, *State Law*, *the Westfall Act*, *and the Nature of the* Bivens *Question*, 161 U. PENN. L. REV. 509, 568–69 (2013). That changed in 1988 with the passage of the Westfall Act.

The Westfall Act provided in part that the FTCA was the exclusive remedy for tort claims falling within the FTCA's ambit, thus precluding state-law tort claims that might have otherwise been available. *See* 28 U.S.C. § 2679(b)(1). Importantly, however, the Act also provided that this exclusivity rule did "not extend or apply to a civil action" against a federal employee "which is brought for a violation of the Constitution of the United States." *Id.* § 2679(b)(2)(A).

This "major feature" of the Act was the direct product of Congress's concern with preserving existing *Bivens* claims. H.R. REP. NO. 100-700, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949–50. A report from the House Committee on the Judiciary specifically noted that the constitutional-torts exception was necessary because, since *Bivens*, "the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention." *Id*. In so doing, the Committee emphasized that the Act preserved existing claims against federal officials for unconstitutional acts. *Id.*

Further, Congress's action in the Westfall Act specifically sought to maintain a method of achieving the kind of accountability that had existed for centuries. From the Founding onward, plaintiffs could bring state common-law tort suits against federal officials who violated the Constitution. *See Developments in the Law: Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 831–32 (1957) (explaining the historical availability of damages suits against federal and state agents who exceeded their authority and noting that federal agents could avoid liability only where "the action in question [was] authorized by a constitutional act of Congress"). That changed with the Westfall Act: Courts have consistently held that the Act precludes plaintiffs from bringing state-law tort claims against federal actors, even for constitutional violations. *See Minneci v. Pollard*, 565 U.S. 118, 126

(2012) (citing the Westfall Act for the proposition that "[p]risoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government").

Absent an action from Congress, therefore, the Act could have foreclosed all avenues to remedying a constitutional violation by federal officials. For those plaintiffs without a viable FTCA claim or another statutory remedy, the preclusion of state-law tort claims could have meant that damaging constitutional violations would avoid redress. *See Abbasi*, 137 S. Ct. at 1856–57 (explaining that *Bivens* "vindicate[s] the Constitution by allowing some redress for injuries"). But Congress expressly averted this injustice with the Westfall Act: Via the Act, Congress offered these as-yet indistinct—but no less deserving—plaintiffs the right to bring a civil action to remedy a constitutional violation. *See* 28 U.S.C. § 2679(b)(2). In effect, these plaintiffs were afforded "*Bivens* or nothing." *Hernandez*, 140 S. Ct. at 760 (Ginsburg, J., dissenting).

This reading aligns with the Supreme Court's recent opinion in *Hernandez*. 140 S. Ct. 735. There, the Court held that no *Bivens* remedy was available to the family of a teenager who was shot by a border patrol agent across the Texas-Mexico border. *Id.* at 739–40. In so doing, the Court reasoned that the Westfall Act was "not a license to create a new *Bivens* remedy in a context we have never before addressed." *Id.* at 748 n.9. However, in response to an argument proffered by *amicus*

Institute for Justice in that case,[3] the Court acknowledged that the Act "simply left *Bivens* where it found it"—reflecting Congress's intent to preserve the availability of *Bivens* remedies. *Id.* Where Congress "found" *Bivens* at such time was as a doctrine that included farTc 0.c 0.00 3.6 (,.1 ((f)]TJre(i)0.6 (hf)]TJrTc 0.cnf)]TJ mer

Amendment rights have been violated at the seat of a branch of the federal government. *Dellums*, 566 F.2d at 197.

In 1971, protestors in the thousands gathered peacefully on the east steps of the United States Capitol to demonstrate against the war in Vietnam. *Id.* at 173–74. Prefiguring the demonstrators in this case, these protestors, while peacefully expressing their "dissatisfaction with the laws and policies of the United States," *id.* at 195, found themselves treated like criminals as they were arrested en masse and detained by federal law enforcement officers. *Id*. at 173–74. In response, the protestors sued various officials of the United States and of the District of Columbia and the District itself, seeking, among other things, damages under *Bivens* for violations of their First and Fourth Amendment rights. *Id.* at 174.

In the resulting case, this Court did not hesitate to uphold a damages award under the Fourth Amendment, *id*. at 175–91, or to affirmatively answer the question of whether "there is a cause of action under the Constitution for violation of First Amendment rights," *id.* at 194–97. On the latter point, this Court spoke definitively:

> The interest in freedom from apprehension of immediate invasion of one's person . . . is only one example of a non-quantifiable interest whose recompense in money damages is routinely left to a jury under proper instructions. The interest protected by the First Amendment in the context of this case is no less certain of quantification or conceptualization.

