United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 18-50977

GERARDO SERRANO, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

CUSTOMS AND BORDER PATROL, U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES OF AMERICA, JOHN DOE 1-X; JUAN ESPINOZA; KEVIN MCALEENAN,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Del Rio Division
No. 2:17–cv–00048–AM-CW, Alia Moses, Judge Presiding

BRIEF FOR *AMICI CURIAE* LAW PROFESSORS JAMES E. PFANDER, ALEXANDER A. REINERT, JOANNA C. SCHWARTZ, AND STEPHEN I. VLADECK IN SUPPORT OF PLAINTIFF-APPELLANT AND IN FAVOR OF REVERSAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff-Appellant Gerardo Serrano
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Defendants-Appellees Customs & Border Patrol; United States of America; John Doe 1-X; Juan Espinoza; and Kevin McAleenan
Represented by John F. Bash, Noah M. Schottenstein, and Sean B. O'Connell (U.S. Attorney for the Western District of Texas; Carleen M. Zubrzycki (U.S. Department of Justice)

Amicus Curiae Americans for Forfeiture Reform
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Amicus Curiae Law Professors James E. Pfander, Alexander A. Reinert, Joanna C. Schwartz, and Stephen I. Vladeck
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Dated: April 24, 2019

/s/ Robert A. Braun
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INTERESTS OF AMICI CURIAE[1]

Amici curiae are Federal Courts scholars with extensive expertise in the history and scope of judicial remedies to challenge official action, particularly related to the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Although *amici* differ in their views of some of these developments, *amici* were impelled to write in this case by the constitutional and other concerning implications of the district court's decision to dismiss the Plaintiff-Appellant's *Bivens* claim for damages.

James E. Pfander is the Owen L. Coon Professor of Law at Northwestern University School of Law, a member of the American Law Institute, and a prolific and widely cited author on both the law governing individual government officers' liability to private litigation and the scope of *Bivens*. His scholarship includes *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862 (2010) (with Jonathan Hunt); *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 Geo. L. J. 117 (2009) (with David P. Baltmanis); "The Story of *Bivens v. Six Unknown Named Agents of the*

[1] This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than *amici* and their counsel have contributed money for this brief.

Federal Narcotics Bureau," *Federal Courts Stories* (Vicki C. Jackson & Judith Resnik eds., 2010); and *Constitutional Torts and the War on Terror* (2017).

Alexander A. Reinert is a Professor of Law and the Director of the Center for Rights and Justice at the Benjamin N. Cardozo School of Law, Yeshiva University. Professor Reinert's scholarship focuses on prisoners' rights, employment discrimination, and disability rights. His recent scholarship includes *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 Stan. L. Rev. 809 (2010); *Asking the First Question: Reframing* Bivens *After* Minneci, 90 Wash. U. L. Rev. 1473 (2013) (with Lumen N. Mulligan); and *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed* (with James E. Pfander and Joanna C. Schwartz), Stanford L. Rev. (forthcoming).

Joanna C. Schwartz is the Vice Dean for Faculty Development and a Professor of Law at the University of California Los Angeles School of Law. Professor Schwartz is one of the country's leading experts on police misconduct litigation, with a focus on the role of lawsuits in organizational decision making. Her recent scholarship includes *How Qualified Immunity Fails*, 127 Yale L. J. 2 (2017); *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. (2018); *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed* (with James E. Pfander and Alex Reinert), Stanford L. Rev. (forthcoming); and *After Qualified Immunity*, Columbia L. Rev. (forthcoming).

Stephen I. Vladeck is the A. Dalton Cross Professor of Law at the University of Texas at Austin School of Law. His scholarship focuses on the intersection between national security and the Federal Courts. Professor Vladeck has written in detail about both *Bivens* and the availability of remedies more generally to victims of post-September 11 U.S. counterterrorism abuses. *See, e.g.*, *National Security and* Bivens *After* Iqbal, 14 Lewis & Clark L. Rev. 255 (2010); Bivens *Remedies and the Myth of the "Heady Days"*, 8 U. St. Thomas L.J. 513 (2011); and *The New National Security Canon*, 61 Am. U. L. Rev. 1295 (2012).

