No. 24-351

In The
Supreme Court of the United States

UNITED STATES POSTAL SERVICE, ET AL.,

Petitioners,

v.

LEBENE KONAN,

Respondent.

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

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

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Interest of Amicus Curiae[1]

The Institute for Justice (IJ) is a nonprofit public-interest law firm that defends the foundations of a free society by securing greater protection for individual liberty. Central to that mission is accountability for rights violations by government, including federal officials—a key component of our original constitutional design. IJ pursues those goals through its Project on Immunity and Accountability. IJ litigates federal accountability cases across the country, including two recent FTCA arguments before this Court. See *Martin* v. *United States* (24-362); *Brownback* v. *King* (19-546). IJ also files amicus briefs in cases of federal accountability before this Court. *E.g.*, *Egbert* v. *Boule*, Brief of Amicus Curiae Institute for Justice, 2022 WL 296925 (U.S. Jan. 26, 2022); *Tanzin* v. *Tanvir*, Brief of Amicus Curiae Institute for Justice, 2020 WL 774437 (U.S. Feb. 12, 2020); see *Hernandez* v. *Mesa*, 589 U.S. 93, 111 n.9 (2020) (citing IJ's brief regarding the Westfall Act and *Bivens*). And IJ publishes scholarship on federal accountability doctrine. *E.g.*, Jaicomo & Bidwell, *Unqualified Immunity and the Betrayal of Butz v. Economou: How the Supreme Court Quietly Granted Federal Officials Absolute Immunity for Constitutional Violations*, 126 Dick. L. Rev. 719, 723–729 (2022). This FTCA case—regarding allegations of intentional discrimination and property deprivation by federal officials—raises those recurring accountability concerns.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae or its counsel made a monetary contribution to fund the preparation or submission of this brief.

Introduction

This case is about more than mail. It's about the continued existence of a judicial remedy when federal officials inflict intentional harm. For that, individual damages actions were a defining feature of our founding-era constitutional order. The FTCA now stands essentially alone for such action. So the Court should be particularly wary of the government's efforts to nullify the statute's remedial text and purpose at every turn—in this case, by overreading the postal exception's limited terms.

Ms. Konan's and her tenants' receipt of mail, as well as the efficient functioning of the postal service, are undoubtedly important. Yet, more fundamentally: As this Court recognized in 1878, that system must function "consistently with rights reserved to the people, of far greater importance than the transportation of the mail." *Ex parte Jackson*, 96 U.S. 727, 732. Such preeminent rights include those at issue here: freedom from discrimination and freedom from unwarranted property deprivation. Against that backdrop, the Court should reject the government's misreading of the FTCA in an effort to elide the difference between routine errors in mail delivery (the postal exception) versus an atypical abuse of the postal system to intentionally violate individual rights (this case). Accord *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) (rejecting the government's effort to stretch the postal exception "to the outer limits of its definitional possibilities" because "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of

the statute, and consulting any precedents or authorities that inform the analysis").[2]

As described below, the current remedial landscape typically means it's the FTCA or nothing when it comes to remedying federal harm. This Court should not countenance the government's efforts to keep moving the needle toward nothing by misdefining or acontextualizing the FTCA's terms (as Ms. Konan's brief thoroughly explains the government has done here). With the nation's original remedial structure for federal wrongdoing significantly altered and the FTCA placed front and center, it's crucial for this Court to reject the government's unyielding efforts (this case included) to render that remedial statute meaningless and place federal officials above the law. Indeed, reading the FTCA's exceptions and the Westfall Act to eliminate founding-era individual tort claims and replace them with nothing (as the government's position here implies) would itself raise serious constitutional concerns. See *Buchanan* v. *Barr*, 71 F.4th 1003, 1015 & n.4 (D.C. Cir. 2023) (Walker, J., concurring) (collecting authorities). Those are among the legal considerations, detailed more fully below, that should "inform the analysis" here. *Dolan*, 546 U.S. at 486.