Id. at 195. Accordingly, this Court resolutely upheld the right of Americans to obtain damages when a "demonstration is broken up" by unlawful actions of federal officials. *Id.*

This Court's holding in *Dellums* remains good law and has been affirmed, repeatedly, since its issuance in 1977. *See*, *e.g.*, *Hobson v. Wilson*, 737 F.2d 1, 56, 62–63 (D.C. Cir. 1984) (upholding a *Bivens* claim brought by individuals "engaged in lawful political protest" on First Amendment and Fourth Amendment grounds); *see also Bloem v. Unknown Dep't of the Interior Emps.*, 920 F. Supp. 2d 154, 160–61 (D.D.C. 2013) (citing favorably to *Dellums* in a case involving protests in downtown Washington, D.C., and holding that "to the extent [the plaintiff] can show a violation of his First, Fourth, or Fifth Amendment rights, he appropriately states a *Bivens* claim for these violations"). Indeed, when Congress passed the Westfall Act, this Court had affirmed *Dellums*—including the availability of a *Bivens* claim under the First Amendment—just four years earlier. *Hobson*, 737 F.2d at 9, 62–63 (upholding an award of damages on First Amendment grounds when federal officials had violated protestors' constitutional rights while "publicly expressing opposition" to various government policies and actions). And neither the Supreme Court nor any circuit court had ruled that demonstrators could not, in any comparable circumstances, obtain *Bivens* remedies when their First Amendment rights had been violated.

Given the facts of *Dellums*—a demonstration on the steps of the Capitol, literally in shouting distance of many of the same Congressmen and Congresswomen who would draft, debate, and vote for the Act; a named plaintiff whose speech had been interrupted by police action and who was himself a Congressman, and still held that office when the House passed the Act by voice vote in 1988; and a theoretical security threat at a seat of the federal government—it would be unreasonable to assume, as the district court impliedly did here, that Congress intended to exclude the claims this Court sanctioned in *Dellums* when promulgating the broad civil actions-preserving provision in the Act. Instead, Congress did not so much as hint that the civil actions it preserved were limited to those expressly ratified by the Supreme Court or to those involving only certain rights within the Constitution. *See* 28 U.S.C. § 2679(b)(2).

If Congress had intended to forestall further application of *Dellums* and other similarly prominent cases allowing *Bivens* causes of action, it could have done so. The Act, after all, foreclosed the availability of other, similar causes of action. *See* 28 U.S.C. § 2679(b)(1) (expressly precluding any "other civil action or proceeding for money damages" on the particular subject matter and thereby requiring suit under the FTCA). But Congress did no such thing. Rather, Congress spoke expansively and plainly in securing the claims already then continually and unequivocally recognized by tribunals like this Court when it decided *Dellums* and *Hobson*.

III. In 1988, when Congress fashioned the Westfall Act, *Bivens* remedies were more expansive than they are today.

Congress would have had no need to specify the precise circumstances in which it was preserving claims under the Westfall Act because the Supreme Court's rendering of *Bivens* causes of action at the time Congress enacted this statute attests to how Congress would have expected courts to understand the law. Simply put, Congress's decision to preserve *Bivens* causes of action in the Westfall Act cannot be assumed to have salvaged only claims mirroring the three distinct contexts in which the Court had, by 1988, affirmatively recognized the availability of a damages remedy.

It is true that, in *Hernandez*, the Supreme Court stated that the Westfall Act "does not suggest . . . that Congress 'intended for a robust enforcement of *Bivens* remedies.'" 140 S. Ct. at 748 n.9. But the Court did so in addressing whether a court can "create a new *Bivens* remedy" in a novel context. *Id.* (stating that the Westfall Act "is not a license to create a new *Bivens* remedy in a context we have never before addressed"). In *Egbert*, the latest decision from the Court on *Bivens* causes of action, the Court clarified that Congress's role is paramount. 142 S. Ct. at 1803 (confirming the need for "utmost deference to Congress' preeminent authority"). Specifically, while *Hernandez* advocated for a two-step inquiry where step one asks whether the case presents "a new *Bivens* context," 140 S. Ct. at 755 (Ginsburg, J., dissenting), the Court's opinion in *Egbert* indicates that this "inquiry really boils down to" a

single step: whether Congress has acted to permit a remedy, 142 S. Ct. at 1809 (Gorsuch, J., concurring in the judgment); *see also Silva v. United States*, 45 F.4th 1134, 1139 n.4 (10th Cir. 2022) (noting the "tension between *Egbert*" and *Hernandez*).

