No. 12-976

IN THE

Supreme Court of the United States

DONALD VANCE AND NATHAN ERTEL,
Petitioners,

v.

DONALD H. RUMSFELD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PROFESSORS JAMES PFANDER AND STEPHEN VLADECK AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors whose research and teaching focus on the law governing the relationship between American citizens and their government and, specifically, federal jurisdiction, sovereign immunity, qualified immunity and the role of the federal courts in the war on terrorism. They file this brief to urge the Court to grant the petition in order to avert what can only be called a dramatic change in the law of immunity and *Bivens*—a revision appropriate only for Congress. *Amici* are:

James E. Pfander, the Owen L. Coon Professor of Law at Northwestern University School of Law, has written extensively on federal and state sovereign immunity, the early republic origins of official liability and indemnity, *Bivens* litigation, and the modern law of qualified immunity.

Stephen I. Vladeck is the Associate Dean for Scholarship and a professor of law at American University Washington College of Law. He is an expert on the role of the federal courts in the war on terrorism, and has written extensively on the availability of civil remedies to victims of unlawful governmental counterterrorism policies. He is a member of the American Law Institute, the Chair of the Section on Federal Courts of the Association of

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for both petitioners and respondent were notified of the intent to file this brief and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

American Law Schools, a senior editor of the peer-reviewed Journal of National Security Law and Policy, a senior contributor to the Lawfare blog, the Supreme Court Fellow at the Constitution Project, and a fellow at the Center on National Security at Fordham University School of Law.

SUMMARY OF THE ARGUMENT

The Seventh Circuit's *en banc* decision substantially departs from this Court's *Bivens* jurisprudence, and from some 300 years of established common law. In doing so, the *en banc* decision conferred on military personnel and cabinet officials an unprecedented de facto immunity that prevents individuals from seeking redress for the improper actions of federal officials.

Until the Seventh Circuit's decision, modern *Bivens* jurisprudence has reflected a natural outgrowth of the historic regime that has been in place since before the Revolution, one that combines the personal liability of government officials with indemnification. Under English law, British military officers who acted outside their authority were subject to direct suit by individuals under common law rights of action. Early U.S. law adopted this tradition of personal liability, and provided routine indemnification by petition to Congress.

This Court's decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), provides the modern successor to this historic regime. Under *Bivens* and its progeny, citizens may sue military and cabinet officials. *Id.* Moreover, with the passage of the Westfall Act in 1988, 28 U.S.C. § 2679(b)(1) (2006), which has been understood to preempt state common law remedies against federal employees, Congress ratified *Bivens*

actions as the means of retrospectively vindicating constitutional violations by officials. Consequently, *Bivens* actions should be routinely recognized in situations where no other adequate remedy exists. Refusing to recognize an action in such cases validates a legal regime where no judicial forum is available to vindicate constitutional rights, in violation of the strong presumption in favor of judicial review of constitutional claims.

Congress's intent for *Bivens* to play a crucial role in checking official misconduct is apparent in the United States' obligations under the United Nations Convention Against Torture (CAT). This treaty requires each party state to ensure that its legal system provides redress—and an enforceable right to fair compensation—for any victim of torture. United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, U.S.-U.N., Dec. 10, 1984, 1465 U.N.T.S. 85; S. TREATY DOC. NO. 100-20 (1988). When ratifying it, the U.S. Senate made clear that the conduct prohibited by the treaty is coextensive with the conduct barred by the Fifth and Eighth Amendments to the Constitution—violations of which are actionable under *Bivens*. Accordingly, the U.S. Department of State has, on two separate occasions, represented to the international community that *Bivens* actions are available for redress of victims of torture by U.S. officials.

The Seventh Circuit's decision in this case contravenes nearly 300 years of established tradition, this Court's well-settled precedents, and the United States' international obligations under the CAT. Operating under the assumption that it was being asked to "create" a new cause of action, the *en banc* majority took the unprecedented step of conferring, in

effect, absolute immunity from liability on U.S. officials who torture citizens abroad. As the history neatly demonstrates, it is the Seventh Circuit's refusal to recognize a damages action against military officials, not the availability of such an action, that is novel. This Court should grant the petition to consider the validity of a decision that clearly undermines the long-standing, congressionally sanctioned approach to official liability.