Summary of Argument

The Court should not countenance or create a legal regime that effectively places federal officials above

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[2] See *Feliciano* v. *Dep't of Transp.*, 145 S. Ct. 1284, 1293 (2025) ("Context plays a vital role when interpreting statutes."); *Biden* v. *Nebraska*, 600 U.S. 477, 512 (2023) (Barrett, J., concurring) ("Context also includes common sense[.]").

the law by artificially constraining the FTCA, which today is the only meaningfully available judicial remedy for federal wrongdoing. "If federal officers had been above the law at the Founding, the new rights won at Yorktown and guaranteed by the Bill of Rights would have been significantly declawed." *Buchanan*, 71 F.4th at 1015–1016 (Walker, J., concurring). Or, as Blackstone put it: Without a method for "recovering and asserting" fundamental rights, "in vain would rights be declared, in vain directed to be observed." 1 *Commentaries on the Laws of England* 55–56 (1765).

Unsurprising, then, that the founding-era Court regarded "effective judicial redress for positive governmental wrongs" "as paramount and essential to American constitutional government." Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 27 (1972); see Jaicomo & Bidwell, *Unqualified Immunity and the Betrayal of Butz v. Economou: How the Supreme Court Quietly Granted Federal Officials Absolute Immunity for Constitutional Violations*, 126 Dick. L. Rev. 719, 723–729 (2022) (discussing illustrative founding-era cases ensuring federal accountability). To that end, "[f]or most of our history, state tort suits were the primary mechanism for holding federal officials accountable." *Buchanan*, 71 F.4th at 1014 (Walker, J., concurring). Indeed, the Bill of Rights itself "presupposed 'a general backdrop of private law' causes of action to vindicate 'primary rights of personal property and bodily liberty.'" *Id.* at 1015 (quoting Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1507 (1987)).

Today, however, that original understanding of the primacy of federal accountability—and of the judiciary as its mechanism—is precarious. Below, we start with a brief overview of the path by which the FTCA became essentially the sole approximation of a founding-era accountability regime (part I). Then, we argue that the Court should account for that altering of the historical accountability default by refusing to compromise the FTCA's remedial text and purpose, and that the Court should avoid acquiescing in the executive branch's consistent (and consistently dubious) efforts to treat the statute as a nullity (this case included) (part II).

By refusing to cosign the government's desire to eviscerate federal accountability, the Court does not usurp legislative power. It simply acts in accordance with original constitutional design. That design treated the awarding of damages for federal wrongdoing as the judiciary's workaday trade. See *Tanzin* v. *Tanvir*, 592 U.S. 43, 52 (2020). And that design was on purpose. As this Court put it, an alternative framework—in which "courts cannot give remedy when the citizen has been deprived of his property by force"—would flout this nation's character and 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." *United States* v. *Lee*, 106 U.S. 196, 220–221 (1882).

Happily, as Ms. Konan explains, the postal exception does not tell the Court to go down the government's ahistorical path here. At the threshold

though, the Court should bear in mind that that's where the government is trying to take it in every case—based on shaky reasoning that, unfortunately, the lower courts too often abide. This Court recently sent a signal against such practices. See *Martin* v. *United States*, 145 S. Ct. 1689, 1700–1702 (2025) (rejecting a Supremacy Clause bar to FTCA liability). It should send another here.

Argument

I. The FTCA stands alone in approximating our original design of meaningful federal accountability.

Today, the FTCA is the sole meaningful approximation of our original constitutional design, which was intended to guard against the treatment of federal officials as above the law. What follows is a short history of how that came to be—by repackaging state-law tort actions against individual federal officials into state-law tort actions against the government, while also leaving constitutional tort actions against individual officials to act as a parallel remedial route, but then all but reading the latter out of existence.