ARGUMENT

Plaintiff Gerardo Serrano sued U.S. Customs and Border Protection for the thousands in damages he incurred during the two-plus years the Federal Government held his car without affording him any process to challenge the seizure. The district court dismissed his claims, including his damages claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Bivens actions are integral to maintaining this country's long history of ensuring that federal officers are accountable under the U.S. Constitution. The district court's opinion is nonetheless part of a growing trend by some courts of whittling the *Bivens* remedy away to nothing. These courts have confined *Bivens* actions to the exact facts of *Bivens* and two subsequent Supreme Court cases, *Davis v. Passman*, 442 U.S. 228 (1979) and *Carlson v. Green*, 446 U.S. 14 (1980). The

district court opinion in this case showcases the paradigmatic move—distinguish prior precedent based on inconsequential differences and then invoke national security without explanation. But this narrowing of *Bivens* moves the law in the wrong direction and, in doing so, raises serious constitutional concerns—particularly in cases where *Bivens* offers the only remedy for unconstitutional actions by federal officers.

This current practice of confining *Bivens* to its facts assumes that the *Bivens* Court crafted a remedy against federal officers out of thin air. But from this country's founding (and even before it) until the 1988 passage of the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563, there was a robust common law tradition of state law tort suits against federal officers for violations of federal constitutional rights. And, with the Westfall Act's passage, Congress explicitly endorsed the Supreme Court's precedent, as reflected in *Bivens* and its progeny, permitting federal law damages actions against individual federal officers. Despite Congress's ratification of both *Bivens* and pre-*Bivens* common law traditions, courts have taken steps—unprecedented in our nation's history—to prevent actions against federal officers in their individual capacity, even in contexts where no other remedies are available. In foreclosing any remedy for acknowledged violations of constitutional rights, these decisions not only buck Congress's will but they also raise significant due process concerns.

These decisions limiting *Bivens* are premised, in part, on the fundamental misconception that, in allowing a damages remedy, individual officers will face personal liability, the threat of which will distract them from performing their jobs. But this argument lacks force because research shows that individual officers rarely pay damages judgments. Accordingly, this Court should reverse the district court's dismissal of the Plaintiff-Appellant's *Bivens* claims.

I. The Supreme Court's *Bivens* Decision Was Founded on a Rich History of State Common Law Tort Actions Against Federal Officers.

Critics of *Bivens* assert that the Court "invent[ed]" a cause of action against federal officers. *Cf. Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); *see also* Sina Kian, *The Path of the Constitution: The Original System of Remedies, How it Changed, and How the Court Responded*, 87 N.Y.U. L. Rev. 132, 136 (2012). This claim rests on the false premise that the *Bivens* Court fashioned a remedy against federal officers where none previously existed. Kian, *supra*, at 136 ("Generally speaking, the logic of these cases—today often characterized as necessary or implied by some, and overreaching or made-up law by others—is actually intimately reliant on the nature and path of common law remedies.").

Instead, *Bivens* was born from a rich history of state common law tort actions against the Federal Government. *See, e.g.*, James E. Pfander and David P. Baltmanis,

Rethinking Bivens*: Legitimacy and Constitutional Adjudication*, 98 Georgetown L. J. 117, 134 (2009) ("In 1971 and for much of the nation's history, state common law provided victims with a right of action that, although somewhat cumbersome, could eventually result in a vindication of their constitutional rights."); Kian, *supra*, at 134 ("Originally, the Constitution was to be implemented through remedies available for violations of common law rights. . . . In the antebellum Union, this was a robust remedy."); Stephen Vladeck, *Bivens Remedies and the Myth of the "Heady Days*,*"* 8 U. St. Thomas L. J. 513, 515 (2011) (By the 1960s, "it was black-letter law that federal officers could be held liable under state . . . law."); Martin H. Redish and Curtis E. Woods, *Congressional Power to Control Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 81-82 & n. 171 (1975) (noting that state courts "clearly have power to impose personal liability against federal officers."). *Bivens* itself acknowledges this history, *see Bivens*, 403 U.S. at 390-91, which traces back to the founding, *e.g.*, Kian, *supra*, at 145; *cf.* Vladeck, *supra*, at 516; Carlos Manuel Vázquez and Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509, 511, 531 (2013).

The early Supreme Court acknowledged many times over the availability of damages against federal officers.[2] An 1817 case explained that damages actions against federal officials were primarily the province of state courts. *See Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 10 (1817) ("[I]f the seizure be fairly adjudged wrongful, and without reasonable cause, he may proceed, at his election, by a suit at common law . . . for damages for the illegal act. Yet, even in that case, any remedy which the law may afford to the party supposing himself to be aggrieved . . . could be prosecuted only in the state court.");[3] *see also Teal v. Felton*, 53 U.S. (12 How.) 284 (1852) (endorsing state law tort actions against federal officers by rejecting an argument that federal jurisdiction over federal officer was exclusive); Vázquez and Vladeck, *supra*, at 516.