ARGUMENT

I. THE HISTORIC REGIME OF PERSONAL LIABILITY WITH INDEMNIFICATION IS WELL-ESTABLISHED IN ENGLISH AND AMERICAN LAW.

The modern regime of personal liability and indemnification for government officials under *Bivens* is the culmination of nearly 300 years of tradition, beginning with the British practice and adopted into the legal regime of the nascent United States. Throughout this period, private rights of action against officials have been the rule, not the exception, in order to vindicate the legal rights of citizens against improper official conduct.

A. The English common law tradition recognized rights of action for money damages against British officers in their personal capacity.

Common law rights of action against military and government officials under English law predate the American Revolution, and were available to individuals directly to sue officers who exceeded their authority. See James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91

CORNELL L. REV. 497, 510–12 (2006). For example, officers of the British army and navy were successfully sued in England by individuals on whom they inflicted personal injuries, false imprisonment, and property destruction. See, e.g., *Mostyn* v. *Fabrigas*, 98 Eng. Rep. 1021 (1774) (Minorcan civilian successfully sued an English military governor for damages when he unlawfully detained the plaintiff and banished him from the island); *Cooke* v. *Maxwell*, 171 Eng. Rep. 614 (1817) (American civilian successfully sued the British governor of Sierra Leone who destroyed a factory belonging to the plaintiff for damages); see also FREDERICK BERNAYS WEINER, CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689 ESPECIALLY IN NORTH AMERICA 78–85 (1967) (discussing the case of civilian carpenter Stephen Conning who was awarded damages after he was illegally imprisoned and flogged by order of the military governor of Gibraltar).

Nor were British officers beyond the reach of English courts simply because their torts occurred overseas; liability for common law torts existed even when officers acted abroad. See *Mostyn*, 98 Eng. Rep. 1021 (1774); see also Pfander, *supra*, 91 CORNELL L. REV. at 510 ("civilian courts measured the legality of military and imperial action overseas by reference to the laws of Britain"). Thus, British officers who committed torts against citizens abroad were subject to private suit in England. See *id.* at 511 ("[P]arties could challenge the jurisdiction of the King's Bench only by showing that another court would have jurisdiction over the claim. If, as in *Mostyn*, such an alternative forum did not exist, adjudication by the superior courts at Westminster was seen as essential to prevent a failure of justice.") (footnotes omitted).

B. Cases in the early Republic.

The United States continued this tradition of allowing common law causes of action against military and government personnel. *Id.* at 515. See, e.g., *Wise* v. *Withers*, 7 U.S. 331, 337 (1806) (Marshall, C.J.) (allowing personal liability for trespass against military officers when they exceed their authority by holding a court martial against a citizen who was not subject to military jurisdiction). Thus if a federal officer violated a citizen's constitutional right, such as by unlawfully seizing the citizen's property, the available method for the victim to redress the injury was to bring a common law tort claim against the officer in his personal capacity.

Early cases identify two key aspects of the system as it existed then: (1) reliance on suits against officers in their personal capacity, without any immunity; and (2) relatively routine indemnification of those officers by petition to Congress and the adoption of a private bill. See, e.g., *Little* v. *Barreme*, 6 U.S. 170 (1804) (holding a U.S. naval captain personally liable for damages for illegally seizing a vessel); *Murray* v. *Schooner Charming Betsy*, 6 U.S. 64, 117 (1804) (same); see also James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1900–02 (2010) (discussing how the officers found to be personally liable in *Little* and *Murray* were each indemnified by Congress). This system applied to federal officers generally, whether they were in the military or not. See *id.* at 1904–05 (collecting 57 petitions for indemnity filed with Congress by federal officers during the antebellum period, reporting that 37 were submitted on behalf of military officers).