"The ratification debates suggest that the Framers thought state tort suits would be an important check against federal misconduct. * * * Reflecting that approach, the First Congress understood 'that under the new federal system, litigants would . . . be able to file common-law claims against federal officials for wrongdoing in the course of their duties.' * * * Federal officers would not be *above* the law because they

would be *subject* to the same common law as private citizens." *Buchanan*, 71 F.4th at 1014–1015 (Walker, J., concurring) (citations omitted). "These common-law causes of action remained available through the 19th century and into the 20th." *Tanzin*, 592 U.S. at 49 (collecting cases). The judiciary brought a strict-liability approach to such cases—deciding liability and letting Congress decide on the back end whether to indemnify tortfeasor federal officials. See Jaicomo & Bidwell, 126 Dick. L. Rev. at 723–733.

But, in a sea change from that personal-liability/congressional-indemnity system, the 1988 Westfall Act "generally prohibit[ed] tort victims from bringing state tort suits against federal officers, forcing victims instead to pursue the limited remedies in the FTCA" against the government as substitute defendant. *Buchanan*, 71 F.4th at 1016 (Walker, J., concurring) (citing 28 U.S.C. 2679(b)(1)).

The Westfall Act did, however, preserve against federal officials the availability of "a civil action * * * brought for a violation of the Constitution of the United States." 28 U.S.C. 2679(b)(2)(A). While Judge Walker, Judge Matey, scholars, and litigants (your amicus among them) are currently arguing in the lower courts that that provision preserves against individual officials certain state common-law torts and/or state statutory causes of action (i.e., those that are premised on federal constitutional violations), the district courts have thus far rejected those arguments and held that the provision preserves only *Bivens* claims. See *Buchanan*, 71 F.4th at 1016–1017 (Walker, J., concurring) (summarizing arguments and literature against reading § 2679(b)(2)(A)'s

individual-liability provision "as a good-for-*Bivens*-only rule"); *Cross* v. *Buschman*, 2024 WL 3292756, at *5 n.12 (3d Cir. July 3, 2024) (Matey, J., concurring) (echoing Judge Walker's argument that a state-law-preserving reading of the provision "finds support in the text of the statute, accords with Founding-era principles of officer accountability, and closes a remedial gap"); *Rise* v. *Bagshaw*, 2025 WL 1380478, at *14 (D.D.C. May 13, 2025) (collecting district court cases rejecting the provision's preservation of state-law claims and holding that it preserves only *Bivens* claims).

Those ostensibly preserved *Bivens* claims, meanwhile, have become virtually impossible to maintain. See generally *Egbert* v. *Boule*, 596 U.S. 482 (2022); *id.* at 502–504 (Gorsuch, J., concurring in judgment); but see *Hernandez* v. *Mesa*, 589 U.S. 93, 111 n.9 (2020) (Westfall Act "left *Bivens* where it found it" in 1988).[3]

The upshot: Redress for rights violations by federal officials currently falls all but exclusively in the FTCA's purview. Next, we turn to the government's efforts to perpetually shrink the statute's redressability aperture—too often

[3] To be clear, we disagree with much about the current treatment of the *Bivens* remedy. For example: Where Congress "left *Bivens*" in 1988 via § 2679(b)(2)(A) was much more robust than current treatment of the remedy admits. See *Egbert*, Brief of Amicus Curiae Institute for Justice, 2022 WL 296925, at *22–26 (U.S. Jan. 26, 2022). But we must acknowledge current doctrinal reality.

successfully in the lower courts. We urge this Court to keep the frame open, in this case and those to come.

II. The Court should reject the government's efforts, here and elsewhere, to dismantle the FTCA's role as a bulwark against the ahistorical elevation of federal officials above the law.