Accordingly, to properly carry out the Court's admonition in *Egbert* that Congress, and not the judiciary, is "better equipped to create a damages remedy," 142 S. Ct. at 1803, courts must acknowledge those instances in which Congress has done exactly that. That includes the Westfall Act. Therefore, the task left to tribunals like this Court is to decide what damages actions Congress endorsed in the Westfall Act.

In 1988, Congress "found" *Bivens* as a doctrine where the availability of a remedy was the rule, and departures from this rule were exceptional. While the *Bivens* Court did not specify the sorts of "special factors" that might "counsel[] hesitation" when recognizing *Bivens* claims, the example cases it cited suggest a narrow view of this principle, limited to concerns over Congress's relationship with federal employees. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *infra* Part III.a. Moreover, in its first two post-*Bivens* cases, the Court recognized the availability of a *Bivens* remedy despite considerable countervailing considerations. *See Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980); *infra* Part III.b. Then, in three

subsequent cases, the Court expounded on—but did not expand—the *Bivens* "special factors" analysis. *See Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983); *United States v. Stanley*, 483 U.S. 669 (1987). These cases collectively demonstrate that, assuming the unavailability of an alternative statutory remedy, the "special factors" analysis as articulated in 1988 focuses on any special relationship Congress has with the plaintiff asserting a *Bivens* claim. *See* Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 740 (2012); *infra* Part III.c. In other words, even under the limited but lucid cases then promulgated by the Supreme Court, Congress legislated against the backdrop of presumptive availability of *Bivens* remedies, and this context informs what Congress intended with the Westfall Act.

a. The *Bivens* Court envisioned the "special factors" analysis as primarily concerning the federal government's relationship with its employees.

When the *Bivens* Court articulated the principle of its decision, it spoke in unqualified terms: "[a] violation of [the Fourth Amendment guarantee against unreasonable searches and seizures] by a federal agent acting under color of his authority gives rise to a cause of action for damages." *Bivens*, 403 U.S. at 389. Thus, under *Bivens*, constitutional violations are assumed to merit a remedy. *See Butz v. Economou*, 438 U.S. 478, 486 (1978) (addressing the immunity of federal officials

under the assumption that *Bivens* applied to different constitutional contexts); *accord Harlow v. Fitzgerald*, 457 U.S. 800, 802–05 (1982); *see also* Bernstein, *supra*, at 734 n.87 (noting that if a damages remedy is available for "violations of some constitutionally guaranteed individual rights," it should be available for all such rights because "the Constitution does not guarantee some individual rights less vigorously than others.").

In fact, the *Bivens* Court mentioned the lack of "special factors counseling hesitation," 403 U.S. at 396, only as "a seeming afterthought," Bernstein, *supra*, at 731. Though the Court did not specify what "special factors" may warrant consideration, it cited two cases as examples: *United States v. Standard Oil Co. of California*, 332 U.S. 301 (1947), and *United States v. Gilman*, 347 U.S. 507 (1954). *Id.* at 731–33. The through line of these cited cases suggests only a limited concern with intruding on Congress's authority to define the parameters of the government's relationship with federal employees.

In *Standard Oil*, the Court refused to create a new cause of action allowing the government to sue a corporation whose employee had injured a soldier. *Id.* at 302, 314. The Court's decision rested on its recognition that "[p]erhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces." *Id.* at 305. "[T]he scope, nature, legal incidents and consequences" of this relationship, the Court noted, "are

fundamentally derived from federal sources and governed by federal authority." *Id.* at 305–06. Creating a new cause of action in that case, therefore, would be "intruding" on Congress's authority to define the parameters of the government's relationship with its soldiers. *Id.* at 316–17.

Likewise, in *Gilman*, the Court declined to create new federal common law allowing the federal government to seek indemnification from one of its employees. *Id.* at 508–13. The Court's primary concern was that "[t]he relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt." *Id.* at 509. The Court recognized that the question in the case involved "considerations that pertain to the financial ability of [federal] employees, to their efficiency, [and] to their morale": considerations, in short, that are at the core of the federal government's relationship with its employees. *Id.* at 510.

b. In *Davis v. Passman* and *Carlson v. Green*, the Court recognized the availability of a *Bivens* remedy despite salient opposing factors.

In its first two post-*Bivens* cases, the Court endorsed a vigorous view of the doctrine, recognizing the availability of a *Bivens* remedy even in the face of salient opposing factors. *See Davis*, 442 U.S. at 245–47; *Carlson*, 446 U.S. at 18–19. These cases—both written by Justice Brennan, the author of the Court's opinion in *Bivens*—suggest that the special factors analysis is limited to the concerns

articulated by the *Bivens* Court, and, even then, this analysis ought to favor recognition of a *Bivens* remedy.