The logic behind the system in place during this period was plain: in order to compensate the injured individual, the officer himself would be held responsible in the first instance; in the event the officer was acting in the line of duty, the officer would be indemnified, shifting the loss to the government. See *id.* at 1888–1917. This two-part structure remains in place today, although the liability determination has been modified by the doctrine of qualified immunity. See *id.* at 1925 ("the nineteenth-century solution to the problem that is now addressed through qualified immunity was to hold the officer accountable in court for violations of the victim's legal rights but then to indemnify the officer"). Given that the government enjoys sovereign immunity from suit for many types of claims (including tort claims arising under the Constitution), this regime allowed for compensation to injured parties, while leaving officers personally liable only if they acted outside the scope of their authority. *Id.* at 1913 ("[S]overeign immunity foreclosed suit against the government. It thus fell to Congress, in passing on the indemnity petition, to evaluate the official's actions and determine if they had occurred in the course and scope of employment. If so, then principles of agency law obliged the government to bear responsibility for the loss.").

The regime of holding federal officers liable in their personal capacity remained largely undisturbed until the latter half of the twentieth century. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 660-61 (1952) (Clark, J., concurring) (emphasizing that the principle pronounced in *Little*, that a trespass does not cease to be a trespass when it is committed under executive orders without authority, is still good law); *Yearsley* v. *W.A. Ross*

Const. Co., 309 U.S. 18, 21 (1940) (recognizing that federal officers can be sued in tort for damages in their personal capacity where "the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred"); *Phila. Co.* v. *Stimson*, 223 U.S. 605, 619–20 (1912) ("The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.") (citations omitted); *Belknap* v. *Schild*, 161 U.S. 10, 18 (1896) ("But the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States.") (citations omitted); *Bates* v. *Clark*, 95 U.S. 204 (1877) (imposing personal liability on military officials who, though following orders, wrongly seized private property in the mistaken belief that it was within Indian country); see also Carlos M. Vazquez & Stephen I. Vladeck, *State Law, The Westfall Act, and the Nature of the Bivens Question After Minneci* v. *Pollard*, 161 U. PA. L. REV. 509, 531-42 (2013) (discussing common law actions in the years preceding *Bivens*, and considering the effect of *Erie Railroad* v. *Tompkins*).

II. *BIVENS* AND THE WESTFALL ACT ARE CONSISTENT WITH THE HISTORIC REGIME OF PERSONAL LIABILITY OF FEDERAL OFFICERS.

It is within this historical context that this Court decided *Bivens*, 403 U.S. 388. In *Bivens*, the Court recognized a cause of action for damages directly under the Constitution against federal officers who violated the plaintiff's Fourth Amendment rights. *Id.*

At the time *Bivens* was decided, common law remedies for actions by federal officials remained available under state law. Writing for the majority, Justice Brennan observed the clear connection between the result in *Bivens* and the traditional regime: "damages [for constitutional violations] should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395. And, in his brief for respondents in *Bivens*, Solicitor General Griswold maintained that "the plan envisaged when the Bill of Rights was passed" was that a person injured by a breach of the Constitution "may . . . proceed . . . by suit at common law . . . for damages for the illegal act." Br. for Respondents at 40, 403 U.S. 388 (Nov. 24, 1970) (No. 301); see also *Bivens*, 403 U.S. at 409 (Harlan, J., concurring) (noting the undesirability of subjecting federal officials to "different rules of liability . . . depend[ing] on the State where the injury occurs."); accord *Carlson* v. *Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting).

Since *Bivens*, subsequent cases have established the circumstances in which *Bivens* actions are available and reinforced the point that the modern constitutional tort claim continues the tradition of common law actions under English and early American law. Thus, civilians may sue military personnel who violate their constitutional rights. *Saucier* v. *Katz*, 533 U.S. 194 (2001) (evaluating claim against military officers under qualified, not absolute, immunity standard), *modified on other grounds*, *Pearson* v. *Callahan*, 555 U.S. 223 (2009). Further, *Bivens* actions have been permitted against cabinet members and other high-ranking government officers. See, e.g., *Mitchell* v. *Forsyth*, 472 U.S. 511

