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DUBLIN LITIGATION: DAMAGES ACTIONS

Litigation against the Federal Bureau of Prisons is different than litigating against state or local actors. 42 U.S.C. § 1983 does not apply, and the immunities and defenses are different. Proceed thoughtfully.

I. *Bivens* actions—a review.

a. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was the traditional way of suing individual federal employees for Constitutional violations.

b. *Carlson v. Green*, 446 U.S. 14 (1980). The Supreme Court extended *Bivens* to include an Eighth Amendment violation in which federal prison officials failed to provide adequate medical treatment for a prisoner's asthma, resulting in his death.

c. But then came *Ziglar v. Abbasi*, 582 U.S. 120 (2017). The Court held there should be no extension of *Bivens* into new contexts whenever there are special factors that counsel against the extension.

d. And in *Egbert v. Boule*, 596 U.S. 482 (2022) (a Border Patrol case), the Court was clear that they really meant it.

> " [I] n all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts." *Id.* (Thomas, J.)

> " In fairness to future litigants and our lower court colleagues, we should not hold out that kind of false hope, and in the process invite still more

> protracted litigation destined to yield nothing. Instead, we should exercise the truer modesty of ceding an ill-gotten gain, and forthrightly return the power to create new causes of action to the people's representatives in Congress." *Id.* (Gorsuch, J., concurring)

e. After *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), even the precedent of *Carlson v. Green* probably doesn't mean much.

> *Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences.
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> *Id.* at 23.

II. Injunctive claims—they are still there!

a. These are not brought under *Bivens*

b. Query if still good after *Egbert.*

III. Congressional action is needed to amend § 1983 or enact other legislation to clarify. But, in the meantime…

IV. The Federal Tort Claims Act—also still there.

a. Almost every court that has looked at it says that only the administrative claim form is a precondition to an FTCA suit, not the internal BOP administrative remedies.

b. But: *Pressley v. United States*, No. 2:21-cv-00202-JMS-MG, 2023 U.S. Dist. LEXIS 182650, at *5 (S.D. Ind. Oct. 11, 2023) (pro se).

> Thus, incarcerated plaintiffs suing the United States must exhaust available administrative remedies within the prison and also complete the tort claim process before filing their lawsuit. Because the defendant's motion for summary judgment focuses on the plaintiffs' failure to exhaust the notice of tort claim process and

that issue is dispositive, the Court does not address whether any plaintiff exhausted the grievance process under the PLRA.

c. Beware of Discretionary Function Exception: preserves the United States' sovereign immunity against "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the [United States], whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

d. Limits fees to 25%

V. Creative Solutions

a. Have we misunderstood the Westfall Act?

i. 28 U.S.C. § 2679(b): FTCA claim is exclusive of any other claim against a federal employee acting within the scope of employment but does not apply to "a civil action against an employee of the Government which is brought for a violation of the Constitution of the United States". Does that mean only *Bivens* actions?

ii. Must read: *Vazquez and Vladeck, State Law, The Westfall Act, and the Nature of the Bivens Question*, 161 U. Pa. L. Rev. 509 (2013). Essentially, the argument is that the act does not prevent state torts against federal officers when the underlying conduct violates the Constitution.

iii. *Buchanan v. Barr*, 71 F.4th 1003 (D.C. Cir. 2023) (Wilkins, J., concurring)

> On a broad reading of the exception, a suit might count as "brought for a violation of the Constitution" if its *purpose* is to remedy a constitutional violation. For instance, a state trespass suit could proceed if its goal was to remedy an unconstitutional search. That interpretation arguably tracks the ordinary meaning of the phrase "brought for". Courts have long used it to describe the goal of a suit, not the cause of action. *See, e.g.*, *Escanaba Co. v. Chi.*, 107

U.S. 678, 684, 2 S. Ct. 185, 27 L. Ed. 442 (1882) (describing a suit as "brought for damages").

Id. at 101.

iv. *Byrd v. Lamb*, 990 F.3d 879, 883–85 (5th Cir. 2021) (Willett, J., concurring)

> Chief Justice John Marshall warned in 1803 that when the law no longer furnishes "a remedy for the violation of a vested legal right," the United States "cease[s] to deserve th[e] high appellation" of being called "a government of laws, and not of men." Fast forward two centuries, and redress for a federal officer's unconstitutional acts is either extremely limited or wholly nonexistent, allowing federal officials to operate in something resembling a Constitution-free zone. *Bivens* today is essentially a relic, technically on the books but practically a dead letter, meaning this: If you wear a federal badge, you can inflict excessive force on someone with little fear of liability.
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> At bottom, *Bivens* poses the age-old structural question of American government: who decides—the judiciary, by creating implied damages actions for constitutional torts, or Congress, by reclaiming its lawmaking prerogative to codify a *Bivens*-type remedy (or by nixing the preemption of state-law tort suits against federal officers)? Justices Thomas and Gorsuch have called for *Bivens* to be overruled, contending it lacks any historical basis. **Some constitutional scholars counter that judge-made tort remedies against lawless federal officers date back to the Founding.** Putting that debate aside, Congress certainly knows how to provide a damages action for unconstitutional conduct. Wrongs inflicted by state officers are covered by § 1983. But wrongs inflicted by federal officers are not similarly lighted, leaving constitutional interests violated but not vindicated. And it certainly smacks of self-dealing when Congress subjects state and local officials to money damages for violating the Constitution but gives a pass to rogue federal officials who do the same. Such imbalance—denying federal remedies while preempting nonfederal remedies—seems innately unjust.

> I am certainly not the first to express unease that individuals whose constitutional rights are violated at the hands of federal officers are essentially remedy-less. 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.

b. Have we ignored the Trafficking Victims Protection Act?

   i. 18 U.S.C. § 1595 provides an individual cause of action for anyone who was a victim of any of the offenses outlined in the TVPA (forced labor and sex trafficking).

   > An individual who is a victim of a violation of this chapter [18 USCS §§ 1581 et seq.] may bring a civil action against the perpetrator (or whoever knowingly benefits, or attempts or conspires to benefit, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter [18 USCS §§ 1581 et seq.]) in an appropriate district court of the United States and may recover damages and reasonable attorneys' fees.

   ii. § 1591 defines sex trafficking as knowing participation or benefitting from a venture (just 2+ individuals) that obtains commercial sex acts through force, fraud, or coercion.

   iii. A commercial sex act is any sex act that in which a thing of value is given. Value is broadly defined. *See* *David v. Weinstein*, 334 F. Supp. 3d 290 (S.D.N.Y. 2018).

   > Plaintiff, an aspiring actress, received meetings—private meetings—with one of the most influential producers in her industry, as well as opportunities for potential movie and television roles based on her contact with him. *Id.* at 303.

   iv. Covers forced labor of detainees *Owino v. CoreCivic, Inc.*, 60 F.4th 437 (9th Cir. 2022).

> The persuasive weight of the text of these policies is augmented by the statements of ICE detainees themselves, who declared that they were in fact required to clean common areas—without payment and under threat of punishment—in line with the policies. Further, one of CoreCivic's own senior managers testified that CoreCivic facilities do not have the ability to opt out of these company-wide, "standard policies." *Id.* at 44.

v. Coercion includes threats of harm, physical restraint (like the SHU), or threatened abuse of legal process. *Bielas v. Cnty. of Alameda*, 519 F. Supp. 3d 636 (N.D. Cal. 20).

> Plaintiffs sufficiently allege that Aramark obtains Plaintiffs' labor by threats of physical restraint. That the physical restraint would be imposed by the County rather than Aramark does not change the analysis. Aramark employees' threats to report Plaintiffs to coerce them to work carry the same effect as if Sheriff's deputies made the threats; no matter who makes the threats, they lead to Plaintiffs providing labor for fear that they will be placed in solitary confinement. *Id.* at 64.
>
> Plaintiffs sufficiently allege that Aramark abused the legal process. The purpose of longer jail sentences and solitary confinement is not to force pretrial detainees to provide labor. Yet, Aramark threatened inmates that they could face punishments which Plaintiffs understood to include solitary confinement and lengthier sentences if they refused to work. *Id.* at 64.

vi. The US is immune, but individual employees are not (though they have qualified immunity). *Hornof v. Waller*, 2:19-cv-00198-JDL, p. 20-22, 2020 U.S. Dist. LEXIS 198577 (D. Me. Oct. 20, 2020).

vii. 10-year statute of limitations.

viii. Not limited by PLRA fee caps.

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics

Supreme Court of the United States

January 12, 1971, Argued ; June 21, 1971, Decided

No. 301

Reporter
403 U.S. 388 *; 91 S. Ct. 1999 **; 29 L. Ed. 2d 619 ***; 1971 U.S. LEXIS 23 ****

BIVENS v. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS

Subsequent History: On remand at Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339, 1972 U.S. App. LEXIS 10860 (2d Cir. N.Y., 1972)

Prior History:

[****1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 409 F.2d 718, 1969 U.S. App. LEXIS 12867 (2d Cir. N.Y., 1969)

Disposition:

409 F.2d 718, reversed and remanded.

Syllabus

Petitioner's complaint alleged that respondent agents of the Federal Bureau of Narcotics, acting under color of federal authority, made a warrantless entry of his apartment, searched the apartment, and arrested him on narcotics charges. All of the acts were alleged to have been done without probable cause. Petitioner's suit to recover damages from the agents was dismissed by the District Court on the alternative grounds (1) that it failed to state a federal cause of action and (2) that respondents were immune from suit by virtue of their official position. The Court of Appeals affirmed on the first ground alone. Held:

1. Petitioner's complaint states a federal cause of action under the Fourth Amendment for which damages are recoverable upon proof of injuries resulting from the federal agents' violation of that Amendment. Pp. 390-397.

2. The Court does not reach the immunity question, which was not passed on by the Court of Appeals. [****2] Pp. 397-398.

Counsel: Stephen A. Grant argued the cause and filed a brief for petitioner.

Jerome Feit argued the cause for respondents. On the brief were Solicitor General Griswold, Assistant Attorney General Ruckelshaus, and Robert V. Zener.

Melvin L. Wulf filed a brief for the American Civil Liberties Union as amicus curiae urging reversal.

Judges: Brennan, J., delivered the opinion of the Court, in which Douglas, Stewart, White, and Marshall, JJ., joined. Harlan, J., filed an opinion concurring in the judgment, post, p. 398. Burger, C. J., post, p. 411, Black, J., post, p. 427, and Blackmun, J., post, p. 430, filed dissenting opinions.

Opinion by: BRENNAN

Opinion

[*389] [***622] [**2001] MR. JUSTICE BRENNAN delivered the opinion of the Court.

[1A]The Fourth Amendment provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

In Bell v. Hood, 327 U.S. 678 (1946), [****3] we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

[2]On July 7, 1967, petitioner brought suit in Federal District Court. In addition to the allegations above, his complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly [****4] read, it alleges as well that the arrest was made without probable cause. 1

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Petitioner's complaint does not explicitly state that the agents had no probable cause for his arrest, but it does allege that the arrest was "done unlawfully, unreasonably and contrary to law." App. 2. Petitioner's affidavit in support of his motion for summary judgment swears that the search was "without cause, consent or warrant," and that the arrest was "without cause, reason or warrant." App. 28.

Petitioner [***623] claimed to have suffered great humiliation, [*390] embarrassment, and mental suffering as a result of the agents' unlawful conduct, and sought $ 15,000 damages from each of them. The District Court, on respondents' motion, dismissed the complaint on the ground, inter alia, that it failed to state a cause of action. 2

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The agents were not named in petitioner's complaint, and the District Court ordered that the complaint be served upon "those federal agents who it is indicated by the records of the United States Attorney participated in the November 25, 1965, arrest of the [petitioner]." App. 3. Five agents were ultimately served.

[****5] 276 F.Supp. 12 (EDNY 1967). The Court of Appeals, one judge concurring specially, 3

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Judge Waterman, concurring, expressed the thought that "the federal courts can . . . entertain this cause of action irrespective of whether a statute exists specifically authorizing a federal suit against federal officers for damages" for acts such as those alleged. In his view, however, the critical point was recognition that some cause of action existed, albeit a state-created one, and in consequence he was willing "as of now" to concur in the holding of the Court of Appeals. 409 F.2d, at 726 (emphasis in original).

affirmed on that basis. 409 F.2d 718 (CA2 1969). We granted certiorari. 399 U.S. 905 (1970). We reverse.

I

Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal agents. In respondents' view, however, the rights that petitioner asserts -- primarily [**2002] rights of privacy -- are creations of state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents [****6] could defend [*391] the state law tort suit by asserting that their actions were a valid

exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals. Candidly admitting that it is the policy of the Department of Justice to remove all such suits from the state to the federal courts for decision, 4

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"Since it is the present policy of the Department of Justice to remove to the federal courts all suits in state courts against federal officers for trespass or false imprisonment, a claim for relief, whether based on state common law or directly on the Fourth Amendment, will ultimately be heard in a federal court." Brief for Respondents 13 (citations omitted); see 28 U. S. C. 1442 (a); Willingham v. Morgan, 395 U.S. 402 (1969). In light of this, it is difficult to understand our Brother BLACKMUN's complaint that our holding today "opens the door for another avalanche of new federal cases." Post, at 430. In estimating the magnitude of any such "avalanche," it is worth noting that a survey of comparable actions against state officers under 42 U. S. C. 1983 found only 53 reported cases in 17 years (1951-1967) that survived a motion to dismiss. Ginger & Bell, Police Misconduct Litigation -- Plaintiff's Remedies, 15 Am. Jur. Trials 555, 580-590 (1968). Increasing this figure by 900%to allow for increases in rate and unreported cases, every federal district judge could expect to try one such case every 13 years.

respondents nevertheless urge that we uphold dismissal of petitioner's complaint in federal court, and remit him to filing an action in the state courts in order that the case may properly be removed to the federal court for decision on the basis of state law.

[****7] [3] [4] [5]We think that respondents' thesis rests upon an unduly restrictive [***624] view of the Fourth Amendment's protection against unreasonable searches and seizures by federal agents, a view that has consistently been rejected by this Court. Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship [*392] between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting -- albeit unconstitutionally -- in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Cf. Amos v. United States, 255 U.S. 313, 317 (1921); United States v. Classic, 313 U.S. 299, 326 (1941). Accordingly, as our cases make clear, [****8] the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S., at 684 (footnote omitted); see Bemis Bros. Bag Co. v. United States, 289 U.S. 28, 36 (1933) (Cardozo, J.); The Western Maid, 257 U.S. 419, 433 (1922) (Holmes, J.).

[6] [7] [8]First. Our cases have long since rejected the notion that the Fourth Amendment [****9] proscribes only such conduct as would, if engaged in by private persons, be condemned by state law. Thus in Gambino v. United States, 275 U.S. 310 (1927), petitioners [**2003] were convicted of conspiracy to violate the National Prohibition Act on the basis of evidence seized by state police officers incident to petitioners' arrest by those officers solely for the purpose of enforcing federal law. Id., at 314. Notwithstanding the lack of probable cause for the arrest, id., at 313, it would have been permissible under state law if effected [*393] by private individuals.5

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New York at that time followed the common-law rule that a private person may arrest another if the latter has in fact committed a felony, and that if such is the case the presence or absence of probable cause is irrelevant to the legality of the arrest. See McLoughlin v. New York Edison Co., 252 N. Y. 202, 169 N. E. 277 (1929); cf. N. Y. Code Crim. Proc. 183 (1958) for codification of the rule. Conspiracy to commit a federal crime was at the time a felony. Act of March 4, 1909, 37, 35 Stat. 1096.

[****11] It appears, moreover, that the officers were under direction from the Governor to aid in the enforcement of federal law. Id., at 315-317. Accordingly, if the Fourth Amendment reached only to conduct impermissible under the law of the State, the Amendment would have had no application to the case. Yet this Court held the Fourth Amendment applicable and reversed petitioners' convictions as having been based upon evidence obtained through an unconstitutional search and seizure. Similarly, in Byars v. United States, 273 U.S. 28 [***625] (1927), [****10] the petitioner was convicted on the basis of evidence seized under a warrant issued, without probable cause under the Fourth Amendment, by a state court judge for a state law offense. At the invitation of state law enforcement officers, a federal prohibition agent participated in the search. This Court explicitly refused to inquire whether the warrant was "good under the state law . . . since in no event could it constitute the basis for a federal search and seizure." Id., at 29 (emphasis added).6

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Conversely, we have in some instances rejected Fourth Amendment claims despite facts demonstrating that federal agents were acting in violation of local law. McGuire v. United States, 273 U.S. 95 (1927) (trespass ab initio); Hester v. United States, 265 U.S. 57 (1924) ("open fields" doctrine); cf. Burdeau v. McDowell, 256 U.S. 465 (1921) (possession of stolen property).

And our recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the [*394] niceties of local trespass laws. Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Silverman v. United States, 365 U.S. 505, 511 (1961). In light of these cases, respondents' argument that the Fourth Amendment serves only as a limitation on federal defenses to a state law claim, and not as an independent limitation upon the exercise of federal power, must be rejected.

[9] [10] [11] [12]Second. The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile. Thus, we may bar the

door against an unwelcome private intruder, or call the police if he persists in seeking [****12] entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. See W. Prosser, The Law of Torts 18, pp. 109-110 (3d ed. 1964); 1 F. Harper & F. James, The Law of Torts 1.11 (1956). But one who demands admission under a claim of federal authority stands in a far different [**2004] position. Cf. Amos v. United States, 255 U.S. 313, 317 (1921). The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. See Weeks v. United States, 232 U.S. 383, 386 (1914); Amos v. United States, supra. 7

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Similarly, although the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant, Marron v. United States, 275 U.S. 192, 196 (1927); see Stanley v. Georgia, 394 U.S. 557, 570-572 (1969) (STEWART, J., concurring in result), a private individual lawfully in the home of another will not normally be liable for trespass beyond the bounds of his invitation absent clear notice to that effect. See 1 F. Harper & F. James, The Law of Torts 1.11 (1956).

[****14] "In such cases there [***626] is no safety for the citizen, [*395] except in the protection of the judicial tribunals, for rights which have been invaded by [****13] the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime." United States v. Lee, 106 U.S. 196, 219 (1882).8

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Although no State has undertaken to limit the common-law doctrine that one may use reasonable force to resist an unlawful arrest by a private person, at least two States have outlawed resistance to an unlawful arrest sought to be made by a person known to be an officer of the law. R. I. Gen. Laws 12-7-10 (1969); State v. Koonce, 89 N. J. Super. 169, 180-184, 214 A. 2d 428, 433-436 (1965).

Nor is it adequate to answer that state law may take into account the different status of one clothed with the authority of the Federal Government. For just as state law may not authorize federal agents to violate the Fourth Amendment, Byars v. United States, supra; Weeks v. United States, supra; In re Ayers, 123 U.S. 443, 507 (1887), neither may state law undertake to limit the extent to which federal authority can be exercised. In re Neagle, 135 U.S. 1 (1890). The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action. Cf. Boilermakers v. Hardeman, 401 U.S. 233, 241 (1971).

[1B] [13] [14]Third. That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal

interests in liberty. See Nixon v. Condon, 286 U.S. 73 (1932); [*396] Nixon v. Herndon, 273 U.S. 536, 540 (1927); Swafford v. Templeton, 185 U.S. 487 (1902); [****15] Wiley v. Sinkler , 179 U.S. 58 (1900); J. Landynski, Search and Seizure and the Supreme Court 28 et seq. (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 43 et seq. (1937); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. Pa. L. Rev. 1, 8-33 (1968); cf. West v. Cabell, 153 U.S. 78 (1894); Lammon v. Feusier, 111 U.S. 17 (1884). Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S., at 684 (footnote omitted). The present [**2005] case involves no special factors counselling hesitation in the absence of affirmative action by [****16] Congress. We are not dealing with a question of "federal fiscal policy," as in United States v. Standard Oil Co., 332 U.S. 301, 311 (1947). In that case we refused to infer from the Government-soldier relationship that [***627] the United States could recover damages from one who negligently injured a soldier and thereby caused the Government to pay his medical expenses and lose his services during the course of his hospitalization. Noting that Congress was normally quite solicitous where the federal purse was involved, we pointed out that "the United States [was] the party plaintiff to the suit. And the United States has power at any time to create the liability." Id., at 316; see United States v. Gilman, 347 U.S. 507 (1954). Nor are we asked in this case to impose liability upon a congressional employee for actions contrary to no constitutional [*397] prohibition, but merely said to be in excess of the authority delegated to him by the Congress. Wheeldin v. Wheeler, 373 U.S. 647 (1963). Finally, we cannot accept respondents' formulation of the question as whether the availability of [****17] money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. Cf. J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); Jacobs v. United States, 290 U.S. 13, 16 (1933). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 1 Cranch 137, 163 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, supra, at 390-395, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result [****18] of the agents' violation of the Amendment.

II

[15]In addition to holding that petitioner's complaint had failed to state facts making out a cause of action, the District Court ruled that in any event respondents were immune from liability by

virtue of their official position. 276 F.Supp., at 15. This question was not passed upon by the Court of Appeals, and accordingly we do not consider [*398] it here. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Concur by: HARLAN

Concur

MR. JUSTICE HARLAN, concurring in the judgment.

My initial view of this case was that the Court of Appeals was correct in dismissing the complaint, but for reasons stated in this opinion I am now persuaded to the contrary. Accordingly, I join in the judgment of reversal.

Petitioner alleged, in his suit in the District Court for the Eastern District of New York, that the defendants, [***628] federal agents acting under color of federal law, subjected him to a search and seizure contravening the requirements of the [****19] Fourth Amendment. He sought damages in the amount of $ 15,000 from each of the agents. Federal jurisdiction [**2006] was claimed, inter alia, 1

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Petitioner also asserted federal jurisdiction under 42 U. S. C. 1983 and 28 U. S. C. 1343 (3), and 28 U. S. C. 1343 (4). Neither will support federal jurisdiction over the claim. See Bivens v. Six Unknown Named Agents, 409 F.2d 718, 720 n. 1 (CA2 1969).

under 28 U. S. C. 1331 (a) which provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $ 10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The District Court dismissed the complaint for lack of federal jurisdiction under 28 U. S. C. 1331 (a) and failure to state a claim for which relief may be granted. 276 F.Supp 12 (EDNY 1967). On appeal, the Court of Appeals concluded, on the basis of this Court's decision in Bell v. Hood, 327 U.S. 678 (1946), that petitioner's claim for damages did "[arise] under the Constitution" [*399] within the meaning of 28 U. S. C. 1331 (a); but the District Court's judgment was affirmed on the

ground that the complaint failed to state a claim for which relief can be granted. 409 F.2d 718 (CA2 1969).

[****20] In so concluding, Chief Judge Lumbard's opinion reasoned, in essence, that: (1) the framers of the Fourth Amendment did not appear to contemplate a "wholly new federal cause of action founded directly on the Fourth Amendment," id., at 721, and (2) while the federal courts had power under a general grant of jurisdiction to imply a federal remedy for the enforcement of a constitutional right, they should do so only when the absence of alternative remedies renders the constitutional command a "mere 'form of words.'" Id., at 723. The Government takes essentially the same position here. Brief for Respondents 4-5. And two members of the Court add the contention that we lack the constitutional power to accord Bivens a remedy for damages in the absence of congressional action creating "a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment." Opinion of MR. JUSTICE BLACK, post, at 427; see also opinion of THE CHIEF JUSTICE, post, at 418, 422.

For the reasons set forth below, I am of the opinion that federal courts do have the power to award damages for violation of "constitutionally protected interests" [****21] and I agree with the Court that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment.

I

I turn first to the contention that the constitutional power of federal courts to accord Bivens damages for his claim depends on the passage of a statute creating a "federal cause of action." Although the point is not [*400] entirely free of ambiguity, 2

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See n. 3, infra.

I do not understand either the Government or my dissenting Brothers to maintain that Bivens' contention that he is entitled to be free from the type of official conduct prohibited [***629] by the Fourth Amendment depends on a decision by the State in which he resides to accord him a remedy. Such a position would be incompatible with the presumed availability of federal equitable relief, if a proper showing can be made in terms of the ordinary principles governing equitable remedies. See Bell v. Hood, 327 U.S. 678, 684 (1946). However broad a federal court's discretion concerning equitable remedies, it is absolutely clear -- at least after Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) -- that in a nondiversity [****22] suit a federal court's power to grant even equitable relief depends on the presence of a substantive right derived from federal law. Compare Guaranty Trust Co. v. York, 326 U.S. 99, 105-107 (1945), [**2007] with Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946). See also H. Hart & H. Wechsler, The Federal Courts and the Federal System 818-819 (1953).

Thus the interest which Bivens claims -- to be free from official conduct in contravention of the Fourth Amendment -- is a federally protected interest. See generally Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. Pa. L. Rev. 1, 33-34 (1968). 3

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The Government appears not quite ready to concede this point. Certain points in the Government's argument seem to suggest that the "state-created right -- federal defense" model reaches not only the question of the power to accord a federal damages remedy, but also the claim to any judicial remedy in any court. Thus, we are pointed to Lasson's observation concerning Madison's version of the Fourth Amendment as introduced into the House:

"The observation may be made that the language of the proposal did not purport to create the right to be secure from unreasonable search and seizures but merely stated it as a right which already existed."

N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 100 n. 77 (1937), quoted in Brief for Respondents 11 n. 7. And, on the problem of federal equitable vindication of constitutional rights without regard to the presence of a "state-created right," see Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 523-524 (1954), quoted in Brief for Respondents 17.

On this point, the choice of phraseology in the Fourth Amendment itself is singularly unpersuasive. The leading argument against a "Bill of Rights" was the fear that individual liberties not specified expressly would be taken as excluded. See generally, Lasson, supra, at 79-105. This circumstance alone might well explain why the authors of the Bill of Rights would opt for language which presumes the existence of a fundamental interest in liberty, albeit originally derived from the common law. See Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765).

In truth, the legislative record as a whole behind the Bill of Rights is silent on the rather refined doctrinal question whether the framers considered the rights therein enumerated as dependent in the first instance on the decision of a State to accord legal status to the personal interests at stake. That is understandable since the Government itself points out that general federal-question jurisdiction was not extended to the federal district courts until 1875. Act of March 3, 1875, 1, 18 Stat. 470. The most that can be drawn from this historical fact is that the authors of the Bill of Rights assumed the adequacy of common-law remedies to vindicate the federally protected interest. One must first combine this assumption with contemporary modes of jurisprudential thought which appeared to link "rights" and "remedies" in a 1:1 correlation, cf. Marbury v. Madison, 1 Cranch 137, 163 (1803), before reaching the conclusion that the framers are to be understood today as having created no federally protected interests. And, of course, that would simply require the conclusion that federal equitable relief would not lie to protect those interests guarded by the Fourth Amendment.

Professor Hart's observations concerning the "imperceptible steps" between In re Ayers, 123 U.S. 443 (1887), and Ex parte Young, 209 U.S. 123 (1908), see Hart, supra, fail to persuade me that the source of the legal interest asserted here is other than the Federal Constitution itself. In re Ayers concerned the precise question whether the Eleventh Amendment barred suit in a

federal court for an injunction compelling a state officer to perform a contract to which the State was a party. Having concluded that the suit was inescapably a suit against the State under the Eleventh Amendment, the Court spoke of the presence of state-created rights as a distinguishing factor supporting the exercise of federal jurisdiction in other contract clause cases. The absence of a state-created right in In re Ayers served to distinguish that case from the perspective of the State's immunity to suit; Ayers simply does not speak to the analytically distinct question whether the Constitution is in the relevant sense a source of legal protection for the "rights" enumerated therein.

Therefore, [***630] the question [*401] of judicial power to grant Bivens damages is not a problem of the "source" of the "right"; instead, the question is whether the power to authorize damages as a judicial [*402] remedy for the vindication of a federal [****23] constitutional right is placed by the Constitution itself exclusively in Congress' hands.

[****24] II

[**2008] The contention that the federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment. Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 213 (1944). Cf. Wyandotte Transportation Co. v. United States, 389 U.S. 191, 201-204 (1967). 4

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The Borak case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal cause of action. There we "implied" -- from what can only be characterized as an "exclusively procedural provision" affording access to a federal forum, cf. Textile Workers v. Lincoln Mills, 353 U.S. 448, 462-463 (1957) (Frankfurter, J., dissenting) -- a private cause of action for damages for violation of 14 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. 78n (a). See 27, 48 Stat. 902, 15 U. S. C. 78aa. We did so in an area where federal regulation has been singularly comprehensive and elaborate administrative enforcement machinery had been provided. The exercise of judicial power involved in Borak simply cannot be justified in terms of statutory construction, see Hill, Constitutional Remedies, 69 Col. L. Rev. 1109, 1120-1121 (1969); nor did the Borak Court purport to do so. See Borak, supra, at 432-434. The notion of "implying" a remedy, therefore, as applied to cases like Borak, can only refer to a process whereby the federal judiciary exercises a choice among traditionally available judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law. See ibid., and Bell v. Hood, supra, at 684.

[****25] [*403] If it is not the nature of the remedy which is thought to render a judgment as to the appropriateness of damages inherently "legislative," then it must be the nature of the [***631] legal interest offered as an occasion for invoking otherwise appropriate judicial relief. But I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy. Initially, I note that it would be at least anomalous to conclude that the federal judiciary -- while competent to choose among the range of traditional judicial remedies to implement statutory and commonlaw policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution, see Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); United States v. Standard Oil Co., 332 U.S. 301, 304-311 (1947); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) -- is powerless to accord [****26] a damages [*404] remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.

More importantly, the presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization. Congress provided specially for the exercise of equitable remedial powers by federal courts, see Act of May [**2009] 8, 1792, 2, 1 Stat. 276; C. Wright, Law of Federal Courts 257 (2d ed., 1970), in part because of the limited availability of equitable remedies in state courts in the early days of the Republic. See Guaranty Trust Co. v. York, 326 U.S. 99, 104-105 (1945). And this Court's decisions make clear that, at least absent congressional restrictions, the scope of equitable remedial discretion is to be determined according to the distinctive historical traditions of equity as an institution, Holmberg v. Armbrecht, 327 U.S. 392, 395-396 (1946); [****27] Sprague v. Ticonic National Bank, 307 U.S. 161, 165-166 (1939). The reach of a federal district court's "inherent equitable powers," Textile Workers v. Lincoln Mills, 353 U.S. 448, 460 (Burton, J., concurring in result), is broad indeed, e. g., Swann v. Charlotte-Mecklenburg Board of Education, 401 U.S. 1 (1971); nonetheless, the federal judiciary is not empowered to grant equitable relief in the absence of congressional action extending jurisdiction over the subject matter of the suit. See Textile Workers v. Lincoln Mills, supra, at 460 (Burton, J., concurring in result); Katz, 117 U. Pa. L. Rev., at 43. 5

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With regard to a court's authority to grant an equitable remedy, the line between "subject matter" jurisdiction and remedial powers has undoubtedly been obscured by the fact that historically the "system of equity 'derived its doctrines, as well as its powers, from its mode of giving relief.'" See Guaranty Trust Co. v. York, supra, at 105, quoting C. Langdell, Summary of Equity Pleading xxvii (1877). Perhaps this fact alone accounts for the suggestion sometimes made that a court's power to enjoin invasion of constitutionally protected interests derives directly from the Constitution. See Bell v. Hood, 71 F.Supp. 813, 819 (SD Cal. 1947).

[****28] [*405] If [***632] explicit congressional authorization is an absolute prerequisite to the power of a federal court to accord compensatory relief regardless of the necessity or appropriateness of damages as a remedy simply because of the status of a legal interest as constitutionally protected, then it seems to me that explicit congressional authorization is similarly prerequisite to the exercise of equitable remedial discretion in favor of constitutionally protected interests. Conversely, if a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, see 28 U. S. C. 1331 (a), then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law. 6

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Chief Judge Lumbard's opinion for the Court of Appeals in the instant case is, as I have noted, in accord with this conclusion:

"Thus, even if the Constitution itself does not give rise to an inherent injunctive power to prevent its violation by governmental officials there are strong reasons for inferring the existence of this power under any general grant of jurisdiction to the federal courts by Congress." 409 F.2d, at 723.

The description of the remedy as "inferred" cannot, of course, be intended to assimilate the judicial decision to accord such a remedy to any process of statutory construction. Rather, as with the cases concerning remedies, implied from statutory schemes, see n. 4, supra, the description of the remedy as "inferred" can only bear on the reasons offered to explain a judicial decision to accord or not to accord a particular remedy.

Of course, the special historical traditions governing the federal equity system, see Sprague v. Ticonic National Bank, 307 U.S. 161 [*406] (1939), might still bear on the comparative appropriateness of granting equitable relief as opposed to money damages. That possibility, however, [****29] relates, not to whether the federal courts have the power to afford one type of remedy as opposed to the other, but rather to the criteria which should govern the exercise of our power. To that question, I now pass.

[****30] III

[**2010] The major thrust of the Government's position is that, where Congress has not expressly authorized a particular remedy, a federal court should exercise its power to accord a traditional form of judicial relief at the behest of a litigant, who claims a constitutionally protected interest has been invaded, only where the remedy is "essential," or "indispensable for vindicating constitutional rights." Brief for Respondents 19, 24. While this "essentiality" test is most clearly articulated with respect to damages remedies, apparently the Government believes the same test explains the exercise of equitable remedial powers. Id., at 17-18. It is argued that historically the Court has rarely exercised the power to accord such relief in the absence of an express congressional authorization and that "if Congress had thought that federal officers should be subject to a law different than state law, it would have had no difficulty in saying so, as it did with respect to state officers . . . ." Id., at 20-21; see 42 U. S. C. 1983. Although conceding that the

standard of determining whether a damage remedy should be utilized to effectuate [****31] statutory policies is one of "necessity" or "appropriateness," see J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); United [***633] States v. Standard Oil Co., 332 U.S. 301, 307 (1947), the Government contends that questions concerning congressional discretion to modify judicial remedies relating to constitutionally protected interests warrant a more stringent constraint on [*407] the exercise of judicial power with respect to this class of legally protected interests. Brief for Respondents 21-22.

These arguments for a more stringent test to govern the grant of damages in constitutional cases 7

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I express no view on the Government's suggestion that congressional authority to simply discard the remedy the Court today authorizes might be in doubt; nor do I understand the Court's opinion today to express any view on that particular question.

seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Missouri, Kansas & Texas R. Co. v. May, 194 U.S. 267, 270 (1904). But it must also be recognized that the Bill of Rights is particularly intended to vindicate [****32] the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.

The question then, is, as I see it, whether compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted. Cf. J. I. Case Co. v. Borak, supra, at 432; United States v. Standard Oil Co., supra, at 307; Hill, Constitutional Remedies, 69 Col. L. Rev. 1109, 1155 (1969); Katz, 117 U. Pa. L. Rev., at 72. In resolving that question, it [****33] seems to me that the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy. In this regard I agree with the Court that the appropriateness of according Bivens [*408] compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. 8

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And I think it follows from this point that today's decision has little, if indeed any, bearing on the question whether a federal court may properly devise remedies -- other than traditionally available forms of judicial relief -- for the purpose of enforcing substantive social policies embodied in constitutional or statutory policies. Compare today's decision with Mapp v. Ohio, 367 U.S. 643 (1961), and Weeks v. United States, 232 U.S. 383 (1914). The Court today simply recognizes what has long been implicit in our decisions concerning equitable relief and remedies

implied from statutory schemes; i.e., that a court of law vested with jurisdiction over the subject matter of a suit has the power -- and therefore the duty -- to make principled choices among traditional judicial remedies. Whether special prophylactic measures -- which at least arguably the exclusionary rule exemplifies, see Hill, The Bill of Rights and the Supervisory Power, 69 Col. L. Rev. 181, 182-185 (1969) -- are supportable on grounds other than a court's competence to select among traditional judicial remedies to make good the wrong done, cf. Bell v. Hood, supra, at 684, is a separate question.

Damages as a traditional form [**2011] of compensation for invasion [***634] of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. Bivens, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law -- vested with the power to accord a remedy -- should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.

[****34] And I think it is clear that Bivens advances a claim of the sort that, if proved, would be properly compensable in damages. The personal interests protected by the Fourth Amendment are those we attempt to capture by the notion of "privacy"; while the Court today properly points out that the type of harm which officials can inflict when they invade protected zones of an individual's life [*409] are different from the types of harm private citizens inflict on one another, the experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights. 9

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The same, of course, may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted. See Monroe v. Pape, 365 U.S. 167, 196 n. 5 (HARLAN, J., concurring).

[****35] On the other hand, the limitations on state remedies for violation of common-law rights by private citizens argue in favor of a federal damages remedy. The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind, as the Court's opinion today discusses in detail. See Monroe v. Pape, 365 U.S. 167, 195 (1961) (HARLAN, J., concurring). It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability. See Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963); Monroe v. Pape, supra, at 194-195 (HARLAN, J., concurring); Howard v. Lyons, 360 U.S. 593 (1959). Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability

for federal officers dependent on the State where the injury occurs. Cf. United States v. Standard Oil Co., 332 U.S. 301, 305-311 (1947). [****36]

Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common-law actions, it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged [*410] position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive [**2012] relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming [***635] Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.

The only substantial policy consideration advanced against recognition of a federal cause of action for violation of Fourth Amendment rights by federal officials is the incremental expenditure of judicial resources that will be necessitated by this class of litigation. There is, however, something ultimately self-defeating about this argument. For if, as the Government contends, damages will rarely be realized by plaintiffs in these cases because [****37] of jury hostility, the limited resources of the official concerned, etc., then I am not ready to assume that there will be a significant increase in the expenditure of judicial resources on these claims. Few responsible lawyers and plaintiffs are likely to choose the course of litigation if the statistical chances of success are truly de minimis. And I simply cannot agree with my Brother BLACK that the possibility of "frivolous" claims -- if defined simply as claims with no legal merit -- warrants closing the courthouse doors to people in Bivens' situation. There are other ways, short of that, of coping with frivolous lawsuits.