"With *Bivens* sharply limited," victims of federal harm "must increasingly rely on the FTCA to vindicate their constitutional rights. They, the government, and the courts would all benefit from clearer guidance" regarding the statute's scope. *Xi* v. *Haugen*, 68 F.4th 824, 844 (3d Cir. 2023) (Bibas, J., concurring) (referring to uncertainty regarding the scope of the discretionary-function exception). The form that guidance should take: a signal to the government and the lower courts that reading the FTCA and its exceptions is not an exercise in creatively dismantling the statute's remedial text and purpose. See *Cervantes* v. *United States*, 330 F.3d 1186, 1190 (9th Cir. 2003) ("In asserting the detention of goods exception as its defense, rather than compensating a plaintiff it has seriously wronged, the United States thumbs its nose at its obligation to see that justice is done. The Supreme Court long ago pronounced the special obligation of the United States Attorney to serve the interests of justice[.]").

Simply put, the FTCA approximates the original design described in part I above (state tort actions as a federal accountability mechanism), with a twist: government as defendant, with certain carefully drawn exceptions. See *Dolan*, 546 U.S. at 486–491

(rejecting the government's efforts to have the exceptions swallow the statute). The government and the lower courts, however, tend to misread the FTCA as a series of landmines designed to leave victims holding the bag. In doing so, they not only blow up the statute's text—they also improperly ignore the "[b]ackground legal conventions" of federal accountability discussed above that "are part of the statute's context." *Biden* v. *Nebraska*, 600 U.S. 477, 511–512 (2023) (Barrett, J., concurring).

Start with this case. As Ms. Konan explains, the government urges a reading of "miscarriage" that it knows would render "superfluous" the postal exception's other two terms, Resp. Br. 21, and it urges a reading of "loss" that it admits would invert the perspective of that one term as distinct from the other two, "contra basic syntax," Resp. Br. 33. Those tactics violate basic precepts of construction. Yet, as illustrated by the circuit split that gave rise to this case, lower courts often cannot help but go along.

That's what happened in 2009, when the Eleventh Circuit took the "outlier position" that the Supremacy Clause (which ensures the primacy of federal law) somehow barred the viability of claims under the FTCA (a federal law). *Martin*, 145 S. Ct. at 1700. By this year, even the government came around as to that issue, and this Court rightly fixed the error. *Id.*[4]

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[4] Of course, the government proceeded to argue that the discretionary-function exception nevertheless eliminates liability when federal officers decline to "look at the address of the house before [they] knock down the door." *Martin*, Tr. of Oral Arg. at 37 (U.S. Apr. 29, 2025).

Similar instances remain. For example, the government has convinced two courts of appeals to hold (contra seven others) that federal officials have discretion to violate constitutional rights (and thereby evade FTCA accountability via the discretionary-function exception). See *Xi*, 68 F.4th at 838 n.10 (collecting cases). The government also convinced at least one district court to import qualified immunity's judge-made "clearly established" test into the constitutional analysis under the discretionary-function exception (before being reversed on appeal). *Id.* at 840.

Recently, the government convinced the Sixth Circuit that where no FTCA claim could be brought for federal taskforce officers' brutal attack of an innocent student, the FTCA's "judgment bar" foreclosed adjudication of any other claims within the same case too—a conclusion shared by several lower courts (contra others) despite some never even bothering to "analyze[] or explain[] how the judgment bar's text or purpose compels the conclusion that claims arising out of the same subject matter in the same suit are barred." *King* v. *Brownback*, 144 S. Ct. 10, 11 (2023) (Sotomayor, J., statement respecting denial of cert).

In that same case, the reason the judgment bar was even on the table was because the government convinced a district court to atextually import state-law *official* immunities to shield the United States from suit for the violent attack at issue—even though the FTCA says the United States "shall be liable * * * in the same manner and to the same extent as a *private individual* under like circumstances," 28

U.S.C. 2674 (emphasis added). See *King* v. *United States*, 2017 WL 6508182, at *13–14 (W.D. Mich. Aug. 24, 2017) (granting immunity without analyzing or even acknowledging § 2674).