These actions adjudicated the constitutional question, albeit indirectly. An injured party would sue the federal officer under state common law—*e.g.*, the victim of an illegal search might sue for trespass. The federal officer would defend himself by asserting that he was authorized to so act. The plaintiff could then respond by

[2] *See, e.g.*, *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458 (1806); *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

[3] Before *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), these claims were adjudicated under the general common law. *See* Vázquez and Vladeck, *supra*, at 539-40.

arguing that the federal officer's authorization was unconstitutional. *See Bivens*, 403 U.S. at 391; Kian, *supra*, at 144; Pfander and Baltmanis, *supra*, at 134.

In light of this history, the *Bivens* decision should be viewed, not as a new adventure fashioned by the Court in the 1970s, but as a refinement of centuries of tort litigation. *Bivens* held—and continues to hold—the prospect of shielding federal officers from the vagaries of state law by creating consistent federal legal standards governing claims against them, while also preserving remedies for the victims of unconstitutional governmental action. *Cf.* Vázquez and Vladeck, *supra*, at 536. It further allows for more uniform enforcement of constitutional rights: pre-*Bivens*, recovery against a federal officer was contingent on whether a particular state recognized an analogous tort law claim—a system that worked better for some rights (*e.g.*, Fourth Amendment claims and trespass) than others (*e.g.*, the Equal Protection Clause). Stephen I. Vladeck, "On Justice Kennedy's Flawed and Depressing Narrowing of Constitutional Damages Remedies," *Just Security* (June 19, 2017).

This history also recasts comparisons between *Bivens* and 42 U.S.C. § 1983. *Id.* With Section 1983, Congress created a mechanism for damages actions against state and local officers for violating a person's constitutional rights. Critics and courts sometimes argue that, in light of Section 1983, Congress's inaction as to federal officers can be understood as deliberate. When Congress passed Section 1983 in 1871, however, damages actions against federal officers were already

available, whereas state courts were hostile to claims against state actors under the Federal Constitution. This asymmetry deprives of force the (purportedly unfavorable) comparison between Section 1983 and *Bivens* actions and shows that, in enacting the former, Congress did not intend to suggest disapproval of private damages actions against federal officials for constitutional violations.

II. Strictly Limiting *Bivens* Contravenes Congress's Statutory Endorsement of *Bivens* and Raises Serious Constitutional Concerns.

Since 1971, when the Supreme Court handed down *Bivens*, Congress has repeatedly endorsed the *Bivens* remedy for violations of the U.S. Constitution by federal officers. *See generally* Pfander and Baltmanis, *supra*, at 131-38.

In 1946, Congress passed the Federal Tort Claims Act ("FTCA"), permitting private individuals to sue the United States in federal court for certain torts committed by individuals acting on its behalf. And, in 1974, the FTCA was amended to create a cause of action against the Federal Government for certain law enforcement torts. 28 U.S.C. § 2680(h). Explaining that its amendment "should be viewed as a counterpart to the *Bivens* case and its progenty [sic]," S. Rep. No. 93-588, at 3 (1973), Congress was "crystal clear" that it did not intend to displace *Bivens*, *Carlson*, 446 U.S. at 20. It instead "view[ed the] FTCA and *Bivens* as parallel, complementary causes of action." *Id.* Indeed, Congress rejected legislation proposed by the Department of Justice that would have substituted the government as the defendant in suits for intentional torts committed by law enforcement officers,

including those arising "under the Constitution or statutes of the United States." S. 2558, 93d Cong. (1973); *see also* Pfander and Baltmanis, *supra*, at 131 & n. 79.

In 1988, Congress again ratified *Bivens* when it passed the Westfall Act, which permitted substitution of the Federal Government for federal officials sued in civil actions—*except* for claims "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A); *see also Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (noting the Westfall Act's "explicit exception for *Bivens*"). In doing so, Congress expressed its intention that the Westfall Act "would not affect the ability of victims of constitutional torts to seek personal redress from federal employees who allegedly violate their Constitutional rights." 29 H.R. Rep. No. 100-700, at 6 (1988). And in 1996, rather than eliminate *Bivens* claims, Congress endorsed certain *Bivens* actions "brought with respect to prison conditions." 42 U.S.C. § 1997e(a) (1996); *see also* 141 Cong. Rec. H14078-02, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo) (exhaustion requirement would deter frivolous *Bivens* claims, while *Bivens* "claims with a greater probability/magnitude of success would, presumably, proceed").