On the other hand, if -- as I believe is the case with respect, at least, to the most flagrant abuses of official power -- damages to some degree will be available when the option of litigation is chosen, then the question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interests of stockholders defrauded by misleading proxies. [*411] See J. I. Case Co. v. Borak, supra. Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we [****38] automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Of course, for a variety of reasons, the remedy may not often be sought. See generally Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955). And the countervailing interests in efficient law enforcement of course argue for a protective zone with respect to many types of Fourth Amendment violations. Cf. Barr v. Matteo, 360 U.S. 564 (1959) (opinion of HARLAN, J.). But, while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct. Although

litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial [****39] branch of the Nation's government stand ready to afford a remedy in these circumstances. It goes without saying that I intimate no view on the merits of petitioner's underlying claim.

For these reasons, I concur in the judgment of the Court.

Dissent by: BURGER; BLACK; BLACKMUN

Dissent

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent from today's holding which judicially creates a damage [***636] remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation [*412] of powers -- and perhaps get a better result -- by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task -- as we do [**2013] not. Professor Thayer, speaking of the limits on judicial power, albeit in another context, had this to say: 1

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J. Thayer, O. Holmes, & F. Frankfurter, John Marshall 88 (Phoenix ed. 1967).

"And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function [****40] not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. . . . For that course -- the true course of judicial duty always -- will powerfully help to bring the people and their representatives to a sense of their own responsibility."

This case has significance far beyond its facts and its holding. For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment. Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616, 633 (1886) (dictum). This rule was extended to the States in Mapp v. Ohio, 367 U.S. 643 (1961). [****41] 2

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The Court reached the issue of applying the Weeks doctrine to the States sua sponte.

[*413] The rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence.

The deterrence theory underlying the suppression doctrine, or exclusionary rule, has a certain appeal in spite of the high price society pays for such a drastic remedy. Notwithstanding its plausibility, many judges and lawyers and some of our most distinguished legal scholars have never quite been able to escape the force of Cardozo's statement of the doctrine's anomalous result:

"The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free." People v. Defore, 242 N. Y. 13, 21, 23-24, 150 N. E. 585, 587, 588 (1926).3

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What Cardozo suggested as an example of the potentially far-reaching consequences of the suppression doctrine was almost realized in Killough v. United States, 114 U. S. App. D. C. 305, 315 F.2d 241 (1962).

The [****42] plurality opinion in Irvine v. California, 347 U.S. 128, 136 (1954), catalogued the doctrine's defects:

"Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy [***637] against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."

From time to time members of the Court, recognizing the validity of these protests, have articulated varying [*414] alternative justifications for the suppression of important evidence in a criminal trial. Under one of these alternative [****43] theories the rule's foundation is shifted to the "sporting contest" thesis that the government must "play the game fairly" and cannot be allowed to profit from its own illegal acts. Olmstead v. United States, 277 U.S. 438, 469, 471 (1928) (dissenting opinions); see Terry v. Ohio, 392 U.S. 1, 13 (1968). But the exclusionary rule does not ineluctably flow from a desire to ensure that government plays the "game" [**2014] according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule. Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government.

The exclusionary rule has also been justified on the theory that the relationship between the Self-Incrimination Clause of the Fifth Amendment and the Fourth Amendment requires the suppression of evidence seized in violation of the latter. Boyd v. United States, supra, at 633 (dictum); Wolf v. Colorado, 338 U.S. 25, 47, 48 (1949) [****44] (Rutledge, J., dissenting); Mapp v. Ohio, supra, at 661-666 (BLACK, J., concurring).

Even ignoring, however, the decisions of this Court that have held that the Fifth Amendment applies only to "testimonial" disclosures, United States v. Wade, 388 U.S. 218, 221-223 (1967); Schmerber v. California, 384 U.S. 757, 764 and n. 8 (1966), it seems clear that the Self-Incrimination Clause does not protect a person from the seizure of evidence that is incriminating. It protects a person only from being the conduit by which the police acquire evidence. Mr. Justice Holmes once put it succinctly, "A party is privileged from producing the [*415] evidence but not from its production." Johnson v. United States, 228 U.S. 457, 458 (1913).

It is clear, however, that neither of these theories undergirds the decided cases in this Court. Rather the exclusionary rule has rested on the deterrent rationale -- the hope that law enforcement officials would be deterred from unlawful searches and seizures if the illegally seized, albeit trustworthy, evidence was suppressed often enough and the courts persistently [****45] enough deprived them of any benefits they might have gained from their illegal conduct.

This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule. See Martin, The Exclusionary Rule Under Foreign Law -- Canada, 52 J. Crim. L. C. & [***638] P. S. 271, 272 (1961); Williams, The Exclusionary Rule Under Foreign Law -- England, 52 J. Crim. L. C. & P. S. 272 (1961).

I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric. Beyond doubt the conduct of some officials requires sanctions as cases like Irvine indicate. But the hope that this objective could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream. Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective [****46] in accomplishing its stated objective. This is illustrated by the paradox that an unlawful act against a totally innocent person -- such as petitioner claims to be -- has been left without an effective remedy, and hence the Court finds [*416] it necessary now -- 55 years later -- to construct a remedy of its own.

Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society -- the release of countless guilty criminals. See Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 Sup. Ct. Rev. 1, 33 n. 172. But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 667 (1970).

[**2015] There are several reasons for this failure. The rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial. With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer [****47] responsible for a particular judicial application of the suppression doctrine. Id., at 710. Thus there is virtually nothing done to bring about a change in his practices. The immediate sanction triggered by the application of the rule is visited upon the prosecutor whose case against a criminal is either weakened or destroyed. The doctrine deprives the police in no real sense; except that apprehending wrongdoers is their business, police have no more stake in successful prosecutions than prosecutors or the public.

The suppression doctrine vaguely assumes that law enforcement is a monolithic governmental enterprise. For example, the dissenters in Wolf v. Colorado, supra, at 44, argued that:

"Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize [*417] the importance of observing the constitutional demands in his instructions to the police." (Emphasis added.)

But the prosecutor who loses his case because of police misconduct is not an official in the police department; [****48] he can rarely set in motion any corrective action or administrative penalties. Moreover, he does not have control or direction over police procedures or police actions that lead to the exclusion of evidence. It is the rare exception when [***639] a prosecutor takes part in arrests, searches, or seizures so that he can guide police action.

Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not "reasonable" amply demonstrate. 4

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For example, in a case arising under Mapp, supra, state judges at every level of the state judiciary may find the police conduct proper. On federal habeas corpus a district judge and a court of appeals might agree. Yet, in these circumstances, this Court, reviewing the case as much as 10 years later, might reverse by a narrow margin. In these circumstances it is difficult to conclude that the policeman has violated some rule that he should have known was a restriction on his authority.

Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity.

[****49] The presumed educational effect of judicial opinions is also reduced by the long time lapse -- often several years -- between the original police action and its final judicial evaluation. Given a policeman's pressing responsibilities, it would be surprising if he ever becomes aware of

the final result after such a delay. Finally, the exclusionary [*418] rule's deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions -- hence the rule has virtually no applicability and no effect in such situations. Oaks, supra, at 720-724.

Today's holding seeks to fill one of the gaps of the suppression doctrine -- at the price of impinging on the legislative and policy functions that the Constitution vests in Congress. Nevertheless, the holding serves the useful purpose of exposing the fundamental weaknesses of the suppression doctrine. Suppressing unchallenged truth has set guilty criminals free but demonstrably has neither deterred deliberate violations of the Fourth Amendment nor decreased those errors in judgment that will inevitably occur [**2016] given the pressures inherent in police work having to [****50] do with serious crimes.

Although unfortunately ineffective, the exclusionary rule has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work. These honest mistakes have been treated in the same way as deliberate and flagrant Irvine-type violations of the Fourth Amendment. For example, in Miller v. United States, 357 U.S. 301, 309-310 (1958), reliable evidence was suppressed because of a police officer's failure to say a "few more words" during the arrest and search of a known narcotics peddler.

This Court's decision announced today in Coolidge v. New Hampshire, post, p. 443, dramatically illustrates the extent to which the doctrine represents a mechanically inflexible response to widely varying degrees of police error and the resulting high price that society pays. I dissented in Coolidge primarily because I do not [***640] believe the Fourth Amendment had been violated. Even on the Court's contrary premise, however, whatever violation [*419] [****51] occurred was surely insufficient in nature and extent to justify the drastic result dictated by the suppression doctrine. A fair trial by jury has resolved doubts as to Coolidge's guilt. But now his conviction on retrial is placed in serious question by the remand for a new trial -- years after the crime -- in which evidence that the New Hampshire courts found relevant and reliable will be withheld from the jury's consideration. It is hardly surprising that such results are viewed with incomprehension by nonlawyers in this country and lawyers, judges, and legal scholars the world over.

Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. From time to time judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent [****52] the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal "capital punishment" we inflict on all evidence when police error is shown in its acquisition. See ALI, Model Code of Pre-Arraignment Procedure SS 8.02 (2), p. 23 (Tent. Draft No. 4, 1971), reprinted in the Appendix to this opinion. Yet for over 55 years, and with increasing scope and intensity as today's Coolidge holding shows, our legal system has treated vastly dissimilar cases as if they were the same. Our adherence to the exclusionary rule, our resistance to change, and our refusal even to acknowledge the need [*420] for effective enforcement mechanisms bring to mind Holmes' well-known statement:

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). [****53]

In characterizing the suppression doctrine as an anomalous and ineffective mechanism with which to regulate law enforcement, I intend no reflection on the motivation of those members of this Court who hoped it would be a means of enforcing the Fourth Amendment. Judges cannot be faulted for being offended by arrests, searches, and seizures [**2017] that violate the Bill of Rights or statutes intended to regulate public officials. But we can and should be faulted for clinging to an unworkable and irrational concept of law. My criticism is that we have taken so long to find better ways to accomplish these desired objectives. And there are better ways.

Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the [***641] common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct.

I do not propose, however, that we abandon the suppression doctrine until some [****54] meaningful alternative can be developed. In a sense our legal system has become the captive of its own creation. To overrule Weeks and Mapp, even assuming the Court was now prepared to [*421] take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed -- that an open season on "criminals" had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be.

Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some [****55] meaningful and effective remedy against unlawful conduct by government officials.

The problems of both error and deliberate misconduct by law enforcement officials call for a workable remedy. Private damage actions against individual police officers concededly have not adequately met this requirement, and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective. There is some validity to the claims that juries will not return verdicts against individual officers except in those unusual cases where the violation has been flagrant or where the error has been complete, as in the arrest of the wrong person or the search of the wrong house. There is surely serious doubt, for example, that a drug peddler caught packaging his wares will be able to arouse much sympathy in a jury on the ground that the police officer did not announce his identity and [*422] purpose fully or because he failed to utter a "few more words." See Miller v. United States, supra. Jurors may well refuse to penalize a police officer at the behest of a person they believe to be a "criminal" and probably will not punish an [****56] officer for honest errors of judgment. In any event an actual recovery depends on finding nonexempt assets of the police officer from which a judgment can be satisfied.

I conclude, therefore, that an entirely different remedy is necessary but it is one that in my view is as much beyond judicial power as the step the Court takes today. Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated. The venerable doctrine of respondeat superior in our tort law provides an entirely [***642] appropriate conceptual basis for this remedy. If, for example, a security guard privately employed by a department store commits an assault or other tort on a customer such as an improper search, the victim [**2018] has a simple and obvious remedy -- an action for money damages against the guard's employer, the department store. W. Prosser, The Law of Torts 68, pp. 470-480 (3d ed. 1964). 5

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Damage verdicts for such acts are often sufficient in size to provide an effective deterrent and stimulate employers to corrective action.

Such a statutory scheme would have the added advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police [****57] conduct -- something that the suppression doctrine, of course, can never accomplish.

A simple structure would suffice. 6

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Electronic eavesdropping presents special problems. See 18 U. S. C. 2510-2520 (1964 ed., Supp. V).

For example, Congress could enact a statute along the following lines:

(a) a waiver of sovereign immunity as to the illegal [*423] acts of law enforcement officials committed in the performance of assigned duties;

(b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;

(c) the creation of a tribunal, quasi-judicial [****58] in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;

(d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and

(e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

I doubt that lawyers serving on such a tribunal would be swayed either by undue sympathy for officers or by the prejudice against "criminals" that has sometimes moved lay jurors to deny claims. In addition to awarding damages, the record of the police conduct that is condemned would undoubtedly become a relevant part of an officer's personnel file so that the need for additional training or disciplinary action could be identified or his future usefulness as a public official evaluated. Finally, appellate judicial review could be made available on much the same basis that it is now provided as to district courts and regulatory agencies. This would leave to the courts the ultimate responsibility for determining and articulating standards.

Once the constitutional [****59] validity of such a statute is established, 7

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Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judicially created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall.

it can reasonably be assumed that the States [*424] would develop their own remedial systems on the federal model. Indeed there is nothing to prevent a State from enacting a comparable statutory scheme without waiting for the Congress. Steps along these lines would move our system toward more responsible law enforcement [***643] on the one hand and away from the irrational and drastic results of the suppression doctrine on the other. Independent of the alternative embraced in this dissenting opinion, I believe the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced.

[****60] In a country that prides itself on innovation, inventive genius, and willingness to experiment, it is a paradox that we should cling for more than a half century to a legal mechanism that was poorly designed and never really worked. I can only hope now that the Congress will manifest a willingness to view realistically the hard evidence of the half-century history of the suppression doctrine revealing [**2019] thousands of cases in which the criminal was set free because the constable blundered and virtually no evidence that innocent victims of police error -- such as petitioner claims to be -- have been afforded meaningful redress.

APPENDIX TO OPINION OF BURGER, C. J., DISSENTING

It is interesting to note that studies over a period of years led the American Law Institute to propose the following in its tentative draft of a model pre-arraignment code:

"(2) Determination. Unless otherwise required by the Constitution of the United States or of this State, a motion to suppress evidence based upon a [*425] violation of any of the provisions of this code shall be granted only if the court finds that such violation was substantial. In determining whether a violation [****61] is substantial the court shall consider all the circumstances, including:

"(a) the importance of the particular interest violated;

"(b) the extent of deviation from lawful conduct;

"(c) the extent to which the violation was willful;

"(d) the extent to which privacy was invaded;

"(e) the extent to which exclusion will tend to prevent violations of this Code;

"(f) whether, but for the violation, the things seized would have been discovered; and

"(g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

"(3) Fruits of Prior Unlawful Search. If a search or seizure is carried out in such a manner that things seized in the course of the search would be subject to a motion to suppress under subsection (1), and if as a result of such search or seizure other evidence is discovered subsequently and offered against a defendant, such evidence shall be subject to a motion to suppress unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such search [****62] or seizure, and the court finds that exclusion of such evidence is not necessary to deter violations of this Code."

ALI, Model Code of Pre-Arraignment Procedure SS 8.02 (2), (3), pp. 23-24 (Tent. Draft No. 4, 1971) (emphasis supplied).

[*426] The Reporters' views on the exclusionary rule are also reflected in their comment on the proposed section:

[***644] "The Reporters wish to emphasize that they are not, as a matter of policy, wedded to the exclusionary rule as the sole or best means of enforcing the Fourth Amendment. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. of Chi. L. Rev. 665 (1970). Paragraph (2) embodies what the Reporters hope is a more flexible approach to the problem, subject of course to constitutional requirements." Id., comment, at 26-27.

This is but one of many expressions of disenchantment with the exclusionary rule; see also:

1. Barrett, Exclusion of Evidence Obtained by Illegal Searches--A Comment on People vs. Cahan, 43 Calif. L. Rev. 565 (1955).

2. Burns, Mapp v. Ohio: An All-American Mistake, 19 DePaul L. Rev. 80 (1969).

3. Friendly, The Bill of Rights as a Code of [****63] Criminal Procedure, 53 Calif. L. Rev. 929, 951-954 (1965).

4. F. Inbau, J. Thompson, & C. Sowle, Cases and Comments on Criminal Justice: Criminal Law Administration 1-84 (3d ed. 1968).

5. LaFave, Improving Police Performance Through the Exclusionary Rule [**2020] (pts. 1 & 2), 30 Mo. L. Rev. 391, 566 (1965).

6. LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich. L. Rev. 987 (1965).

7. N. Morris & G. Hawkins, The Honest Politician's Guide to Crime Control 101 (1970).

8. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970).

[*427] 9. Plumb, Illegal Enforcement of the Law, 24 Cornell L. Q. 337 (1939).

10. Schaefer, The Fourteenth Amendment and Sanctity of the Person, 64 Nw. U. L. Rev. 1 (1969).

11. Waite, Judges and the Crime Burden, 54 Mich. L. Rev. 169 (1955).

12. Waite, Evidence -- Police Regulation by Rules of Evidence, 42 Mich. L. Rev. 679 (1944).

13. Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A. B. A. J. 479 (1922). [****64]

14. 8 J. Wigmore, Evidence 2184a (McNaughton rev. 1961).

MR. JUSTICE BLACK, dissenting.

In my opinion for the Court in Bell v. Hood, 327 U.S. 678 (1946), we did as the Court states, reserve the question whether an unreasonable search made by a federal officer in violation of the Fourth Amendment gives the subject of the search a federal cause of action for damages against the officers making the search. There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment. Although Congress has created such a federal cause of action against state officials acting under color of state law, *

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"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Rev. Stat. 1979, 42 U. S. C. 1983.

it [***645] has never created such a cause of action against federal officials. If it wanted to do so, Congress could, of course, create a remedy against [*428] federal officials who violate the Fourth Amendment in the performance of their duties. But the point of this case and the fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise [****65] of power that the Constitution does not give us.

Even if we had the legislative power to create a remedy, there are many reasons why we should decline to create a cause of action where none has existed since the formation of our Government. The courts of the United States as well as those of the States are choked with lawsuits. The number of cases on the docket of this Court have reached an unprecedented volume in recent years. A majority of these cases are brought by citizens with substantial complaints [****66] -- persons who are physically or economically injured by torts or frauds or governmental infringement of their rights; persons who have been unjustly deprived of their liberty or their property; and persons who have not yet received the equal opportunity in education, employment, and pursuit of happiness that was the dream of our forefathers. Unfortunately, there have also been a growing number of frivolous lawsuits, particularly actions for damages against law enforcement officers whose conduct has been judicially sanctioned by state trial and appellate courts and in many instances even by this Court. My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations [**2021] of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature.

[*429] We sit at the top of a judicial system accused by some of nearing the point of collapse. Many criminal defendants do not receive [****67] speedy trials and neither society nor the accused are assured of justice when inordinate delays occur. Citizens must wait years to litigate their private civil suits. Substantial changes in correctional and parole systems demand the attention of the lawmakers and the judiciary. If I were a legislator I might well find these and other needs so pressing as to make me believe that the resources of lawyers and judges should be devoted to them rather than to civil damage actions against officers who generally strive to perform within constitutional bounds. There is also a real danger that such suits might deter officials from the proper and honest performance of their duties.

All of these considerations make imperative careful study and weighing of the arguments both for and against the creation of such a remedy under the Fourth Amendment. I would have great difficulty for myself in resolving the competing policies, goals, and priorities in the use of

resources, if I thought it were my job to resolve those questions. But that is not my task. The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures [****68] of the States. Congress has not provided that any federal court can entertain [***646] a suit against a federal officer for violations of Fourth Amendment rights occurring in the performance of his duties. A strong inference can be drawn from creation of such actions against state officials that Congress does not desire to permit such suits against federal officials. Should the time come when Congress desires such lawsuits, it has before it a model of valid legislation, 42 U. S. C. 1983, to create a damage remedy against federal officers. Cases could be cited to support the legal proposition which [*430] I assert, but it seems to me to be a matter of common understanding that the business of the judiciary is to interpret the laws and not to make them.

I dissent.

MR. JUSTICE BLACKMUN, dissenting.

I, too, dissent. I do so largely for the reasons expressed in Chief Judge Lumbard's thoughtful and scholarly opinion for the Court of Appeals. But I also feel that the judicial legislation, which the Court by its opinion today concededly is effectuating, opens the door for another avalanche of new federal cases. Whenever a suspect imagines, or chooses [****69] to assert, that a Fourth Amendment right has been violated, he will now immediately sue the federal officer in federal court. This will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical. Why the Court moves in this direction at this time of our history, I do not know. The Fourth Amendment was adopted in 1791, and in all the intervening years neither the Congress nor the Court has seen fit to take this step. I had thought that for the truly aggrieved person other quite adequate remedies have always been available. If not, it is the Congress and not this Court that should act.

References

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L Ed Index to Anno, Damages; Officers; Search and Seizure

ALR Quick Index, Damages; Public Officers and Employees; Search and Seizure

Federal Quick Index, Damages; Public Officers and Employees; Search and Seizure

Annotation References:

Unconstitutional conduct by state [****70] or federal officer as affecting governmental immunity from suit in federal court. 12 L Ed 2d 1110.

Police action in connection with arrest as violation of Civil Rights Act, 42 USC 1983. 1 ALR Fed 519.

Carlson v. Green

Supreme Court of the United States

January 7, 1980, Argued ; April 22, 1980, Decided

No. 78-1261

Reporter
446 U.S. 14 *; 100 S. Ct. 1468 **; 64 L. Ed. 2d 15 ***; 1980 U.S. LEXIS 120 ****

CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. v. GREEN, ADMINISTRATRIX

Prior History:

[**** 1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Disposition:

581 F.2d 669, affirmed.

Syllabus

Respondent brought suit in Federal District Court in Indiana on behalf of her deceased son's estate, alleging that her son while a prisoner in a federal prison in Indiana suffered personal injuries from which he died because petitioner prison officials violated, inter alia, his Eighth Amendment rights by failing to give him proper medical attention. Asserting jurisdiction under 28 U. S. C. 1331 (a), respondent claimed compensatory and punitive damages. The District Court held that the allegations pleaded a violation of the Eighth Amendment's proscription against cruel and unusual punishment, thus giving rise to a cause of action for damages under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, [****2] under which it was established that victims of a constitutional violation by a federal official have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. But the court dismissed the complaint on the ground that, although the decedent could have maintained the action if he had survived, the damages remedy as a matter of federal law was limited to that

provided by Indiana's survivorship and wrongful-death laws, which the court construed as making the damages available to the decedent's estate insufficient to meet 1331 (a)'s $ 10,000 jurisdictional-amount requirement. While otherwise agreeing with the District Court, the Court of Appeals held that the latter requirement was satisfied because whenever a state survivorship statute would abate a Bivens-type action, the federal common law allows survival of the action.

Held:

1. A Bivens remedy is available to respondent even though the allegations could also support a suit against the United States under the Federal Tort Claims Act (FTCA). Pp. 18-23.

(a) Neither of the situations in which a cause of action under Bivens may be defeated are present [****3] here. First, the case involves no special factors counseling hesitation in the absence of affirmative action by Congress, petitioners not enjoying such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate. Second, there is no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover damages from the officers but must be remitted to another remedy, equally effective in Congress' view. There is nothing in the FTCA or its legislative history to show that Congress meant to pre-empt a Bivens remedy or to create an equally effective remedy for constitutional violations. Rather, in the absence of a contrary expression from Congress, the FTCA's provision creating a cause of action against the United States for intentional torts committed by federal law enforcement officers, contemplates that victims of the kind of intentional wrongdoing alleged in the complaint in this case shall have an action under the FTCA against the United States as well as a Bivens action against the individual officials alleged to have infringed their constitutional [****4] rights. Pp. 18-20.

(b) The following factors also support the conclusion that Congress did not intend to limit respondent to an FTCA action: (i) the Bivens remedy, being recoverable against individuals, is a more effective deterrent than the FTCA remedy against the United States; (ii) punitive damages may be awarded in a Bivens suit, but are statutorily prohibited in an FTCA suit; (iii) a plaintiff cannot opt for a jury trial in an FTCA action as he may in a Bivens suit; and (iv) an action under the FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. Pp. 20-23.

2. Since Bivens actions are a creation of federal law, the question whether respondent's action survived her son's death is a question of federal law. Only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct. Robertson v. Wegmann, 436 U.S. 584, distinguished. Pp. 23-25.

Counsel: Deputy Solicitor General Geller argued the cause for petitioners. On the briefs were Solicitor General McCree, Acting [****5] Assistant Attorney General Daniel, Robert E. Kopp, and Barbara L. Herwig.

Michael Deutsch argued the cause for respondent. With him on the brief was Charles Hoffman. *

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Alvin J. Bronstein, Bruce J. Ennis, and William E. Hellerstein filed a brief for the American Civil Liberties Union Foundation, Inc., et al. as amici curiae urging affirmance.

John B. Jones, Jr., Norman Redlich, William L. Robinson, Norman J. Chachkin, and Richard S. Kohn filed a brief for the Lawyers' Committee for Civil Rights Under Law as amicus curiae.

Judges: BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, in which STEWART, J., joined, post, p. 25. BURGER, C. J., post, p. 30, and REHNQUIST, J., post, p. 31, filed dissenting opinions.

Opinion by: BRENNAN

Opinion

[*16] [***22] [**1470] MR. JUSTICE BRENNAN delivered the opinion of the Court.

[1A] [2A] [3A] [****6] Respondent brought this suit in the District Court for the Southern District of Indiana on behalf of the estate of her deceased son, Joseph Jones, Jr., alleging that he suffered personal injuries from which he died because the petitioners, federal prison officials, violated his due process, equal protection, and Eighth Amendment rights. 1

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More specifically, respondent alleged that petitioners, being fully apprised of the gross inadequacy of medical facilities and staff at the Federal Correction Center in Terre Haute, Ind., and of the seriousness of Jones' chronic asthmatic condition, nonetheless kept him in that facility against the advice of doctors, failed to give him competent medical attention for some eight hours after he had an asthmatic attack, administered contraindicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative which further impeded his breathing, and delayed for too long a time his transfer to an outside hospital. The complaint further alleges that Jones' death resulted from these acts and omissions, that petitioners were deliberately indifferent to Jones' serious medical needs, and that their indifference was in part attributable to racial prejudice.

[****7] Asserting jurisdiction under 28 U. S. C. 1331 (a), she claimed compensatory and punitive damages for the constitutional violations. Two questions are presented for decision: (1) Is a remedy available

directly under the Constitution, given that respondent's allegations could also support a claim against the United States [*17] under the Federal Tort Claims Act? 2

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[2B]

This question was presented in the petition for certiorari, but not in either the District Court or the Court of Appeals. However, respondent does not object to its decision by this Court. Though we do not normally decide issues not presented below, we are not precluded from doing so. E. g., Youakim v. Miller, 425 U.S. 231 (1976). Here, the issue is squarely presented and fully briefed. It is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case. See Loe v. Armistead, 582 F.2d 1291 (CA4 1978), cert. pending sub nom. Moffitt v. Loe, No. 78-1260. We conclude that the interests of judicial administration will be served by addressing the issue on its merits.

And (2) if so, is survival of the cause [**1471] of action governed by federal common law or by state statutes?

I

The District Court held that under Estelle v. Gamble, 429 U.S. 97 (1976), the allegations set out in note [****8] 1, supra, pleaded a violation of the Eighth Amendment's proscription against infliction of cruel and unusual punishment, 3

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Petitioners do not contest the determination that the allegations satisfy the standards set out in Estelle.

[***23] giving rise to a cause of action for damages under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). The court recognized that the decedent could have maintained this action if he had survived, but dismissed the complaint because in its view the damages remedy as a matter of federal law was limited to that provided by Indiana's survivorship and wrongful-death laws and, as the court construed those laws, the damages available to Jones' estate failed to meet 1331 (a)'s $ 10,000 jurisdictional-amount requirement. The Court of Appeals for the Seventh Circuit agreed that an Eighth Amendment violation was pleaded under Estelle and that a cause of action was stated under Bivens, but reversed the holding that 1331 (a)'s jurisdictional-amount requirement was not met. 4

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The relevant Indiana law provides that a personal injury claim does not survive where the acts complained of caused the victim's death. Ind. Code 34-1-1-1 (1976). Indiana does provide a wrongful-death cause of action for the personal representative of one whose death is caused by an alleged wrongful act or omission. Damages may "[include], but [are] not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings." But if the decedent is not survived by a spouse, dependent child, or dependent next of kin, then the recovery is limited to expenses incurred in connection with the death. Ind. Code 34-1-1-2 (1976).

The District Court read the complaint in this case as stating claims under 34-1-1-1 and 34-1-1-2. Accordingly, the court assumed that recovery on the claim was limited to expenses (all of which would be paid by the Federal Government) only because Jones died without a spouse or any dependents. The Court of Appeals read the complaint as stating only a survivorship claim on behalf of Jones under 34-1-1-1. Thus it assumed that the claim would have abated even if Jones had left dependents or a spouse. 581 F.2d 669, 672, n. 4 (1978). Resolution of this conflict is irrelevant in light of our holding today.

Rather, the Court of Appeals held that [*18] 1331 (a) was satisfied because "whenever the relevant State survival statute would abate a Bivens-type action brought against defendants whose conduct results in death, the federal [****9] common law allows survival of the action." 581 F.2d 669, 675 (1978). The court reasoned that the Indiana law, if applied, would "subvert" "the policy of allowing complete vindication of constitutional rights" by making it "more advantageous for a tortfeasor to kill rather than to injure." Id., at 674. We granted certiorari. 442 U.S. 940 (1979). We affirm.

[****10] II

[4A]Bivens established 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. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S., at 396; Davis v. Passman, 442 U.S. 228, 245 (1979). The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly [*19] under the Constitution and viewed as equally effective. Bivens, supra, at 397; [***24] Davis v. Passman, supra, at 245-247.

[**1472] [1B]Neither situation obtains in this case. First, [****11] the case involves no special factors counselling hesitation in the absence of affirmative action by Congress. Petitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate. Davis v. Passman, supra, at 246. Moreover, even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under Butz v. Economou, 438 U.S. 478 (1978), provides adequate protection. See Davis v. Passman, supra, at 246.

[4B]Second, we have here no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress. Petitioners point to nothing in the Federal Tort Claims Act (FTCA) or its legislative history to show that Congress [****12] meant to pre-empt a Bivens remedy or to create an equally effective remedy for constitutional violations. 5

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[4C]

To satisfy this test, petitioners need not show that Congress recited any specific "magic words." See the dissenting opinion of THE CHIEF JUSTICE, post, at 31, and n. 2. Instead, our inquiry at this step in the analysis is whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the Bivens remedy. Where Congress decides to enact a statutory remedy which it views as fully adequate only in combination with the Bivens remedy, e. g., 28 U. S. C. 2680 (h), that congressional decision should be given effect by the courts.

FTCA was enacted long before Bivens was decided, but when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, 28 U. S. C. 2680 (h), the congressional comments accompanying [*20] that amendment made it crystal clear that Congress views FTCA and Bivens as parallel, complementary causes of action:

"[After] the date of enactment of this measure, innocent individuals who are subjected to raids [like that in Bivens] will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the Bivens case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in Bivens (and for which that case imposes liability upon the individual Government officials involved)." S. Rep. No. 93-588, p. [****13] 3 (1973) (emphasis supplied).

In the absence of a contrary expression from Congress, 2680 (h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a Bivens action against the individual officials alleged to have infringed their constitutional rights.

[****14] This conclusion is buttressed by [***25] the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See 38 U. S. C. 4116 (a), 42 U. S. C. 233 (a), 42 U. S. C. 2458a, 10 U. S. C. 1089 (a), and 22 U. S. C. 817 (a) (malpractice by certain Government health personnel); 28 U. S. C. 2679 (b) (operation of motor vehicles by federal employees); and 42 U. S. C. 247b (k) (manufacturers of swine flu vaccine). Furthermore, Congress has not taken action on other bills that would expand the exclusivity of FTCA. See, e. g., S. 695, 96th Cong., 1st Sess. (1979); H. R. 2659, 96th Cong., 1st Sess. (1979); S. 3314, 95th Cong., 2d Sess. (1978).

Four additional factors, each suggesting that the Bivens remedy is more effective than the FTCA remedy, also support our conclusion that Congress did not intend to limit respondent [*21] to an FTCA action. First, [****15] the Bivens remedy, in addition to compensating victims, serves a deterrent [**1473] purpose. See Butz v. Economou, supra, at 505. 6

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Title 42 U. S. C. 1983 serves similar purposes. See, e. g., Robertson v. Wegmann, 436 U.S. 584, 590-591 (1978); Carey v. Piphus, 435 U.S. 247, 256 (1978); Mitchum v. Foster, 407 U.S. 225, 242 (1972); Monroe v. Pape, 365 U.S. 167, 172-187 (1961).

Because the Bivens remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, 7

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Indeed, underlying the qualified immunity which public officials enjoy for actions taken in good faith is the fear that exposure to personal liability would otherwise deter them from acting at all. See Butz v. Economou, 438 U.S. 478, 497 (1978); Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (WHITE, J., concurring in judgment), surely particularly so when the individual official faces personal financial liability.

[****16] Petitioners argue that FTCA liability is a more effective deterrent because the individual employees responsible for the Government's liability would risk loss of employment 8

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Some doubt has been cast on the validity of the assumption that there exist adequate mechanisms for disciplining federal employees in such cases. See Testimony of Griffin B. Bell, Attorney General of the United States, Joint Hearing on Amendments to the Federal Tort Claims Act before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 95th Cong., 2d Sess., pt. 1, p. 6 (1978).

and because the Government would be forced to promulgate corrective policies. That argument suggests, however, that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen's constitutional rights. The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.

[****17] [5] [6A]Second, our decisions, although not expressly addressing [*22] and deciding the question, indicate that punitive damages may be awarded in a Bivens suit. Punitive damages [***26] are "a particular remedial mechanism normally available in the federal courts," Bivens, 403 U.S., at 397, and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. Moreover, punitive damages are available in "a proper" 1983 action, Carey v. Piphus, 435 U.S. 247, 257, n. 11 (1978) (punitive damages not awarded because District Court found defendants "did not act with a malicious intention to deprive respondents of their rights or to do them other injury"), 9

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[6B]

Moreover, after Carey punitive damages may be the only significant remedy available in some 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury.

andButz v. Economou, suggests that the "constitutional design" would be stood on its head if federal officials did not face at least the same liability as state officials guilty of [****18] the same constitutional transgression. 438 U.S., at 504. But punitive damages in an FTCA suit are statutorily prohibited. 28 U. S. C. 2674. Thus FTCA is that much less effective than a Bivens action as a deterrent to unconstitutional acts.

[7] [8] [9A]Third, a plaintiff [****19] cannot opt for a jury in an FTCA action, 28 U. S. C. 2402, as he may in a Bivens suit. 10

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[9B]

Petitioners argue that the availability of punitive damages or a jury trial under Bivens is irrelevant because neither is a necessary element of a remedial scheme. But that argument completely misses the mark. The issue is not whether a Bivens cause of action or any one of its particular features is essential. Rather the inquiry is whether Congress has created what it views as an equally effective remedial scheme. Otherwise the two can exist side by side. Moreover, no one difference need independently render FTCA inadequate. It can fail to be equally effective on the cumulative basis of more than one difference.

Petitioners argue [**1474] that this is an irrelevant difference because juries have been biased against Bivens claimants. Reply Brief for Petitioners 7, and n. 6; Brief for Petitioners 30-31, n. 30. Significantly, however, they do not assert that judges trying the claims as FTCA actions would have been more receptive, and [*23] they cannot explain why the plaintiff should not retain the choice.

[****20] [3B]Fourth, an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U. S. C. 1346 (b) (United States liable "in accordance with the law of the place where the act or omission occurred"). Yet it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules. See Part III, infra. The question whether respondent's action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.

Plainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy.

III

[3C] [****21] Bivens actions are a creation of federal law and, therefore, the [***27] question whether respondent's action survived Jones' death is a question of federal law. See Burks v. Lasker, 441 U.S. 471, 476 (1979). Petitioners, however, would have us fashion a federal rule of survivorship that incorporates the survivorship laws of the forum State, at least where the state law is not inconsistent with federal law. Respondent argues, on the other hand, that only a

uniform federal rule of survivorship is compatible with the goal of deterring federal officials from infringing federal constitutional rights in the manner alleged in respondent's complaint. We agree with respondent. Whatever difficulty we might have resolving the question were the federal involvement less clear, we hold that only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct.

[*24] In short, we agree with and adopt the reasoning of the Court of Appeals, 581 F.2d, at 674-675 (footnote omitted):

"The essentiality of the survival of civil rights claims for complete vindication [****22] of constitutional rights is buttressed by the need for uniform treatment of those claims, at least when they are against federal officials. As this very case illustrates, uniformity cannot be achieved if courts are limited to applicable state law. Here the relevant Indiana statute would not permit survival of the claim, while in Beard [v. Robinson, 563 F.2d 331 (CA7 1977),] the Illinois statute permitted survival of the Bivens action. The liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred. . . . In sum, we hold that whenever the relevant state survival statute would abate a Bivens-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action."

[10A] Robertson v. Wegmann, 436 U.S. 584 (1978), holding that a 1983 action would abate in accordance with Louisiana survivorship law is not to the contrary. There the plaintiff's [****23] death was not caused by the acts of the defendants upon which the suit was based. 11

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[10B]

Robertson fashioned its holding by reference to 42 U. S. C. 1988, which requires that 1983 actions be governed by

"the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of [the] civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States."