(1985) (applying qualified immunity standard, rather than absolute immunity, to suit against Attorney General); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity standard applies to senior presidential aide); *Butz* v. *Economou*, 438 U.S. 478 (1978) (same, with regard to Secretary of Agriculture). *Bivens* actions are also available to prisoners who have been abused or mistreated by federal jailors. See *Carlson*, 446 U.S. 14. While the doctrine of qualified immunity for federal officers has developed in parallel with modern *Bivens* actions, it is critical to note that over the last 40 years, the federal courts have consistently declined to apply absolute immunity to block suits against such officers. See *Vance* v. *Rumsfeld*, 701 F.3d 193 (7th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3460 (U.S. Feb. 5, 2013) (No. 12-976) (Hamilton, J., dissenting) (collecting cases).

A. The Westfall Act ratified *Bivens* as the sole heir to the common law tradition.

In 1988, Congress passed the Westfall Act, 28 U.S.C. § 2679(b)(1), which narrowed, but maintained, the historic pre-*Bivens* regime by purporting to preempt[2] common law torts, while preserving suits

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[2] *Amici* disagree on the scope of § 2679(b)(2)(A)'s constitutional torts exception. Professor Pfander interprets this provision as extinguishing all state-law tort claims, whereas Professor Vladeck believes that the statute should be interpreted to preserve state law claims that vindicate constitutionally protected interests. Vazquez & Vladeck, *supra* p. 8. *Cf.* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 132–38 (2009). Dictum in *Minneci* v. *Pollard*, 132 S. Ct. 617, 623 (2012), supports Professor Pfander's interpretation, which is adopted for the purposes of this brief. Professor

"for a violation of the Constitution of the United States." *Id.* § 2679(b)(2)(A). This law was enacted in response to this Court's unanimous decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), which recognized the continuing availability of state tort claims against federal officers, holding that absolute immunity did not shield federal employees from common law claims involving non-discretionary duties. The Westfall Act preempts non-federal remedies against federal employees acting within the scope of their employment, except those "brought for a violation of the Constitution of the United States." 8 U.S.C.A. § 2679(b)(2)(A). The Act's accompanying legislative history made clear that this provision was meant to preserve *Bivens* claims. See H.R. Rep. No. 100-700 at 6 (1988) ("Since the Supreme Court's decision in *Bivens*, the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, [the Act] would not affect the ability of victims of constitutional torts to seek personal redress from federal employees who allegedly violate their constitutional rights.").

The Westfall Act displaced state common law tort claims against federal officials—the traditional means of vindicating constitutional rights—but preserved constitutional tort claims under *Bivens*. *Bivens* actions have thus become a primary means of vindicating constitutional violations and deterring federal officials from violating clearly established

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Vladeck agrees that, to the extent that *Minneci's* dictum properly states the law, the necessary implication is that Congress in the Westfall Act intended to presumptively recognize a *Bivens* right of action in circumstances where relief would previously have been available under state law. *See*, *e.g.*, Vazquez & Vladeck, *supra* p. 8, at 577-79.

constitutional rights. In situations where retrospective relief provides the only effective avenue of redress, and other remedies, such as claims under the FTCA, are inadequate or unavailable,[3] *Bivens* actions remain the *only* means of vindicating constitutional rights. 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 omitted). Accordingly, with the passage of the Westfall Act, Congress ratified[4] *Bivens* and has replaced the common law regime with a constitutional tort regime that is predicated on the availability of a *Bivens* remedy against federal officials who commit constitutional violations in contexts in which no constitutionally adequate legislative remedy is available.[5]

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[3] In the instant case, Plaintiffs have no remedy available to them under the FTCA because several FTCA provisions bar suit for the conduct at issue. See 28 U.S.C. § 2680 (k) (barring claims arising in foreign countries); *id.* § 2680(h) (barring most intentional tort claims).

[4] As this Court has recognized, Congress was influenced by the availability of *Bivens* actions before the passage of the Westfall Act. *Carlson*, 446 U.S. at 19 n.5, 19–20 (1980) ("[T]he congressional comments accompanying [the FTCA] amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action. . . . In the absence of a contrary expression from Congress, § 2680(h) thus contemplates that victims . . . shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials . . . .") (internal quotation marks and citation omitted).