That's all to say nothing of the longstanding "*Feres* doctrine," which has "no basis in the text or logic of the FTCA" and "unjustifiably deprives the injured servicemember of a tort remedy simply because he devoted his life to serving in his country's Armed Forces." *Carter* v. *United States*, 145 S. Ct. 519, 523 (2025) (Thomas, J., dissenting from denial of cert) (cleaned up).

With federal accountability in such a stranglehold—*Bivens* all but dead, the FTCA artificially constrained by highly dubious lower-court decisions, and the Westfall Act's constitutional-torts provision so far toothless—it's no wonder that the most egregious rights violators are quick to cloak themselves in federal legal garb (via federal–state taskforces) and avail themselves of the DOJ's ever-increasingly aggressive anti-accountability stances. That's precisely how Heather Weyker, a St. Paul police officer, has evaded any accountability "in a series of civil rights lawsuits" for putting teenage Somali refugees in federal prison based on charges she knowingly fabricated (in order to protect a separate bogus criminal case she was cooking up). See *Mohamud* v. *Weyker*, 144 F.4th 1099, 1101–1102 (8th Cir. 2025); https://ij.org/case/task-force-immunity-and-accountability/.

Such unremedied abuses have federal judges and others gravely concerned about the state of federal accountability:

> Private citizens who are brutalized—even killed—by rogue federal officers can find little solace in *Bivens*. * * * If *Bivens* is off the table, whether formally or functionally, and if the Westfall Act preempts all previously available state-law constitutional tort claims against federal officers acting within the scope of their employment, do victims of unconstitutional conduct have any judicial forum whatsoever? Are all courthouse doors—both state and federal—slammed shut? If so, and leaving aside the serious constitutional concerns that would raise, does such wholesale immunity induce impunity, giving the federal government a pass to commit one-off constitutional violations? * * * A written constitution is mere meringue when rights can be violated with nonchalance. I add my voice to those lamenting today's rights-without-remedies regime, hoping (against hope) that as the chorus grows louder, change comes sooner.

Byrd v. *Lamb*, 990 F.3d 879, 883–885 (5th Cir. 2021) (Willett, J., specially concurring).

Judge Willett is "certainly not the first to express unease that individuals whose constitutional rights

are violated at the hands of federal officers are essentially remedy-less." *Id.* at 884 & n.12 (collecting authorities); see *Buchanan*, 71 F.4th at 1015 & n.4 (collecting authorities for the proposition that "prohibiting all damages actions against federal officers might be a constitutional problem today").[5] But they're not always remedy-less. Often, the FTCA lights a path. As it does in this case, for the intentional acts of discrimination and property deprivation Ms. Konan has alleged. The Court should say so, and it should remind the government and the lower courts that the FTCA is not an inconvenience for the government to cleverly subvert. It's a bulwark of our constitutional order and individual liberty.

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[5] Accord *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 6–7 (2011) (statement of Justice Scalia) ("Every banana republic has a bill of rights. * * * The bill of rights of the former [Soviet Union] was much better than ours. * * * Of course, they were just words on paper, what our Framers would have called 'a parchment guarantee.' "); Levitan, *Before lecture on war powers, Gorsuch laments public's lack of knowledge of the judiciary*, SCOTUSblog (Oct. 19, 2018) (recounting Justice Gorsuch's reminder that North Korea's expansive bill of rights provisions are "not worth the parchment they're written on because you don't have judges to enforce them"); Baude, *Bivens Liability and Its Alternatives*, The Volokh Conspiracy (Feb. 27, 2020) ("[I]f the Court is going to abolish the 20th century remedies for unconstitutional conduct, can we at least have the 19th century remedies back? * * * It does seem perverse to think that Congress can eliminate state law damages for constitutional violations without either Congress or the courts providing an alternative.").

Conclusion

The Court should affirm.

Respectfully submitted,

August 20, 2025

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