Section 1988 does not in terms apply to Bivens actions, and there are cogent reasons not to apply it to such actions even by analogy. Bivens defendants are federal officials brought into federal court for violating the Federal Constitution. No state interests are implicated by applying purely federal law to them. While it makes some sense to allow aspects of 1983 litigation to vary according to the laws of the States under whose authority 1983 defendants work, federal officials have no similar claim to be bound only by the law of the State in which they happen to work. Bivens, 403 U.S., at 409 (Harlan, J., concurring in judgment). Moreover, these petitioners have the power to transfer prisoners to facilities in any one of several States which may have different rules governing survivorship or other aspects of the case, thereby controlling to some extent the

law that would apply to their own wrongdoing. See Robertson, 436 U.S., at 592-593, and n. 10. Another aspect of the power to transfer prisoners freely within the federal prison system is that there is no reason to expect that any given prisoner will have any ties to the State in which he is incarcerated, and, therefore, the State will have little interest in having its law applied to that prisoner. Nevertheless, as to other survivorship questions that may arise in Bivens actions, it may be that the federal law should choose to incorporate state rules as a matter of convenience. We leave such questions for another day.

[****24] [**1475] Moreover, Robertson [***28] expressly [*25] recognized that to prevent frustrations of the deterrence goals of 1983 (which in part also underlie Bivens actions, see Part II, supra) "[a] state official contemplating illegal activity must always be prepared to face the prospect of a 1983 action being filed against him." 436 U.S., at 592. A federal official contemplating unconstitutional conduct similarly must be prepared to face the prospect of a Bivens action. A uniform rule that claims such as respondent's survive the decedent's death is essential if we are not to "frustrate in [an] important way the achievement" of the goals of Bivens actions. Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966). 12

12

Otherwise, an official could know at the time he decided to act whether his intended victim's claim would survive. Cf. Auto Workers v. Hoosier Cardinal Corp. (whether statute of limitation will matter cannot be known at time of conduct).

Affirmed.

Concur by: POWELL

Concur

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring in the judgment.

Although I join the judgment, I do not agree with much of the language in the Court's opinion. The Court states the principles governing Bivens actions as follows:

"Bivens established that the victims of a constitutional [*26] violation . . . have a right to recover damages. . . . Such a cause of action may be defeated . . . in two situations. The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.' . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective. . . ." Ante [****25] , at 18-19 (emphasis in original).

The foregoing statement contains dicta that go well beyond the prior holdings of this Court.

I

We are concerned here with inferring a right of action for damages directly from the Constitution. In Davis v. Passman, 442 U.S. 228, 242 (1979), the Court said that persons who have "no [other] effective means" of redress "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." The Davis rule now sets the boundaries of the "principled discretion" that must be brought to bear when a court is asked to infer a private cause of action not specified by the enacting authority. Id., at 252 (POWELL, J., dissenting). But the Court's opinion, read literally, would restrict that discretion dramatically. Today we are told that a court must entertain a Bivens [***29] suit unless the action is "defeated" in one of two specified ways.

Bivens recognized that implied remedies may be unnecessary when Congress has [**1476] provided "equally effective" alternative remedies. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971); [****26] see Davis v. Passman, supra, at 248. The Court now volunteers the view that a defendant cannot defeat a Bivens action simply by showing that there are adequate alternative avenues of relief. The defendant also must show that Congress "explicitly declared [its remedy] [*27] to be a substitute for recovery directly under the Constitution and viewed [it] as equally effective." Ante, at 18-19 (emphasis in original). These are unnecessarily rigid conditions. The Court cites no authority and advances no policy reason -- indeed no reason at all -- for imposing this threshold burden upon the defendant in an implied remedy case.

The Court does implicitly acknowledge that Congress possesses the power to enact adequate alternative remedies that would be exclusive. Yet, today's opinion apparently will permit Bivens plaintiffs to ignore entirely adequate remedies if Congress has not clothed them in the prescribed linguistic garb. No purpose is served by affording plaintiffs a choice of remedies in these circumstances. Nor is there any precedent for requiring federal courts to blind themselves to congressional intent expressed in language other [****27] than that which we prescribe.

A defendant also may defeat the Bivens remedy under today's decision if "special factors" counsel "hesitation." But the Court provides no further guidance on this point. The opinion states simply that no such factors are present in this case. The Court says that petitioners enjoy no "independent status in our constitutional scheme" that would make judicially created remedies inappropriate. Ante, at 19. But the 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. No other factors relevant to the purported exception are mentioned.

One is left to wonder whether judicial discretion in this area will hereafter be confined to the question of alternative remedies, which is in turn reduced to the single determination that congressional action does or does not comport with the specifications prescribed by this Court. Such a drastic curtailment of discretion would be inconsistent with the Court's longstanding recognition that Congress is ultimately the appropriate body [****28] to create federal remedies.

See ante, at 19-20; [*28] Bivens v. Six Unknown Fed. Narcotics Agents, supra, at 397. A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task. In this situation, as Mr. Justice Harlan once said, a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy." Bivens, supra, at [***30] 407. The Court does not explain why this discretion should be limited in the manner announced today.

The Court's absolute language is all the more puzzling because it comes in a case where the implied remedy is plainly appropriate under any measure of discretion. The Federal Tort Claims Act, on which petitioners rely, simply is not an adequate remedy. 1

1

The Federal Tort Claims Act is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States where a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. 1346 (b); see also 28 U. S. C. 2674. Here, as in Bivens itself, a plaintiff denied his constitutional remedy would be remitted to the vagaries of state law. See 403 U.S., at 394-395. The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States. As the Court points out, the FTCA allows neither jury trial nor punitive damages. Ante, at 21-22. And recovery may be barred altogether if the claim arises from a "discretionary function" or "the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U. S. C. 2680 (a).

[****30] And there are reasonably clear [**1477] indications that Congress did not intend that statute to displace Bivens claims. See ante, at 19-20. No substantial contrary policy has been identified, and I am aware of none. I therefore [****29] agree that a private damages remedy properly is inferred from the Constitution in this case. But I do not agree that Bivens plaintiffs have a "right" to such a remedy whenever the defendant fails to show that Congress has "provided an [equally effective] alternative remedy which it explicitly [*29] declared to be a substitute. . . ." In my view, the Court's willingness to infer federal causes of action that cannot be found in the Constitution or in a statute denigrates the doctrine of separation of powers and hardly comports with a rational system of justice. Cf. Cannon v. University of Chicago, 441 U.S. 677, 730-749 (1979) (POWELL, J., dissenting). 2

2

I do not suggest that courts enjoy the same degree of freedom to infer causes of action from statutes as from the Constitution. See Davis v. Passman, 442 U.S. 228, 241-242 (1979). I do believe, however, that the Court today has overstepped the bounds of rational judicial decisionmaking in both contexts.

II

In Part III of its opinion, the Court holds that "'whenever the relevant state survival statute would abate a Bivens-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.'" Ante, at 24, quoting 581 F.2d 669, 675 (CA7 1978). I agree that the relevant policies require the application of federal common law to allow survival in this case.

It is not "obvious" to me, however, that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" in every case. Ante, at 23; see ante, at 23-24. On the contrary, federal courts routinely refer to state law to fill the procedural gaps in national remedial schemes. [****31] [***31] The policy against invoking the federal common law except where necessary to the vitality of a federal claim is codified in 42 U. S. C. 1988, which directs that state law ordinarily will govern those aspects of 1983 actions not covered by the "laws of the United States."

The Court's opinion in this case does stop short of mandating uniform rules to govern all aspects of Bivens actions. Ante, at 24-25, n. 11. But the Court also says that the preference for state law embodied in 1988 is irrelevant to the selection of rules that will govern actions against federal officers under Bivens. Ibid. I see no basis for this view. In [*30] Butz v. Economou, 438 U.S. 478, 498-504, and n. 25 (1978), the Court thought it unseemly that different rules should govern the liability of federal and state officers for similar constitutional wrongs. I would not disturb that understanding today.

Dissent by: BURGER; REHNQUIST

Dissent

MR. CHIEF JUSTICE BURGER, dissenting.

Although I would be prepared to join an opinion giving effect to Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) [****32] -- which I thought wrongly decided -- I cannot join today's unwarranted expansion of that decision. The Federal Tort Claims Act provides an adequate remedy for prisoners' claims of medical mistreatment. For me, that is the end of the matter.

Under the test enunciated by the Court the adequacy of the Tort Claims Act remedy is an irrelevancy. The sole inquiry called for by the Court's new test is whether "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution." Ante, at 18-19 (first emphasis added). 1

1

The Court pays lipservice to the notion that there must be no "special factors counselling hesitation in the absence of affirmative action by Congress." Ante, at 19. Its one-sentence discussion of the point, however, plainly shows that it is unlikely to hesitate unless Congress says that it must. See opinion of MR. JUSTICE POWELL, ante, at 27.

That test would seem to permit [**1478] a person whose constitutional rights have been violated by a state officer to bring suit under Bivens even though Congress in 42 U. S. C. 1983 has already fashioned an equally effective remedy. Cf. Turpin v. Mailet, 591 F.2d 426 (CA2 1979) (en banc). After all, there is no "explicit congressional declaration," ante, at 19, that 1983 was meant to pre-empt a Bivens remedy. Taken to its logical conclusion, the Court's test, coupled with its holding on survivorship, ante, at 23, [****33] and n. 11, suggests that the plaintiff in Robertson v. Wegmann, 436 U.S. 584 (1978), might have [*31] escaped the impact of that decision by filing a separate Bivens-type claim. And the Court's test throws into doubt the decision in Brown v. GSA, 425 U.S. 820 (1976), where we held that 717 of the Civil Rights Act of 1964 provides the exclusive remedy for claims of discrimination in federal employment. In enacting 717 Congress did not say the magic words [***32] which the Court now seems to require. 2

2

In his concurrence in Bivens, Mr. Justice Harlan emphasized that judicial implication of a constitutional damages remedy was required because the Bill of Rights is aimed at "restraining the Government as an instrument of the popular will." 403 U.S., at 404. See generally J. Ely, Democracy and Distrust 73-104 (1980). Under the Harlan view, it would seem irrelevant whether Congress "meant to pre-empt a Bivens remedy." Ante, at 19. Rather the sole inquiry in every case -- no matter what magic words Congress had said or failed to say -- would be whether the alternative remedy gave satisfactory protection to constitutional interests. I note this point only to show how far the Court today strays from the principles underlying Bivens.

[****34] Until today, I had thought that Bivens was limited to those circumstances in which a civil rights plaintiff had no other effective remedy. See 403 U.S., at 410 (Harlan, J., concurring in judgment); Davis v. Passman, 442 U.S. 228, 245, and n. 23 (1979). Now it would seem that implication of a Bivens-type remedy is permissible even though a victim of unlawful official action may be fully recompensed under an existing statutory scheme. I have difficulty believing that the Court has thought through, and intends the natural consequences of, this novel test; I cannot escape the conclusion that in future cases the Court will be obliged to retreat from the language of today's decision. 3

3

In response to this dissent, the Court's opinion tells us that it is merely "[giving] effect" to what Congress intended. See ante, at 19, n. 5. Presumably, this is a reference to the legislative history of the 1974 amendment to the FTCA, in which Congress, according to the Court, "made it crystal clear that . . . FTCA and Bivens [were] parallel, complementary causes of action." Ante, at 20. But as MR. JUSTICE REHNQUIST observes, the legislative history is far from clear. See post, at 33, n. 2. In any event, if the Court is correct in its reading of that history, then it is not

really implying a cause of action under the Constitution; rather, it is simply construing a statute. If so, almost all of the Court's opinion is dicta.

[****35] MR. JUSTICE REHNQUIST, dissenting.

The Court today adopts a formalistic procedural approach for inferring private damages remedies from constitutional [*32] provisions that in my view still further highlights the wrong turn this Court took in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). Although ordinarily this Court should exercise judicial restraint in attempting to attain a wise accommodation between liberty and order under the Constitution, to dispose of this case as if Bivens were rightly decided would in the words of Mr. Justice Frankfurter be to start with an "unreality." Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (concurring opinion). Bivens is a decision "by a closely divided court, unsupported by the confirmation of time," and, as a result of its weak precedential and doctrinal foundation, it cannot be viewed as a check on "the living process of striking a wise balance between liberty and [**1479] order as new cases come here for adjudication." Cf. 336 U.S., at 89; B. & W. Taxicab Co. v. B. & Y. Taxicab Co., 276 U.S. 518, 532-533 (1928) (Holmes, J., dissenting); [****36] Hudgens v. NLRB, 424 U.S. 507 (1976), overruling Food Employees v. Logan Valley Plaza, 391 U.S. 308 [***33] (1968). 1

1

As observed by Mr. Justice Brandeis: "This Court, while recognizing the soundness of the rule of stare decisis where appropriate, has not hesitated to overrule earlier decisions shown, upon fuller consideration, to be erroneous." Ashwander v. TVA, 297 U.S. 288, 352-353 (1936) (concurring opinion).

The Court concludes that Congress intended a Bivens action under the Eighth Amendment to exist concurrently with actions under the Federal Tort Claims Act (FTCA) because Congress did not indicate that it meant the FTCA "to preempt a Bivens remedy or to create an equally effective [*33] remedy for constitutional violations," ante, at 19, nor are there any "'special factors counselling [judicial] hesitation.'" Ante, at 18. 2

2

As suggested by MR. JUSTICE POWELL, this analysis is properly viewed as dicta in light of other statements in the Court's opinion. Ante, at 26, 28 (opinion concurring in judgment). The Court's opinion entirely disposes of this case by stating that "when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, 28 U. S. C. 2680 (h), the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and Bivens as parallel, complementary causes of action. . . ." Ante, at 19-20 (emphasis added). In light of these comments the Court concludes: "In the absence of a contrary expression from Congress, 2680 (h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint

shall have an action under FTCA against the United States as well as a Bivens action against the individual officials alleged to have infringed their constitutional rights." Ante, at 20.

Although the Court finds these comments conclusive, in my view they do not purport to suggest that it is proper for courts to infer constitutional damages remedies in areas addressed by the FTCA. Rather, I think it more likely that they reflect Congress' understanding (albeit erroneous) that Bivens was a constitutionally required decision. If I am correct, the comments comprise merely an effort on the part of the Senate Committee to avoid what it perceived as a constitutional issue. In any event, the Report seems to be an uncertain basis for concluding that Congress supports the inference of a constitutional damages remedy here or in any other context.

[****38] The Court's opinion otherwise lacks even an arguably principled basis for deciding [****37] in what circumstances an inferred constitutional damages remedy is appropriate and for defining the contours of such a remedy. And its "practical" conclusion is all the more anomalous in that Congress in 1974 amended the FTCA to permit private damages recoveries for intentional torts committed by federal law enforcement officers, thereby enabling persons injured by such officers' violations of their federal constitutional rights in many cases to obtain redress for their injuries. 3

3

Under the FTCA, if a federal agent's official conduct would render a private person liable in accordance with "the law of the place where the act or omission complained of occurred," 28 U. S. C. 2674, recovery may be had against the United States except as provided in 28 U. S. C. 2680. See also 2672, 2675. And after Bivens, Congress amended the FTCA to allow direct recovery against the Government for certain intentional torts committed by federal officials. 2680 (h). As the Court notes, however, punitive damages may not be assessed against the United States, 2674, nor may prejudgment interest be so assessed.

[*34] In my view, it is "an exercise of power that the Constitution does not give us" for this Court to infer a private civil damages remedy from the Eighth Amendment or any other constitutional provision. Bivens, 403 U.S., at 428 (Black, J., dissenting). The creation [***34] of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority. [****39] Ibid.

I

Prior to Bivens, this Court in Bell v. Hood, 327 U.S. 678 (1946), held that an individual who brought suit against federal agents for an alleged violation of his constitutional rights [**1480] had in a strictly procedural sense stated a claim that "arises" under the Constitution and must be entertained by federal courts. Id., at 681-682. The Court did not, however, hold that the Constitution confers a substantive right to damages in this context. Rather, it merely decided that the proper disposition of the suit was a ruling on the merits, not dismissal for want of jurisdiction. 4

4

Indeed, on remand the District Court concluded that plaintiff had failed to state a federal claim upon which relief could be granted. Bell v. Hood, 71 F.Supp. 813 (SD Cal. 1947). In dismissing plaintiff's action the court observed that "[plaintiffs] are unable to point to any constitutional provision or federal statute giving one who has suffered an unreasonable search and seizure or false imprisonment by federal officers any Federal right or cause of action to recover damages from those officers as individuals." Id., at 817. The District Court's opinion provided the foundation for many subsequent decisions reaching the same result. See, e. g., United States v. Faneca, 332 F.2d 872, 875 (CA5 1964), cert. denied, 380 U.S. 971 (1965); Johnston v. Earle, 245 F.2d 793, 796 (CA9 1957); Koch v. Zuieback, 194 F.Supp. 651, 656 (SD Cal. 1961), aff'd, 316 F.2d 1 (CA9 1963); Garfield v. Palmieri, 193 F.Supp. 582, 586 (EDNY 1960), aff'd per curiam, 290 F.2d 821 (CA2), cert. denied, 368 U.S. 827 (1961).

[****40] [*35] Despite the lack of a textual constitutional foundation or any precedential or other historical support, Bivens inferred a constitutional damages remedy from the Fourth Amendment, authorizing a party whose constitutional rights had been infringed by a federal officer to recover damages from that officer. Davis v. Passman, 442 U.S. 228 (1979), subsequently held that such a remedy could also be inferred from the Due Process Clause of the Fifth Amendment. And the Court today further adds to the growing list of Amendments from which a civil damages remedy may be inferred. In so doing, the Court appears to be fashioning for itself a legislative role resembling that once thought to be the domain of Congress, when the latter created a damages remedy for individuals whose constitutional rights had been violated by state officials, 42 U. S. C. 1983, and separately conferred jurisdiction on federal courts to hear such actions, 28 U. S. C. 1343. See Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979).

A

In adding to the number of Amendments from which causes of [****41] actions may be inferred, the Court does not provide any guidance for deciding when a constitutional provision permits an inference that an individual may recover damages and when it does not. For example, the Eighth Amendment, from which the Court infers a cause of action today, also provides that "[excessive] bail shall not be required, nor excessive fines imposed. . . ." If a cause of action be inferred for violations of [***35] these and other constitutional rights -- such as the Seventh Amendment right to a jury trial, the Sixth Amendment right to a speedy trial, and the Fifth Amendment privilege against compulsory self-incrimination -- I think there is an ever-increasing likelihood that the attention of [*36] federal courts will be diverted from needs that in this policymaking context might well be considered to be more pressing. As observed by Mr. Justice Black at the time this Court "inferred" a cause of action under only the Fourth Amendment:

"My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages

of factual allegations of misconduct [***42] by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature." 403 U.S., at 428 (dissenting opinion).

Because the judgments that must be made here involve many "competing policies, goals, and priorities" that are not well suited [**1481] for evaluation by the Judicial Branch, in my view "[the] task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States." Id., at 429.

B

It is clear under Art. III of the Constitution that Congress has broad authority to establish priorities for the allocation of judicial resources in defining the jurisdiction of federal courts. Ex parte McCardle, 7 Wall. 506 (1869); Sheldon v. Sill, 8 How. 441 (1850). Congress thus may prevent the federal courts from deciding cases that it believes would be an unwarranted expenditure of judicial time or would impair the ability of federal courts to dispose of matters that Congress considers to be [****43] more important. In reviewing Congress' judgment in this area, "[we] are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution. . . ." Ex parte McCardle, [*37] supra, at 514. As stated by Mr. Justice Chase in Turner v. Bank of North America, 4 Dall. 8, 10, n. (1799):

"The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess [sic] it, not otherwise: and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of federal Courts, to every subject, in every form, which the constitution might warrant."

See also Sheldon v. Sill, supra, at 449.

While it is analytically correct to view the question of jurisdiction as distinct from that [****44] of the appropriate relief to be granted, see Davis v. Passman, [***36] supra, at 239-240, n. 18, congressional authority here may all too easily be undermined when the judiciary, under the guise of exercising its authority to fashion appropriate relief, creates expansive damages remedies that have not been authorized by Congress. Just as there are some tasks that Congress may not impose on an Art. III court, Gordon v. United States, 2 Wall. 561 (1865); United States v. Klein, 13 Wall. 128 (1872), there are others that an Art. III court may not simply seize for itself without congressional authorization. This concern is initially reflected in the notion that federal courts do not have the authority to act as general courts of common law absent congressional authorization.

In Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963), the Court observed that "[as] respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not

in the freewheeling days antedating Erie R. Co. v. Tompkins, 304 U.S. 64 [1938]." Erie expressly [****45] rejected the [*38] view, previously adopted in Swift v. Tyson, 16 Pet. 1 (1842), that federal courts may declare rules of general common law in civil fields. And it has long been established that federal courts lack the authority to create a common law of crimes. United States v. Hudson & Goodwin, 7 Cranch 32 (1812). Hudson & Goodwin rested on the notion that:

"The powers of the general Government are made up of concessions from the several states -- whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions -- that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the [**1482] constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates [****46] them, and can be vested with none but what the power ceded to the general Government will authorize them to confer." Id., at 33.

Thus, the Court in Hudson concluded:

"It is not necessary to inquire whether the general Government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those Courts as a consequence of their creation." Ibid.

In my view the authority of federal courts to fashion remedies based on the "common law" of damages for constitutional violations likewise falls within the legislative domain, and does not exist where not conferred by Congress.

[*39] [***37] The determination by federal courts of the scope of such a remedy involves the creation of a body of common law analogous to that repudiated in Erie and Hudson & Goodwin. This determination raises such questions as the types of damages recoverable, the injuries compensable, the degree of intent required for recovery, and the extent to which official immunity will be available as a defense. [****47] And the creation of such a remedy by federal courts has the effect of diverting judicial resources from areas that Congress has explicitly provided for by statute. It thereby may impair the ability of federal courts to comply with judicial priorities established by Congress.

Congress' general grant of jurisdiction to federal courts under 28 U. S. C. 1331 does not permit those courts to create a remedy for the award of damages whenever an individual's constitutional rights have been violated. While 1331 grants federal courts jurisdiction to hear cases that arise under the Constitution, it makes no provision whatsoever for the award of such damages, nor, as

noted above, is there any precedential or other historical support for such a remedy prior to Bivens.5

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In his concurrence in Bivens, Mr. Justice Harlan relied heavily on decisions of this Court that have inferred private damages remedies from federal statutes. See, e. g., 403 U.S., at 402, 402-403, n. 4, 406, 407, 410-411. Thus, he states: "The Borak Case [J. I. Case Co. v. Borak, 377 U.S. 426 (1964)] is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal cause of action. . . . The exercise of judicial power involved in Borak simply cannot be justified in terms of statutory construction, . . . nor did the Borak Court purport to do so. See Borak, supra, at 432-434. The notion of 'implying' a remedy, therefore, as applied to cases like Borak, can only refer to a process whereby the federal judiciary exercises a choice among traditionally available judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law." Id., at 402-403, n. 4.

In light of this Court's recent decisions in Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), and Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), it is clear that there is nothing left of the rationale of Borak. As observed in both those cases, it is obvious that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." Touche Ross, supra, at 572; Transamerica, supra, at 21. Because the statutes at issue in those cases did not expressly provide for such a remedy and there was no clear evidence of such a congressional intention in their legislative history, the Court, unlike in Borak, declined to imply a damages remedy from the statutes' broad language. Touche Ross and Transamerica thereby undermine the principal foundation of Mr. Justice Harlan's concurring opinion in Bivens. Thus, in spite of his cursory comment that for a Bivens plaintiff "it is damages or nothing," 403 U.S., at 410, I doubt that Mr. Justice Harlan would today reach the same conclusion that he did in Bivens in 1971, especially in light of his statement that "[my] initial view of this case was that the Court of Appeals was correct in dismissing the complaint, but for reasons stated in this opinion I am now persuaded to the contrary." Id., at 398.

[****49] [*40] By contrast, it is obvious that when Congress has wished [**1483] to authorize federal courts to grant damages relief, it has known how to do so and has done so expressly. For example, in 42 U. S. C. 1983 Congress explicitly provided for federal courts to award damages against state officials who violate an [***38] individual's constitutional rights. [****48] 6

6

Title 42 U. S. C. 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

With respect to federal officials, however, it has never provided for these types of damages awards. 7

7

Indeed, in discussing the scope of authority conferred on federal courts by 1983, Senator Thurman stated at the time 1983 was adopted:

"[This section's] whole effect is to give to the Federal Judiciary that which now does not belong to it -- a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy." Cong. Globe, 42d Cong., 1st Sess., App. 216-217 (1871), quoted in Owen v. City of Independence, 445 U.S. 622, 636-637, n. 17 (1980).

Since Senator Thurman was a staunch opponent of 1983, the latter part of this statement may be viewed as not unlike the "parade of horribles" frequently marshaled against a pending measure and not the most reliable source of legislative history. But the first part of the statement quite certainly expressed the view entertained by students of federal jurisdiction until very recently.

Rather, it chose a different route in 1974 by eliminating [*41] the immunity of federal officials under the FTCA. See n. 2, supra.

[****50] Congress has also created numerous express causes of actions for damages in other areas. See, e. g., Fair Labor Standards Act, 29 U. S. C. 216 (b); Civil Rights Act of 1968, 42 U. S. C. 3612 (c); Federal Employers' Liability Act, 45 U. S. C. 51-60. While the injuries for which such damages have been authorized may seem less important than violations of constitutional rights by federal officials, Congress has nonetheless said that it wants federal courts to hear the former, and has not similarly spoken with respect to the latter.

In my view, absent a clear indication from Congress, federal courts lack the authority to grant damages relief for constitutional violations. Although Congress surely may direct federal courts to grant relief in Bivens-type actions, it is enough that it has not done so. As stated by this Court in Wheeldin v. Wheeler, 373 U.S., at 652, which declined to create an implied cause of action for federal officials' abuse of their statutory authority to issue subpoenas:

"Over the years Congress has considered the problem of state civil and criminal [****51] actions against federal officials many times. . . . But no general statute making federal officers liable for acts committed 'under color,' but in violation, of their federal authority has been passed. . . . That state law governs the cause of action alleged is shown by the fact that removal is possible in a nondiversity case such as this one only because the interpretation of a federal defense makes the case one 'arising under' [*42] the Constitution or laws of the United States. . . . [It] is not for us to fill any hiatus Congress has left in this area."

Because Congress also has never provided for a Bivens-type damages [***39] award, I think the appropriate course is for federal courts to dismiss such actions for failure to state a claim upon which relief can be granted. Congress did not even grant to federal courts a general jurisdiction to entertain cases arising under the Constitution until 1875. Act of Mar. 3, 1875, 1, 18 Stat. 470. It thus would seem that the most reasonable explanation for Congress' failure explicitly to provide for damages in Bivens actions [**1484] is that Congress intended to leave this responsibility to state courts [****52] in the application of their common law, or to put it conversely to preclude federal courts from granting such relief.

The authority of federal courts "to adjust their remedies so as to grant the necessary relief," Bell v. Hood, 327 U.S., at 684; Bivens, 403 U.S., at 392; Davis v. Passman, 442 U.S., at 245, does not suggest a contrary conclusion. While federal courts have historically had broad authority to fashion equitable remedies, 8

8

Indeed, the principal cases relied on in Bell, Bivens, and Davis for the principle that federal courts have broad authority to fashion appropriate relief are equitable. Marbury v. Madison, 1 Cranch 137 (1803), for example, which is referred to in those decisions and relied on in Bell for the principle that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief," 327 U.S., at 684, involved equitable relief by way of mandamus or injunction.

it does not follow that absent congressional authorization they may also grant damages awards for constitutional violations that would traditionally be regarded as remedies at law. The broad power of federal courts to grant equitable relief for constitutional violations has long been established. As this Court observed in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971):

"Once a right and a violation have been shown, the scope [*43] of a district court's equitable powers to remedy past wrong is broad, for breadth and flexibility are inherent in equitable remedies.

"'The essence of equity jurisdiction has been the power of [****53] the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation betwen the public interest and private needs as well as between competing private claims.' Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944), cited in Brown [v. Board of Education, 349 U.S. 294, 300 (1955)]."

Thus, for example, in Ex parte Young, 209 U.S. 123 (1908), it was held that a federal court may enjoin a state officer from enforcing penalties and remedies provided by an unconstitutional statute. See also, e. g., Osborn v. United States Bank, 9 Wheat, 738, 838-846, 859 (1824).

[****54] No similar authority of federal courts to award damages for violations of constitutional rights had [***40] ever been recognized prior to Bivens. 9

9

The Just Compensation Clause of the Fifth Amendment is not an exception here because the express language of that Clause requires that "compensation" be paid for any governmental taking.

And no statutory grant by Congress supports the exercise of such authority by federal courts. The Rules of Decision Act, for example, provides that "[the] laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U. S. C. 1652. And the All Writs Act authorizes this Court and lower federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. 1651. Neither these statutes, nor 28 U. S. C. 1331, authorizes federal [*44] courts to create a body of common-law damages remedies for constitutional violations or any other legal wrong. And as previously discussed, federal courts do not have the authority to act as general courts of common law absent [****55] authorization by Congress.

In light of the absence of any congressional authorization or historical support, I do not think the equitable authority of federal courts to grant "the necessary relief [**1485] " provides a foundation for inferring a body of common-law damages remedies from various constitutional provisions. I believe my conclusion here is further supported by an examination of the difficulties that arise in attempting to delimit the contours of the damages remedy that the Court has held should be available when an individual's constitutional rights are violated.

II

The Court concludes, as noted above, that respondent may recover damages as a result of an inferred remedy under the Eighth Amendment because "nothing in the Federal Tort Claims Act (FTCA) or its legislative history . . . [shows] that Congress [****56] meant to pre-empt a Bivens remedy or to create an equally effective remedy for constitutional violations," ante, at 19, nor are there any "'special factors counselling [judicial] hesitation.'" Ante, at 18. After observing that Congress did not explicitly state in the FTCA or its legislative history that the FTCA was intended to provide such a remedy, the Court points to "[four] additional factors" that suggest a "Bivens remedy is more effective than the FTCA remedy" in attempting to ascertain congressional intention here. Ante, at 20. The first is that the Bivens remedy is recoverable against individuals whereas the FTCA remedy is against the United States, and thus the Bivens remedy more effectively serves the deterrent purpose articulated in Bivens.

The Court not only fails to explain why the Bivens remedy is effective in the promotion of deterrence, but also does not provide any reason for believing that other sanctions on federal [*45] employees -- such as a threat of deductions in pay, reprimand, suspension, or firing -- will be ineffective in promoting the desired level of deterrence, or that Congress did not consider the

marginal[****57] increase in deterrence here to be outweighed by other considerations. See, e. g., Bell, [***41] Proposed Amendments to the Federal Tort Claims Act, 16 Harv. J. on Leg. 1, 13 (1979). And while it may be generally true that the extent to which a sanction is imposed directly on a wrongdoer will have an impact on the effectiveness of a deterrent remedy, 10

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It must also be remembered that along with the greater deterrent effect resulting from liability imposed directly on the governmental wrongdoer, there is also strong potential for distortion of governmental decisionmaking as a result of the threat of liability. Thus, MR. JUSTICE BRENNAN in his opinion for the Court in Owen v. City of Independence, 445 U.S., at 655-656, states:

"At the heart of [the] justification for a qualified immunity for the individual official is the concern that the threat of personal monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy. The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed."

The fact that Congress in the FTCA has provided for a remedy against the United States, rather than against federal officials, thus does not suggest that Congress views a Bivens remedy as desirable because of its deterrent effect. Rather, it is at least equally, if not more, plausible that Congress viewed the approach in the FTCA to be preferable because of the potential impact on governmental decisionmaking that might result from the threat of personal liability.

[****59] there are also a number of other factors that must be taken into account -- such as the amount of damages necessary to offset the benefits of the objectionable conduct, the risk that the wrongdoer might escape liability, the clarity with which the objectionable conduct is defined, and the perceptions of the individual who is a potential wrongdoer. In a Bivens action, however, there is no relationship whatsoever between the damages awarded and the benefits from infringing the individual's rights because the damages award focuses [*46] solely on the loss to the plaintiff. The damages in such an action do not take into account the risk that the wrongdoer will escape liability altogether. In addition, it is often not clear what conduct violates the Constitution, see, e. g., Owen v. City of Independence, 445 U.S. 622 [**1486] (1980); [****58] 11

11

For example, in Owen, which relies partially on a deterrence rationale, 445 U.S., at 651-652, the conduct causing the alleged injury to plaintiff had not been held to be a constitutional violation at the time it was committed. It is thus readily apparent that the imposition of damages in Owen had no deterrent impact whatsoever.

California v. Minjares, 443 U.S. 916, 917-919 (1979) (REHNQUIST, J., dissenting from denial of stay). In many cases the uncertainty as to what constitutes a constitutional violation will impair the deterrent impact of a Bivens remedy. 12

12

Even where the legal principles are not in flux, the constitutional standard may be sufficiently general that it is difficult to predict in advance whether a particular set of facts amounts to a constitutional violation. For example, as interpreted by this Court, the Due Process Clause of the Fourteenth Amendment may be violated by conduct that offends traditional notions of "fair play and substantial justice," Shaffer v. Heitner, 433 U.S. 186, 207, 212 (1977), or that "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952).

Finally, the perceptions of the potential wrongdoer as to the above considerations may also detract from the deterrent effect of a Bivens action. The Court makes no attempt to assess these factors or to examine them in relation to an FTCA action. In my view, its assertion that the Bivens remedy is a more effective deterrent than the FTCA remedy, [***42] and that this is a reason for concluding that Congress intended Bivens actions to exist concurrently with FTCA actions, remains an unsupported assertion. 13

13

Although the Court states that a Bivens remedy is recoverable against individuals, it does not state that the damages paid in a Bivens action actually come out of the federal employee's pocket. And even if they did, as explained above, it is not clear that the award would promote deterrence, or that any marginal increase in deterrence would outweigh other considerations that counsel against judicial creation of this type of remedy.

[****60] [*47] In addition, there are important policy considerations at stake here that Congress may decide outweigh the interest in deterrence promoted by personal liability of federal officials. Indeed, the fear of personal liability may "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Gregoire v. Biddle, 177 F.2d 579, 581 (CA2 1949) (L. Hand). And, as one commentator has observed: "Despite the small odds an employee will actually be held liable in a civil suit, morale within the federal services has suffered as employees have been dragged through drawn-out lawsuits, many of which are frivolous." Bell, 16 Harv. J. on Leg., supra, at 6.

The Court next argues that Congress did not intend the FTCA to displace the Bivens remedy because it did not provide for punitive damages in the FTCA. As the Court observes, we have not "expressly [addressed] and [decided] the question" whether punitive damages may be awarded in a Bivens suit. Ante, at 21-22. And despite the Court's assertion to the contrary, we have also not done so with respect to 1983 actions. In Carey v. Piphus, 435 U.S. 247, 257, n. 11 (1978), [****61] this Court explicitly stated that "we imply no approval or disapproval of any of [the] cases" that have awarded punitive damages in 1983 actions. Because this Court has never reached the question whether punitive damages may be awarded in either a Bivens or 1983 action, I think serious doubts arise as to the Court's claim that an FTCA action is not as effective as a Bivens action because the FTCA does not permit punitive damages awards. Indeed, this Court in Carey also stated that "[to] the extent that Congress intended that [damages] awards under 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a

deterrent more formidable than that inherent in the award of compensatory damages." 435 U.S., at 256-257.

Even if punitive damages were appropriate in a Bivens action, such damages are typically determined by reference [*48] to factors such as the character of the wrong, the amount necessary to "punish" the defendant, [**1487] etc., and the jury has a great deal of discretion in deciding both whether such damages should be awarded and the amount of the punitive award. See, [****62] e. g., C. McCormick, Law of Damages 85 (1935). The determination whether this or some other remedy -- such as a fixed fine, a threat of being reprimanded, suspended, or fired, or simply compensatory damages -- provides the desired level of deterrence is one for Congress. This Court should defer to Congress even when Congress has [***43] not explicitly stated that its remedy is a substitute for a Bivens action.

The third factor relied on by the Court to support its conclusion that Congress did not intend the FTCA to serve as a substitute for a Bivens action is that a plaintiff cannot opt for a jury in a FTCA action while he can in a Bivens suit. The Court, however, offers no reason why a judge is preferable to a jury, or vice versa, in this context. Rather, the Court merely notes that petitioners cannot explain why plaintiffs should not retain the choice between a judge and jury. Ante, at 23, and n. 9. I do not think the fact that Congress failed to specify that the FTCA was a substitute for a Bivens action supports the conclusion that Congress viewed the plaintiff's ability to choose between a judge and a jury as a reason for retaining a Bivens [****63] action in addition to an action under the FTCA.

Finally, I do not think it is obvious, as the Court states, that liability of federal officials for violations of constitutional rights should be governed by uniform rules absent an explicit statement by Congress indicating a contrary intention. The importance of federalism in our constitutional system has been recognized both by this Court, see, e. g., Younger v. Harris, 401 U.S. 37 (1971), and by Congress, see, e. g., 42 U. S. C. 1988, and in accommodating the values of federalism with other constitutional principles and congressional statutes, this Court has often deferred to state rules. See, e. g., Robertson [*49] v. Wegmann, 436 U.S. 584 (1978); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). As observed by MR. JUSTICE POWELL, "federal courts routinely refer to state law to fill the procedural gaps in national remedial schemes." Ante, at 29 (opinion concurring in judgment). 14

14

Like a Bivens action, a 1983 action is a creation of federal law and an exclusively federal right. Congress in 1988 nonetheless "quite clearly instructs [federal courts] to refer to state statutes" when federal law provides no rule of decision for actions brought under 1983. Robertson v. Wegmann, 436 U.S., at 593. See also n. 10, supra. Although a 1983 action is against state officers and a Bivens action is against federal officers, it does not follow that there is an obvious interest in application of uniform rules. Indeed, the controlling authority is to the contrary. See, e. g., Johnson v. Railway Express Agency, Inc., 421 U.S., at 462, and cases cited therein; infra, at 50.

Indeed, the Rules of Decision Act would seem ordinarily to require it. 28 U. S. C. 1652.