[5] For more comprehensive treatments of this argument, see James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 132–38 (2009); Vazquez & Vladeck, *supra* p. 8.

The argument for the routine recognition of *Bivens* actions after passage of the Westfall Act gains additional force from 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 federal statute in order to avoid the "serious constitutional question" that would arise if the statute were construed to preclude judicial review of constitutional questions); *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"); *Johnson* v. *Robison*, 415 U.S. 361, 366-67 (1974) (construing statute not to bar jurisdiction, in order to avoid the "serious question[]" of the validity of barring the federal courts from deciding the constitutionality of veteran's benefits legislation); see also Vazquez & Vladeck, *supra* p. 8, at 580-582.

B. The Convention Against Torture.

The presumptive availability of the *Bivens* action plays a key role in effectuating the obligations that the United States has undertaken under the United Nations Convention Against Torture ("CAT"). Article 14 of the CAT requires that:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result

> of an act of torture, his dependants shall be entitled to compensation.

United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, U.S.-U.N., Dec. 10, 1984, 1465 U.N.T.S. 85.

When the Senate ratified the treaty, *Bivens* actions were presumptively available for the types of injuries the treaty sought to prevent, when caused by U.S. officials.[6] In its ratification, the Senate specified that it interpreted the terms cruel, "inhuman, or degrading treatment or punishment" to mean "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States," S. TREATY DOC. NO. 100-20 (1988), violations of which are actionable under § 1983 and *Bivens*. Moreover, because the CAT is not self-executing, Congress and the executive branch have taken steps to comply with some of the United States' obligations under the CAT, see, e.g., Torture Victim Protection Act of 1991, Pub. L. 102-256, codified as note to the Alien Tort Statute, 28 U.S.C. § 1350 (permitting civil remedies for victims of torture by government officials of other nations); 8 C.F.R. § 208.18 (establishing procedures to prevent the removal of aliens whose removal would violate U.S.

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[6] Article 14 of the CAT requires each party state to provide civil remedies to *all* victims of torture who are subject to its jurisdiction. Torture by foreign officials is redressable under the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992); torture by United States contractors acting under color of law is actionable under state law, cf. *Al Shimari* v. *CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc). Thus, *Bivens* actions play the crucial role of providing a remedy to victims of torture by United States government officials.

treaty obligations under CAT); § 2242(a), Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (implementing United States' non-refoulement obligations under the CAT). However, Congress did not need to take legislative action in order to implement Article 14 because *Bivens* and its progeny were already available for violations of the amendments that the Senate interpreted to be coextensive with its treaty obligations (in conjunction with actions under 42 U.S.C. § 1983, for victims of torture committed by state actors). See *Carlson*, 446 U.S. 14 (holding that Eighth amendment violations are actionable under *Bivens*); *Davis* v. *Passman*, 442 U.S. 228 (1979) (recognizing the availability of *Bivens* action for Fifth Amendment violation).

Accordingly, on two separate occasions, the Department of State has represented to the international community that *Bivens* actions are available as a means of redress for victims of torture. See United States Written Response to Questions Asked by the United Nations Committee Against Torture, U.S. DEP'T OF STATE, (Apr. 28, 2006) (Question Five), *available at* http://www.state.gov/j/drl/rls/68554.htm (last accessed Mar. 10, 2013); Consideration of Reports Submitted By States Parties Under Art. 19 Of The Convention, Addendum Of The United States Of America, UNITED NATIONS COMMITTEE AGAINST TORTURE, ¶ 51, (Oct. 15, 1999), *available at* http://www.state.gov/documents/organization/100296.pdf (last accessed Mar. 10, 2013) (listing *Bivens* actions as an "avenue[] for seeking redress, including financial compensation"). Moreover, the Reservations, Declarations, and Understandings to the CAT further emphasized that the United States

agreed to ensure the availability specifically of *damages* to victims of torture. See S. TREATY DOC. NO. 100-20 (1988) ("[I]t is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages . . . for acts of torture committed in territory under the jurisdiction of that State Party."). As was true when the CAT was ratified, the United States Government has relied on the availability of *Bivens* actions for victims of torture by U.S. officials in order to fulfill its international obligations.