Davis was a damages action brought against Congressman Otto Passman by Shirley Davis, an administrative assistant who alleged that her Fifth Amendment rights had been violated when Passman discharged her because she was a woman and that this violated her Fifth Amendment rights. *Davis*, 442 U.S. at 230–31. The Court concluded that, if Davis prevailed on the merits, she would be entitled to a *Bivens* remedy to recover her damages. *Id.* at 248. As for the "special factors" analysis, the Court held that any such special factors were "coextensive with the protections afforded by the Speech or Debate Clause." *Id.* at 246.

As a leading contemporary federal courts textbook noted, *Davis* reflects a narrow view of the "special factors" analysis. *See* Paul M. Bator et al., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 926–35 (3d ed. 1988) ("Are there many cases which would present *more* difficult obstacles to the inferring of a cause action [than *Davis*]?"). The Court's decision in *Davis*, then, demonstrates that even when addressing the *Bivens* Court's original concerns—the relationship between Congress and federal employees—the special factors test was not intended as an exception that automatically defeats the rule.

The Court's opinion in *Carlson* is similarly instructive. That case was a damages action against federal prison officials alleging that their failure to provide

medical attention to an inmate violated the Eighth Amendment. *Carlson*, 446 U.S. at 16 & n.1. The Court interpreted *Bivens* as "establish[ing] that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Id.* at 18. As for special factors, even though the case involved potential issues of federal prison security and personnel, the Court did not engage in any hand wringing: "th[is] case involves no special factors counselling hesitation." *Id.* at 19. Most importantly, as Justice Powell noted in a concurrence, *Carlson* dispenses with any notion that one's status as a federal official is itself a special factor. *Id.* at 27 (Powell, J., concurring in the judgment) ("[T]he implication that official status may be a 'special factor' is withdrawn in the sentence that follows, which concludes that qualified immunity affords all the protection necessary to ensure the effective performance of official duties.").

c. *Bush*, *Chappell*, and *Stanley* demonstrate that the *Bivens* Court's original concerns animating the "special factors" analysis focused on the federal employee-employer relationship.

The conventional account of the *Bivens* doctrine describes an initial expansion (in *Davis* and *Carlson*) followed by sustained retreat (purportedly beginning with *Bush v. Lucas*). *See* Vázquez & Vladeck, *supra*, at 550–56. While perhaps true of cases decided *after* the text of the Westfall Act was proposed, reports of the Court's

"retrenchment" in the three cases decided *before* this date have been exaggerated.[4] *But cf. id.* Rather than reflecting an unwillingness to expand *Bivens*, *Bush*, *Chappell*, and *Stanley* are all consistent with the *Bivens* Court's original concern for judicial intrusion on the federal employee–employer relationship. As such, these cases explain, without expanding, the circumstances that "counsel[] hesitation" for courts addressing *Bivens* claims.

Far from a retreat from *Bivens*, *Bush*—a Justice Stevens opinion joined by Justice Brennan—reflects the *Bivens* Court's original "special factors" concern with government employment relationships. There, the Court declined to recognize a *Bivens* claim for a federal aerospace engineer "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions . . . ." *Bush*, 462 U.S. at 368–69. Citing to *Standard Oil* and *Gilman*, the Court recognized that this case likewise concerned "the relations between the Government and its employees." *Id.* at 380. Accordingly, "the ultimate question on the merits" in *Bush* touched on issues of "federal personnel policy." *Id.*

[4] The House of Representatives received the text of the Westfall Act, as it would eventually be adopted, on June 14, 1988. *See* H.R. 4612, 100th Cong. (as reported by the H. Comm. on the Judiciary, June 14, 1988) (proposing the text of 28 U.S.C. § 2679(b)(2)(A) as it was eventually enrolled). The Court issued its decision in another case involving a *Bivens* cause of action, *Schweiker v. Chilicky*, 487 U.S. 412, 422–23 (1988) (excluding claims related to the denial of Social Security benefits due to the existence of statutory mechanisms giving meaningful remedies against the United States), ten days later, on June 24, 1988, which has been omitted from this discussion accordingly.

at 380–81. The Court then chronicled the history of the federal government's authority to define the scope of the federal employment relationship, including the legal rights and remedies available to federal employees. *Id.* at 381–88. The Court concluded that "Congress is in a far better position" to assess the impact of new legal remedies on "the efficiency of the civil service." *Id.* at 389.