[****64] Once we get past the level of a high-school civics text, it is simply not self-evident to merely assert that here we have a federal cause of action for violations of federal rights by federal officials, and thus the question whether reference to state procedure is appropriate "admits of only a negative answer in the absence of a contrary congressional resolution." Ante, at 23. The Court articulates no solid basis for concluding that there is any interest in uniformity that should generally be viewed as significant. Although the Court identifies "deterrence" as an objective of a Bivens action, a 1983 action, which is also a creation of federal law, has been recognized by this Court as [***44] having a similar objective in the promotion of deterrence. See, e. g., Carey v. Piphus, supra, at 257; Robertson v. Wegmann, 436 U.S., at 592; Imbler v. Pachtman, supra, at 442 (WHITE, J., concurring in judgment).15

15

Robertson reveals that, however one views the appropriateness of the Court's refusal to apply Indiana survivorship law in this case, the objective of deterrence does not mean that application of state law is inappropriate for filling procedural gaps in Bivens actions on the ground that the state rule will result in an unfavorable outcome for the plaintiff.

[****66] [*50] And with respect [**1488] to such actions state procedural rules are generally controlling, see, e. g., Robertson v. Wegmann, supra. As observed in Robertson, supra, at 593: [****65]

"It is true that 1983 provides 'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.' Mitchum v. Foster, [407 U.S. 225,] 239. That a federal remedy should be available, however, does not mean that a 1983 plaintiff (or his representatives) must be allowed to continue an action in disregard of the state law to which 1988 refers us. A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." 16

16

The Court states as one justification for its refusal to apply Indiana survivorship law that here the suit is against federal officials whereas 1983 actions, which are subject to the requirements of 1988, are against state officers. Ante, at 24-25, n. 11. Section 1988, however, applies not only to claims against state officers under 1983, but also to suits under 1981, 1982, and 1985, which do not require state action. And the Rules of Decision Act applies by its terms to federal causes of action, whether or not against federal officials. Thus, the asserted interest in uniform rules of procedure in federal actions against federal officials, absent more, is unpersuasive and not justified in light of established practice.

I think the congressional determination to defer to state procedural rules in the 1983 context indicates the weak foundation upon which the Court's analysis here rests. 17

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Any alleged inconsistency with the policies of federal law here is highly speculative at best. In order to find even a marginal influence on behavior as a result of Indiana's survivorship provisions, one would have to assume not only that federal officials have both the desire and ability to select as victims only those persons who would not be survived by any close relatives, but also that (1) they are aware that if the victim dies survivorship law will preclude recovery, (2) they would intentionally kill the individual or permit him to die, rather than violate his constitutional rights to a lesser extent, in order to avoid liability under Bivens, and (3) a Bivens remedy will have a deterrent impact in these circumstances beyond that of ordinary criminal sanctions. In addition, one must include in the evaluation a consideration of competing policies that Congress may wish to promote.

[****67] [*51] In my view, the fact that Congress has created a tort remedy against federal officials at all, as it has done here under the FTCA, is dispositive. The policy questions at issue in the creation of any tort remedies, constitutional or otherwise, involve judgments as to diverse factors that are more appropriately made by the legislature [***45] than by this Court in an attempt to fashion a constitutional common law. This Court stated in TVA v. Hill, 437 U.S. 153, 194 (1978):

"Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While '[it] is emphatically the province and duty of the judicial department to say what the law is,' Marbury v. Madison, 1 Cranch 137, 177 (1803), it is equally -- and emphatically -- the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the [****68] laws and for the courts to enforce them when enforcement is sought."

Here Congress has provided no indication that it believes sound policy favors damages awards against federal officials for violations of constitutional rights.

[**1489] III

I think the Court acknowledges the legislative nature of the determinations involved here when it states that such a [*52] remedy may be defeated when "Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the Bivens remedy." Ante, at 19, n. 5. Here Congress did not do so because in the Court's words: "In the absence of a contrary expression from Congress, 2680 (h) . . . contemplates that victims of the kind of intentional

wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a Bivens action against the individual officials alleged to have infringed their constitutional rights." Ante, at 20. But under the Court's rationale if Congress had made clear that it intended the FTCA to displace judicially inferred remedies under the Constitution, this Court must defer to that legislative judgment. 18

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Thus, although it does not appear that Congress explicitly stated that 1983 is intended as the exclusive remedy for violations of constitutional rights by state officials, it would clearly be invasion of the legislative province for this Court to fashion a constitutional damages remedy against state officials that would exist concurrently with 1983. As this Court observed with respect to its creation of a Bivens action, "[the] presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution." Butz v. Economou, 438 U.S. 478, 503 (1978). Here Congress' action in adopting 42 U. S. C. 1983 demonstrates that Congress has exercised its judgment in balancing the relevant policies and in determining the nature and scope of the damages remedy against state officials who violate an individual's federal constitutional rights. In light of traditional notions of separation of powers, its judgment is conclusive.

This principle was [****69] also recognized in Bivens, wherein the Court noted that Congress had given no indication that it viewed any other remedy to be as effective as the damages remedy inferred by the Court from the Fourth Amendment. 403 U.S., at 397. See also Davis v. Passman, 442 U.S., at 245, 246-247; Butz v. Economou, 438 U.S. 478, 504 [***46] (1978).

[****70] I agree with the Court that Congress is free to devise whatever remedy it sees fit to redress violations of constitutional rights sued upon in Art. III courts, and to have that [*53] remedy altogether displace any private civil damages remedies that this Court may devise. I disagree, however, that, unless "special factors" counsel hesitation, Congress must make some affirmative showing that it intends its action to provide such redress before this Court will deem Congress' action to be an adequate substitute for an inferred remedy. 19

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As MR. JUSTICE POWELL states, the Court did not go this far even in Bivens. Ante, at 26-27 (opinion concurring in judgment).

The requirement of such congressional action is a formal procedural device that not only serves little useful purpose, but also subverts the policymaking authority vested by the Constitution in the Legislative Branch. Its application in this case, through the Court's attempt to ascertain congressional intention by examining whether the FTCA or a Bivens action is "more effective," in my view demonstrates that the creation of constitutional damages remedies involves policy considerations that are more appropriately made by the Legislative rather than the Judicial Branch of our Government.

[****71] IV

I think the Court's formalistic procedural approach to this problem is flawed for weeded additional reason. As noted above, the approach adopted by the Court in Bivens and reaffirmed today is one that permits Congress to displace this Court in fashioning a constitutional common law of its choosing merely by indicating that it intends to do so. Ante, at 19, n. 5. Otherwise, unless special factors counsel "hesitation," it will be presumed under the Court's analysis that Congress intended any remedy it creates to be enforced simultaneously by federal courts with a Bivens action. The Court provides no justification for this canon of [**1490] divining legislative intention. Presumably when Congress creates and defines the limits of a cause of action, it has taken into account competing considerations and struck what it considers to be an appropriate balance among them. In my view it is wholly at odds with traditional [*54] principles for interpretation of legislative intention and with the constitutional notion of separation of powers to conclude that because Congress failed to indicate that it did not intend the cause of action and its limitations to be defined [****72] otherwise, it intended for this Court to exercise free rein in fashioning additional rules for recovery of damages under the guise of an inferred constitutional damages action.

For the foregoing reasons I dissent, and would reverse the judgment.

References

Implication of private right of action from provision of United States Constitution

21 Am Jur 2d, Criminal Law 610; 77 Am Jur 2d, United States 88

15 Federal Procedural Forms L Ed, Claims Against United States 63:81

8 Am Jur Trials 635, Federal Tort Claims Act Proceedings 22 Am Jur Trials 1, Prisoners' Rights Litigation

28 USCS 1346(b), 2671 et seq; Constitution, 8th Amendment

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Federal Quick Index, Cruel and Unusual Punishment; Federal Tort Claims Act; Public Officers and Employees

Annotation References:

Supreme Court's construction of Civil Rights Act of 1871 (42 USCS 1983) [****73] providing private right of action for violation of federal rights. 43 L Ed 2d 833.

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. 42 L Ed 2d 946.

Supreme Court's construction of Seventh Amendment's guarantee of right to trial by jury. 40 L Ed 2d 846.

Federal constitutional guarantee against cruel and unusual punishment. 33 L Ed 2d 932.

Unconstitutional conduct by state or federal officer as affecting governmental immunity from suit in federal court. 12 L Ed 2d 1110.

United States' liability, under Federal Tort Claims Act, for death or injury of federal prisoner . 10 L Ed 2d 1361.

Punitive damages in actions for violations of Federal Civil Rights Acts. 14 ALR Fed 608.

Ziglar v. Abbasi

Supreme Court of the United States

January 18, 2017, Argued; June 19, 2017, Decided

*

Together with No. 15-1359, Ashcroft, Former Attorney General, et al. v. Abbasi et al., and No. 15-1363, Hasty et al. v. Abbasi et al., also on certiorari to the same court.

Nos. 15-1358, 15-1359, 15-1363.

Reporter
582 U.S. 120 *; 137 S. Ct. 1843 **; 198 L. Ed. 2d 290 ***; 2017 U.S. LEXIS 3874 ****; 85 U.S.L.W. 4360; 26 Fla. L. Weekly Fed. S 655; 2017 WL 2621317

JAMES W. ZIGLAR, Petitioner (No. 15-1358) v. AHMER IQBAL ABBASI, et al.

Notice:

The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: Magistrate's recommendation at Turkmen v. Ashcroft, 2018 U.S. Dist. LEXIS 137492 (E.D.N.Y., Aug. 13, 2018)

Prior History:

[****1] ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Turkmen v. Hasty, 789 F.3d 218, 2015 U.S. App. LEXIS 10160 (2d Cir. N.Y., June 17, 2015)

Disposition:

Reversed in part and vacated and remanded in part.

Syllabus

[**1847] [***298] [*120] In the immediate aftermath of the September 11 terrorist attacks, the Federal Government ordered hundreds of illegal aliens to be taken into custody and held pending a determination whether a particular detainee had connections to terrorism. Respondents, six men of Arab or South Asian descent, were detained for periods of three to six months in a federal facility in Brooklyn. After their release, they were removed from the United States. They then filed this putative class action against petitioners, two groups of federal officials. The first group consisted of former Attorney General John Ashcroft, former Federal Bureau of Investigation Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar (Executive Officials). The second group consisted of the facility's warden and assistant warden, Dennis Hasty and James Sherman (Wardens). Respondents sought damages for constitutional violations under the implied cause of action theory adopted in *Bivens* v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619, alleging that petitioners detained them in harsh pretrial conditions [***2] for a punitive purpose, in violation of the Fifth Amendment; that petitioners did so because of their actual or perceived race, religion, or national origin, in violation of the Fifth Amendment; that the Wardens subjected them to punitive strip searches, in violation of the Fourth and Fifth Amendments; and that the Wardens knowingly allowed the guards to abuse them, in violation of the Fifth Amendment. Respondents also brought a claim under 42 U. S. C. 1985(3), which forbids certain conspiracies to violate equal protection rights. The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Second Circuit affirmed in most respects as to the Wardens but reversed as to the Executive Officials, reinstating respondents' claims.

Held: The judgment is reversed in part and vacated and remanded in part.

[** *299] 789 F. 3d 218

, reversed in part and vacated and remanded in part.

[**1848] [*121] Justice Kennedy delivered the opinion of the Court, except as to Parts II-B, IV concluding:

1. The limited reach of the *Bivens* action informs the decision whether an implied damages remedy should be recognized here. Pp. ____, 198 L. Ed. 2d, at 305-310.

(a) In 42 U. S. C. 1983, Congress provided a specific damages remedy for plaintiffs whose constitutional rights were violated by state officials, but Congress [****3] provided no corresponding remedy for constitutional violations by agents of the Federal Government. In 1971, and against this background, this Court recognized in *Bivens* an implied damages action to compensate persons injured by federal officers who violated the Fourth Amendment's prohibition against unreasonable searches and seizures. In the following decade, the Court likewise allowed type remedies twice more, in a Fifth Amendment gender-discrimination case, *Davis* v. *Passman*,

442 U. S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846, and in an Eighth Amendment Cruel and Unusual Punishments Clause case, Carlson v. Green, 446 U. S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15. These are the only cases in which the Court has approved of an implied damages remedy under the Constitution itself. Pp. ___ - ___, 198 L. Ed. 2d, at 305-306.

(b) Bivens, Davis, and Carlson were decided at a time when the prevailing law assumed that a proper judicial function was to provide such remedies as are necessary to make effective a statute's purpose. J.I. Case Co. v. Borak, 377 U. S. 426, 433, 84 S. Ct. 1555, 12 L. Ed. 2d 423. The Court has since adopted a far more cautious course, clarifying that, when deciding whether to recognize an implied cause of action, the determinative question is one of statutory intent. Alexander v. Sandoval, 532 U. S. 275, 286, 121 S. Ct. 1511, 149 L. Ed. 2d 517. If a statute does not evince Congress' intent to create the private right of action asserted, Touche Ross & Co. v. Redington, 442 U. S. 560, 568, 99 S. Ct. 2479, 61 L. Ed. 2d 82, no such action will be created through judicial mandate. Similar caution must be exercised with respect to damages actions [****4] implied to enforce the Constitution itself. Bivens is well-settled law in its own context, but expanding the Bivens remedy is now considered a disfavored judicial activity. Ashcroft v. Iqbal, 556 U. S. 662, 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868.

When a party seeks to assert an implied cause of action under the Constitution, separation-of-powers principles should be central to the analysis. The question is whether Congress or the courts should decide to authorize a damages suit. Bush v. Lucas, 462 U. S. 367, 380, 103 S. Ct. 2404, 76 L. Ed. 2d 648. Most often it will be Congress, for Bivens will not be extended to a new context if there are 'special factors counselling hesitation in the absence of affirmative action by Congress.' Carlson, supra, at 18, 100 S. Ct. 1468, 64 L. Ed. 2d 15. If there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, courts must refrain from creating that kind [*122] of remedy. An alternative remedial structure may also limit the Judiciary's [***300] power to infer a new Bivens cause of action. Pp. ___ - ___, 198 L. Ed. 2d, at 306-310.

2. Considering the relevant special factors here, a Bivens-type remedy should not be extended to the claims challenging the confinement conditions imposed on respondents pursuant to the formal policy adopted by the Executive Officials in [****5] the wake of the September 11 attacks. These detention policy claims include the allegations that petitioners violated respondents' due process and equal protection rights by holding them in restrictive conditions [**1849] of confinement, and the allegations that the Wardens violated the Fourth and Fifth Amendments by subjecting respondents to frequent strip searches. The detention policy claims do not include the guard-abuse claim against Warden Hasty. Pp. ___ - ___, 198 L. Ed. 2d, at 310-316.

(a) The proper test for determining whether a claim arises in a new Bivens context is as follows. If the case is different in a meaningful way from previous Bivens cases decided by this Court, then the context is new. Meaningful differences may include, e.g., the rank of the officers involved; the constitutional right at issue; the extent of judicial guidance for the official conduct; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of

potential special factors not considered in previous Bivens cases. Respondents' detention policy claims bear little resemblance to the three Bivens claims the Court has approved in previous cases. The Second Circuit thus should have held that this was a new Bivens [****6] context and then performed a special-factors analysis before allowing this damages suit to proceed. Pp. ___ - ___, 198 L. Ed. 2d, at 310-312.

(b) The special factors here indicate that Congress, not the courts, should decide whether a damages action should be allowed.

With regard to the Executive Officials, a Bivens action is not a proper vehicle for altering an entity's policy, Correctional Services Corp. v. Malesko, 534 U. S. 61, 74, 122 S. Ct. 515, 151 L. Ed. 2d 456, and is not designed to hold officers responsible for acts of their subordinates, see Iqbal, supra, at 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868. Even an action confined to the Executive Officials' own discrete conduct would call into question the formulation and implementation of a high-level executive policy, and the burdens of that litigation could prevent officials from properly discharging their duties, see Cheney v. United States Dist. Court for D. C., 542 U. S. 367, 382, 124 S. Ct. 2576, 159 L. Ed. 2d 459. The litigation process might also implicate the discussion and deliberations that led to the formation of the particular policy, requiring courts to interfere with sensitive Executive Branch functions. See Clinton v. Jones, 520 U. S. 681, 701, 117 S. Ct. 1636, 137 L. Ed. 2d 945.

Other special factors counsel against extending Bivens to cover the detention policy claims against any of the petitioners. Because those [*123] claims challenge major elements of the Government's response to the September 11 attacks, they necessarily require an inquiry into national-security [****7] issues. National-security policy, however, is the prerogative of Congress and the President, and courts are reluctant to intrude upon that authority absent congressional authorization. [***301] Department of Navy v. Egan, 484 U. S. 518, 530, 108 S. Ct. 818, 98 L. Ed. 2d 918. Thus, Congress' failure to provide a damages remedy might be more than mere oversight, and its silence might be more than inadvertent. Schweiker v. Chilicky, 487 U. S. 412, 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370. That silence is also relevant and telling here, where Congress has had nearly 16 years to extend the kind of remedies [sought by] respondents, id., at 426, 108 S. Ct. 2460, 101 L. Ed. 2d 370, but has not done so. Respondents also may have had available 'other alternative forms of judicial relief,' Minneci v. Pollard, 565 U. S. 118, 124, 132 S. Ct. 617, 181 L. Ed. 2d 606, including injunctions and habeas petitions.

The proper balance in situations like this, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril, is one for the Congress to undertake, not the Judiciary. The Second Circuit thus erred [**1850] in allowing respondents' detention policy claims to proceed under Bivens. Pp. ___ - ___, 198 L. Ed. 2d, at 312-316.

3. The Second Circuit also erred in allowing the prisoner abuse claim against Warden Hasty to go forward without conducting the required special-factors analysis. Respondents' prisoner abuse allegations [****8] against Warden Hasty state a plausible ground to find a constitutional

violation should a Bivens remedy be implied. But the first question is whether the claim arises in a new Bivens context. This claim has significant parallels to Carlson, which extended Bivens to cover a failure to provide medical care to a prisoner, but this claim nevertheless seeks to extend Carlson to a new context. The constitutional right is different here: Carlson was predicated on the Eighth Amendment while this claim was predicated on the Fifth. The judicial guidance available to this warden with respect to his supervisory duties was less developed. There might have been alternative remedies available. And Congress did not provide a standalone damages remedy against federal jailers when it enacted the Prison Litigation Reform Act some 15 years after Carlson. Given this Court's expressed caution about extending the Bivens remedy, this context must be regarded as a new one. Pp. ___ - ___, 198 L. Ed. 2d, at 316-318.

4. Petitioners are entitled to qualified immunity with respect to respondents' claims under 42 U. S. C. 1985(3). Pp. ___ - ___, 198 L. Ed. 2d, at 318-322.

(a) Assuming that respondents' allegations are true and well pleaded, the question is whether a reasonable officer in petitioners' position [****9] would have known the alleged conduct was an unlawful conspiracy. The qualified-immunity inquiry turns on the objective legal reasonableness [*124] of the official's acts, Harlow v. Fitzgerald, 457 U. S. 800, 819, 102 S. Ct. 2727, 73 L. Ed. 2d 396, assessed in light of the legal rules that were 'clearly established' at the time [the action] was taken, Anderson v. Creighton, 483 U. S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523. If it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted, Saucier v. Katz, 533 U. S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272, the defendant officer is not entitled to [***302] qualified immunity. But if a reasonable officer might not have known that the conduct was unlawful, then the officer is entitled to qualified immunity. Pp. ___ - ___, 198 L. Ed. 2d, at 318-320.

(b) Here, reasonable officials in petitioners' positions would not have known with sufficient certainty that 1985(3) prohibited their joint consultations and the resulting policies. There are two reasons. First, the conspiracy is alleged to have been among officers in the same Department of the Federal Government. And there is no clearly established law on the issue whether agents of the same executive department are distinct enough to conspire with one another within the meaning of 42 U. S. C. 1985(3). Second, open discussion among federal officers should be encouraged to help those officials reach consensus on [****10] department policies, so there is a reasonable argument that 1985(3) liability should not extend to cases like this one. As these considerations indicate, the question whether federal officials can be said to conspire in these kinds of situations is sufficiently open that the officials in this suit would not have known that 1985(3) applied to their discussions and actions. It follows that reasonable officers in petitioners' positions would not have known with any certainty that the alleged agreements were forbidden by that statute. Pp. ___ - ___, 198 L. Ed. 2d, at 320-322.

Counsel: Ian H. Gershengorn argued the cause for petitioners in No. 15-1358 and No. 15-1359.

Jeffrey A. Lampken argued the cause for petitioners uin No. 15-1363.

Rachel Meeropol argued the cause for respondents.

Judges: Kennedy, J., delivered the opinion of the Court except as to Part IV-B. Roberts, C. J., and Alito, J., joined that opinion in full, and Thomas, J., joined except as to Part IV-B. Thomas, J., filed an opinion concurring in part and concurring in the judgment, post, p.___. Breyer, J., filed a dissenting opinion, in which Ginsburg, J., joined, post, p.___. Sotomayor, Kagan, and Gorsuch, JJ., took no part in the consideration or decision of the cases.

Opinion by: KENNEDY

Opinion

[**1851] [*125] Justice Kennedy delivered the opinion of the Court, except as to Part IV-B.

After the September 11 terrorist attacks in this country, and in response to the deaths, destruction, [****11] and dangers they caused, the United States Government ordered hundreds of illegal aliens to be taken into custody and held. Pending a determination whether a particular detainee had connections to terrorism, the custody, under harsh conditions to be described, continued. In many instances custody lasted for days and weeks, then stretching into months. Later, some [*126] of the aliens who had been detained filed suit, leading to the cases now before the Court.

The complaint named as defendants three high executive officers in the Department of Justice and two of the wardens at the facility where the detainees had been held. Most of the claims, alleging various constitutional violations, sought damages [**1852] under the implied cause-of-action theory adopted by this Court in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Another claim in the complaint was based upon the statutory cause of action authorized and created by Congress under Rev. Stat. [***303] 1980, 42 U. S. C. 1985(3). This statutory cause of action allows damages to persons injured by conspiracies to deprive them of the equal protection of the laws.

The suit was commenced in the United States District Court for the Eastern District of New York. After this Courts decision in Ashcroft v. Iqbal, 556 U. S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), a fourth amended complaint was filed; [****12] and that is the complaint to be considered here. Motions to dismiss the fourth amended complaint were denied as to some defendants and granted as to others. These rulings were the subject of interlocutory appeals to the United States Court of Appeals for the Second Circuit. Over a dissenting opinion by Judge Raggi with respect to the decision of the three-judge paneland a second unsigned dissent from the courts declining to rehear the suit en banc, joined by Judge Raggi and five other judgesthe Court

of Appealsruled that the complaint was sufficient for the action to proceed against the named officials who are now before us. See Turkmen v. Hasty, 789 F. 3d 218 (2015) (panel decision); Turkmen v. Hasty, 808 F. 3d 197 (2015) (en banc decision).

The Court granted certiorari to consider these rulings. 580 U. S. 915, 137 S. Ct. 292, 196 L. Ed. 2d 211 (2016). The officials who must defend the suit on the merits, under the ruling of the Court of Appeals, are the petitioners here. The former detainees who seek relief under the fourth amended complaint are the respondents. [*127] The various claims and theories advanced for recovery, and the grounds asserted for their dismissal as insufficient as a matter of law, will be addressed in turn.

I

Given the present procedural posture of the suit, the Court accepts as true the facts [****13] alleged in the complaint. See Iqbal, 556 U. S., at 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868.

A

In the weeks following the September 11, 2001, terrorist attacksthe worst in American historythe Federal Bureau of Investigation (FBI) received more than 96,000 tips from members of the public. See id., at 667, 129 S. Ct. 1937, 173 L. Ed. 2d 868. Some tips were based on well-grounded suspicion of terrorist activity, but many others may have been based on fear of Arabs and Muslims. FBI agents questioned more than 1,000 people with suspected links to the [September 11] attacks in particular or to terrorism in general. Ibid.

While investigating the tipsincluding the less substantiated onesthe FBI encountered many aliens who were present in this country without legal authorization. As a result, more than 700 individuals were arrested and detained on immigration charges. Ibid. If the FBI designated an alien as not being of interest to the investigation, then he or she was processed according to normal procedures. In other words the alien was treated just as if, for example, he or she had been arrested at the border after an illegal entry. If, however, the FBI designated an alien as of interest to the investigation, or if it had doubts about the proper designation in a particular case, the [****14] alien was detained subject to a hold-until-cleared policy. The aliens were held without bail.

Respondents were among some 84 aliens who were subject to the hold-until-cleared [***304] policy and detained at the Metropolitan [**1853] Detention Center (MDC) in Brooklyn, New York. They were held in the Administrative Maximum Special Housing [*128] Unit (or Unit) of the MDC. The complaint includes these allegations: Conditions in the Unit were harsh. Pursuant to official Bureau of Prisons policy, detainees were held in tiny cells for over 23 hours a day. 789 F. 3d, at 228. Lights in the cells were left on 24 hours. Detainees had little opportunity for

exercise or recreation. They were forbidden to keep anything in their cells, even basic hygiene products such as soap or a toothbrush. When removed from the cells for any reason, they were shackled and escorted by four guards. They were denied access to most forms of communication with the outside world. And they were strip searched oftenany time they were moved, as well as at random in their cells.

Some of the harsh conditions in the Unit were not imposed pursuant to official policy. According to the complaint, prison guards engaged in a pattern of physical and verbal abuse. [****15] Ibid. Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion.

B

Respondents are six men of Arab or South Asian descent. Five are Muslims. Each was illegally in this country, arrested during the course of the September 11 investigation, and detained in the Administrative Maximum Special Housing Unit for periods ranging from three to eight months. After being released respondents were removed from the United States.

Respondents then sued on their own behalf, and on behalf of a putative class, seeking compensatory and punitive damages, attorneys fees, and costs. Respondents, it seems fair to conclude from the arguments presented, acknowledge that in the ordinary course aliens who are present in the United States without legal authorization can be detained for some period of time. But here the challenge is to the conditions [*129] of their confinement and the reasons or motives for imposing those conditions. The gravamen of their claims was that the Government had no reason to suspect them of any connection [****16] to terrorism, and thus had no legitimate reason to hold them for so long in these harsh conditions.

As relevant here, respondents sued two groups of federal officials in their official capacities. The first group consisted of former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar. This opinion refers to these three petitioners as the Executive Officials. The other petitioners named in the complaint were the MDCs warden, Dennis Hasty, and associate warden, James Sherman. This opinion refers to these two petitioners as the Wardens.

Seeking to invoke the Courts decision in Bivens, respondents brought four claims under the Constitution itself. First, respondents alleged that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the substantive [***305] due process component of the Fifth Amendment. Second, respondents alleged that petitioners detained them in harsh conditions because of their actual or apparent race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment. Third, respondents alleged that the Wardens subjected them to punitive [****17] strip searches unrelated to any legitimate

penological interest, in violation of the [**1854] Fourth Amendment and the substantive due process component of the Fifth Amendment. Fourth, respondents alleged that the Wardens knowingly allowed the guards to abuse respondents, in violation of the substantive due process component of the Fifth Amendment.

Respondents also brought a claim under 42 U. S. C. 1985(3), which forbids certain conspiracies to violate equal protection rights. Respondents alleged that petitioners conspired with one another to hold respondents in harsh conditions [*130] because of their actual or apparent race, religion, or national origin.

C

The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Court of Appeals affirmed in most respects as to the Wardens, though it held that the prisoner abuse claim against Sherman (the associate warden) should have been dismissed. 789 F. 3d, at 264-265. As to the Executive Officials, however, the Court of Appeals reversed, reinstating respondents claims. Ibid. As noted above, Judge Raggi dissented. She would have held that only the prisoner abuse claim against Hasty should go forward. Id., at 295, n. 41, 302 (opinion concurring in part in judgment and dissenting in part). The [****18] Court of Appeals declined to rehear the suit en banc, 808 F. 3d, at 197; and, again as noted above, Judge Raggi joined a second dissent along with five other judges, id., at 198. This Court granted certiorari. 580 U. S. 915, 137 S. Ct. 292, 196 L. Ed. 2d 211 (2016).

II

The first question to be discussed is whether petitioners can be sued for damages under Bivens and the ensuing cases in this Court defining the reach and the limits of that precedent.

A

In 1871, Congress passed a statute that was later codified at Rev. Stat. 1979, 42 U. S. C. 1983. It entitles an injured person to money damages if a state official violates his or her constitutional rights. Congress did not create an analogous statute for federal officials. Indeed, in the 100 years leading up to Bivens, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.

In 1971, and against this background, this Court decided Bivens. The Court held that, even absent statutory authorization, [*131] it would enforce a damages remedy to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures. See 403 U. S., at 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619. The Court acknowledged that the Fourth

Amendment does not provide for money damages in so many words. Id., at 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619. The [****19] Court noted, however, that [***306] Congress had not foreclosed a damages remedy in explicit terms and that no special factors suggested that the Judiciary should hesitat[e] in the face of congressional silence. Id., at 396-397, 91 S. Ct. 1999, 29 L. Ed. 2d 619. The Court, accordingly, held that it could authorize a remedy under general principles of federal jurisdiction. See id., at 392, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (citing Bell v. Hood, 327 U. S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946)).

In the decade that followed, the Court recognized what has come to be called an implied cause of action in two cases involving other constitutional violations. In Davis v. Passman, 442 U. S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979), an administrative assistant sued a Congressman for firing her because she was a woman. The Court held that the Fifth Amendment Due Process Clause gave her a damages remedy [**1855] for gender discrimination. Id., at 248-249, 99 S. Ct. 2264, 60 L. Ed. 2d 846. And in Carlson v. Green, 446 U. S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), a prisoners estate sued federal jailers for failing to treat the prisoners asthma. The Court held that the Eighth Amendment Cruel and Unusual Punishments Clause gave him a damages remedy for failure to provide adequate medical treatment. See id., at 19, 100 S. Ct. 1468, 64 L. Ed. 2d 15. These three casesBivens, Davis, and Carlsonrepresent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.

B

To understand Bivens and the two other cases implying a damages remedy under the Constitution, it is necessary to understand the prevailing law when they were [****20] decided. In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this ancien regime, Alexander v. Sandoval, [*132] 532 U. S. 275, 287, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), the Court assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statutes purpose, J.I. Case Co. v. Borak, 377 U. S. 426, 433, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964). Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself. See, e.g., id., at 430-432, 84 S. Ct. 1555, 12 L. Ed. 2d 423; Allen v. State Bd. of Elections, 393 U. S. 544, 557, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969); Sullivan v. Little Hunting Park, Inc., 396 U. S. 229, 239, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969) (The existence of a statutory right implies the existence of all necessary and appropriate remedies).

These statutory decisions were in place when Bivens recognized an implied cause of action to remedy a constitutional violation. Against that background, the Bivens decision held that courts must 'adjust their remedies so as to grant the necessary relief' when 'federally protected rights have been invaded.' 403 U. S., at 392, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (quoting Bell, supra, at 684, 66 S. Ct. 773, 90 L. Ed. 939); see also 403 U. S., at 402, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (Harlan, J., concurring in judgment) (discussing cases recognizing implied causes of action under

federal statutes). In light of this interpretive framework, there was a possibility that the Court would keep expanding [***307] Bivens until it became the substantial equivalent of 42 U. S. C. 1983. Kent, Are Damages Different?: Bivens [****21] and National Security, 87 S. Cal. L. Rev. 1123, 1139-1140 (2014).

C

Later, the arguments for recognizing implied causes of action for damages began to lose their force. In cases decided after Bivens, and after the statutory implied cause-of-action cases that Bivens itself relied upon, the Court adopted a far more cautious course before finding implied causes of action. In two principal cases under other statutes, it declined to find an implied cause of action. See Piper v. Chris-Craft Industries, Inc., 430 U. S. 1, 42, 45-46, 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977); Cort v. Ash, 422 U. S. 66, 68-69, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). Later, in Cannon v. University of Chicago, 441 U. S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), the Court did allow an implied cause of action; but it cautioned that, where Congress intends private litigants to have a cause of action, the far [*133] better course is for Congress to confer that remedy in explicit terms. Id., at 717, 99 S. Ct. 1946, 60 L. Ed. 2d 560.

Following this expressed caution, the Court clarified in a series of cases that, [1] when deciding whether to recognize an implied cause of action, the determinative question is one of statutory intent. [**1856] Sandoval, 532 U. S., at 286, 121 S. Ct. 1511, 149 L. Ed. 2d 517. If the statute itself does not displa[y] an intent to create a private remedy, then a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Id., at 286-287, 121 S. Ct. 1511, 149 L. Ed. 2d 517; see also Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U. S. 11, 15-16, 23-24, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979); Karahalios v. Federal Employees, 489 U. S. 527, 536-537, 109 S. Ct. 1282, 103 L. Ed. 2d 539 (1989). The Court held that the judicial task was instead limited solely to determining [****22] whether Congress intended to create the private right of action asserted. Touche Ross & Co. v. Redington, 442 U. S. 560, 568, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979). If the statute does not itself so provide, a private cause of action will not be created through judicial mandate. See Transamerica, supra, at 24, 100 S. Ct. 242, 62 L. Ed. 2d 146.

[2] The decision to recognize an implied cause of action under a statute involves somewhat different considerations than when the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself. When Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action. With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.

Even so, [3] it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for

damages against federal officials in order to remedy a constitutional violation. When determining whether traditional equitable powers suffice to give necessary constitutional protectionor [****23] whether, in addition, a damages remedy [*134] is necessarythere are a [***308] number of economic and governmental concerns to consider. Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered. In an analogous context, Congress, it is fair to assume, weighed those concerns in deciding not to substitute the Government as defendant in suits seeking damages for constitutional violations. See 28 U. S. C. 2679(b)(2)(A) (providing that certain provisions of the Federal Tort Claims Act do not apply to any claim against a federal employee which is brought for a violation of the Constitution).

For these and other reasons, the Courts expressed caution as to implied causes of actions under congressional statutes led to similar caution with respect to actions in the Bivens context, where the action is implied to enforce [****24] the Constitution itself. Indeed, in light of the changes to the Courts general approach to recognizing implied damages remedies, it is possible that the analysis in the Courts three Bivens cases might have been different if they were decided today. To be sure, no congressional enactment has disapproved of these decisions. And it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of Bivens in the search-and-seizure context in which it arose. Bivens does vindicate the Constitution by allowing some redress for injuries, and it provides [**1857] instruction and guidance to federal law enforcement officers going forward. The settled law of Bivens in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.

[4] [*135] Given the notable change in the Courts approach to recognizing implied causes of action, however, the Court has made clear that expanding the Bivens remedy is now a disfavored judicial activity. Iqbal, 556 U. S., at 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868. This is in accord with the Courts observation that it has consistently refused to extend Bivens to any new context or new [****25] category of defendants. Correctional Services Corp. v. Malesko, 534 U. S. 61, 68, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001). Indeed, the Court has refused to do so for the past 30 years.

For example, the Court declined to create an implied damages remedy in the following cases: a First Amendment suit against a federal employer, Bush v. Lucas, 462 U. S. 367, 390, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983); a race-discrimination suit against military officers, Chappell v. Wallace, 462 U. S. 296, 297, 304-305, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983); a substantive due process suit against military officers, United States v. Stanley, 483 U. S. 669, 671-672, 683-684, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987); a procedural due process suit against Social Security officials, Schweiker v. Chilicky, 487 U. S. 412, 414, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); a procedural due process suit against a federal agency for wrongful termination, FDIC v. Meyer,

510 U. S. 471, 474, [***309] 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994); an Eighth Amendment suit against a private prison operator, Malesko, supra, at 63, 122 S. Ct. 515, 151 L. Ed. 2d 456; a due process suit against officials from the Bureau of Land Management, Wilkie v. Robbins, 551 U. S. 537, 547-548, 562, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007); and an Eighth Amendment suit against prison guards at a private prison, Minneci v. Pollard, 565 U. S. 118, 120, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012).

[5] When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is who should decide whether to provide for a damages remedy, Congress or the courts? Bush, 462 U. S., at 380, 103 S. Ct. 2404, 76 L. Ed. 2d 648.

The answer most often will be Congress. [6] When an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write [****26] [*136] the laws rather than those who interpret them. Ibid. (quoting United States v. Gilman, 347 U. S. 507, 512-513, 74 S. Ct. 695, 98 L. Ed. 898 (1954)). In most instances, the Courts precedents now instruct, the Legislature is in the better position to consider if the public interest would be served by imposing a "new substantive legal liability." Schweiker, supra, at 426-427, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (quoting Bush, supra, at 390, 103 S. Ct. 2404, 76 L. Ed. 2d 648). As a result, the Court has urged caution before extending Bivens remedies into any new context. Malesko, supra, at 74, 122 S. Ct. 515, 151 L. Ed. 2d 456. The Courts precedents now make clear that a Bivens remedy will not be available if there are special factors counselling hesitation in the absence of affirmative action by Congress. Carlson, 446 U. S., at 18, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (quoting Bivens, 403 U. S., at 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619).

[7] This Court has not defined the phrase special factors counselling hesitation. The necessary inference, though, is that the inquiry must concentrate on [**1858] whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a special factor counselling hesitation, a factor must cause a court to hesitate before answering that question in the affirmative.

[8] It is not necessarily a judicial function to establish whole categories of cases in which federal officers must [****27] defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others. It is true that, if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations. Yet the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies. These and other considerations may [***310] make it less probable [*137] that Congress would want the Judiciary to entertain a damages suit in a given case.

[9] Sometimes there will be doubt because the case arises in a context in which Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere. See Chappell, supra, at 302, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (military); Stanley, supra, at 679, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (same); Meyer, supra, at 486, 114 S. Ct. 996, 127 L. Ed. 2d 308 (public purse); Wilkie, supra, at 561-562, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (federal land). And sometimes there will be [****28] doubt because some other feature of a casedifficult to predict in advancecauses a court to pause before acting without express congressional authorization. In sum, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.