III. THE SEVENTH CIRCUIT'S ANALYSIS CONFLICTS WITH THIS COURT'S IMMUNITIES AND *BIVENS* JURISPRUDENCE AND THREATENS THE ABILITY OF THE UNITED STATES TO FULFILL ITS TREATY OBLIGATIONS.

The *en banc* majority opinion below framed the question before it as "whether to create an extra-statutory right of action for damages against military personnel." *Vance*, 701 F.3d at 198. The majority concluded that without explicit approval from Congress, a private right of action would be inappropriate. *Id.* at 200. As the first two sections of this brief show, however, a regime of personal liability for acts outside the scope of official authority has been the rule—not the exception—for nearly three centuries. See *id.* at 212 (Hamilton, J., dissenting) ("Plaintiffs are not asking this court to *create* a cause of action. It already exists.") (emphasis in original); see also *id.* at 206-207 (Wood, J., concurring in the judgment) ("Almost every part" of the claim that the court is being asked to create a right of action "needs closer examination."). Further, despite the Seventh Circuit's concern that a *Bivens* remedy would "divert[] Cabinet officers' time from

management of public affairs to defense of their bank accounts," *id.* at 202, *Bivens* continues the practice of allowing wronged citizens to sue officers personally for their misconduct, while providing routine indemnification to officers who act within the scope of their duties. See Cornelia T. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65-104, 77 (1999) ("[a]s a practical matter," indemnification under the *Bivens* regime has been "a virtual certainty.").

The Seventh Circuit misapplied this Court's standard for recognizing constitutional torts under *Bivens*, which first asks whether adequate alternative remedies exist for victims to vindicate their constitutional rights, such that the court has a compelling reason to abstain from recognizing a damages remedy; and second whether other "special factors counseling hesitation" weigh against allowing the cause of action to proceed. See *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). The majority focused its attention on the second prong of this analysis, and found that national security, as well as the judiciary's traditional reluctance to create remedies in the military sphere, counseled against a *Bivens* remedy here. After discussing the possibility of Petitioners seeking relief under the Military Claims Act and the Foreign Claims Act, the majority recognized that these statutory remedies were not "full substitutes" for a *Bivens* action; but it nonetheless asserted that the other remedies demonstrated that "[Congress] has considered best how to address the fact that the military can injure persons by improper conduct." *Vance*, 701 F.3d at 201. As the above discussion makes clear, Congress has legislated under the assumption that *Bivens* actions are available for

violations of the Fourth Amendment, Eighth Amendment, and the Due Process Clause of the Fifth Amendment. Yet in reaching its conclusion, the majority envisioned a congressional regime in which no redress is available for plaintiffs in petitioners' position. *None* of the remedies discussed by the majority was in fact available to the petitioners.[7]

In the same way, other statutory schemes, such as the Detainee Treatment Act (DTA), recognize the implicit availability of *Bivens* actions. In pertinent part, the DTA provides that "[i]n any civil action . . . against an officer, employee, member of the Armed Forces, or other agent of the United States Government" such officers and agents can defend themselves against claims of torture on the grounds that, in good faith, they "did not know that the practices were unlawful." 42 U.S.C. § 2000dd-1(a). The Seventh Circuit concluded that, with this statement, Congress was merely "mak[ing] doubly sure that federal employees will not be [held] personally liable." *Vance*, 701 F.3d at 201–02. In the context of the legal structure described above, however, this conclusion is untenable. Because the

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[7] As Judge Hamilton explained in his dissent

> Looking to other legislation, the majority criticizes plaintiffs for not having sought relief under the Military Claims Act, 10 U.S.C. § 2733, or the Foreign Claims Act, 10 U.S.C. § 2734, ... At the most basic level, those laws simply do not apply to claims for constitutional violations. 32 C.F.R. § 536.42. Nor do they apply to intentional torts, including assault, battery, and false imprisonment. 32 C.F.R. § 536.45(h). Plaintiffs would have been wasting everyone's time by asserting claims under either Act.