The state of the Supreme Court's *Bivens* case law during this period demonstrates that Congress's decisions to preserve a damages remedy for certain constitutional claims against federal officials were an affirmative endorsement of *Bivens*—and not mere acquiescence to perceived compulsory judicial

pronouncements. Prior to the Westfall Act's passage, for instance, the Supreme Court had recognized Congress's authority to abrogate *Bivens*, including by creating alternative remedial schemes. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 378 (1983) ("When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised."); *Carlson*, 446 U.S. at 18-20; *Davis*, 442 U.S. at 245-47; *Bivens*, 403 U.S. at 397. Despite this, Congress made, in some circumstances, conscious choices to create alternative remedies that would displace *Bivens*, while deciding in other contexts (like this one) that *Bivens* should be preserved.

The availability of a *Bivens* remedy as reflected in the Westfall Act here is also strongly favored because, holding otherwise—even in cases where there is no other legal remedy—would raise serious constitutional questions.[4] As described above, for much of our nation's history, aggrieved individuals could vindicate their constitutional rights by bringing claims against federal officials under state common law. But the Supreme Court and many commentators have suggested that, in passing the Westfall Act, Congress sought to preempt state law tort claims against federal

[4] The total confinement of *Bivens* to its facts also raises institutional concerns for the judiciary. Pfander and Baltmanis, *supra*, at 120. It effectively overturns *Bivens* without the process, safeguards, and attention that normally accompany such a significant change in the law. *See generally* Daniel B. Rice and Jack Boeglin, *Confining Cases to their Facts*, 105 Va. L. Rev. (forthcoming 2019).

officers for actions within the scope of their employment. *See, e.g.*, *Minneci v. Pollard*, 565 U.S. 118, 126 (2012) ("Prisoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government." (citing the Westfall Act, 28 U.S.C. §§ 2671, 2679(b)(1))).[5] Given this, without state law claims against federal officers, there are many contexts where a *Bivens* action provides the only effective avenue for *any redress* when individual rights have been violated. *Cf. Anderson v. Creighton*, 483 U.S. 635, 638 (1987) ("When government officials abuse their offices, action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." (internal quotation marks and citation omitted)).

Narrowly circumscribing *Bivens*, even in circumstances in which there is no colorable basis for conferring immunity or declining to exercise jurisdiction over a dispute, is contrary to the well-settled presumption in favor of the availability of some judicial forum to vindicate constitutional rights. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988) (reading an implied exception for constitutional questions into a federal statute in order to avoid the "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable

[5] Although *amici* have debated the scope of the Westfall Act immunity, we agree that, if the Westfall Act is read to preclude state law remedies for constitutional violations, the Act contemplates that *Bivens* claims will be broadly available to remedy constitutional violations by federal officials. *Compare* Vázquez and Vladeck, *supra*, at 577-82, *with* James E. Pfander and David P. Baltmanis, W*(h)ither Bivens?*, 161 U. Pa. L. Rev. Online 231, 236-42 (2013).

constitutional claim"); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 680–81, 681 n.12 (1986) (interpreting statute in a manner that "avoids the 'serious constitutional question' that would arise if we construed [the Medicare statute] to deny a judicial forum for constitutional claims"). Indeed, as a fellow court of appeals has observed, "it has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise." *Bartlett ex rel. Neuman v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987).

Accordingly, reading the Westfall Act to reflect an endorsement of *Bivens* (at minimum, in the limited circumstances where no sufficient alternative remedial scheme is available) is necessary to avoid a collision with the Due Process Clause of the Fifth Amendment.

III. *Bivens* Actions Rarely Result in Personal Liability for Federal Officers.

Moreover, the oft-expressed concern that expanding the availability of the *Bivens* remedy will unduly interfere with federal officers' ability to conduct their jobs is rooted in the false premise that officers (and not the government) will bear the financial burden of money judgments. In practice, where *Bivens* claims are permitted, individual officers rarely pay judgments from their own pockets. For example, one recent study, focusing on successful *Bivens* claims involving the

Bureau of Prisons, found that, in the studied cases, individual federal officer defendants were required to contribute to settlements or payments of cases involving *Bivens* claims less than five percent of the time. James E. Pfander, Alexander A. Reinert, and Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed,* Stanford L. Rev. (forthcoming). While the results may vary in connection with litigation against agents of other departments of the Federal Government, this study nonetheless provides strong evidence that individual officers rarely contribute personal funds to the resolution of *Bivens* claims even when the plaintiff recovers.

Thus, both of the primary criticisms of *Bivens*—that it was a dramatic act of judicial creativity and that it poses an existential threat to the personal finances of individual federal officers—fall short.

CONCLUSION

For the foregoing reasons, *amici* respectfully suggest that the decision below dismissing the Plaintiff-Appellant's *Bivens* claims be reversed.

Dated: April 24, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of April, 2019, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Robert A. Braun
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CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,301 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Robert A. Braun
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