In a related way, [10] if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new Bivens cause of action. For if Congress has created any alternative, existing process for protecting the [injured partys] interest that itself may amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. Wilkie, supra, at 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389; see also Bush, supra, at 385-388, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (recognizing that civil-service regulations provided alternative means for relief); Malesko, 534 U. S., at 73-74, 122 S. Ct. 515, 151 L. Ed. 2d 456 (recognizing that state tort law provided alternative means for relief); Minneci, supra, at 127-130, 132 S. Ct. 617, 181 L. Ed. 2d 606 (same).

III

It is appropriate now to turn first to the Bivens [****29] claims challenging the conditions of confinement imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks. [*138] The Court will refer to these claims as the detention policy claims. The detention policy claims allege that petitioners violated respondents due process and equal protection rights by holding them in restrictive conditions of confinement; the claims further allege that the Wardens violated the Fourth and Fifth Amendments by subjecting respondents to frequent strip searches. The term detention [**1859] policy claims does not include respondents claim alleging that Warden Hasty allowed guards to abuse the detainees. That claim will be considered separately, and further, below. At this point, the question is whether, having considered the relevant special factors in the whole context of the detention policy claims, the Court should extend a Bivens-type remedy to those claims.

A

Before allowing respondents detention policy claims to proceed under Bivens, the Court of Appeals did not perform any special-factors analysis at all. 789 F. 3d, at 237. The reason, it said, was that the special factors analysis is necessary only if a plaintiff [***311] asks for a Bivens [****30] remedy in a new context. 789 F. 3d, at 234. And in the Court of Appeals view, the context here was not new. Id., at 235.

To determine whether the Bivens context was novel, the Court of Appeals employed a two-part test. First, it asked whether the asserted constitutional right was at issue in a previous Bivens case. 789 F. 3d, at 234. Second, it asked whether the mechanism of injury was the same mechanism of injury in a previous Bivens case. 789 F. 3d, at 234. Under the Court of Appeals approach, if the answer to both questions is yes, then the context is not new and no special-factors analysis is required. Ibid.

That approach is inconsistent with the analysis in Malesko. Before the Court decided that case, it had approved a Bivens action under the Eighth Amendment against federal prison officials for failure to provide medical treatment. See Carlson, 446 U. S., at 16, n. 1, 18-19, 100 S. Ct. 1468, 64 L. Ed. 2d 15. In Malesko, the plaintiff [*139] sought relief against a private prison operator in almost parallel circumstances. 534 U. S., at 64, 122 S. Ct. 515, 151 L. Ed. 2d 456. In both cases, the right at issue was the same: the Eighth Amendment right to be free from cruel and unusual punishment. And in both cases, the mechanism of injury was the same: failure to provide adequate medical treatment. Thus, if the approach followed by the Court of Appeals is the correct one, this Court should have [****31] held that the cases arose in the same context, obviating any need for a special-factors inquiry.

That, however, was not the controlling analytic framework in Malesko. Even though the right and the mechanism of injury were the same as they were in Carlson, the Court held that the contexts were different. 534 U. S., at 70, 122 S. Ct. 515, 151 L. Ed. 2d 456, and n. 4. The Court explained that special factors counseled hesitation and that the Bivens remedy was therefore unavailable. 534 U. S., at 74, 122 S. Ct. 515, 151 L. Ed. 2d 456.

For similar reasons, the holding of the Court of Appeals in the instant suit is inconsistent with this Courts analytic framework in Chappell. In Davis, decided before the Courts cautionary instructions with respect to Bivens suits, see supra, at __ - ___, 198 L. Ed. 2d, at 308-309, the Court had held that an employment-discrimination claim against a Congressman could proceed as a Bivens-type action. Davis, 442 U. S., at 230-231, 99 S. Ct. 2264, 60 L. Ed. 2d 846. In Chappell, however, the cautionary rules were applicable; and, as a result, a similar discrimination suit against military officers was not allowed to proceed. It is theChappell framework that now controls; and, under it, the Court of Appeals erred by holding that this suit did not present a new Bivens context.

[11] The proper test for determining whether a case presents a new Bivens context is as follows. [****32] If the case is different in a meaningful way from previous Bivens cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context [**1860] a new one, some examples might

prove instructive. A case might differ in a meaningful [*140] way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to [***312] how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases did not consider.

In the present suit, respondents detention policy claims challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil. Those claims bear little resemblance to the three Bivens claims the Court has approved in the past: a claim against FBI agents for handcuffing [****33] a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmates asthma. See Bivens, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619; Davis, 442 U. S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846; Carlson, 446 U. S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15. The Court of Appeals therefore should have held that this was a new Bivens context. Had it done so, it would have recognized that a special-factors analysis was required before allowing this damages suit to proceed.

B

[12] After considering the special factors necessarily implicated by the detention policy claims, the Court now holds that those factors show that whether a damages action should be allowed is a decision for the Congress to make, not the courts.

With respect to the claims against the Executive Officials, it must be noted that [13] a Bivens action is not a proper vehicle for altering an entitys policy. Malesko, supra, at 74, 122 S. Ct. 515, 151 L. Ed. 2d 456. Furthermore, a Bivens claim is brought against the individual official for his or her own acts, not the acts of others. [T]he purpose of Bivens is to deter the officer. Meyer, [*141] 510 U. S., at 485, 114 S. Ct. 996, 127 L. Ed. 2d 308. Bivens is not designed to hold officers responsible for acts of their subordinates. See Iqbal, 556 U. S., at 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat [****34] superior).

Even if the action is confined to the conduct of a particular Executive Official in a discrete instance, these claims would call into question the formulation and implementation of a general policy. This, in turn, would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged. These consequences counsel against allowing a Bivens action against the Executive Officials, for the burden and demand of litigation might well prevent themor, to be more precise, future officials like themfrom devoting the time and effort required for the proper discharge of their duties. See Cheney v. United States Dist. Court for D. C., 542 U. S. 367, 382, 124 S. Ct. 2576,

159 L. Ed. 2d 459 (2004) (noting the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties).

A closely related problem, as just noted, is that the discovery and litigation [***313] process would either border upon or directly implicate [**1861] the discussion and deliberations that led to the formation of the policy in question. See Federal Open Market Comm. v. Merrill, 443 U. S. 340, 360, 99 S. Ct. 2800, 61 L. Ed. 2d 587 (1979) (noting that disclosure of Executive Branch documents could inhibit the free flow of advice, including [****35] analysis, reports, and expression of opinion within an agency). Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch. See Clinton v. Jones, 520 U. S. 681, 701, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997) (recognizing that [e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties [*142] (quoting Loving v. United States, 517 U. S. 748, 757, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996))). These considerations also counsel against allowing a damages claim to proceed against the Executive Officials. See Cheney, supra, at 385, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (noting that special considerations control when a case implicates the Executive Branchs interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications).

In addition to this special factor, which applies to the claims against the Executive Officials, there are three other special factors that apply as well to the detention policy claims against all of the petitioners. First, respondents detention policy claims challenge more than standard law enforcement operations. United States v. Verdugo-Urquidez, 494 U. S. 259, 273, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990). They challenge as well major elements of the Governments whole response [****36] to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security. Were this inquiry to be allowed in a private suit for damages, theBivens action would assume dimensions far greater than those present in Bivens itself, or in either of its two follow-on cases, or indeed in any putative Bivens case yet to come before the Court.

[14] National-security policy is the prerogative of the Congress and President. See U. S. Const., Art. I, 8; Art. II, 1, 2. Judicial inquiry into the national-security realm raises concerns for the separation of powers in trenching on matters committed to the other branches. Christopher v. Harbury, 536 U. S. 403, 417, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002). These concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.

For these and other reasons, courts have shown deference to what the Executive Branch has determined . . . is essential to national security. Winter v. Natural Resources Defense [*143]

Council, Inc, 555 U. S. 7, 24, 26, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Indeed, courts traditionally have been reluctant to intrude upon the authority of [****37] the Executive in military and national security affairs unless Congress specifically has provided otherwise. Department of Navy v. [***314] Egan, 484 U. S. 518, 530, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988). Congress has not provided otherwise here.

[15] There are limitations, of course, on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security. See, e.g., [**1862] Hamdi v. Rumsfeld, 542 U. S. 507, 527, 532-537, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (plurality opinion) (Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake); Boumediene v. Bush, 553 U. S. 723, 798, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008) (Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law). And national-security concerns must not become a talisman used to ward off inconvenient claimsa label used to cover a multitude of sins. Mitchell v. Forsyth, 472 U. S. 511, 523, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). This danger of abuse is even more heightened given the difficulty of defining the security interest in domestic cases. Ibid. (quoting United States v. United States Dist. Court for Eastern Dist. of Mich., 407 U. S. 297, 313-314, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)).

Even so, [16] the question is only whether congressionally uninvited intrusion is inappropriate action for the Judiciary to take. Stanley, 483 U. S., at 683, 107 S. Ct. 3054, 97 L. Ed. 2d 550. The factors discussed above all suggest that Congress failure to provide a damages remedy [****38] might be more than mere oversight, and that congressional silence might be more than inadvertent. Schweiker, 487 U. S., at 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370. This possibility counsels hesitation in the absence of affirmative action by Congress. Bivens, 403 U. S., at 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619.

Furthermore, [17] in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant; [*144] and here that silence is telling. In the almost 16 years since September 11, the Federal Governments responses to that terrorist attack have been well documented. Congressional interest has been frequent and intense, Schweiker, supra, at 425, 108 S. Ct. 2460, 101 L. Ed. 2d 370, and some of that interest has been directed to the conditions of confinement at issue here. Indeed, at Congress behest, the Department of Justices Office of the Inspector General compiled a 300-page report documenting the conditions in the MDC in great detail. See 789 F. 3d, at 279 (opinion of Raggi, J.) (noting that the USA PATRIOT Act required the Departments Inspector General to review and report semi-annually to Congress on any identified abuses of civil rights and civil liberties in fighting terrorism). Nevertheless, [a]t no point did Congress choose to extend to any person the kind of remedies that respondents seek in this lawsuit. Schweiker, 487 U. S., at 426, 108 S. Ct. 2460, 101 L. Ed. 2d 370.

This silence is notable [****39] because it is likely that high-level policies will attract the attention of Congress. Thus, when Congress fails to provide a damages remedy in circumstances

like these, it is much more difficult to believe that congressional inaction was inadvertent. Vel non, 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370.

[***315] It is of central importance, too, that this is not a case like Bivens or Davis in which it is damages or nothing. Bivens, supra, at 410, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (Harlan, J., concurring in judgment); Davis, 442 U. S., at 245, 99 S. Ct. 2264, 60 L. Ed. 2d 846. Unlike the plaintiffs in those cases, respondents do not challenge individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact. Respondents instead challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief. And in addition to that, we have left open the question whether they might be able to challenge their confinement [**1863] conditions via a petition for a writ of habeas corpus. See Bell v. Wolfish, 441 U. S. 520, 526-527, n. 6, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ([W]e [*145] leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement); Preiser v. Rodriguez, 411 U. S. 475, 499, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973) (When a [****40] prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making custody illegal).

Indeed, the habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief than a suit for money damages. A successful habeas petition would have required officials to place respondents in less-restrictive conditions immediately; yet this damages suit remains unresolved some 15 years later. (As in Bell and Preiser, the Court need not determine the scope or availability of the habeas corpus remedy, a question that is not before the Court and has not been briefed or argued.) In sum, respondents had available to them other alternative forms of judicial relief. Minneci, 565 U. S., at 124, 132 S. Ct. 617, 181 L. Ed. 2d 606. And when alternative methods of relief are available, a Bivens remedy usually is not. See Bush, 462 U. S., at 386-388, 103 S. Ct. 2404, 76 L. Ed. 2d 648; Schweiker, supra, at 425-426, 108 S. Ct. 2460, 101 L. Ed. 2d 370; Malesko, 534 U. S., at 73-74, 122 S. Ct. 515, 151 L. Ed. 2d 456; Minneci, supra, at 125-126, 132 S. Ct. 617, 181 L. Ed. 2d 606.

There is a persisting concern, of course, that absent a Bivens remedy there will be insufficient deterrence to prevent officers from violating the Constitution. In circumstances like those presented here, however, the stakes on both sides of the argument are far higher than in [****41] past cases the Court has considered. If Bivens liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. And, as already noted, the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office.

On the other side of the balance, the very fact that some executive actions have the sweeping potential to affect the liberty of so many is a reason to consider proper means to [*146] impose restraint and to provide some redress from injury. There is therefore a balance to be struck, in situations like this one, between deterring constitutional violations and freeing high officials

[***316] to make the lawful decisions necessary to protect the Nation in times of great peril. Cf. Stanley, 483 U.S., at 681, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (noting that the special-factors analysis in that case turned on how much occasional, unintended impairment of military discipline one is willing to tolerate). The proper balance is one for the Congress, not the Judiciary, to undertake. For all of these reasons, the Court of Appeals erred by allowing respondents detention policy claims to proceed under Bivens.

IV

A

One [****42] of respondents claims under Bivens requires a different analysis: the prisoner abuse claim against the MDCs warden, Dennis Hasty. The allegation is that Warden Hasty violated the Fifth Amendment by allowing prison guards to abuse respondents.

The warden argues, as an initial matter, that the complaint does not state a claim to relief that is plausible on its face. Iqbal, 556 U. S., at 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (quoting Bell Atlantic Corp. v. Twombly, 550 U. S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Applying its precedents, the Court of Appeals held that the [**1864] substantive standard for the sufficiency of the claim is whether the warden showed deliberate indifference to prisoner abuse. 789 F. 3d, at 249-250. The parties appear to agree on this standard, and, for purposes of this case, the Court assumes it to be correct.

The complaint alleges that guards routinely abused respondents; that the warden encouraged the abuse by referring to respondents as 'terrorists', App. to Pet. for Cert. in No. 15-1359, p. 280a; that he prevented respondents from using normal grievance procedures; that he stayed away from the Unit to avoid seeing the abuse; that he was made aware of the abuse via inmate complaints, staff complaints, [*147] hunger strikes, and suicide attempts id., at 260a; that he ignored other direct evidence of [the] abuse, including logs and other official [records], id. at 280a; that he took no action to rectify [****43] or address the situation, id., at 260a; and that the abuse resulted in the injuries described above, see supra, at ___, 198 L. Ed. 2d, at 304. These allegationsassumed here to be true, subject to proof at a later stageplausibly show the wardens deliberate indifference to the abuse. Consistent with the opinion of every judge in this case to have considered the question, including the dissenters in the Court of Appeals, the Court concludes that the prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation if a Bivens remedy is to be implied.

Warden Hasty argues, however, that Bivens ought not to be extended to this instance of alleged prisoner abuse. As noted above, the first question a court must ask in a case like this one is whether the claim arises in a new Bivens context, i.e., whether the case is different in a meaningful way from previous Bivens cases decided by this Court. Supra, at ___, 198 L. Ed. 2d, at 311.

It is true that this case has significant parallels to one of the Courts previous Bivens cases, Carlson v. Green, 446 U. S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15. There, the Court did allow a Bivens claim for prisoner mistreatmentspecifically, for failure to provide medical care. And the allegations of injury here are just as compelling [***317] as those at issue [****44] in Carlson. This is especially true given that the complaint alleges serious violations of Bureau of Prisons policy. See 28 CFR 552.20 (2016) (providing that prison staff may use force only as a last alternative after all other reasonable efforts to resolve a situation have failed and that staff may use only that amount of force necessary to [ensure prison safety and security]); 552.22(j) (All incidents involving the use of force . . . must be carefully documented); 542.11 (requiring the warden to investigate certain complaints of inmate abuse).

Yet even a modest extension is still an extension. And this case does seek to extend Carlson to a new context. As [*148] noted above, [18] a case can present a new context for Bivens purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous Bivens cases. See supra, at ___, 198 L. Ed. 2d, at 309.

The constitutional right is different here, since Carlson was predicated on the Eighth Amendment and this claim is predicated on the Fifth. See 446 U. S., at 16, 100 S. Ct. 1468, 64 L. Ed. 2d 15. And the judicial guidance available to this warden, with respect to his supervisory duties, was less developed. [19]The Court has [****45] long made clear the standard for claims alleging failure to provide medical treatment to a prisonerdeliberate indifference to serious medical needs. Estelle v. Gamble, 429 U. S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). The standard for a claim alleging that a warden [**1865] allowed guards to abuse detainees is less clear under the Courts precedents.

This case also has certain features that were not considered in the Courts previous Bivens cases and that might discourage a court from authorizing a Bivens remedy. As noted above, [20] the existence of alternative remedies usually precludes a court from authorizing a Bivens action. Supra, at ___, 198 L. Ed. 2d, at 310. And there might have been alternative remedies available here, for example, a writ of habeas corpus, Wolfish, 441 U. S., at 526, n. 6, 99 S. Ct. 1861, 60 L. Ed. 2d 447; an injunction requiring the warden to bring his prison into compliance with the regulations discussed above; or some other form of equitable relief.

Furthermore, [21] legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation. See supra, at ___, 198 L. Ed. 2d, at 310. Some 15 years after Carlson was decided, Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way prisoner abuse claims must be brought in federal court. See 42 U. S. C. 1997e. So it seems clear that Congress [****46] had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs. This [*149] Court has said in dicta that the Acts exhaustion provisions would apply to Bivens suits. See Porter v. Nussle, 534 U. S. 516, 524, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002). But the Act itself does not provide for a standalone damages remedy against federal jailers. It could be argued that

this suggests Congress chose not to extend the Carlson damages remedy to cases involving other types of prisoner mistreatment.

The differences between this claim [***318] and the one in Carlson are perhaps small, at least in practical terms. Given this Courts expressed caution about extending the Bivens remedy, however, the new-context inquiry is easily satisfied. [22] Some differences, of course, will be so trivial that they will not suffice to create a new Bivens context. But here the differences identified above are at the very least meaningful ones. Thus, before allowing this claim to proceed under Bivens, the Court of Appeals should have performed a special-factors analysis. It should have analyzed whether there were alternative remedies available or other sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy in a suit like [****47] this one. Supra, at ___, 198 L. Ed. 2d, at 310.

B

Although the Court could perform that analysis in the first instance, the briefs have concentrated almost all of their efforts elsewhere. Given the absence of a comprehensive presentation by the parties, and the fact that the Court of Appeals did not conduct the analysis, the Court declines to perform the special-factors analysis itself. The better course is to vacate the judgment below, allowing the Court of Appeals or the District Court to do so on remand.

V

One issue remains to be addressed: the claim that petitioners are subject to liability for civil conspiracy under 42 U. S. C. 1985(3). Unlike the prisoner abuse claim just discussed, this claim implicates the activities of all the petitionersthe [*150] Executive Officials as well as the Wardensin creating the conditions of confinement at issue here.

[23] The civil-conspiracy prohibition contained in 1985(3) was enacted as a significant part of the civil rights legislation passed in the aftermath of the Civil War. See Carpenters v. Scott, 463 U. S. 825, 834-837, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983) (detailing the legislative history of 1985(3)); [**1866] Griffin v. Breckenridge, 403 U. S. 88, 99-101, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971) (same); Great American Fed. Sav. & Loan Assn. v. Novotny, 442 U. S. 366, 379, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979) (Powell, J., concurring) (describing 1985(3) as a Civil War Era remedial statute). The statute imposes liability on two or more persons who conspire . . . for the purpose of depriving [****48] . . . any person or class of persons of the equal protection of the laws. 1985(3). In the instant suit, respondents allege that petitioners violated the statute by agreeing to implement a policy under which respondents would be detained in harsh conditions because of their race, religion, ethnicity, and national origin. App. to Pet. for Cert in No. 15-1359, at 347a. Assuming these allegations to be true and well pleaded, the question is whether petitioners are entitled to qualified immunity.

A

[24] The qualified immunity rule seeks a proper balance between two competing interests. On one hand, damages suits may offer the only realistic avenue for vindication of constitutional guarantees. Harlow v. Fitzgerald, 457 U. S. 800, 814, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. Anderson v. [***319] Creighton, 483 U. S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). As one means to accommodate these two objectives, the Court has held that Government officials are entitled to qualified immunity with respect to discretionary functions performed in their official capacities. Ibid. The doctrine of qualified immunity gives officials breathing [*151] room to make [****49] reasonable but mistaken judgments about open legal questions.Ashcroft v. al-Kidd, 563 U. S. 731, 743 (2011).

The Courts cases provide additional instruction to define and implement that immunity. [25] Whether qualified immunity can be invoked turns on the objective legal reasonableness of the officials acts. Harlow, supra, at 819, 102 S. Ct. 2727, 73 L. Ed. 2d 396. And reasonableness of official action, in turn, must be assessed in light of the legal rules that were clearly established at the time [the action] was taken. Anderson, supra, at 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (internal quotation marks omitted); see also Mitchell, 472 U. S., at 528, 105 S. Ct. 2806, 86 L. Ed. 2d 411. This requirementthat an official loses qualified immunity only for violating clearly established lawprotects officials accused of violating extremely abstract rights. Anderson, supra, at 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523.

[26] The Fourth Amendment provides an example of how qualified immunity functions with respect to abstract rights. By its plain terms, the Amendment forbids unreasonable searches and seizures, yet it may be difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered. See Saucier v. Katz, 533 U. S. 194, 205, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts). For this reason, [****50] [t]he dispositive question is whether the violative nature of particular conduct is clearly established. Mullenix v. Luna, 577 U. S. 7, 12, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255, 259 (2015) (per curiam) (quoting Ashcroft, supra, at 742, 129 S. Ct. 1937, 173 L. Ed. 2d 868).

[27] It is not necessary, of course, that the very action in question has previously been held unlawful. [**1867] Anderson, supra, at 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523. That is, an officer might lose qualified immunity even if there is no reported case directly on point. Ashcroft, supra, at 741, 129 S. Ct. 1937, 173 L. Ed. 2d 868. But in the light of pre-existing law, the unlawfulness of the officers conduct must be apparent. Anderson, supra, at 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523. To subject officers to any broader liability would be to disrupt the balance that our cases [*152]

strike between the interests in vindication of citizens constitutional rights and in public officials effective performance of their duties. Davis v. Scherer, 468 U. S. 183, 195, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). For then, both as a practical and legal matter, it would be difficult for officials reasonably [to] anticipate when their conduct may give rise to liability for damages. Ibid.

In light of these concerns, the Court has held that [28] qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Malley v. Briggs, 475 U. S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d [***320] 271 (1986). To determine whether a given officer falls into either of those two categories, a court must ask whether it would have been clear [****51] to a reasonable officer that the alleged conduct was unlawful in the situation he confronted. Saucier, supra, at 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272. If so, then the defendant officer must have been either incompetent or else a knowing violator of the law, and thus not entitled to qualified immunity. If not, howeveri.e., if a reasonable officer might not have known for certain that the conduct was unlawfulthen the officer is immune from liability.

B

Under these principles, it must be concluded that reasonable officials in petitioners positions would not have known, and could not have predicted, that 1985(3) prohibited their joint consultations and the resulting policies that caused the injuries alleged.

At least two aspects of the complaint indicate that petitioners potential liability for this statutory offense would not have been known or anticipated by reasonable officials in their position. First, the conspiracy recited in the complaint is alleged to have been between or among officers in the same branch of the Government (the Executive Branch) and in the same Department (the Department of Justice). Second, the discussions were the preface to, and the outline of, a general and far-reaching policy.

As to the fact that these [****52] officers were in the same Department, an analogous principle discussed in the context of antitrust [*153] law is instructive. [29] The Courts precedent indicates that there is no unlawful conspiracy when officers within a single corporate entity consult among themselves and then adopt a policy for the entity. See Copperweld Corp. v. Independence Tube Corp., 467 U. S. 752, 769-771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). Under this principlesometimes called the intracorporate-conspiracy doctrinean agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy. Ibid. The rule is derived from the nature of the conspiracy prohibition. Conspiracy requires an agreementand in particular an agreement to do an unlawful actbetween or among two or more separate persons. When two agents of the same legal entity make an agreement in the course of their official duties, however, as a practical and legal matter their acts are attributed to their principal. And it then follows that there has not been an agreement between two or more separate people. See id., at 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628

(anabgizing to a multiple team of horses [**1868] drawing a vehicle under the control of a single driver).

To be sure, this Court has not given its approval to this doctrine in the specific [****53] context of 1985(3). See Great American, 442 U. S., at 372, n. 11, 99 S. Ct. 2345, 60 L. Ed. 2d 957. There is a division in the courts of appeals, moreover, respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to 1985 conspiracies. See Hull v. Shuck, 501 U. S. 1261, 1261-1262, 111 S. Ct. 2917, 115 L. Ed. 2d 1080 (1991) (White, J., dissenting from denial of certiorari) (discussing the Circuit split); Bowie v. Maddox, 642 F. 3d 1122, 1130-1131, 395 U.S. App. D.C. 301 (CADC 2011) (detailing a longstanding split about whether the [***321] intracorporate-conspiracy doctrine applies to civil rights conspiracies). Nothing in this opinion should be interpreted as either approving or disapproving the intracorporate-conspiracy doctrines application in the context of an alleged 1985(3) violation. The Court might determine, in some later case, that different considerations apply to a conspiracy respecting equal protection guarantees, as distinct from a conspiracy in the antitrust [*154] context. Yet the fact that the courts are divided as to whether or not a 1985(3) conspiracy can arise from official discussions between or among agents of the same entity demonstrates that the law on the point is not well established. [30] When the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability. See Wilson v. Layne, 526 U. S. 603, 618, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) (noting that it would be unfair to subject officers [****54] to damages liability when even judges . . . disagree); Reichle v. Howards, 566 U. S. 658, 669-670, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012) (same).

In addition to the concern that agents of the same legal entity are not distinct enough to conspire with one another, there are other sound reasons to conclude that conversations and agreements between and among federal officials in the same Department should not be the subject of a private cause of action for damages under 1985(3). To state a claim under 1985(3), a plaintiff must first show that the defendants conspiredthat is, reached an agreementwith one another. See Carpenters, 463 U. S., at 828, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (stating that the elements of a 1985(3) claim include a conspiracy). Thus, a 1985(3) claim against federal officials by necessity implicates the substance of their official discussions.

As indicated above with respect to other claims in this suit, open discussion among federal officers is to be encouraged, so that they can reach consensus on the policies a department of the Federal Government should pursue. See supra, at ___ - ___, 198 L. Ed. 2d, at 312-313. Close and frequent consultations to facilitate the adoption and implementation of policies are essential to the orderly conduct of governmental affairs. Were those discussions, and the resulting policies, to be the basis for private suits seeking damages against [****55] the officials as individuals, the result would be to chill the interchange and discourse that is necessary for the adoption and implementation of governmental policies. See Cheney, 542 U. S., at 383, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (discussing the need for confidential communications among Executive Branch officials); Merrill, 443 U. S., at 360, 99 S. Ct. 2800, 61 L. Ed. 2d 587 (same).

[*155]These considerations suggest that officials employed by the same governmental department do not conspire when they speak to one another and work together in their official capacities. Whether that contention should prevail need not be decided here. It suffices to say that the question is sufficiently open so that the officials in this suit could not be certain that [**1869] 1985(3) was applicable to their discussions and actions. Thus, the law respondents seek to invoke cannot be clearly established. It follows that reasonable officers in petitioners [***322] positions would not have known with any certainty that the alleged agreements were forbidden by law. See Saucier, 533 U. S., at 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272. Petitioners are entitled to qualified immunity with respect to the claims under 42 U. S. C. 1985(3).

***

If the facts alleged in the complaint are true, then what happened to respondents in the days following September 11 was tragic. Nothing in this opinion should be read to condone the treatment to which [****56] they contend they were subjected. The question before the Court, however, is not whether petitioners alleged conduct was proper, nor whether it gave decent respect to respondents dignity and well-being, nor whether it was in keeping with the idea of the rule of law that must inspire us even in times of crisis.

Instead, the question with respect to the Bivens claims is whether to allow an action for money damages in the absence of congressional authorization. For the reasons given above, the Court answers that question in the negative as to the detention policy claims. As to the prisoner abuse claim, because the briefs have not concentrated on that issue, the Court remands to allow the Court of Appeals to consider the claim in light of the Bivens analysis set forth above.

The question with respect to the 1985(3) claim is whether a reasonable officer in petitioners position would have known the alleged conduct was an unlawful conspiracy. For the reasons given above, the Court answers that question, too, in the negative.

[*156] The judgment of the Court of Appeals is reversed as to all of the claims except the prisoner abuse claim against Warden Hasty. The judgment of the Court of Appeals with respect [****57] to that claim is vacated, and that case is remanded for further proceedings.

It is so ordered.

Justice Sotomayor, Justice Kagan, and Justice Gorsuch took no part in the consideration or decision of these cases.

Concur by: Thomas

Concur

JusticeThomas, concurring in part and concurring in the judgment.

I join the Courts opinion except for Part-B/ I write separately to express my view on the Courts decision to remand some of respondents claims under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and my concerns about our qualified immunity precedents.

I

With respect to respondents Bivens claims, I join the opinion of the Court to the extent it reverses the Second Circuits ruling. The Court correctly applies precedent to hold that Bivens does not supply a cause of action against petitioners for most of the alleged Fourth and Fifth Amendment violations. It also correctly recognizes that respondents claims against petitioner Dennis Hasty seek to extend Bivens to a new context. See ante, at ___, 198 L. Ed. 2d, at 316.

I concur in the judgment of the Court vacating the Court of Appeals judgment with regard to claims against Hasty. Ante, [***323] at ___, 198 L. Ed. 2d, at 319. I have previously noted that Bivens is a relic of the heady days in which this Court assumed common-law powers to create causes of action. Wilkie v. Robbins, 551 U. S. 537, 568, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007) (concurring [****58] opinion) (quoting [**1870] Correctional Services Corp. v. Malesko, 534 U. S. 61, 75, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) (Scalia, J., concurring)). I have thus declined to extend Bivens even [where] its reasoning logically applied, thereby [*157] limiting Bivens and its progeny . . . to the precise circumstances that they involved. Wilkie, supra, at 568, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (internal quotation marks omitted). This would, in most cases, mean a reversal of the judgment of the Court of Appeals is in order. However, in order for there to be a controlling judgment in this suit, I concur in the judgment vacating and remanding the claims against petitioner Hasty as that disposition is closest to my preferred approach.

II

As for respondents claims under 42 U. S. C. 1985(3), I join Part V of the Courts opinion, which holds that respondents are entitled to qualified immunity. The Court correctly applies our precedents, which no party has asked us to reconsider. I write separately, however, to note my growing concern with our qualified immunity jurisprudence.

The Civil Rights Act of 1871, of which 1985(3) and the more frequently litigated 1983 were originally a part, established causes of action for plaintiffs to seek money damages from Government officers who violated federal law. See 1, 2, 17 Stat. 13. Although the Act made no

mention of defenses or immunities, we have [****59] it in harmony with general principles of tort immunities and defenses rather than in derogation of them. Malley v. Briggs, 475 U. S. 335, 339, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (internal quotation marks omitted). We have done so because [c]ertain immunities were so well established in 1871 . . . that we presume that Congress would have specifically so provided had it wished to abolish them. Buckley v. Fitzsimmons, 509 U. S. 259, 268, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993); accord, Briscoe v. LaHue, 460 U. S. 325, 330, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). Immunity is thus available under the statute if it was historically accorded the relevant official in an analogous situation at common law, Imbler v. Pachtman, 424 U. S. 409, 421, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), unless the statute provides some reason to think that Congress did not preserve the defense, see Tower v. Glover, 467 U. S. 914, 920, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984).

[*158] In some contexts, we have conducted the common-law inquiry that the statute requires. See Wyatt v. Cole, 504 U. S. 158, 170, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992) (Kennedy, J., concurring). For example, we have concluded that legislators and judges are absolutely immune from liability under 1983 for their official acts because that immunity was well established at common law in 1871. See Tenney v. Brandhove, 341 U. S. 367, 372-376, 71 S. Ct. 783, 95 L. Ed. 1019 (1951) (legislators); Pierson v. Ray, 386 U. S. 547, 553-555, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) (judges). We have similarly looked to the common law in holding that a prosecutor is immune from suits relating to the judicial phase of the criminal process, [***324] Imbler, supra, at 430, 96 S. Ct. 984, 47 L. Ed. 2d 128; Burns v. Reed, 500 U. S. 478, 489-492, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991); but see Kalina v. Fletcher, 522 U. S. 118, 131-134, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (Scalia, J., joined by Thomas, J., concurring) (arguing that the Court in Imbler misunderstood 1871 common-law [****60] rules), although not from suits relating to the prosecutors advice to police officers, Burns, supra, at 493, 111 S. Ct. 1934, 114 L. Ed. 2d 547.

In developing immunity doctrine for other executive officers, we also started off by applying common-law rules. In Pierson, we held that police officers are not absolutely [**1871] immune from a 1983 claim arising from an arrest made pursuant to an unconstitutional statute because the common law never granted arresting officers that sort of immunity. 386 U. S., at 555, 87 S. Ct. 1213, 18 L. Ed. 2d 288. Rather, we concluded that police officers could assert the defense of good faith and probable cause against the claim for an unconstitutional arrest because that defense was available against the analogous torts of false arrest and imprisonment at common law. Id., at 557, 87 S. Ct. 1213, 18 L. Ed. 2d 288.

In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. See Wyatt, supra, at 170, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (Kennedy, J., concurring); accord, Crawford-El v. Britton, 523 U. S. 574, 611, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) (Scalia, J., joined by Thomas, J., dissenting). In the decisions following Pierson, we have completely reformulated qualified immunity along principles not at all embodied in the common law. Anderson [*159] v. Creighton, 483 U. S. 635, 645, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (discussing Harlow v. Fitzgerald, 457 U. S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). Instead of asking whether the common law in 1871 would

have accorded immunity[****61] to an officer for a tort analogous to the plaintiffs claim under 1983, we instead grant immunity to any officer whose conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Mullenix v. Luna, 577 U. S. 7, 11, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255, 259 (2015) (per curiam) (internal quotation marks omitted); Taylor v. Barkes, 575 U. S. 822, 825, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78, 81 (2015)) (per curiam) (a Government official is liable under the 1871 Act only if existing precedent . . . placed the statutory or constitutional question beyond debate (quoting Ashcroft v. al-Kidd, 563 U. S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011))). We apply this clearly established standard across the board and without regard to the precise nature of the various officials duties or the precise character of the particular rights alleged to have been violated. Anderson, supra, at 641-643, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (internal quotation marks omitted). *

*

Although we first formulated the clearly established standard in Bivens cases like Harlow and Anderson, we have imported that standard directly into our 1871 Act cases. See, e.g., Pearson v. Callahan, 555 U. S. 223, 243-244, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (applying the clearly established standard to a 1983 claim).

We have not attempted to locate that standard in the common law as it existed in 1871, however, [***325] and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine. See generally Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. 45, 51-62 (2018).

Because our analysis is no [****62] longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in interpret[ing] the intent of Congress in enacting the Act. Malley, 475 U.S., at 342, 106 S. Ct. 1092, 89 L. Ed. 2d 271; see Burns, supra, at 493 111 S. Ct. 1934, 114 L. Ed. 2d 547. Our qualified immunity precedents instead represent precisely the sort of freewheeling policy choice[s] that we have previously disclaimed the power to [*160] make. Rehberg v. Paulk, 566 U. S. 356, 363, 132 S. Ct. 1497, 182 L. Ed. 2d 593 (2012) (internal quotation marks omitted); see also Tower, supra, at 922-923, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (We do not have a license to establish immunities from suits brought under [**1872] the Act in the interests of what we judge to be sound public policy). We have acknowledged, in fact, that the clearly established standard is designed to protec[t] the balance between vindication of constitutional rights and government officials effective performance of their duties. Reichle v. Howards, 566 U. S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012) (internal quotation marks omitted); Harlow, supra, at 807, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (explaining that the recognition of a qualified immunity defense . . . reflected an attempt to balance competing values). The Constitution assigns this kind of balancing to Congress, not the Courts.

In todays decision, we continue down the path our precedents have marked. We ask whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation [****63] he confronted, ante, at ___, 198 L. Ed. 2d, at 320 (internal quotation marks

omitted), rather than whether officers in petitioners positions would have been accorded immunity at common law in 1871 from claims analogous to respondents. Even if we ultimately reach a conclusion consistent with the common-law rules prevailing in 1871, it is mere fortuity. Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.

Dissent by: Breyer

Dissent

Justice Breyer, with whom Justice Ginsburg joins, dissenting.

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), this Court held that the Fourth Amendment provides a damages remedy for those whom federal officials have injured as a result of an unconstitutional search or seizure. In Davis v. Passman, 442 U. S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979), the Court held that the Fifth Amendment provides a damages remedy [*161] to an individual dismissed by her employer (a Member of Congress) on the basis of her sex in violation of the equal protection component of that Amendments Due Process Clause. And in Carlson v. Green, 446 U. S. 14, 100 S. Ct. [***326] 1468, 64 L. Ed. 2d 15 (1980), the Court held that the Eighth Amendment provides a damages remedy to a prisoner who died as a result of prison officials deliberate indifference to his medical needs, in violation [****64] of the Amendments prohibition against cruel and unusual punishment.

It is by now well established that federal law provides damages actions at least in similar contexts, where claims of constitutional violation arise. Congress has ratified Bivens actions, plaintiffs frequently bring them, courts accept them, and scholars defend their importance. See J. Pfander, Constitutional Torts and the War on Terror (2017) (canvassing the history of Bivens and cataloging cases). Moreover, the courts, in order to avoid deterring federal officials from properly performing their work, have developed safeguards for defendants, including the requirement that plaintiffs plead plausible claims, Ashcroft v. Iqbal, 556 U. S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), as well as the defense of qualified immunity, which frees federal officials from both threat of liability and involvement in the lawsuit, unless the plaintiffs establish that officials have violated clearly established . . . constitutional rights, id., at 672, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (quoting Harlow v. Fitzgerald, 457 U. S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). [This] Court has been reluctant to extend Bivens liability to any new context or new category of defendants. Iqbal, supra, at 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (quoting [**1873] Correctional Services Corp. v. Malesko, 534 U. S. 61, 68, 122 S. Ct. 515, 151 L. Ed. 2d 456

(2001)). But the Court has made clear that it would not narrow Bivens existing scope. See FDIC v. Meyer, 510 U. S. 471, 485, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994) (guarding against the [****65] evisceration of the Bivens remedy so that its deterrent effects . . . would [not] be lost).