Vance, 701 F.3d at 220 (Hamilton, J., dissenting) (footnote omitted).

Westfall Act eliminated all non-constitutional causes of action against officers of the United States, Congress reasonably could only have been referring to *Bivens* actions when referencing "civil actions" against Government employees. *Id.* at 219-20 (Hamilton, J., dissenting). Moreover, the three statutory provisions the Seventh Circuit cited as other examples of Congress legislating in order to "make doubly sure" that federal officials are immune from liability afford absolute, not qualified immunity to those officials. *Id.* at 202 (citing the Westfall Act (28 U.S.C. § 2679), 42 U.S.C. § 233(a), and Section 7(a) of the Military Commissions Act, 28 U.S.C. § 2241(e)(2)[8]). However, unlike a grant of absolute immunity, which extinguishes all possible causes of action that can be brought against a defendant, a grant of qualified immunity is only meaningful on the assumption that a cause of action exists.

Fundamentally, the Seventh Circuit's analysis conflates the immunity and availability inquiries under *Bivens*, resulting in the unprecedented conclusion that *Bivens* actions are unavailable against military defendants, regardless of the constitutional provisions allegedly violated. *Id.* at 198-203; *Id.* at 212 (Hamilton, J., dissenting) (the majority has "in effect create[d] a new absolute immunity from *Bivens* liability for all members of the U.S. military.").

As this Court has repeatedly emphasized, the inquiry into whether *Bivens* is available is distinct

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[8] Note that none of these three immunities is applicable here. As discussed above, 28 U.S.C. § 2679(b)(1) does not apply to claims of constitutional violations; 42 U.S.C. § 233(a) is applicable only to medical, surgery or dental procedures; and 28 U.S.C. § 2241(e)(2) is applicable only to aliens detained as enemy combatants.

from the inquiry into whether particular governmental agents are entitled to immunity. *United States* v. *Stanley*, 483 U.S. 669, 684 (1987) ("[T]he availability of a damages action under the Constitution for particular *injuries* . . . is a question logically distinct from immunity to such an action on the part of particular *defendants*") (emphasis supplied); *Hui* v. *Castaneda*, 130 S. Ct. 1845, 1851-52 (2010) ("There are two separate inquiries involved in determining whether a *Bivens* action may proceed against a federal agent: whether the agent is amenable to suit, and whether a damages remedy is available for a particular constitutional violation absent authorization by Congress") (citation omitted). What is more, this Court has never differentiated between different classes of federal employees in determining whether a specific injury is actionable under *Bivens*. *Bivens* itself identifies "federal officials" as possible defendants. 403 U.S. at 395. In holding that a *Bivens* defendant's status as a member of the military is a "special factor" that is categorically sufficient to preclude *Bivens* actions, the Seventh Circuit reached a sweeping, unprecedented result that is inconsistent with this Court's jurisprudence.

Finally, the Seventh Circuit's decision puts the United States in violation of its obligation to provide means of redress for victims of torture by U.S. officials, under Article 14 of the CAT. The combination of U.S. law and U.S. treaty obligations creates a coherent structure, in which private rights of action for constitutional violations play a vital role. When viewed together: (1) the CAT's requirement that victims of U.S. torture be provided with a right of action for damages; (2) the presumptive availability of *Bivens* actions when the CAT was

ratified; (3) the preservation of civil actions against federal employees for "violation[s] of the Constitution of the United States" in the Westfall Act (enacted the same year that the Senate ratified the CAT) (28 U.S.C. § 2679(b)(2)(A)); and (4) the State Department's repeated assertions that *Bivens* actions are available to provide redress for victims of Fifth and Eighth Amendment violations committed by federal officials, it is clear that Congress envisioned that *Bivens* actions would continue to be available to redress victims of torture.

Given this Court's *Bivens* jurisprudence, as ratified in the Westfall Act, and given the United States' obligations under the CAT, Congress had ample reason to make such an assumption when legislating.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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