Chappell carried this rationale to the military context. There, five enlisted sailors sued their superior officers alleging constitutional violations for racial discrimination. *Chappell*, 462 U.S. at 297. Recognizing that the relationship between sailors and their superiors "is at the heart of the necessarily unique structure of the military establishment," the Court proceeded to the special factors analysis. *Id.* at 300. And after surveying the underpinnings of Congress's "plenary constitutional authority" over the military, the Court concluded that "the unique disciplinary structure of the military establishment and Congress' activity in the field" were special factors militating against "provid[ing] enlisted military personnel a *Bivens*-type remedy against their superior officers." *Id.* at 302–04.

Finally, in *Stanley*, the Court made clear that its holding in *Chappell* applied to any damages claims incident to military service, not merely to those involving the officer-subordinate relationship. *Stanley*, 483 U.S. at 678–86. The Court again emphasized the "insistence . . . with which the Constitution confers authority over the Army, Navy, and militia upon the political branches." *Id.* at 682. Therefore, the

Court adopted a more "prophylactic" approach to the special factors analysis in this particular context in order to avoid any "intrusion upon[] military matters." *Id.* at 681–83.

In the end, as of June 14, 1988, the day that the House received the text of the Westfall Act as it would eventually be adopted, the Court had recognized the availability of *Bivens* claims in three cases (*Bivens*, *Davis*, and *Carlson*); assumed the availability of *Bivens* claims in two cases (*Butz* and *Harlow*); and refused to recognize *Bivens* claims only in suits brought by federal employees (*Bush*, *Chappell*, and *Stanley*). This is where Congress "found" *Bivens* when it preserved such claims against federal officials.

Because Congress is "better equipped" than a court "to create a damages remedy," *Egbert*, 142 S. Ct. at 1798, and Congress expressly sanctioned damages remedies in the Westfall Act, both the Act and *Egbert* require courts to confirm the scope of this congressionally approved damages remedy in a case like this. Congress, in 1988, did not know *Bivens* as a doctrine in a state of uncertainty. Rather, as the above history demonstrates, Congress "found" a doctrine where remedies for constitutional violations were presumptively available absent a single then-recognized "special factor." To assume that Congress aimed only to endorse damages claims in the smattering of circumstances then tackled by the Court requires one to ignore the legible background in which Congress legislated. As the Court

itself recognized, Congress's preeminence deserves deference, no less when it acted in a domain where doctrine seemed—but would not, for reasons beyond its influence, remain—settled.

* * *

At bottom, this case involves (1) the violation of the rights of peaceful demonstrators at the hands of federal law enforcement officers and other officials and (2) the refusal by the district court, in contravention of congressional will, to hold those officers and other responsible parties accountable. These two wrongs only add up to injustice and cannot go unremedied. This issue is particularly salient here, where the district court has permitted identical claims against state and local officials to proceed.

To circumscribe or discard the *Bivens* remedy in these essential circumstances now, decades after Congress preserved its scope, would not only upset the remedial balance Congress explicitly struck in 1988 but would also, for the first time in this Nation's history, leave plaintiffs like these with no viable means of vindicating their rights. That is not what Congress intended when it exercised its "preeminent authority" by promulgating the Westfall Act's plain language preserving *Bivens*. At that time, the Supreme Court had decided only three cases in which it recognized the availability of a *Bivens* remedy, while other courts had developed a thorough and vigorous view of *Bivens* as it applied in myriad contexts. At its core, the question of

what Congress accomplished with the relevant provisions of the Westfall Act turns on whether Congress meant to safeguard only the limited universe of three civil actions involving three unique contexts addressed by the Supreme Court, or whether Congress meant to safeguard more. The answer is evident in the language of the Act and in the fundamental design of our Nation's ordered liberty.

CONCLUSION

The Court should reverse the dismissal of the *Bivens* claims.

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Respectfully submitted,

/s/ Scott F. Regan

Darpana Sheth
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
501 Walnut Street, Suite 1250
Philadelphia, Pennsylvania 19106
(215) 717-3474
darpana.sheth@thefire.org

Scott F. Regan
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, Virginia 22203
(703) 682-9320
sregan@ij.org

Victoria Clark
INSTITUTE FOR JUSTICE
816 Congress Ave., Suite 960
Austin, Texas 78701
(512) 480-5936
tclark@ij.org

Counsel for *Amici Curiae*

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/s/ Scott F. Regan
Scott F. Regan
Counsel for *Amicus Curiae*
Institute for Justice

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I hereby certify that on November 29, 2022, I caused the foregoing brief to be filed with the Court and to be served upon counsel via the Court's ECF system.

Dated: November 29, 2022

/s/ Scott F. Regan
Scott F. Regan
Counsel for *Amicus Curiae*
Institute for Justice