The plaintiffs before us today seek damages for unconstitutional conditions of confinement. They alleged that federal officials slammed them against walls, shackled them, exposed them to nonstop lighting, lack of hygiene, and the like, all [*162] based upon invidious discrimination and without penological justification. See ante, at ___ - ___, 198 L. Ed. 2d, at 304-305. In my view, these claims are well-pleaded, state violations of clearly established law, and fall within the scope of longstanding Bivens law. For those reasons, I would affirm the judgment of the Court of Appeals. I shall discuss at some length what I believe is the most important point of disagreement. The Court, in my view, is wrong to hold that permitting a constitutional tort action here would extend Bivens, applying it in a new context. To the contrary, I fear that the Courts holding would significantly shrink the existing Bivens contexts, diminishing the compensatory remedy constitutional tort law now offers to harmed individuals.

I shall explain why I believe this suit falls well within the scope of traditional constitutional tort law and why I cannot agree [****66] with the Courts arguments to the contrary. I recognize, and write separately about, the strongest of the Courts arguments, namely, the fact that the plaintiffs claims concern detention that took place soon after a serious attack on the United States and some of them concern actions of high-level Government officials. While these facts may affect [***327] the substantive constitutional questions (e.g., were any of the conditions legitimate?) or the scope of the qualified-immunity defense, they do not extinguish the Bivens action itself. If I may paraphrase Justice Harlan, concurring in Bivens: In wartime as well as in peacetime, it is important, in a civilized society, that the judicial branch of the Nations government stand ready to afford a remedy for the most flagrant and patently unjustified, unconstitutional abuses of official power. 403 U. S., at 410-411, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (opinion concurring in judgment); cf. Boumediene v. Bush, 553 U. S. 723, 798, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008).

I

The majority opinion well summarizes the particular claims that the plaintiffs make in this suit. All concern the conditions of their confinement, which began soon after the [*163] September 11, 2001, attacks and lasted for days and weeks, then stretching into months. Ante, at ___, 198 L. Ed. 2d, at 302. At some point, the plaintiffs allege, [****67] all the defendants knew that they had nothing to do with the September 11 attacks but continued to detain them anyway in harsh conditions. Official Government policy, both before and after the defendants became aware of the plaintiffs innocence, led to the plaintiffs being held in tiny cells for over 23 hours a day with lights continuously left on, shackled when moved, often strip searched, and denied access to most forms of communication with the outside world. Ante, at ___, 198 L. Ed. 2d, at 304 (internal

quotation marks omitted). The defendants detained the plaintiffs in these conditions on the basis of their race or religion and without justification.

Moreover, the prison wardens were aware of, but deliberately indifferent to, certain unofficial activities of prison guards involving a pattern of physical and verbal abuse, such as slam[ming] detainees into walls; twist[ing] their arms, wrists, and [**1874] fingers; [breaking] their bones; and subjecting them to verbal taunts. Ibid. (internal quotation marks omitted).

The plaintiffs complaint alleges that all the defendantshigh-level Department of Justice officials and prison wardens alikewere directly responsible for the official confinement policy, which, in some or [****68] all of the aspects mentioned, violated the due process and equal protection components of the Fifth Amendment. The complaint adds that, insofar as the prison wardens were deliberately indifferent to the unofficial conduct of the guards, they violated the Fourth and the Fifth Amendments.

I would hold that the complaint properly alleges constitutional torts, i.e.,Bivens actions for damages.

A

The Courts holdings in Bivens, Carlson, and Davis rest upon four basic legal considerations. First, the Bivens [*164] Court referred to longstanding Supreme Court precedent stating or suggesting that the Constitution provides federal courts with considerable legal authority to use traditional remedies to right constitutional wrongs. That precedent begins with Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), which effectively placed upon those who would deny the existence of an effective legal remedy the burden [***328] of showing why their case was special. Chief Justice John Marshall wrote for the Court that

[t]he very essence of civil liberty [lies] in the right of every individual to claim the protection of the laws, whenever he receives an injury. Id., at 163.

The Chief Justice referred to Blackstones Commentaries stating that there

is a general and indisputable rule, that where there is a legal [****69] right, there is also a legal remedy . . . [and that] it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress. 1 Cranch, at 163.

The Chief Justice then wrote:

The government of the United States has been emphatically termed a government of laws, and not of men. It will [not] deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. Ibid.

He concluded for the Court that there must be something peculiar (i.e., special) about a case that warrants exclu[ding] the injured party from legal redress [and placing it within] that class of cases

which come under the description of damnum absque injuriaa loss without an injury. Id., at 163-164; but cf. id., at 164 (placing political questions in the latter, special category).

[*165] Much later, in Bell v. Hood, 327 U. S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946), the Court wrote that,

where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

See also Bivens, 403 U. S., at 392, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (citing opinions of Justices Cardozo and Holmes to similar effect).

The Bivens Court reiterated these principles and confirmed that the appropriate [****70] remedial 'adjust[ment]' in the case before it was an award of money damages, the remedial mechanism normally available in the federal courts. Id., at 392, 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619. Justice Harlan agreed, adding that, since Congress general statutory grant of jurisdiction authorized courts to grant equitable relief in cases arising under federal jurisdiction, courts likewise had the authority to award damagesthe traditional remedy at lawin order to vindicate the interests of the individual [**1875] protected by the Bill of Rights. Id., at 405-407, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (opinion concurring in judgment).

Second, our cases have recognized that Congress silence on the subject indicates a willingness to leave this matter to the courts. In Bivens, the Court noted, as an argument favoring its conclusion, the absence of an explicit congressional declaration that persons injured by a federal officers violation of the Fourth Amendment may not recover money damages from the agents. Id., at 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619. Similarly, in Davis , the Court stressed that there was no evidence . . . that Congress meant . . . to foreclose a damages remedy. 442 U. S., at 247, 99 S. Ct. [***329] 2264, 60 L. Ed. 2d 846. In Carlson, the Court went further, observing that not only was there no sign that Congress meant to pre-empt a Bivens remedy, but there was also clear evidence that [****71] Congress intended to preserve it. 446 U. S., at 19-20, 100 S. Ct. 1468, 64 L. Ed. 2d 15.

Third, our Bivens cases acknowledge that a constitutional tort may not lie when special factors counse[l] hesitation and when Congress has provided an adequate alternative [*166] remedy. 446 U. S., at 18-19, 91 S. Ct. 1999, 29 L. Ed. 2d 619. The relevant special factors in those cases included whether the court was faced with a question of federal fiscal policy, Bivens, supra, at 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619, or a risk of deluging federal courts with claims, Davis, supra, at 248, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (internal quotation marks omitted). Carlson acknowledged an additional factorthat damages suits might inhibit [federal officials] efforts to perform their official dutiesbut concluded that the qualified immunity accorded [federal officials] under [existing law] provides adequate protection. 446 U. S., at 19, 100 S. Ct. 1468, 64 L. Ed. 2d 15.

Fourth, as the Court recognized later in Carlson, a Bivens remedy was needed to cure what would, without it, amount to a constitutional anomaly. Long before this Court incorporated many

of the Bill of Rights guarantees against the States, see Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L. J. 1193 (1992), federal civil rights statutes afforded a damages remedy to any person whom a state official deprived of a federal constitutional right, see 42 U. S. C. 1983; Monroe v. Pape, 365 U. S. 167, 171-187, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961) (describing this history). But federal statutory law did not provide a damages remedy to a [****72] person whom a federal official had deprived of that same right, even though the Bill of Rights was at the time of the founding primarily aimed at constraining the Federal Government. Thus, a person harmed by an unconstitutional search or seizure might sue a city mayor, a state legislator, or even a Governor. But that person could not sue a federal agent, a national legislator, or a Justice Department official for an identical offense. [Our] constitutional design, the Court wrote, would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression. Carlson, supra, at 22, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (quoting Butz v. Economou, 438 U. S. 478, 504, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)).

The Bivens Court also recognized that the Court had previously inferred damages remedies caused by violations of certain federal statutes that themselves did not explicitly authorize [*167] damages remedies. 403 U. S., at 395-396, 91 S. Ct. 1999, 29 L. Ed. 2d 619. At the same time, Bivens, Davis, and Carlson treat the courts power to derive a damages remedy from a constitutional provision not as included within a power to find a statute-based damages remedy but as flowing from those statutory cases a fortiori.

[**1876] As the majority opinion points out, this Court in more recent years has indicated that [****73] expanding the Bivens remedy is now a disfavored judicial activity. Ante, at ___, 198 L. Ed. 2d, at 308 (quoting Iqbal, 556 U. S., at 675, 129 S. Ct. 1937, 173 L. Ed. 2d [***330] 868; emphasis added). Thus, it has held that the remedy is not available in the context of suits against military officers, see Chappell v. Wallace, 462 U. S. 296, 298-300, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983); United States v. Stanley, 483 U. S. 669, 683-684, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987); in the context of suits against privately operated prisons and their employees, see Minneci v. Pollard, 565 U. S. 118, 120, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012); Malesko, 534 U. S., at 70-73, 122 S. Ct. 515, 151 L. Ed. 2d 456; in the context of suits seeking to vindicate procedural, rather than substantive, constitutional protections, see Schweiker v. Chilicky, 487 U. S. 412, 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); and in the context of suits seeking to vindicate two quite different forms of important substantive protection, one involving free speech, see Bush v. Lucas, 462 U. S. 367, 368, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983), and the other involving protection of land rights, see Wilkie v. Robbins, 551 U. S. 537, 551, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007). Each of these cases involved a context that differed from that of Bivens, Davis, and Carlson with respect to the kind of defendant, the basic nature of the right, or the kind of harm suffered. That is to say, as we have explicitly stated, these cases were fundamentally different from anything recognized in Bivens or subsequent cases. Malesko, supra, at 70, 122 S. Ct. 515, 151 L. Ed. 2d 456 (emphasis added). In each of them, the plaintiffs were

asking the Court to authoriz[e] a new kind of federal litigation. Wilkie, supra, at 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (emphasis added).

Thus the Court, as the majority opinion says, repeatedly wrote that it was not [****74] expanding the scope of the Bivens remedy. Ante, at ___, 198 L. Ed. 2d, at 308. But the Court nowhere suggested [*168] that it would narrow Bivens existing scope. In fact, to diminish any ambiguity about its holdings, the Court set out a framework for determining whether a claim of constitutional violation calls for a Bivens remedy. See Wilkie, supra, at 549-550, 127 S. Ct. 2588, 168 L. Ed. 2d 389. At step one, the court must determine whether the case before it arises in a new context, that is, whether it involves a new category of defendants, Malesko, supra, at 68, 122 S. Ct. 515, 151 L. Ed. 2d 456, or (presumably) a significantly different kind of constitutional harm, such as a purely procedural harm, a harm to speech, or a harm caused to physical property. If the context is new, then the court proceeds to step two and asks whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. Wilkie, 551 U. S., at 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389. If there is none, then the court proceeds to step three and asks whether there are any special factors counselling hesitation before authorizing a new kind of federal litigation. Ibid.

Precedent makes this framework applicable here. I would apply it. And, doing so, I cannot get past [****75] step one. This suit, it seems to me, arises in a context similar to those in which this Court has previously permitted Bivens actions.

B

1

The context here is not new, Wilkie, supra, at 550, 127 S. Ct. 2588, [***331] 168 L. Ed. 2d 389, or fundamentally different from our previous Bivens cases, Malesko, supra, at 70, 122 S. Ct. 515, 151 L. Ed. 2d 456. First, the plaintiffs are civilians, not members of the military. They are not citizens, but the Constitution protects [**1877] noncitizens against serious mistreatment, as it protects citizens. See United States v. Verdugo-Urquidez, 494 U. S. 259, 271, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) ([A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country). Some or all of the plaintiffs [*169] here may have been illegally present in the United States. But that fact cannot justify physical mistreatment. Nor does anyone claim that that fact deprives them of a Bivens right available to other persons, citizens and noncitizens alike.

Second, the defendants are Government officials. They are not members of the military or private persons. Two are prison wardens. Three others are high-ranking Department of Justice officials. Prison wardens have been defendants in Bivens actions, as have other high-level Government officials. One of the defendants in Carlson [****76] was the Director of the Bureau

of Prisons; the defendant in Davis was a Member of Congress. We have also held that the Attorney General of the United States is not entitled to absolute immunity in a damages suit arising out of his actions related to national security. See Mitchell v. Forsyth, 472 U. S. 511, 520, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

Third, from a Bivens perspective, the injuries that the plaintiffs claim they suffered are familiar ones. They focus upon the conditions of confinement. The plaintiffs say that they were unnecessarily shackled, confined in small unhygienic cells, subjected to continuous lighting (presumably preventing sleep), unnecessarily and frequently strip searched, slammed against walls, injured physically, and subject to verbal abuse. They allege that they suffered these harms because of their race or religion, the defendants having either turned a blind eye to what was happening or themselves introduced policies that they knew would lead to these harms even though the defendants knew the plaintiffs had no connections to terrorism.

These claimed harms are similar to, or even worse than, the harms the plaintiffs suffered in Bivens (unreasonable search and seizure in violation of the Fourth Amendment), Davis (unlawful discrimination in violation [****77] of the Fifth Amendment), and Carlson (deliberate indifference to medical need in violation of the Eighth Amendment). Indeed, we have said that, [i]f a federal prisoner in a [Bureau of Prisons] [*170] facility alleges a constitutional deprivation, he may bring a Bivens claim against the offending individual officer, subject to the defense of qualified immunity. Malesko, supra, at 72, 122 S. Ct. 515, 151 L. Ed. 2d 456; see also Farmer v. Brennan, 511 U. S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (Bivens case about prisoner abuse). The claims in this suit would seem to fill the Bivens bill. See Sell v. United States, 539 U. S. 166, 193, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003) (Scalia, J., dissenting) ([A] [Bivens] action . . . is available to federal pretrial detainees challenging the conditions of their confinement).

It is true that the plaintiffs bring [***332] their deliberate indifference claim against Warden Hasty under the Fifth Amendments Due Process Clause, not the Eighth Amendments Cruel and Unusual Punishment Clauses, as in Carlson. But that is because the latter applies to convicted criminals while the former applies to pretrial and immigration detainees. Where the harm is the same, where this Court has held that both the Fifth and Eighth Amendments give rise to Bivens remedies, and where the only difference in constitutional scope consists of a circumstance (the absence of a conviction) that makes the violation here worse, it cannot be maintained [**1878] that the difference between the use of the two Amendments is fundamental. [****78] See City of Revere v. Massachusetts Gen. Hospital, 463 U. S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983) (due process rights of an unconvicted person are at least as great as the Eighth Amendment protections available to a convicted prisoner); Kingsley v. Hendrickson, 576 U. S. 389, 400, 135 S. Ct. 2466, 2475, 192 L. Ed. 2d 416, 428 (2015)) (pretrial detainees (unlike convicted prisoners) cannot be punished at all); Zadvydas v. Davis, 533 U. S. 678, 721, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) (Kennedy, J., dissenting) (detention incident to removal . . . cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish). See also Bistrian v. Levi, 696 F. 3d 352, 372 (CA3 2012) (permitting Bivens action brought by detainee in administrative segregation); Thomas v. Ashcroft, 470 F. 3d 491, 493, 496-

497 (CA2 2006) (detainee alleging failure to provide adequate medical care); Magluta v. Samples, 375 F. 3d 1269, 1271, 1275-1276 (CA11 2004) (detainee [*171] in solitary confinement); Papa v. United States, 281 F. 3d 1004, 1010-1011 (CA9 2002) (due process claims arising from death of immigration detainee); Loe v. Armistead, 582 F. 2d 1291, 1293-1296 (CA4 1978) (detainees claim of deliberate indifference to medical need). If an arrestee can bring a claim of excessive force (Bivens itself), and a convicted prisoner can bring a claim for denying medical care (Carlson), someone who has neither been charged nor convicted with a crime should also be able to challenge abuse that causes him to need medical care.

Nor has Congress suggested that it wants to withdraw a damages remedy in circumstances like these. By its express terms, the Prison Litigation Reform Act of 1995 (PLRA) does not apply to immigration detainees. [****79] See 42 U. S. C. 1997e(h) ([T]he term prisoner means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law . . .); see also Agyeman v. INS, 296 F. 3d 871, 886 (CA9 2002) ([W]e hold that an alien detained by the Immigration and Naturalization Service pending deportation is not a prisoner within the meaning of the PLRA); LaFontant v. INS, 135 F. 3d 158, 165, 328 U.S. App. D.C. 359 (CADC 1998) (same); Ojo v. INS, 106 F. 3d 680, 683 (CA5 1997) (same). And, in fact, there is strong evidence that Congress assumed that Bivens remedies would be available to prisoners when it enacted the PLRAe.g., Congress continued to permit prisoners to recover for physical injuries, the typical kinds of Bivens injuries. See 28 U. S. C. 1346(b)(2); Pfander, Constitutional Torts, at 105-106.

If there were any lingering doubt that the claim against Warden Hasty [***333] arises in a familiar Bivens context, the Court has made clear that conditions-of-confinement claims and medical-care claims are subject to the same substantive standard. See Hudson v. McMillian, 503 U. S. 1, 8, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992) ([Wilson v. Seiter, 501 U. S. 294, 303, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991)] extended the deliberate indifference standard applied to Eighth Amendment [*172] claims involving medical care to claims about conditions of confinement). Indeed, the Court made this very point in a Bivens case alleging that prison wardens were deliberately indifferent to an inmates safety. See Farmer, supra, at 830, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811.

I recognize that the Court finds a significant difference in the fact [****80] that the confinement here arose soon after a national-security emergency, namely, the September 11 attacks. The short answer to this argument, in respect to at least some of the claimed harms, is that some plaintiffs continued to suffer those harms up to [**1879] eight months after the September 11 attacks took place and after the defendants knew the plaintiffs had no connection to terrorism. See App. to Pet. for Cert. in No. 15-1359, p. 280a. But because I believe the Courts argument here is its strongest, I will consider it at greater length below. See Part III-C, infra.

Because the context here is not new, I would allow the plaintiffs constitutional claims to proceed. The plaintiffs have adequately alleged that the defendants were personally involved in imposing the conditions of confinement and did so with knowledge that the plaintiffs bore no ties to

terrorism, thus satisfying Iqbals pleading standard. See 556 U. S., at 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (claims must be plausible); see also id., at 699-700, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (Breyer, J., dissenting). And because it is clearly established that it is unconstitutional to subject detainees to punitive conditions of confinement and to target them based solely on their race, religion, or national origin, the defendants [****81] are not entitled to qualified immunity on the constitutional claims. See Bell v. Wolfish, 441 U. S. 520, 535-539, 99 S. Ct. 1861, 60 L. Ed. 2d 447, and n. 20 (1979); Davis, 442 U. S., at 236, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (It is equally clear . . . that the Fifth Amendment confers on petitioner a constitutional right to be free from illegal discrimination). (Similarly, I would affirm the judgment of the Court of Appeals with respect to the plaintiffs statutory claim, namely, that the defendants conspired to deprive the plaintiffs of equal protection of the laws in violation of 42 U. S. C. 1985(3). [*173] See Turkmen v. Hasty, 789 F. 3d 218, 262-264 (CA2 2015). I agree with the Court of Appeals that the defendants are not entitled to qualified immunity on this claim. See ibid.)

2

Even were I wrong and were the context here fundamentally different, Malesko, 534 U. S., at 70, 122 S. Ct. 515, 151 L. Ed. 2d 456, the plaintiffs claims would nonetheless survive step two and step three of the Courts framework for determining whether Bivens applies, see supra, at ___, 198 L. Ed. 2d, at 330. Step two consists of asking whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. Wilkie, [***334] 551 U. S., at 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389. I can find no such alternative, existing process here.

The Court does not claim that the PLRA provides the plaintiffs with a remedy. Ante, at ___ - ___, 198 L. Ed. 2d, at 317-318. Rather, it says that the plaintiffs may have had [****82] available to them relief in the form of a prospective injunction or an application for a writ of habeas corpus. Ante, at ___, 198 L. Ed. 2d, at 315. Neither a prospective injunction nor a writ of habeas corpus, however, will normally provide plaintiffs with redress for harms they have already suffered. And here the plaintiffs make a strong claim that neither was available to themat least not for a considerable time. Some of the plaintiffs allege that for two or three months they were subject to a communications blackout; that the prison staff did not permit them visitors, legal or social telephone calls, or mail; that their families and attorneys did not know where they were being held; that they could not receive visits from their attorneys; that subsequently their lawyers could call them only once a week; and that some or all of the defendants interfered with the detainees effective access to legal counsel. Office of Inspector General (OIG) Report, App. 223, 293, 251, 391; see App. to Pet. for Cert. in No. 15-1359, at 253a, n. 1 (incorporating the OIG report into the complaint). These claims make it [*174] virtually impossible to say that here there is an elaborate, comprehensive alternative remedial scheme similar [****83] to schemes that, [**1880] in the past, we have found block the application of Bivens to new contexts. Bush, 462 U. S., at 385, 103 S. Ct. 2404, 76 L. Ed. 2d 648. If these allegations are proved, then in this suit, it is damages or

nothing.Bivens, 403 U. S., at 410, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (Harlan, J., concurring in judgment).

There being no alternative, existing process that provides a convincing reason for not applying Bivens, we must proceed to step three. Wilkie, supra, at 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389. Doing so, I can find no 'special factors [that] counse[l] hesitation before authorizing' this Bivens action. 551 U. S., at 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389. I turn to this matter next.

II

A

The Court describes two general considerations that it believes argue against an extension of Bivens. First, the majority opinion points out that the Court is now far less likely than at the time it decided Bivens to imply a cause of action for damages from a statute that does not explicitly provide for a damages claim. See ante, at ___ - ___, 198 L. Ed. 2d, at 307. Second, it finds the silence of Congress notable in that Congress, though likely aware of the high-level policies involved in this suit, did not choose to extend to any person the kind of remedies that the plaintiffs here seek. Ante, at ___, 198 L. Ed. 2d, at 314 (internal quotation marks omitted). I doubt the strength of these two general considerations.

The first consideration, [****84] in my view, is not relevant. I concede that the majority and concurring opinions in Bivens looked in part for support to the fact that the Court had implied damages remedies from statutes silent on the subject. See 403 U. S., at 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619; [***335] id., at 402-403, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (Harlan, J., concurring in judgment). But that was not the main argument favoring the Courts conclusion. Rather, the Court drew far stronger support from the need for such a remedy when [*175] measured against a common-law and constitutional history of allowing traditional legal remedies where necessary. Id., at 392, 396-397, 91 S. Ct. 1999, 29 L. Ed. 2d 619. The Court believed such a remedy was necessary to make effective the Constitutions protection of certain basic individual rights. See id., at 392, 91 S. Ct. 1999, 29 L. Ed. 2d 619; id., at 407, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (opinion of Harlan, J.). Similarly, as the Court later explained, a damages remedy against federal officials prevented the serious legal anomaly I previously mentioned. Its existence made basic constitutional protections of the individual against Federal Government abuse (the Bill of Rights pre-Civil War objective) as effective as protections against abuse by state officials (the post-Civil War, post-selective-incorporation objective). See supra, at ___, 198 L. Ed. 2d, at 329.

Nor is the second circumstancecongressional silencerelevant in the manner that the majority [****85] opinion describes. The Court initially saw that silence as indicating an absence of congressional hostility to the Courts exercise of its traditional remedy-inferring powers. See Bivens, supra, at 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619; Davis, 442 U. S., at 246-247, 99 S. Ct. 2264, 60 L. Ed. 2d 846. Congress subsequent silence contains strong signs that it accepted Bivens

actions as part of the law. After all, Congress rejected a proposal that would have eliminated Bivens by substituting the U. S. Government as a defendant in suits against federal officers that raised constitutional claims. See Pfander, Constitutional Torts, at 102. Later, Congress expressly immunized federal employees acting in the course of their official duties from tort claims except those premised on violations of the Constitution. See Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, 28 U. S. C. 2679(b)(2)(A). [**1881] We stated that it is consequently crystal clear that Congress views [the Federal Tort Claims Act] and Bivens as [providing] parallel, complementary causes of action. Carlson, 446 U. S., at 20, 100 S. Ct. 1468, 64 L. Ed. 2d 15; see Malesko, 534 U. S., at 68, 122 S. Ct. 515, 151 L. Ed. 2d 456 (similar). Congress has even assumed the existence of a Bivens remedy in suits brought by noncitizen detainees suspected of terrorism. See 42 U. S. C. 2000dd-1 [*176] (granting qualified immunitybut not absolute immunityto military and civilian federal officials [****86] who are sued by alien detainees suspected of terrorism).

B

The majority opinion also sets forth a more specific list of factors that it says bear on whether a case presents a new Bivens context. Ante, at ___, 198 L. Ed. 2d, at 311. In the Courts view, a case might differ from Bivens in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the official action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [***336] [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; [7] or the presence of potential special factors that previous Bivens cases did not consider. Ante, at ___, 198 L. Ed. 2d, at 311. In my view, these factors do not make a meaningful difference at step one of the Bivens framework. Some of them are better cast as special factors relevant to step three. But, as I see it, none should normally foreclose a Bivens action and none is determinative here. Consider them one by one:

(1) The rank of the officers. I can understand why an officers rank [****87] might bear on whether he violated the Constitution, because, for example, a plaintiff might need to show the officer was willfully blind to a harm caused by lower ranking officers or that the officer had actual knowledge of the misconduct. And I can understand that rank might relate to the existence of a legal defense, such as qualified, or even absolute, immunity. But ifand I recognize that this is often a very big ifa plaintiff proves a clear constitutional violation, say, of the Fourth Amendment, and he shows that the defendant does not possess any form of immunity or other defense, then why should he not have a damages remedy for harm suffered? What does rank have to do with [*177] that question, namely, the Bivens question? Why should the law treat differently a high-level official and the local constable where each has similarly violated the Constitution and where neither can successfully assert immunity or any other defense?

(2) The constitutional right at issue. I agree that this factor can make a difference, but only when the substance of the right is distinct. See, e.g., Wilkie, 551 U. S. 537, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (land rights). But, for reasons I have already pointed out, there is no relevant difference between the rights at issue here [****88] and the rights at issue in our previous Bivens cases, namely, the rights to be free of unreasonable searches, invidious discrimination, and physical abuse in federal custody. See supra, at ___ - ___, 198 L. Ed. 2d, at 331.

(3) The generality or specificity of the individual action. I should think that it is not the generality or specificity of an official action but rather the nature of the official action that matters. Bivens should apply to some generally applicable actions, such as actions taken deliberately to jail a large group of known-innocent people. And it should not apply to some highly [**1882] specific actions, depending upon the nature of those actions.

(4) The extent of judicial guidance. This factor may be relevant to the existence of a constitutional violation or a qualified-immunity defense. Where judicial guidance is lacking, it is more likely that a constitutional violation is not clearly established. See Anderson v. Creighton, 483 U. S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (Officials are protected by qualified immunity unless [t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right). But I do not see how, assuming the violation is clear, the presence or absence of judicial guidance is relevant [****89] to the existence of a damages remedy.

(5) The statutory (or other) legal mandate under which the officer was operating. This factor too may prove [***337] relevant to the question whether a constitutional violation exists [*178] or is clearly established. But, again, assuming that it is, I do not understand why this factor is relevant to the existence of a damages remedy. See Stanley, 483 U. S., at 684, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (the question of immunity is analytically distinct from the question whether a Bivens action should lie).

(6) Risk of disruptive judicial intrusion. All damages actions risk disrupting to some degree future decisionmaking by members of the Executive or Legislative Branches. Where this Court has authorized Bivens actions, it has found that disruption tolerable, and it has explained why disruption is, from a constitutional perspective, desirable. See Davis, 442 U. S., at 242, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (Unless constitutional rights are to become merely precatory, . . . litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for . . . protection); Malesko, 534 U.S., at 70, 122 S. Ct. 515, 151 L. Ed. 2d 456 (The purpose of Bivens is to deter [****90] individual federal officers from committing constitutional violations). Insofar as the Court means this consideration to provide a reason why there should be no Bivens action where a Government employee acts in time of security need, I shall discuss the matter next, in Part C.

(7) Other potential special factors. Since I am not certain what these other potential factors are and, since the Court does not specify their nature, I would not, and the Court cannot, consider

them in differentiating this suit from our previous Bivens cases or as militating against recognizing a Bivens action here.

C

In my view, the Courts strongest argument is that Bivens should not apply to policy-related actions taken in times of national-security need, for example, during war or national-security emergency. As the Court correctly points out, the Constitution grants primary power to protect the Nations security to the Executive and Legislative Branches, not to [*179] the Judiciary. But the Constitution also delegates to the Judiciary the duty to protect an individuals fundamental constitutional rights. Hence when protection of those rights and a determination of security needs conflict, the Court has a role [****91] to play. The Court most recently made this clear in cases arising out of the detention of enemy combatants at Guantanamo Bay. Justice OConnor wrote that a state of war is not a blank check. Hamdi v. Rumsfeld, 542 U. S. 507, 536, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (plurality opinion). In Boumediene, 553 U. S., at 732-733, 128 S. Ct. 2229, 171 L. Ed. 2d 41, the Court reinforced that point, holding that noncitizens detained as enemy combatants [**1883] were entitled to challenge their detention through a writ of habeas corpus, notwithstanding the national-security concerns at stake.

We have not, however, answered the specific question the Court places at issue here: Should Bivens actions continue to exist in respect to policy-related actions taken in time of war or national emergency? In my view, they should.

For one thing, a Bivens action comes [***338] accompanied by many legal safeguards designed to prevent the courts from interfering with Executive and Legislative Branch activity reasonably believed to be necessary to protect national security. In Justice Jacksons well-known words, the Constitution is not a suicide pact. Terminiello v. Chicago, 337 U. S. 1, 37, 69 S. Ct. 894, 93 L. Ed. 1131 (1949) (dissenting opinion). The Constitution itself takes account of public necessity. Thus, for example, the Fourth Amendment does not forbid all Government searches and seizures; it forbids only those that are unreasonable. Ordinarily, [****92] it requires that a police officer obtain a search warrant before entering an apartment, but should the officer observe a woman being dragged against her will into that apartment, he should, and will, act at once. The Fourth Amendment makes allowances for such exigent circumstances. Brigham City v. Stuart, 547 U. S. 398, 401-402, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) (warrantless entry justified to forestall imminent injury). Similarly, the Fifth Amendment bars only conditions of confinement that are not reasonably related to a [*180] legitimate governmental objective. Bell v. Wolfish, 441 U. S., at 539, 99 S. Ct. 1861, 60 L. Ed. 2d 447. What is unreasonable and illegitimate in time of peace may be reasonable and legitimate in time of war.

Moreover, Bivens comes accompanied with a qualified-immunity defense. Federal officials will face suit only if they have violated a constitutional right that was clearly established at the time they acted. Harlow, 457 U. S., at 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396.

Further, in order to prevent the very presence of a Bivens lawsuit from interfering with the work of a Government official, this Court has held that a complaint must state a claim for relief that is plausible. Iqbal, 556 U. S., at 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868. [C]onclusory statements and [t]hreadbare allegations will not suffice. Id., at 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868. And the Court has protected high-level officials in particular by requiring that plaintiffs plead that an official was personally involved in the unconstitutional [****93] conduct; an official cannot be vicariously liable for anothers misdeeds. Id., at 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868.

Finally, where such a claim is filed, courts can, and should, tailor discovery orders so that they do not unnecessarily or improperly interfere with the officials work. The Second Circuit has emphasized the need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation. Iqbal v. Hasty, 490 F. 3d 143, 158 (2007). Where some of the defendants are current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court not only may, but must exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that those officials are not subjected to unnecessary and burdensome discovery or trial proceedings. Id., at 158-159. The court can make all such discovery subject to prior court approval. Id., at 158. It can structure . . . limited discovery by examining written responses to interrogatories and requests to admit before authorizing [**1884] [*181] depositions, and by deferring discovery directed to high- [***339] level officials until discovery of front-line [****94] officials has been completed and has demonstrated the need for discovery higher up the ranks. Ibid. In a word, a trial court can and should so structure the proceedings with full recognition that qualified immunity amounts to immunity from suit as well as immunity from liability.

Given these safeguards against undue interference by the Judiciary in times of war or national-security emergency, the Courts abolition, or limitation of, Bivens actions goes too far. If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do not set fire to the house.

At the same time, there may well be a particular need for Bivens remedies when security-related Government actions are at issue. History tells us of far too many instances where the Executive or Legislative Branch took actions during time of war that, on later examination, turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights. We have read about the Alien and Sedition Acts, the thousands of civilians imprisoned during the Civil War, and the suppression of civil liberties during World War I. See W. Rehnquist, All the Laws but One: Civil Liberties in Wartime [****95] 209-210, 49-50, 173-180, 183 (1998); see also Ex parteMilligan, 71 U.S. 2, 4 Wall. 2, 18 L. Ed. 281 (1866) (decided after the Civil War was over). The pages of the U. S. Reports themselves recite this Courts refusal to set aside the Governments World War II action removing more than 70,000 American citizens of Japanese origin from their west coast homes and interning them in camps, see Korematsu v. United States, 323 U. S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944)an action that at least some officials knew at the time was unnecessary, see id., at 233-242, 65 S. Ct. 193, 89 L. Ed. 194 (Murphy, J., dissenting); P.

04, 288 (1983). President Franklin Roosevelts Attorney General, perhaps exaggerating, once said that '[t]he Constitution has not greatly bothered any wartime President.' Rehnquist, supra, at 191.

[*182] Can we, in respect to actions taken during those periods, rely exclusively, as the Court seems to suggest, upon injunctive remedies or writs of habeas corpus, their retail equivalent? Complaints seeking that kind of relief typically come during the emergency itself, when emotions are strong, when courts may have too little or inaccurate information, and when courts may well prove particularly reluctant to interfere with even the least well-founded Executive Branch activity. That reluctance may itself set an unfortunate precedent, which, as Justice Jackson pointed [****96] out, can li[e] about like a loaded weapon awaiting discharge in another case. Korematsu, supra, at 246, 65 S. Ct. 193, 89 L. Ed. 194 (dissenting opinion).

A damages action, however, is typically brought after the emergency is over, after emotions have cooled, and at a time when more factual information is available. In such circumstances, courts have more time to exercise such judicial virtues as calm reflection and dispassionate application of the law to the facts. We have applied the Constitution to actions taken during periods of war and national-security emergency. See Boumediene, 553 U. S., at 732-733, 128 S. Ct. 2229, 171 L. Ed. 2d 41; Hamdi v. Rumsfeld, 542 U. S. 507, 124 [***340] S. Ct. 2633, 159 L. Ed. 2d 578; cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952). I should think that the wisdom of permitting courts to consider Bivens actions, later granting monetary compensation to those wronged at the time, would follow a fortiori.

[**1885] As is well known, Lord Atkins, a British judge, wrote in the midst of World War II that amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. Liversidge v. Anderson, [1942] A. C. 206 (H. L. 1941) 244. The Court, in my view, should say the same of this Bivens action.

With respect, I dissent.

References

U.S.C.S., Constitution, Amendments 4, 5; 42 U.S.C.S. 1985(3)

1 Civil Rights Actions 2A.04, 2A.06 (Matthew Bender)

3 Civil Rights Actions 11.06, 11.07, 11.09, 14.01, 14.04 (Matthew [****97] Bender)

L Ed Digest, Conspiracy 16; United States 107.3

L Ed Index, Bivens Action; Qualified Immunity

When will private right of action for damages (Bivens action) be implied from provision of Federal Constitution--Supreme Court cases. 127 L. Ed. 2d 715.

Supreme Court's views as to validity, construction, and application of 42 U.S.C.S. 1985 (and similar predecessor provisions), providing for civil liability with respect to conspiracies to interfere with civil rights. 122 L. Ed. 2d 807.

Supreme Court's views as to application or applicability of doctrine of qualified immunity in action under 42 U.S.C.S. 1983, or in Bivens action, seeking damages for alleged civil rights violations. 116 L. Ed. 2d 965.

Conditions of confinement as constituting cruel and unusual punishment in violation of Federal Constitution's Eighth Amendment--Supreme Court cases. 115 L. Ed. 2d 1151.

Implication of private right of action from provision of federal statute not expressly providing for one--Supreme Court cases. 61 L. Ed. 2d 910.

Egbert v. Boule

Supreme Court of the United States

March 2, 2022, Argued; June 8, 2022, Decided

No. 21-147.

Reporter
596 U.S. 482 *; 142 S. Ct. 1793 **; 213 L. Ed. 2d 54 ***; 2022 U.S. LEXIS 2829 ****; 29 Fla. L. Weekly Fed. S 309; 2022 WL 2056291

ERIK EGBERT, PETITIONER v. ROBERT BOULE

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Prior History:

[****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Boule v. Egbert, 998 F.3d 370, 2020 U.S. App. LEXIS 42293 (9th Cir. Wash., May 20, 2021)

Disposition:

998 F. 3d 370, reversed.

Syllabus

[**1796] [***58] [*482] Respondent Robert Boule owns a bed-and-breakfast the Smugglers Inn in Blaine, Washington. The inn abuts the international border between Canada and the United States. Boule at times helped federal agents identify and apprehend persons [**1797] engaged in unlawful cross-border activity on or near his property. But Boule also would provide transportation and lodging to illegal border crossers. Often, Boule would agree to help illegal

border crossers enter or exit the United States, only to later call federal agents to report the unlawful activity.

In 2014, Boule informed petitioner Erik Egbert, a U. S. Border Patrol agent, that a Turkish national, arriving in Seattle by way of New York, had scheduled transportation to Smugglers Inn. When Agent Egbert observed one of Boules vehicles returning to the inn, he suspected that the Turkish national was a passenger and followed the vehicle to the inn. On Boules account, Boule asked Egbert to leave, but Egbert refused, became violent, and threw Boule first against the vehicle and then to the ground. Egbert then checked the immigration paperwork for Boules guest [****2] and left after finding everything in order. The Turkish guest unlawfully entered Canada later that evening.

Boule filed a grievance with Agent Egberts supervisors and an administrative [***59] claim with Border Patrol pursuant to the Federal Tort Claims Act (FTCA). Egbert allegedly retaliated against Boule by reporting Boules SMUGLER license plate to the Washington Department of Licensing for referencing illegal activity, and by contacting the Internal Revenue Service and prompting an audit of Boules tax returns. Boules FTCA claim was ultimately denied, and Border Patrol took no action against Egbert for his use of force or alleged acts of retaliation. Boule then sued Egbert in Federal District Court, alleging a Fourth Amendment violation for excessive use of force and a First Amendment violation for unlawful retaliation. Invoking Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619, Boule asked the District Court to recognize a damages action for each alleged constitutional violation. The District Court declined to extend Bivens as requested, but the Court of Appeals reversed.

Held: Bivens does not extend to create causes of action for Boules Fourth Amendment excessive-force claim and First Amendment retaliation claim. Pp. 5-17.

[*483] (a) In Bivens, the Court held that it had authority to create a damages action against [****3] federal agents for violating the plaintiffs Fourth Amendment rights. Over the next decade, the Court also fashioned new causes of action under the Fifth Amendment, see Davis v. Passman, 442 U. S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846, and the Eighth Amendment, see Carlson v. Green, 446 U. S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15. Since then, however, the Court has come to appreciate more fully the tension between judicially created causes of action and the Constitutions separation of legislative and judicial power, Hernández v. Mesa, 589 U. S. ___, ___, 140 S. Ct. 735, 206 L. Ed. 2d 29, and has declined 11 times to imply a similar cause of action for other alleged constitutional violations, see, e.g., Chappell v. Wallace, 462 U. S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586; Bush v. Lucas, 462 U. S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648. Rather than dispense with Bivens, the Court now emphasizes that recognizing a Bivens cause of action is a disfavored judicial activity. Ziglar v. Abbasi, 582 U. S. ___, ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290.

The analysis of a proposed Bivens claim proceeds in two steps: A court asks first whether the case presents a new Bivens contexti.e.,is it meaningfully different from the three cases in which

the Court has implied a damages action, Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290, and, second, even if so, do special factors [**1798] indicate that the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed. Id., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290. This two-step inquiry often resolves to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy. [****4] Further, under the Courts precedents, a court may not fashion a Bivens remedy if Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure. Ziglar, 582 U. S., at ___., 137 S. Ct. 1843, 198 L. Ed. 2d 290. Pp. 5-8.

[***60] (b) The Court of Appeals conceded that Boules Fourth Amendment claim presented a new Bivens context, but its conclusion that there was no reason to hesitate before recognizing a cause of action against Agent Egbert was incorrect for two independent reasons. Pp. 9-13.

(1) First, the risk of undermining border security provides reason to hesitate before extending Bivens into this field. Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29. In Hernández, the Court declined to create a damages remedy for an excessive-force claim against a Border Patrol agent because regulating the conduct of agents at the border unquestionably has national security implications. Id., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29. That reasoning applies with full force here. The Court of Appeals disagreed because it viewed Boules Fourth Amendment claim as akin to a conventional excessive-force claim, as in Bivens, and less like the cross-border shooting in Hernández. But that does not bear on the relevant point: Permitting suit against a Border Patrol agent presents national security concerns that foreclose Bivens relief. Further, the Court of Appeals analysis betrays the [****5] pitfalls of applying the special-factors analysis at [*484] too granular a level. A court should not inquire whether Bivens relief is appropriate in light of the balance of circumstances in the particular case. United States v. Stanley, 483 U. S. 669, 683, 107 S. Ct. 3054, 97 L. Ed. 2d 550. Rather, it should ask [m]ore broadly whether there is any reason to think that judicial intrusion into a given field might be harmful or inappropriate, id., at 681. The proper inquiry here is whether a court is competent to authorize a damages action not just against Agent Egbert, but against Border Patrol agents generally. The answer is no. Pp. 9-12.

(2) Second, Congress has provided alternative remedies for aggrieved parties in Boules position that independently foreclose a Bivens action here. By regulation, Border Patrol must investigate [a]lleged violations and accept grievances from [a]ny persons. 8 CFR 287.10(a)-(b). Boule claims that this regulatory grievance procedure was inadequate, but this Court has never held that a Bivens alternative must afford rights such as judicial review of an adverse determination. Bivens is concerned solely with deterring the unconstitutional acts of individual officers. Correctional Services Corp. v. Malesko, 534 U. S. 61, 71, 122 S. Ct. 515, 151 L. Ed. 2d 456. And, regardless, the question whether a given remedy is adequate is a legislative determination. As in Hernández, this

[****6] Court has no warrant to doubt that the consideration of Boules grievance secured adequate deterrence and afforded Boule an alternative remedy. See 589 U. S., at ___., 140 S. Ct. 735, 206 L. Ed. 2d 29. Pp. 12-13.

(c) There is no Bivens cause of action for Boules First Amendment retaliation claim. That claim presents a new Bivens context, and there are many reasons to think that Congress is better suited to authorize a damages remedy. Extending Bivens to alleged First Amendment violations would pose an acute risk that fear of [**1799] personal monetary liability and harassing litigation will unduly inhibit [***61] officials in the discharge of their duties. Anderson v. Creighton, 483 U. S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523. In light of these costs, Congress is in a better position to decide whether or not the public interest would be served by imposing a damages action. Bush, 462 U. S., at 389. The Court of Appeals reasons for extending Bivens in this contextthat retaliation claims are well-established and that Boule alleges that Agent Egbert was not carrying out official duties when the retaliation occurredlack merit. Also lacking merit is Boules claim that this Court identified a Bivens cause of action under allegedly similar circumstances in Passman. Even assuming factual parallels, Passman carries little weight because it predates the Courts current approach to implied causes of action. A plaintiff cannot [****7] justify a Bivens extension based on parallel circumstances with Bivens, Passman, or Carlsonthe three cases in which the Court has implied a damages actionunless the plaintiff also satisfies the prevailing analytic [*485] framework prescribed by the last four decades of intervening case law. Ziglar, 582 U. S., at ___-___, 137 S. Ct. 1843, 198 L. Ed. 2d 290. Pp. 13-16.

998 F. 3d 370, reversed.

Counsel: Sarah M. Harris & Michael R. Huston argued the cause for petitioner.

Felicia H. Ellsworth argued the cause for respondent.

Judges: Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Alito, Kavanaugh, and Barrett, JJ., joined. Gorsuch, J., filed an opinion concurring in the judgment. Sotomayor, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Breyer and Kagan, JJ., joined.

Opinion by: THOMAS

Opinion

[*486] Justice Thomas delivered the opinion of the Court.

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), this Court authorized a damages action against federal officials for alleged violations of the

Fourth Amendment. Over the past 42 years, however, we have declined 11 times to imply a similar cause of action for other alleged constitutional violations. See Chappell v. Wallace, 462 U. S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983); Bush v. Lucas, 462 U. S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983); United States v. Stanley, 483 U. S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987); Schweiker v. Chilicky, 487 U. S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); FDIC v. Meyer, 510 U. S. 471, 114 S. Ct. 996, 127 [**1800] L. Ed. 2d 308 (1994); Correctional Services Corp. v. Malesko, 534 U. S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001); Wilkie v. Robbins, 551 U. S. 537, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007); Hui v. Castaneda, 559 U. S. 799, 130 S. Ct. 1845, 176 L. Ed. 2d 703 (2010); Minneci v. Pollard, 565 U. S. 118, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012); Ziglar v. Abbasi, 582 U. S. ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017); Hernández v. Mesa, 589 U. S. ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (2020). Nevertheless, the Court of Appeals permitted not one, but two constitutional damages actions to proceed against a U. S. Border Patrol agent: a Fourth Amendment excessive-force claim and a First Amendment retaliation claim. Because our cases have [***62] made clear that, in all but the most unusual circumstances, [****8] prescribing a cause of action is a job for Congress, not the courts, we reverse.

I

Blaine, Washington, is the last town in the United States along U. S. Interstate Highway 5 before reaching the Canadian border. Respondent Robert Boule is a longtime Blaine resident. The rear of his property abuts the Canadian border at 0 Avenue, a Canadian street. Boules property line actually extends five feet into Canada. Several years ago, [*487] Boule placed a line of small stones on his property to mark the international boundary. As shown below, any person could easily enter the United States or Canada through or near Boules property. See App. 100.

Boule markets his home as a bed-and-breakfast aptly named Smugglers Inn. The area surrounding the Inn is a hotspot for cross-border smuggling of people, drugs, illicit money, and items of significance to criminal organizations. Id., at 91. On numerous occasions, U. S. Border Patrol agents have observed persons come south across the border and walk into Smugglers Inn through the back door. Id., at 101. Federal agents also have seized from the Inn shipments of cocaine, methamphetamine, ecstasy, and other narcotics. For a time, Boule served as a confidential [****9] informant who would help federal agents identify and apprehend persons engaged in unlawful cross-border activity on or near his property. Boule claims that the Government has paid him upwards of $60,000 for his services.

Ever the entrepreneur, Boule saw his relationship with Border Patrol as a business opportunity. Boule would host persons who unlawfully entered the United States as guests at the Inn and offer

to drive them to Seattle [*488] elsewhere. He [**1801] also would pick up Canada-bound guests throughout the State and drive them north to his property along the border. Either way, Boule would charge $100-$150 per [***63] hour for his shuttle service and require guests to pay for a night of lodging even if they never intended to stay at the Inn. Meanwhile, Boule would inform federal law enforcement if he was scheduled to lodge or transport persons of interest. In short order, Border Patrol agents would arrive to arrest the guests, often within a few blocks of the Inn. Boule would decline to offer his erstwhile customers a refund. In his view, this practice was nothing any different than [the] normal policies of any hotel/ motel. Id., at 120.1

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Notwithstanding his defense of the Inns policies, Boule was recently convicted in Canadian court for engaging in human trafficking. In December 2021, he pleaded guilty to trafficking 11 Afghanis and Syrians into Canada. He billed each foreign national between $200 and $700 for the trip. See Regina v. Boule, 2021 BCSC 2561, 7-11.

In light of Boules business model, local Border Patrol [****10] agents, including petitioner Erik Egbert, were well acquainted with Smugglers Inn and the criminal activity that attended it. On March 20, 2014, Boule informed Agent Egbert that a Turkish national, arriving in Seattle by way of New York, had scheduled transportation to Smugglers Inn later that day. Agent Egbert grew suspicious, as he could think of no legitimate reason a person would travel from Turkey to stay at a rundown bed-and-breakfast on the border in Blaine. Id., at 104. The photograph below displays the amenities for which Boules Turkish guest would have traveled more than 7,500 miles. See id., at 102.

[*489]

Later that afternoon, Agent Egbert observed one of Boules vehiclesa black SUV with the license plate SMUGLERreturning to the Inn. Agent Egbert suspected that Boules Turkish guest was a passenger and followed the SUV into the driveway so he could check the guests immigration status. On Boules account, the situation escalated from there. Boule instructed Agent Egbert to leave his property, but Agent Egbert declined. [***64] Instead, Boule claims, Agent Egbert lifted him off the ground and threw him against the SUV. After Boule collected himself, Agent Egbert allegedly threw [****11] him to the ground. Agent Egbert then checked the guests immigration paperwork, concluded that everything was in order, and left. Later that evening, Boules Turkish guest unlawfully entered Canada from Smugglers Inn.

Boule lodged a grievance with Agent Egberts supervisors, alleging that Agent [**1802] Egbert had used excessive force and caused him physical injury. Boule also filed an administrative claim with Border Patrol pursuant to the Federal Tort Claims Act (FTCA). See 28 U. S. C. 2675(a). According to Boule, Agent Egbert retaliated against him while those claims were pending by reporting Boules SMUGLER license plate to the Washington Department of Licensing for

[*490] referencing illegal conduct, and by contacting the Internal Revenue Service and prompting an audit of Boules tax returns. Ultimately, Boules FTCA claim was denied and, after a year-long investigation, Border Patrol took no action against Agent Egbert for his alleged use of force or acts of retaliation. Thereafter, Agent Egbert continued to serve as an active-duty Border Patrol agent.

In January 2017, Boule sued Agent Egbert in his individual capacity in Federal District Court, alleging a Fourth Amendment violation for excessive use of force and a First Amendment violation [****12] for unlawful retaliation. Boule invoked Bivens and asked the District Court to recognize a damages action for each alleged constitutional violation. The District Court declined to extend a Bivens remedy to Boules claims and entered judgment for Agent Egbert. The Court of Appeals reversed. See 998 F. 3d 370, 385 (CA9 2021). Twelve judges dissented from the denial of rehearing en banc. See id., at 373 (Bumatay, J., dissenting); id., at 384 (Owens, J., dissenting); ibid. (Bress, J., dissenting).

We granted certiorari. 595 U. S. ___, 142 S. Ct. 457, 211 L. Ed. 2d 278 (2021).

II

In Bivens, the Court held that it had authority to create a cause of action under the Fourth Amendment against federal agents who allegedly manacled the plaintiff and threatened his family while arresting him for narcotics violations. 403 U. S., at 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619. Although the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages, id., at 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619, the Court held that it could authorize a remedy under general principles of federal jurisdiction, Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 7) (citing Bivens, 403 U. S., at 392, 91 S. Ct. 1999, 29 L. Ed. 2d 619). Over the following decade, the Court twice again fashioned new causes of action under the Constitutionfirst, for a former congressional staffers Fifth Amendment sex-discrimination claim, see Davis v. Passman, 442 U. S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979); and second, for a federal prisoners [*491] inadequate-care claim under the Eighth Amendment, see Carlson v. Green, 446 U. S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980).

Since these cases, the Court has not [****13] implied additional causes of action [***65] under the Constitution. Now long past the heady days in which this Court assumed common-law powers to create causes of action, Malesko, 534 U. S., at 75, 122 S. Ct. 515, 151 L. Ed. 2d 456 (Scalia, J., concurring), we have come to appreciate more fully the tension between judicially created causes of action and the Constitutions separation of legislative and judicial power,

Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 5). At bottom, creating a

cause of action is a legislative endeavor. Courts engaged in that unenviable task must evaluate a range of policy considerations . . . at least as broad as the range . . . a legislature would consider. Bivens, 403 U. S., at 407, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (Harlan, J., concurring in judgment);

see also post, at 2 (Gorsuch, J., concurring in judgment). Those factors include economic and governmental concerns, administrative costs, and the impact on governmental operations systemwide. Ziglar, 582 U. S., [**1803] at ___, ___, 137 S. Ct. at 1858, 198 L. Ed. 2d 290. Unsurprisingly, Congress is far more competent than the Judiciary to weigh such policy considerations. Schweiker, 487 U. S., at 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370. And the Judiciarys authority to do so at all is, at best, uncertain. See, e.g., Hernández, 589 U. S., at ___, 140 S. Ct. at 742, 206 L. Ed. 2d 29.

Nonetheless, rather than dispense with Bivens altogether, we have emphasized that recognizing a cause of action under Bivens is a disfavored judicial activity. [****14] Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 11) (internal quotation marks omitted);Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 7) (internal quotation marks omitted). When asked to imply a Bivens action, our watchword is caution. Id., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 6). [I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy[,] the courts must refrain from creating [it]. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 13). [E]ven a single sound reason to defer to Congress is enough to require a court to refrain from creating such a remedy. Nestlé USA, Inc. v. Doe, 593 U. S. ___, ___, 141 S. Ct. 1931, 210 L. Ed. 2d 207 (2021) (plurality opinion) (slip op., at 6). Put another [*492] way, the most important question is who should decide whether to provide for a damages remedy, Congress or the courts? Hernández, 589 U. S., at ___-___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 19-20) (internal quotation marks omitted). If there is a rational reason to think that the answer is Congressas it will be in most every case, see Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 12)no Bivens action may lie. Our cases instruct that, absent utmost deference to Congress preeminent authority in this area, the courts arrogat[e] legislative power. Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 5).

To inform a courts analysis of a proposed Bivens claim, our cases have framed the inquiry as proceeding in two steps. See Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 7). First, we ask whether the case presents a new Bivens context [****15] i.e., is it meaningful[ly] different from the three cases in which the Court has implied a damages action. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 16). Second, if a claim arises in a new context, a Bivens remedy is unavailable if there are special factors [***66] indicating that the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 12) (internal quotation marks omitted). If there is even a single

reason to pause before applying Bivens in a new context, a court may not recognize a Bivens remedy. Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 7).

While our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy. For example, we have explained that a new context arises when there are potential special factors that previous Bivens cases did not consider. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 16). And we have identified several examples of new contextse.g., a case that involves a new category of defendants, Malesko, 534 U. S., at 68, 122 S. Ct. 515, 151 L. Ed. 2d 456; see also Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 11)largely because they represent situations in which a court is not undoubtedly better positioned than Congress to create a damages action. [****16] We have never offered [*493] an exhaustive accounting of such scenarios, however, because no court could forecast every factor that might counse[l] hesitation. Id., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 16). Even in a particular case, a court likely cannot predict the systemwide consequences of recognizing a cause of action under Bivens. Ziglar, 582 U. S., at ___, [**1804] 137 S. Ct. 1858, 198 L. Ed. 2d 290.

That uncertainty alone is a special factor that forecloses relief. See Hernández v. Mesa, 885 F. 3d 811, 818 (CA5 2018) (en banc) (The newness of this new context should alone require dismissal).

Finally, our cases hold that a court may not fashion a Bivens remedy if Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 14); see also Schweicker, 487 U. S., at 425, 108 S. Ct. 2460, 101 L. Ed. 2d 370. If there are alternative remedial structures in place, that alone, like any special factor, is reason enough to limit the power of the Judiciary to infer a new Bivens cause of action. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 14).2

2

Congress also may preclude a claim under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), against federal officers if it affirmatively forecloses one. Even in circumstances in which a Bivens remedy is generally available, an action under Bivens will be defeated if the defendant is immune from suit, Hui v. Castaneda, 559 U. S. 799, 807, 130 S. Ct. 1845, 176 L. Ed. 2d 703 (2010), and Congress may grant such immunity as it sees fit.

Importantly, the relevant question is not whether a Bivens action would disrup[t] a remedial scheme, Schweicker, 487 U. S., at 426, 108 S. Ct. 2460, 101 L. Ed. 2d 370, or whether the court should provide for a wrong that would otherwise go unredressed, Bush, 462 U. S., at 388, 103 S. Ct. 2404, 76 L. Ed. 2d 648. Nor does it matter that existing remedies do not provide complete relief. Ibid. Rather, the court must ask only [****17] whether it, rather than the political branches, is better equipped to decide whether existing

remedies should be augmented by the creation of a new [*****7] judicial remedy. Ibid; see also id., at 380, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (the question [is] who should decide).

III

Applying the foregoing principles, the Court of Appeals plainly erred when it created causes of action for Boules [*494] Fourth Amendment excessive-force claim and First Amendment retaliation claim.

A

The Court of Appeals conceded that Boules Fourth Amendment claim presented a new context for Bivens purposes, yet it concluded there was no reason to hesitate before recognizing a cause of action against Agent Egbert. See 998 F. 3d, at 387. That conclusion was incorrect for two independent reasons: Congress is better positioned to create remedies in the border-security context, and the Government already has provided alternative remedies that protect plaintiffs like Boule. We address each in turn.

1

In Hernández, we declined to create a damages remedy for an excessive-force claim against a Border Patrol agent who shot and killed a 15-year-old Mexican national across the border in Mexico. See 589 U. S., at ___-___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 1-2). We did not recognize a Bivens action there because regulating the conduct of agents at the border unquestionably has national security implications, [*****18] and the risk of undermining border security provides reason to hesitate before extending Bivens into this field. Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 14). This reasoning applies here with full force. During the alleged altercation with Boule, Agent Egbert was carrying out Border Patrols mandate to interdic[t] persons attempting to illegally enter or exit the United States or goods being illegally imported into or exported from the United States. 6 U. S. C. 211(e)(3)(A). Because [m]atters intimately [**1805] related to foreign policy and national security are rarely proper subjects for judicial intervention, Haig v. Agee, 453 U. S. 280, 292, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981), we reaffirm that a Bivens cause of action may not lie where, as here, national security is at issue.

The Court of Appeals thought otherwise. In its view, Boules Fourth Amendment claim is conventional, 998 F. 3d, at 387; see also post, at 8, 12 (Sotomayor, J., [*495] concurring in

judgment in part and dissenting in part) (same), and, though it arises in a new context, this Court has not cast doubt on extending Bivens within the common and recurrent sphere of law enforcement in which it arose, 998 F. 3d, at 389 (quoting Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 11)). While Bivens and this case do involve similar allegations of excessive force and thus arguably present almost parallel circumstances or a similar mechanism [****19] of injury, Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 15), these superficial similarities are not enough to support the judicial creation of a cause of action. The special-factors inquirywhich Bivens never meaningfully undertook, see Stanley, 483 U. S., at 678shows here, no less than in Hernández, that the Judiciary is not undoubtedly better positioned than Congress [***68] to authorize a damages action in this national-security context. That this case does not involve a cross-border shooting, as in Hernández, but rather a more conventional excessive-force claim, as in Bivens, does not bear on the relevant point. Either way, the Judiciary is comparatively ill suited to decide whether a damages remedy against any Border Patrol agent is appropriate.

The Court of Appeals downplayed the national-security risk from imposing Bivens liability because Agent Egbert was not literally at the border, and Boules guest already had cleared customs in New York. 998 F. 3d, at 388; see also post, at 11-12, 18 (opinion of Sotomayor, J.) (same). The court also found that Boule had a weightier interest in Bivens relief than the parents of the deceased Mexican teenager in Hernández, because Boule is a United States citizen, complaining of harm suffered on his own property in the United States. 998 F. 3d, at 388; see also post, at 12, 18 [****20] (opinion of Sotomayor, J.) (same). Finding that any costs imposed by allowing a Bivens claim to proceed are outweighed by compelling interests in favor of protecting United States citizens on their own property in the United States, the court extended Bivens to Boules case. 998 F. 3d, at 389.

[*496] This analysis is deeply flawed. The Bivens inquiry does not invite federal courts to independently assess the costs and benefits of implying a cause of action. A court faces only one question: whether there is any rational reason (even one) to think that Congress is better suited to weigh the costs and benefits of allowing a damages action to proceed. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 12). Thus, a court should not inquire, as the Court of Appeals did here, whether Bivens relief is appropriate in light of the balance of circumstances in the particular case. Stanley, 483 U. S., at 683. A court inevitably will impai[r] governmental interests, and thereby frustrate Congress policymaking role, if it applies the special factors analysis at such a narrow leve[l] of generality. Id., at 681. Rather, under the proper approach, a court must ask [m]ore broadly if there is any reason to think that judicial intrusion into a given field might be harmful or inappropriate. Ibid. If [****21] so, or even if there is the potential for such consequences, a court cannot afford a plaintiff a Bivens remedy. Ziglar, 582 U. S., at ___, ___, 137 S. Ct. 1859-1860, [**1806] 1864-1865, 198 L. Ed. 2d 290 (emphasis added). As in

Hernández, then, we ask here whether a court is competent to authorize a damages action not just against Agent Egbert but against Border Patrol agents generally. The answer, plainly, is no. See Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 14) (refusing to extend Bivens into the field of border security).

The Court of Appeals analysis betrays the pitfalls of applying the special-factors analysis at too granular a level. The court rested on three irrelevant distinctions from Hernández. First, Agent Egbert was several feet from (rather than straddling) the border, but cross-border security is obviously implicated in either event. Second, Boules guest arrived in Seattle from New York rather than abroad, but an aliens port of entry [***69] does not make him less likely to be a national-security threat. And third, Agent Egbert investigated immigration violations on our side of the border, not Canadas, but immigration investigations in this country are [*497] perhaps more likely to impact the national security of the United States. In short, the Court of Appeals offered no plausible basis to permit a Fourth Amendment Bivens claim against Agent Egbert to proceed. [****22]

2

Second, Congress has provided alternative remedies for aggrieved parties in Boules position that independently foreclose a Bivens action here. In Hernández, we declined to authorize a Bivens remedy, in part, because the Executive Branch already had investigated alleged misconduct by the defendant Border Patrol agent. See 589 U. S., at ___-___, ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 9-10, 14). In Malesko, we explained that Bivens relief was unavailable because federal prisoners could, among other options, file grievances through an Administrative Remedy Program. 534 U. S., at 74. Both kinds of remedies are available here. The U. S. Border Patrol is statutorily obligated to control, direc[t], and supervis[e] . . . all employees. 8 U. S. C. 1103(a)(2). And, by regulation, Border Patrol must investigate [a]lleged violations of the standards for enforcement activities and accept grievances from [a]ny persons wishing to lodge a complaint. 8 CFR 287.10(a)-(b). As noted, Boule took advantage of this grievance procedure, prompting a year-long internal investigation into Agent Egberts conduct. See supra, at 4-5.

Boule nonetheless contends that Border Patrols grievance process is inadequate because he is not entitled to participate and has no right to judicial review of an adverse determination.3

3

Boule also argues that Agent Egbert forfeited any argument about Border Patrols grievance process because he did not raise the issue in the Court of Appeals. We disagree. Because

recognizing a Bivens cause of action is an extraordinary act that places great stress on the separation of powers, Nestl頃SA, Inc. v. Doe, 593 U. S. ___, ___, 141 S. Ct. 1931, 210 L. Ed. 2d 207 (2021) (plurality opinion) (slip op., at 7), we have a concomitant responsibility to evaluate any grounds that counsel against Bivens relief, Oliva v. Nivar, 973 F. 3d 438, 443, n. 2 (CA5 2020); see also Elhady v. Unidentified CBP Agents, 18 F. 4th 880, 884 (CA6 2021). And, in any event, Agent Egbert has consistently claimed that alternative remedies foreclose applying Bivens in this case. Thus, under our precedents, he is not limited to the precise arguments [he] made below. Yee v. Escondido, 503 U. S. 519, 534, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992).

But we have never held that a Bivens alternative [*498] must [****23] afford rights to participation or appeal. That is so because Bivens is concerned solely with deterring the unconstitutional acts of individual officersi.e., the focus is whether the Government has put in place safeguards to preven[t] constitutional violations from recurring. Malesko, 534 U. S., at 71, 74, 122 S. Ct. 515, 151 L. Ed. 2d 456; see [**1807] also Meyer, 510 U. S., at 485. And, again, the question whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts. So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a Bivens remedy. That is true even if a court [***70] independently concludes that the Governments procedures are not as effective as an individual damages remedy. Bush, 462 U. S., at 372, 103 S. Ct. 2404, 76 L. Ed. 2d 648. Thus here, as in Hernández, we have no warrant to doubt that the consideration of Boules grievance against Agent Egbert secured adequate deterrence and afforded Boule an alternative remedy. See 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 10).

B

We also conclude that there is no Bivens cause of action for Boules First Amendment retaliation claim. While we have assumed that such a damages action might be available, see, e.g., Hartman v. Moore, 547 U. S. 250, 252, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006), [w]e have never held that Bivens extends to [****24] First Amendment claims, Reichle v. Howards, 566 U. S. 658, 663, n. 4, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012). Because a new context arises when there is a new constitutional right at issue, Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 16), the Court of Appeals correctly held that Boules First Amendment claim presents a new Bivens context. See 998 F. 3d, at 390. Now presented with the question whether to extend Bivens to [*499] this context, we hold that there is no Bivens action for First Amendment retaliation. There are many reasons to think that Congress, not the courts, is better suited to authorize such a damages remedy.

Recognizing any new Bivens action entail[s] substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. Anderson v. Creighton, 483 U. S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Extending Bivens to alleged First Amendment violations would pose an acute risk of increasing

such costs. A plaintiff can turn practically any adverse action into grounds for a retaliation claim. And, [b]ecause an officials state of mind is easy to allege and hard to disprove, insubstantial claims that turn on [retaliatory] intent may be less amenable to summary disposition. Crawford-El v. Britton, 523 U. S. 574, 584-585, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) (internal quotation marks omitted). Even a frivolous retaliation claim threaten[s] to set off broad-ranging discovery in which there is often no clear end to the relevant evidence. Nieves v. Bartlett, 587 U. S. ___, ___, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019) (slip [****25] op., at 11) (internal quotation marks omitted).

[U]ndoubtedly, then, the prospect of personal liability under the First Amendment would lead to new difficulties and expense. Schweiker, 487 U. S., at 425, 108 S. Ct. 2460, 101 L. Ed. 2d 370. Federal employees face[d with] the added risk of personal liability for decisions that they believe to be a correct response to improper [activity] would be deterred from carrying out their duties. Bush, 462 U. S., at 389, 103 S. Ct. 2404, 76 L. Ed. 2d 648. We are therefore convinced that, in light of these costs, Congress is in a better position to decide whether or not the public interest would be served by imposing a damages action. Id., at 390, 103 S. Ct. 2404, 76 L. Ed. 2d 648.

The Court of Appeals nonetheless extended Bivens to the First Amendment because, in its view, retaliation claims are well-established, and Boule alleges that [**1808] Agent Egbert was [***71] not carrying out official duties when he retaliated against him. 998 F. 3d, at 391. Neither rationale has merit. [*500] First, just because plaintiffs often plead unlawful retaliation to establish a First Amendment violation is not a reason to afford them a cause of action to sue federal officers for money damages. If anything, that retaliation claims are common, and therefore more likely to impose a significant expansion of Government liability, Meyer, 510 U. S., at 486, counsels against permitting Bivens relief.

Second, the Court of Appeals scope-of-duty [****26] observation does not meaningfully limit the number of potential Bivens claims or otherwise undermine the reasons for hesitation stated above. It is easy to allege that federal employees acted beyond the scope of their authority when claiming a constitutional violation. And, regardless, granting Bivens relief because a federal agent supposedly did not act pursuant to his law-enforcement mission misses the point. Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 14). The question is not whether national security, or some other governmental interest, actually requires [the defendants] conduct. Ibid. Instead, we ask whether the Judiciary should alter the framework established by the political branches for addressing any such conduct that allegedly violates the Constitution. Ibid. With respect to that question, the foregoing discussion shows that the Judiciary is ill equipped to alter that framework generally, and especially so when it comes to First Amendment claims.

Boule responds that any hesitation is unwarranted because this Court in Passman already identified a Bivens cause of action under allegedly similar circumstances. There, the Court permitted a congressional staffer to sue a congressman for sex discrimination under the Fifth

Amendment. See 442 U. S., at 231, 99 S. Ct. 2264, 60 L. Ed. 2d 846. In Boule's view, [***27] Passman, like this case, permitted a damages action to proceed even though it required the factfinder to probe a federal officials motives for taking an adverse action against the plaintiff.

Even assuming the factual parallels are as close as Boule claims, Passman carries little weight because it predates our current approach to implied causes of action and diverges [*501] from the prevailing framework in three important ways. First, the Passman Court concluded that a Bivens action must be available if there is no effective means other than the judiciary to vindicate the purported Fifth Amendment right. 442 U. S., at 243, 99 S. Ct. 2264, 60 L. Ed. 2d 846; see also Carlson, 446 U. S., at 18-19, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (Congress can foreclose Bivens relief by provid[ing] an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective). Since then, however, we have explained that the absence of relief does not by any means necessarily imply that courts should award money damages. Schweiker, 487 U. S., at 421, 108 S. Ct. 2460, 101 L. Ed. 2d 370. Second, Passman indicated that a damages remedy is appropriate unless Congress explicit[ly] declares that a claimant may not recover money damages. 442 U. S., at 246-247, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (internal quotation marks omitted; emphasis deleted). Now, though, we defer to congressional inaction [***72] if the design of a Government [****28] program suggests that Congress has provided what it considers adequate remedial mechanisms. Schweiker, 487 U. S., at 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370; see also Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 14). Third, when assessing the special factors, Passman asked whether a court is competent to calculate damages without difficult questions of valuation or causation. 442 U. S., at 245, 99 S. Ct. 2264, 60 L. Ed. 2d 846. But today, we do not ask whether a court can determine a damages [**1809] amount. Rather, we ask whether there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy at all. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 13).

In short, as we explained in Ziglar, a plaintiff cannot justify a Bivens extension based on parallel circumstances with Bivens, Passman, or Carlson unless he also satisfies the analytic framework prescribed by the last four decades of intervening case law. 582 U. S., at ___-___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 15-16). Boule has failed to do so.

IV

Since it was decided, Bivens has had no shortage of detractors. See, e.g., Bivens, 403 U. S., at 411, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (Burger, C. J., dissenting); id., at 427, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (Black, J., dissenting); id., at 430 [*502] (Blackmun, J., dissenting); Carlson, 446 U. S., at 31 (Rehnquist, J., dissenting); Malesko, 534 U. S., at 75 (Scalia, J., concurring); Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (Thomas, J., concurring) (slip op., at 1); post, at 1-3 (opinion of Gorsuch, J.). And, more recently, we have indicated that if we were called to

decideBivens today, we would decline to discover any implied causes of action [****29] in the Constitution. See Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 11). But, to decide the case before us, we need not reconsider Bivens itself. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

Concur by: GORSUCH; SOTOMAYOR(In Part)

Concur

Justice Gorsuch, concurring in the judgment.

Our Constitutions separation of powers prohibits federal courts from assuming legislative authority. As the Court today acknowledges, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), crossed that line by impl[ying] a new set of private rights and liabilities Congress never ordained. Ante, at 5-6; see also Alexander v. Sandoval, 532 U. S. 275, 286, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001); Nestl頃SA, Inc. v. Doe, 593 U. S. ___, ___-___, 141 S. Ct. 1931, 210 L. Ed. 2d 207 (2021) (Gorsuch, J., concurring) (slip op., at 4-7).

Recognizing its misstep, this Court has struggled for decades to find its way back. Initially, the Court told lower courts to follow a two ste[p] inquiry before applying Bivens to any new situation. Ante, at 7. At the first step, a court [***73] had to ask whether the case before it presented a new context meaningfully different from Bivens. Ante, at 7. At the second, a court had to consider whether special factors counseled hesitation before recognizing a new cause of action. Ibid. But these tests soon produced their own set of questions: What distinguishes the first step from the second? What makes a context new or a factor special? [****30] And, most fundamentally, on what authority may courts recognize new causes of action even under these standards?

Today, the Court helpfully answers some of these lingering questions. It recognizes that our two-step inquiry really [*503] boils down to a single question: Is there any reason to think that Congress might be better equipped than a court to weigh the costs and benefits of allowing a damages action to proceed? Ante, at 7-8; see Ziglar v. Abbasi, 582 U. S. 120, ___-___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017) (slip op., at 13-14). But, respectfully, resolving that much only serves to highlight the larger remaining question: When might a court ever be better equipped than the peoples elected representatives to weigh the costs and benefits of creating a cause of action?

[**1810] It seems to me that to ask the question is to answer it. To create a new cause of action is to assign new private rights and liabilitiesa power that is in every meaningful sense an act of legislation. See Sandoval, 532 U. S., at 286-287, 121 S. Ct. 1511, 149 L. Ed. 2d 517; Nestl鼸span>, 593 U. S., at ___, 141 S. Ct. 1931, 210 L. Ed. 2d 207 (Gorsuch, J., concurring) (slip op., at 5); Jesner v. Arab Bank, PLC, 584 U. S. ___, ___, 138 S. Ct. 1386, 200 L. Ed. 2d 612 (2018) (Gorsuch, J., concurring in part and concurring in judgment) (slip op., at 3). If exercising that sort of authority may once have been a proper function for common-law courts in England, it is no longer generally appropriate for federal [****31] tribunals in a republic where the people elect representatives to make the rules that govern them. Sandoval, 532 U. S., at 287, 121 S. Ct. 1511, 149 L. Ed. 2d 517. Weighing the costs and benefits of new laws is the bread and butter of legislative committees. It has no place in federal courts charged with deciding cases and controversies under existing law.

Instead of saying as much explicitly, however, the Court proceeds on to conduct a case-specific analysis. And there I confess difficulties. The plaintiff is an American citizen who argues that a federal law enforcement officer violated the Fourth Amendment in searching the curtilage of his home. Candidly, I struggle to see how this set of facts differs meaningfully from those in Bivens itself. To be sure, as the Court emphasizes, the episode here took place near an international border and the officers search focused on violations of the immigration laws. But why does that matter? The Court suggests that Fourth Amendment violations [*504] matter less in this context because of likely national-security risks. Ante, at 11-12. So once more, we tote up for ourselves the costs and benefits of a private right of action in this or that setting and reach a legislative judgment. To atone for Bivens, it seems we continue repeating its most basic mistake. [****32]

Of course, the Courts real messages run deeper than its case-specific analysis. If the costs and benefits do not justify a new Bivens action on [***74] facts so analogous to Bivens itself, its hard to see how they ever could. And if the only question is whether a court is better equipped than Congress to weigh the value of a new cause of action, surely the right answer will always be no. Doubtless, these are the lessons the Court seeks to convey. I would only take the next step and acknowledge explicitly what the Court leaves barely implicit. Sometimes, it seems, this Court leaves a door ajar and holds out the possibility that someone, someday might walk through it even as it devises a rule that ensures no one . . . ever will. Edwards v. Vannoy, 593 U. S. ___, ___, 141 S. Ct. 1547, 209 L. Ed. 2d 651 (2021) (Gorsuch, J., concurring) (slip op., at 1). In fairness to future litigants and our lower court colleagues, we should not hold out that kind of false hope, and in the process invite still more protracted litigation destined to yield nothing. Nestl鼸span>, 593 U. S., at ___, 141 S. Ct. 1931, 210 L. Ed. 2d 207 (Gorsuch, J., concurring) (slip op., at 7). Instead, we should exercise the truer modesty of ceding an ill-gotten gain, ibid., and forthrightly return the power to create new causes of action to the peoples representatives in Congress. [****33]

Dissent by: SOTOMAYOR(In Part)

Dissent

Justice Sotomayor, with whom Justice Breyer and Justice Kagan join, concurring in the judgment in part and dissenting in part.

Respondent Robert Boule alleges that petitioner Erik Egbert, a U. S. Customs and Border Patrol agent, violated the Fourth Amendment by entering Boules property without a warrant and assaulting him. Existing precedent permits Boule to seek compensation for his injuries in federal court. [*505] See Bivens v. Six Unknown Fed. [**1811] Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); Ziglar v. Abbasi, 582 U. S. 120, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017). The Court goes to extraordinary lengths to avoid this result: It rewrites a legal standard it established just five years ago, stretches national-security concerns beyond recognition, and discerns an alternative remedial structure where none exists. The Courts innovations, taken together, enable it to close the door to Boules claim and, presumably, to others that fall squarely within Bivens ambit.

Todays decision does not overrule Bivens. It nevertheless contravenes precedent and will strip many more individuals who suffer injuries at the hands of other federal officers, and whose circumstances are materially indistinguishable from those in Bivens, of an important remedy. I therefore dissent from the Courts disposition of Boules Fourth Amendment claim. I concur in the Courts judgment that Boules [****34] First Amendment retaliation claim may not proceed under Bivens, but for reasons grounded in precedent rather than this Courts newly announced test.

I

This case comes to the Court following the District Courts grant of summary judgment to Agent Egbert. The Court is therefore bound to draw all reasonable factual inferences in favor of Boule. See Tolan v. Cotton, 572 U. S. 650, 656-657, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (per curiam). Because the Court fails to do so, the factual record is described below in some detail, in the light our precedent requires.

A

Boule is a U. S. citizen who owns, operates, and lives in a small bed-and-breakfast [***75] called the Smugglers Inn in Blaine, Washington. The property line of the land on which the inn is located touches the U. S.-Canada border. Shortly after purchasing the property in 2000, Boule became aware that people used his property to cross the border illegally in both [*506] directions.

Boule began serving as a paid, confidential informant for Customs and Border Protection (CBP) in 2003 and for Immigration and Customs Enforcement (ICE) in 2008. At the time of the events at issue in this case, Boule was still serving as an informant for ICE. ICE would coordinate with CBP and other agencies based on the information Boule provided. Over the years, [****35] Boule provided information leading to numerous arrests.

On the morning of March 20, 2014, petitioner Erik Egbert, a CBP agent, twice stopped Boule while Boule was running errands in town. Agent Egbert knew that Boule was a long-time informant for ICE and that he had previously worked as an informant for CBP. Agent Egbert asked Boule about guests at the inn, and Boule advised him of a guest he expected to arrive that day from New York who had flown in from Turkey the day before. Boule explained that two of his employees were en route to pick the guest up at the Seattle-Tacoma International Airport. Agent Egbert continued patrolling in his CBP vehicle for the rest of the morning but stayed near the inn so he would see when the car carrying the guest returned. When it arrived, he followed the car into the driveway of the inn, passing a no trespassing sign. Agent Egbert parked his vehicle behind the arriving car in the driveway immediately adjacent to the inn.

Agent Egbert exited his patrol vehicle and approached the car. Boules employee also exited the car; the guest remained inside. From the front porch of his inn, Boule asked Agent Egbert to leave. When Agent Egbert refused, Boule [****36] stepped off the porch, positioned himself between [**1812] Agent Egbert and the vehicle, and explained that the person in the car was a guest who had come from New York to Seattle and who had been through security at the airport. Boule again asked Agent Egbert to leave. Agent Egbert grabbed Boule by his chest, lifted him up, and shoved him against the vehicle and then threw him to the ground. Boule landed on his hip and shoulder.

[*507] Agent Egbert opened the car door and asked the guest about his immigration status. Boule called 911 to request a supervisor; Agent Egbert relayed the same request over his radio. Several minutes later, a supervisor and another agent arrived at the inn. After concluding that the guest was lawfully in the country (just as Boule had previously informed Agent Egbert), the three officers departed. Boule later sought medical treatment for his injuries.

Boule complained to Agent Egberts superiors about the incident and filed an administrative claim with CBP, which allegedly prompted Agent Egbert to retaliate against Boule. Agent Egbert contacted the Internal Revenue Service (IRS), the Social Security Administration, the Washington State Department of Licensing, and the Whatcom [****37] County Assessors Office, asking them to investigate Boules business. These agencies did so, but none found that Boule had done anything wrong. Boule paid over $5,000 to his accountant to assist him [***76] in responding to the IRS tax audit. Boule also filed claims pursuant to the Federal Tort Claims Act (FTCA), which were denied. CBPs investigation of Agent Egbert concluded that he failed to be forthcoming with investigators and demonstrated lack of integrity, serious offenses that warranted his removal. Rev. Redacted App. 184.

B

Boule sued Agent Egbert in Federal District Court, seeking damages under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619, for violation of Boules First and Fourth Amendment rights. The District Court granted summary judgment to Agent Egbert on both claims. The Court of Appeals reversed, concluding that both claims were cognizable under Bivens. In the Court of Appeals view, Boules Fourth Amendment claim constituted a modest extension of Bivens. Even so, the court explained, no special factors counseled hesitation such that this extension should be foreclosed; rather, Boules Fourth Amendment excessive force claim is part and parcel of the common and recurrent [*508] sphere of law enforcement that remained a permissible area for Bivens claims. 998 F. 3d 370, 389 (CA9 2021) (quoting Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 11)). The court separately [****38] held that Boules First Amendment claim could proceed under Bivens.

This Court granted certiorari. 595 U. S. ___, 142 S. Ct. 457, 211 L. Ed. 2d 278 (2021).

II

A

In Bivens, the plaintiff alleged that Federal Bureau of Narcotics agents unlawfully entered his apartment in New York City and used constitutionally unreasonable force to arrest him. 403 U. S., at 389, 91 S. Ct. 1999, 29 L. Ed. 2d 619. This Court observed that an agent actingalbeit unconstitutionallyin the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Id., at 392, 91 S. Ct. 1999, 29 L. Ed. 2d 619. The Fourth Amendment, the Court explained, guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures [**1813] carried out by virtue of federal authority. Ibid.

The Court ultimately held that a violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages. Id., at 389, 91 S. Ct. 1999, 29 L. Ed. 2d 619. In doing so, the Court observed that existing state-law causes of action were no substitute for a federal cause of action because [t]he interests protected by state laws regulating trespass and the invasion of privacy and those protected by the Fourth Amendment may be inconsistent or even hostile. Id., at 394, 91 S. Ct. 1999, 29 L. Ed. 2d 619; see also id., at 410, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (Harlan, J., concurring in judgment) (For people in Bivens shoes, it [****39] is damages or [***77] nothing).4

4

For example, an individual may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance and may seek damages under state law for any consequent trespass. Bivens, 403 U. S., at 394. By contrast, [t]he mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. Ibid.

The Court also noted that the case [*509] before it involve[d] no special factors counselling hesitation, such as a question concerning federal fiscal policy. Id., at 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619.

This Court has twice extended the cause of action first articulated in Bivens: first to a Fifth Amendment due process claim for sex discrimination, see Davis v. Passman, 442 U. S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979), and then to an Eighth Amendment deliberate indifference claim for failure to provide proper medical attention, see Carlson v. Green, 446 U. S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). In Davis, Carlson, and subsequent cases, the Court built on Bivens inquiry to develop a two-step test for determining whether a Bivens cause of action may be defeated. Carlson, 446 U. S., at 18, 100 S. Ct. 1468, 64 L. Ed. 2d 15. First, the Court considered whether, under the circumstances of a particular case, special factors counseled hesitation in allowing a private right of action to proceed. See, e.g., Bivens, 403 U. S., at 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619; Davis, 442 U. S., at 246, 99 S. Ct. 2264, 60 L. Ed. 2d 846; Carlson, 446 U. S., at 18, 100 S. Ct. 1468, 64 L. Ed. 2d 15; Bush v. Lucas, 462 U. S. 367, 377-380, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983). Second, the Court considered whether Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective. Carlson, 446 U. S., at 18-19, 100 S. Ct. 1468, 64 L. Ed. 2d 15; see also, e.g., Davis, 442 U. S., at 246-247, 99 S. Ct. 2264, 60 L. Ed. 2d 846; Bush, 462 U. S., at 377-378, 103 S. Ct. 2404, 76 L. Ed. 2d 648; Wilkie v. Robbins, 551 U. S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007) (describing this two-step test). Where, for example, Congress crafted an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, Bush, 462 U. S., at 388, 103 S. Ct. 2404, 76 L. Ed. 2d 648, this Court [****40] concluded that it would be inappropriate . . . to supplement that regulatory scheme with a new judicial remedy, id., at 368, 103 S. Ct. 2404, 76 L. Ed. 2d 648; accord, Schweiker v. Chilicky, 487 U. S. 412, 414, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988). Applying this two-step test, the Court has declined to extend Bivens beyond situations like [*510] those addressed in Davis, Carlson, and Bivens itself. See ante, at 1.

In Ziglar v. Abbasi, 582 U. S. 120, 137 S. Ct. 1843, 198 L. Ed. 2d 290, the Court not only declined to extend Bivens but also revised and narrowed its two-step analytic framework. The Ziglar Court set forth a new inquiry requiring courts considering a Bivens claim first to ask whether a case is different in a meaningful way from previous Bivens cases decided by this [**1814] Court and therefore arises in a new . . . context. 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 16); see also Hernández v. Mesa, 589 U. S. ___, ___, [***78] 140 S. Ct. 735, 206 L. Ed. 2d 29 (2020) (slip op., at 7). The Ziglar Court offered a laundry list of differences that might be

meaningful, including the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases [****41] did not consider. 582 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 16). The Court recognized, however, that some differences will be so trivial that they will not suffice to create a new Bivens context. Id., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 26).

If the differences are in fact meaningful ones, ibid., then the context is new, id., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 16), and a court proceed[s] to the second step of the analysis, Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 7). The second step requires courts to consider whether special factors counsel hesitation in recognizing a Bivens remedy in a new context. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 12); Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 7).

Importantly, even as the Ziglar Court grafted a more demanding new-context inquiry onto the traditional Bivens framework, the Court emphasized that its opinion was not intended to cast doubt on the continued force, or even the necessity, of Bivens in the search-and-seizure context in which it arose. 582 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 11). Quite the opposite: The Court recognized that Bivens vindicate[s] the Constitution [*511] by allowing some redress for injuries and provides instruction and guidance to federal law enforcement officers going forward. 582 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 11). Accordingly, the Court explained, there are powerful reasons to retain [Bivens] in the common and recurrent sphere of law enforcement. Ibid. The [****42] Court further recognized that individual instances of discrimination or law enforcement overreach are, by their nature, difficult to address except by way of damages actions after the fact. Id., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 21).

B

Ziglar and Hernández control here. Applying the two-step framework set forth in those cases, the Court of Appeals determination that Boules Fourth Amendment claim is cognizable under Bivens should be affirmed for two independent reasons. First, Boules claim does not present a new context. Second, even if it did, no special factors would counsel hesitation.

1

Boules Fourth Amendment claim does not arise in a new context. Bivens itself involved a U. S. citizen bringing a Fourth Amendment claim against individual, rank-and-file federal law enforcement officers who allegedly violated his constitutional rights within the United States by entering his property without a warrant and using excessive force. Those are precisely the facts of Boules complaint.

The only arguably salient difference in context between this case [***79] and Bivens is that the defendants in Bivens were employed at the time by the (now-defunct) Federal Bureau of Narcotics, while Agent Egbert was employed by CBP. As discussed, however, this Courts precedent instructs that some differences [****43] are too trivial . . . to create a new Bivens context. Ziglar, 582 U. S., at ___, 137 S. Ct. [**1815] at 1865, 198 L. Ed. 2d 290.5

5

Egbert argues in passing that the fact that he was operating under a statutory . . . mandate not invoked in prior cases, standing alone, dooms [Boules] no-new-context argument. Reply Brief 19 (quoting Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 16)). Not so. Egbert fails to show that any difference in statutory mandates as between CBP agents and other law enforcement officers is meaningful, which our precedents require him to do. Id., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 16).

That it was a CBP [*512] agent rather than a Federal Bureau of Narcotics agent who unlawfully entered Boules property and used constitutionally excessive force against him plainly is not the sort of meaningful distinction that our new-context inquiry is designed to weed out. Ibid.

It is of course well established that a Bivens suit involving an entirely new category of defendants arises in a new context. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at

11); see also Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 7). The

Court, however, has never relied on this principle to draw artificial distinctions between line-level officers of the 83 different federal law enforcement agencies with authority to make arrests and provide police protection. See Dept. of Justice, C. Brooks, Federal Law Enforcement Officers, 2016Statistical Tables (NCJ 251922, Oct. 2019), https://bjs.ojp.gov/content/pub/pdf/fleo16st.pdf. Indeed, if the new context inquiry were defined at such a fine level of granularity, every case would raise a new context, because the Federal Bureau of Narcotics no longer exists. See National Archives, Records of the Drug Enforcement Administration [DEA] (Aug. 15, 2016), https://www.archives.gov/ [****44] research/guide-fed-records/groups/170.html.

Moreover, the new category of defendants language traces back to a different concern raised in the Courts decision in Correctional Services Corp. v. Malesko, 534 U. S. 61, 68, 122 S. Ct. 515,

151 L. Ed. 2d 456 (2001). That case involved an Eighth Amendment claim brought by a federal prisoner against a private corporation under contract with the federal Bureau of Prisons. The Court observed that the threat of suit against an individuals employer, rather than the individual directly responsible for the alleged injury, was not the kind of deterrence contemplated by Bivens. Id., at 70-71, 122 S. Ct. 515, 151 L. Ed. 2d 456. Applying Bivens to a corporate defendant would amount to a marked extension [*513] of Bivens . . . to contexts that would not advance Bivens core purpose of deterring individual officers from engaging in unconstitutional wrongdoing. Malesko, 534 U. S., at 74, 122 S. Ct. 515, 151 L. Ed. 2d 456; see also FDIC v. Meyer, 510 U. S. 471, 485, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994) (declining to allow a Bivens claim to proceed against a federal agency for similar reasons). Here, by contrast, Boules suit against Agent Egbert directly advances that core purpose.

At bottom, Boules claim is materially indistinguishable from the claim brought in Bivens. His case therefore [***80] does not present a new context for the purposes of assessing whether a Bivens remedy is available.

2

Even assuming that this case presents a new context, no special factors warrant foreclosing [****45] a Bivens action.

The Court has not defined the phrase special factors counselling hesitation, but it has recognized that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 12); see also

Hernández, 589 U. S., at ___-___, 140 [**1816] S. Ct. at 742-744, 206 L. Ed. 2d 29. For example,

where a claim would call into question the formulation and implementation of a general policy or require courts to interfere in an intrusive way with sensitive functions of the Executive Branch, recognizing a Bivens action may be inappropriate. Ziglar, 582 U. S., at ___-___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 17-18); see also, e.g., Chappell v. Wallace, 462 U. S. 296, 300, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983) (declining to extend Bivens where military personnel sought damages from superior officers, citing concerns about tamper[ing] with the established relationship between enlisted military personnel and their superior officers, which lies at the heart of the necessarily unique structure of the Military Establishment). Precedent thus establishes that separation-of-powers principles . . . should be central to the [special-factors] analysis. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 12).

[*514] Here, the only possible special factor is that Boules property abuts an international border. [****46] Boules case, however, is a far cry from others in which the Court declined to extend

Bivens for reasons of national security or foreign relations. In Hernández, for example, a CBP agent

shot and killed a Mexican child across the U.S.-Mexico border. 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 2). The Mexican Government unsuccessfully sought extradition of the agent to Mexico, and after an investigation, the U. S. Department of Justice declined to bring charges against the agent. Ibid. The parents of the deceased child attempted to bring a Bivens action against the CBP agent, but this Court held that several warning flags counseled caution, including a potential effect on foreign relations. Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 9). The Court observed that [a] cross-border shooting is by definition an international incident, and that both the United States and Mexico had legitimate and important interests that may be affected by the way in which this matter is handled. Id., at ___, ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 9, 11). The Court concluded that because regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending Bivens into this field. Id., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 14). [****47]

The conduct here took place near an international border and involved a CBP agent. That, however, is where the similarities with Hernández begin and end. The conduct occurred exclusively on U. S. soil, and the injury was [***81] to a U. S. citizen. This case therefore does not present an international incident that might affect diplomatic relations, unlike the cross-border killing of a foreign-national child. As for national-security concerns, the Court in Hernández emphasized that some [CBP agents] are stationed right at the border and have the responsibility of attempting to prevent illegal entry; it was [f]or th[i]s reaso[n], among others, that their conduct had a clear and strong connection to national security. Id., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 13). Here, by contrast, Agent Egbert [*515] was not attempting to prevent illegal entry or otherwise engaged in activities with a strong connection to national security. Ibid. Agent Egbert was aware (because Boule had told him earlier in the day and again at the scene) that the foreign national arriving at the inn had already entered the United States by airplane and had been processed by U. S. customs at the airport in New York the previous day. [****48]

Nor does this case present special factors similar to those that deterred the Court from recognizing a Bivens action in Ziglar. In that case, foreign nationals who had been unlawfully present in the United States brought a Bivens action against three high executive officers in the Department of Justice and two wardens of [**1817] the facility where they had been held. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 2). The Court reasoned that allowing the plaintiffs claims to proceed against the executive officers would call into question the formulation and implementation of a general policy, and that the discovery and litigation process would border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question, thereby implicating sensitive national-security functions entrusted to Congress and the President. Id., at ___-___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 17-18). If Bivens liability were imposed, the Court explained, high officers who face personal liability

for damages might refrain from taking urgent and lawful action in a time of crisis, and the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 22).

Here, Boule plainly [****49] does not seek to challenge or alter high-level executive policy. Id., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 16). Allowing his claim to proceed would not require courts to intrude into the discussion and deliberations that led to the formation of any policy or national-security decision or interest. Id., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 18). Agent Egbert, a line officer, was engaged in a run-of-the-mill inquiry into the status of a foreign national on U. S. soil who had no actual or suggested ties to terrorism, and who recently had been through U. S. customs to boot. [*516] See id., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 21) (distinguishing a challenge to individual instances of discrimination or law enforcement overreach, which lends itself to a Bivens action, from a challenge to large-scale policy decisions, which does not). No special factors counsel against allowing Boules Bivens action to proceed.

C

Boule also argues that his First Amendment retaliatory-investigation claim is cognizable under Bivens. I [***82] concur in the Courts judgment that it is not, but I arrive at that conclusion by following precedent rather than by applying the Courts new, single-step inquiry. Ante, at 7; see infra, at 15-17.

This Court has repeatedly assumed without deciding that Bivens extends [****50] to First Amendment claims, see Wood v. Moss, 572 U. S. 744, 757, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014), but has never squarely held as much, see Reichle v. Howards, 566 U. S. 658, 663, n. 4, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012). Accordingly, Boules First Amendment retaliation presents a new context for the purpose of the Bivens analysis. See Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 24) (noting that a case can present a new context if it implicates a different constitutional right than those already recognized as cognizable under Bivens).

Moving to the second step of the Bivens inquiry, unlike Boules Fourth Amendment claim, there is reason to pause before extending Bivens to Boules First Amendment claim. Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 7). In particular, his First Amendment claim raises line-drawing concerns similar to those this Court identified in Wilkie, 551 U. S. 537, 127 S. Ct. 2588, 168 L. Ed. 2d 389. In Wilkie, a landowner sought to bring a Bivens action against federal officials whom the landowner accused of harassment and intimidation meant to extract an easement across his property. 551 U. S., at 541, 127 S. Ct. 2588, 168 L. Ed. 2d 389. The Court observed that defining a workable cause of action for such a claim was difficul[t]. Id., at 555, 127 S. Ct. 2588, 168 L. Ed. 2d 389; see also id., at 557, 127 S. Ct. 2588, 168 L. Ed. 2d 389.

Recognizing a Bivens action to redress retaliation under such circumstances would, in the Courts view, invite claims in every sphere of legitimate [*517] governmental action [**1818] affecting property interests and across this enormous swath of potential litigation would hover the difficulty of devising a . . . standard that could guide an employees conduct [****51] and a judicial factfinders conclusion. 551 U. S., at 561, 127 S. Ct. 2588, 168 L. Ed. 2d 389. Because of the elusiveness of a limiting principle for claims like the landowners, id., at 561, n. 11, 127 S. Ct. 2588, 168 L. Ed. 2d 389, the Court decided that courts were ill equipped to tailor an appropriate remedy, id., at 562, 127 S. Ct. 2588, 168 L. Ed. 2d 389.

Boules First Amendment retaliation claim raises similar concerns. Unlike the constitutional rights this Court has recognized as cognizable under Bivens, First Amendment retaliation claims could potentially be brought against many different federal officers, stretching substantially beyond the common and recurrent sphere of law enforcement to reach virtually all federal employees. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 11). Under such circumstances, this Courts precedent holds that evaluat[ing] the impact of a new species of litigation on the efficiency of civil service is a task for Congress, not the courts. Wilkie, 551 U. S., at 562, 127 S. Ct. 2588, 168 L. Ed. 2d 389; see also Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 13). I therefore concur in the judgment as to the Courts reversal of the Court of Appeals conclusion that Boules First Amendment Bivens action may proceed, not for the reasons [***83] the Court identifies, ante, at 13-16, but because precedent requires it.

III

If the legal standard the Court articulates to reject Boules Fourth Amendment claim sounds unfamiliar, that is because it is. Just five years after circumscribing the standard for [****52] allowing Bivens claims to proceed, a restless and newly constituted Court sees fit to refashion the standard anew to foreclose remedies in yet more cases. The measures the Court takes to ensure Boules claim is dismissed are inconsistent with governing precedent.

A

Two Terms ago, this Court reiterated and reaffirmed Ziglars two-step test for assessing whether a claim may be [*518] brought as a Bivens action. See Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 7) (When asked to extend Bivens, we engage in a two-step inquiry). Today, however, the Court pays lip service to the test set out in our precedents, but effectively replaces it with a new single-step inquiry designed to constrict Bivens. Ante, at 7 (acknowledging this Courts previous two ste[p] standard but insisting that those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy); ante, at 8 (positing that [t]he newness of [some] new context[s] should alone

require dismissal (some internal quotation marks omitted)). The Court goes so far as to announce that [t]he Bivens inquiry does not invite federal courts to independently assess the costs and benefits of implying a cause of action, ante, at 11; [****53] instead, courts must only decide whether there is any rational reason (even one) to think that Congress is better suited to weigh the costs and benefits of allowing a damages action to proceed, ibid. (quoting Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 12)).

That approach contrasts starkly with the standard the Court announced in Ziglar and applied in Hernández. This Court regularly has considered whether courts are well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed, Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 12), and have never held that such weighing is categorically impermissible, contrary to the Courts [**1819] analysis today. See also Wilkie, 551 U. S., at 554, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (noting that the Bivens inquiry asks courts to weig[h] reasons for and against the creation of a new cause of action).

The Court justifies its innovations by selectively quoting our precedents and presenting its newly announced standard as if it were always the rule. The Courts repeated citation to United States v. Stanley, 483 U. S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987), is just one example. The Court cites Stanley for, among other things, the proposition that the special-factors analysis must be conducted at a very broad level of generality. Ante, [*519] at 11. Stanley, however, cautioned against a case-specific special-factors analysis in the narrow context of [****54] judicial intrusion upon military discipline. 483 U. S., at 681, 107 S. Ct. 3054, 97 L. Ed. 2d 550. [***84] As it had in previous cases seeking to raise Bivens actions in the military context, the Stanley Court emphasized the need to be protective of military concerns, 483 U. S., at 681, 107 S. Ct. 3054, 97 L. Ed. 2d 550, and to avoid call[ing] into question military discipline and decisionmaking, id., at 682, 107 S. Ct. 3054, 97 L. Ed. 2d 550. The Court therefore determined that in the military sphere, the special-factors analysis should be applied somewhat more broadly than the respondent urged. Id., at 681, 107 S. Ct. 3054, 97 L. Ed. 2d 550. Stanley, in other words, reflected the Courts longstanding approach to Bivens cases: considering the facts and the substantive context of each case and determining whether special factors counseled hesitation. Stanley did not purport to articulate a special-factors framework that should apply to all Bivens cases going forward.

The Court further declares that a plaintiff cannot justify a Bivens extension based on parallel circumstances with previous cases that have recognized a Bivens remedy. Ante, at 17. To the extent these statements suggest an exacting new-context inquiry, they are in serious tension with the Courts longstanding rule that trivial differences alone do not create a new Bivens context. See Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 26); see also ante, at 2 (Gorsuch, J., concurring in judgment) (Candidly, [****55] I struggle to see how this set of facts differs meaningfully from those in Bivens itself). Indeed, until today, the Court has never so much as hinted that courts should refuse to permit a Bivens action in a case involving facts substantially identical to those in Bivens itself. Supra, at 8-9.6

6

The Court supports its decision not to recognize an action under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), by observing that we have declined to recognize a Bivens-style cause of action for other constitutional violations. Ante, at 1. What the Court fails to acknowledge, however, is that each of those cases presented a meaningfully new context and/ or raised special factors counseling hesitation that are not present in this case. See supra, at 6, 9-10, 13-14, 15-16; infra, at 21-22. The one exception is Hui v. Castaneda, 559 U. S. 799, 808, 130 S. Ct. 1845, 176 L. Ed. 2d 703 (2010), in which the Court did not have to conduct this analysis because it held the FTCAs comprehensive remedial scheme, which provided both a cause of action and an exclusive damages remedy for the claim at issue, clearly precluded a Bivens claim.

[*520] B

The Courts application of its new standard to Boules Fourth Amendment claim underscores just how novel that standard is. Even assuming the claim presents a new context, the Courts insistence that national-security concerns bar the claim directly contravenes Ziglar. Moreover, the Courts holding that a nonbinding administrative investigation process, internal to the agency and offering no meaningful [**1820] protection of the constitutional interests at stake, constitutes an alternative remedy that forecloses Bivens relief blinks reality.

1

The Court acknowledges the force of the Court of Appeals conclusion that Bivens and this case present almost parallel circumstances, but it nonetheless concludes that a most unlikely special factor counsels hesitation: [***85] the national-security context. Ante, at 10. By the Courts telling, Hernández declined to recognize a Bivens action because regulating the conduct of agents at the border unquestionably has national [****56] security implications, and the risk of undermining border security provides reason to hesitate before extending Bivens into this field. Ante, at 9 (quoting Hernández, 589 U. S., at ___, 140 S. Ct. 735, 206 L. Ed. 2d 29 (slip op., at 14)). That reasoning, the Court concludes, applies here with full force because national security is at issue. Ante, at 9-10.

This is sheer hyperbole. Most obviously, the Courts conclusion that this case, which involves a physical assault by a federal officer against a U. S. citizen on U. S. soil, raises national [*521] security concerns does exactly what this Court counseled against just four years ago. Back then, the Court advised that national-security concerns must not become a talisman to use to ward off inconvenient claimsa label used to cover a multitude of sins. Ziglar, 582 U. S., at ___, 137 S. Ct.

1843, 198 L. Ed. 2d 290 (slip op., at 20) (quoting Mitchell v. Forsyth, 472 U. S. 511, 523, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). It explained that this danger of abuse is even more heightened given the difficulty of defining the security interest in domestic cases. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 20) (internal quotation marks omitted). This case does not remotely implicate national security. The Court may wish it were otherwise, but on the facts of this case, its effort to raise the specter of national security is mere sleight of hand.

Nor is there any indication that Congress acted to deny [****57] a Bivens remedy for a case like this, which otherwise might counsel hesitation. See Bush, 462 U. S., at 368, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (declining to supplement Congress existing scheme with a new judicial remedy). Congress has not provided that federal law enforcement officers may enter private property near a border at any time or for any purpose. Quite the contrary: Congress has determined that immigration officers may enter private lands within 25 miles of an international border without a warrant only for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States. 66 Stat. 233, 8 U. S. C. 1357(a)(3). This allowance is itself subject to exceptions: Officers cannot enter a dwellin[g] for immigration enforcement purposes without a warrant. Ibid. Mere proximity to a border, in other words, did not give Agent Egbert greater license to enter Boules property. Nor does it diminish or call into question the remedies for constitutional violations that a plaintiff may pursue, particularly where, as here, an agent unquestionably was not acting for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States. Ibid.

[*522] Remarkably, the Court goes beyond invoking its national-security talisman in [****58] this case alone. In keeping with the unprecedented level of generality the Court imports into the special-factors analysis, the Court holds that courts are not competent to authorize a damages action . . . against Border Patrol agents generally. Ante, at 11. This extraordinary and gratuitous conclusion contradicts decades of [***86] precedent requiring a context-specific determination of whether a particular claim presents [**1821] special factors counseling hesitation. See supra, at 6-8.7

7

Any concerns that a case-specific Bivens inquiry in cases involving CBP or ICE agents would pose administrability problems is misplaced. See Brief for American Civil Liberties Union et al. as Amici Curiae 14-18 (citing lower court cases that have applied this approach to suits against CBP and ICE agents).

The consequences of the Courts drive-by, categorical assertion will be severe. Absent intervention by Congress, CBP agents are now absolutely immunized from liability in any Bivens action for damages, no matter how egregious the misconduct or resultant injury. That will preclude redress under Bivens for injuries resulting from constitutional violations by CBPs nearly 20,000 Border Patrol agents, including those engaged in ordinary law enforcement activities, like traffic stops, far removed from the border. U. S. Customs and Border Protection, On a Typical Day in Fiscal Year 2021, CBP . . . (2022), https:/ / www.cbp.gov/ newsroom/ stats/ typical-day-

fy2021. This is no hypothetical: Certain CBP agents exercise [****59] broad authority to make warrantless arrests and search vehicles up to 100 miles away from the border. See 8 U. S. C. 1357(a); 8 CFR 287.1(a)(2) (2021). The Courts choice to foreclose liability for constitutional violations that occur in the course of such activities, based on even the most tenuous and hypothetical connection to the border (and thereby, to the nationalsecurity context), betrays the context-specific nature of Bivens and shrinks Bivens in the core [*523] Fourth Amendment law enforcement sphere where it is needed most. See Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 11).8

8

To the extent the Courts decision may be motivated by fears that allowing this Bivens action to proceed will open the floodgates to countless claims in the future, cf. ante, at 15, that concern is overblown. The doctrine of qualified immunity will continue to protect government officials from liability for damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct. Wood v. Moss, 572 U. S. 744, 757, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014) (quoting Ashcroft v. al-Kidd, 563 U. S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)).

2

The Court further proclaims that Congress has provided alternative remedies that independently foreclose a Bivens action in this case. Ante, at 12. The administrative remedy the Court perceives, however, is no remedy whatsoever.

The sole remedy the Court cites is an administrative grievance procedure that does not provide Boule with any relief. The statute on which the Court relies provides: The Secretary of Homeland Security . . . shall have control, direction, and supervision of all employees and of all the files and records of [CBP]. 8 U. S. C. 1103(a)(2); see ante, at 12. Administrative regulations direct CBP to investigate alleged violations of its own standards by its own employees. See 8 CFR 287.10(a)-(b).9

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The regulations require any investigative report regarding excessive force to be referred promptly for appropriate action in accordance with the policies and procedures of the Department [of Homeland Security]. 8 CFR 287.10(c). Those policies and procedures, in turn, explicitly establish no right or benefit, substantive or procedural, enforceable at law or in equity. Dept. of Homeland Security, Dept. Policy on the Use of Force, X, Policy Statement 044-05 (Sept. 7, 2018).

The Court sees fit to [****60] defer to this procedure, even while [***87] acknowledging that complainants in Boules position have no right to participate in the proceedings or to seek judicial review of any determination. Ante, at 12. The Court supports its conclusion [**1822] that [*524] CBPs internal

administrative grievance procedure offers an adequate remedy by insisting that we have never held that a Bivens alternative must afford rights to participation or appeal. Ante, at 13. In the Courts view, [s]o long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a Bivens remedy. Ibid. (emphasis added).

This analysis drains the concept of remedy of all meaning. To be sure, the Court has previously deemed Bivens claims foreclosed by substantive remedies to claimants that are in significant part administrative. Bush, 462 U. S., at 385; see also, e.g., Schweiker, 487 U. S., at 424-425. The Court also has recognized that existing remedies need not provide complete relief for the plaintiff, Bush, 462 U. S., at 388, including loss due to emotional distress or mental anguish, or attorneys fees, Schweiker, 487 U. S., at 424-425. Until today, however, this Court has never held that a threadbare disciplinary review process, [****61] expressly conferring no substantive rights, secure[s] adequate deterrence and afford[s] . . . an alternative remedy. Ante, at 14. Nor has it held that remedies providing no relief to the individual whose constitutional rights have been violated are adequate for the purpose of foreclosing a Bivens action. To the contrary, each of the alternative remedies the Court has recognized has afforded participatory rights, an opportunity for judicial review, and the potential to secure at least some meaningful relief. See, e.g., Minneci v. Pollard, 565 U. S. 118, 127, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012) (state tort law); Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (slip op., at 25) (petition for writ of habeas corpus or injunctive relief); Bush, 462 U. S., at 385.10

10

Aside from CBPs internal grievance procedure, Agent Egbert contends that the FTCA offers an alternative remedy for claims like Boules. This Court does not endorse this argument, and for good reason. This Court repeatedly has observed that the FTCA does not cover claims against Government employees for violation[s] of the Constitution of the United States. 28 U. S. C. 2679(b)(2)(A); see Wilkie v. Robbins, 551 U. S. 537, 553, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007); Carlson v. Green, 446 U. S. 14, 20, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) (Congress views FTCA and Bivens as parallel, complementary causes of action); Correctional Services Corp. v. Malesko, 534 U. S. 61, 68, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) (noting that it was crystal clear that Congress intended the FTCA and Bivens to serve as parallel and complementary sources of liability (internal quotation marks omitted)). Just two Terms ago, the Court reaffirmed that by carving out claims brought for . . . violation[s] of the Constitution from the FTCAs exclusive remedy for most claims against Government employees arising out of their official conduct, Congress made clear that it was not attempting to abrogate Bivens and instead simply left Bivens where it found it, Hernández v. Mesa, 589 U. S. ___, ___?-___, and n. 9, 140 S. Ct. 735, 206 L. Ed. 2d 29 (2020) (slip op., at 16-17, and n. 9) (quoting Hui, 559 U. S., at 806; 2679(b)(2)(A)).

[*525] The Court previously has emphasized that a Bivens action may be [***88] inappropriate where Congress has provided an alternative remedy which it explicitly declared to be a substitute

for recovery directly under the Constitution and viewed as equally effective. Carlson, 446 U. S., at 18-19, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (emphasis deleted). Thus, our cases declining to extend Bivens have done so where Congress, sometimes in conjunction with the Executive Branch, provided comprehensive and meaningful remedies. Bush, 462 U. S., at 388, 103 S. Ct. 2404, 76 L. Ed. 2d 648; see also Schweiker, 487 U. S., at 414, 423, 428 (emphasizing that the design of the elaborate remedial scheme in the Social Security disability program [**1823] suggests that Congress [****62] has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration); Malesko, 534 U. S., at 72, 122 S. Ct. 515, 151 L. Ed. 2d 456 (noting that remedies available to the plaintiff were at least as great, and in many respects greater, than anything that could be had under Bivens); Minneci, 565 U. S., at 120, 132 S. Ct. 617, 181 L. Ed. 2d 606 (rejecting Bivens action for Eighth Amendment violations against employees of a privately operated federal prison because state tort law authorizes adequate alternative damages actionsactions that provide both significant deterrence and compensation). By the Courts logic, however, the existence of any disciplinary framework, even if crafted by the Executive Branch rather [*526] than Congress, and even if wholly nonparticipatory and lacking any judicial review, is sufficient to bar a court from recognizing a Bivens remedy. That reasoning, as disturbing as it is wrong, marks yet another erosion of Bivens deterrent function in the law enforcement sphere.11

11

Even beyond its doctrinal innovations on the merits, the Court also fashions a brand new, Bivens-specific procedural rule under which it excuses Egberts forfeiture of his argument that CBPs administrative process suffices as an alternative remedy. Ante, at 12, n. 3.

C

The Court thinly veils its disapproval of Bivens, ending its opinion by citing a string of dissenting opinions and single-Member concurrences by various Members of this Court expressing criticisms of Bivens. Ante, at 16-17. But the Court unmistakably stops short of overruling Bivens and its progeny, [****63] and appropriately so. Even while declining to extend Bivens to new contexts, this Court has reaffirmed that it did not inten[d] to cast doubt on the continued force, or even the necessity, of Bivens in the search-and-seizure context in which it arose. Ziglar, 582 U. S., at ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290(slip op., at 11). Although todays opinion will make it harder for plaintiffs to bring a successful Bivens claim, even in the Fourth Amendment context, the lower courts should not read it to render Bivens a dead letter.

That said, the Court plainly modifies the Bivens standard in a manner that forecloses Boules claims and others like them that should be permitted under this Courts Bivens precedents. That choice is in tension with [***89] the Courts insistence that prescribing a cause of action is a job for Congress, not the courts. Ante, at 1; see ante, at 11 (cautioning against frustrat[ing] Congresss policymaking role when considering whether special factors counsel hesitation). Faithful

adherence to this logic counsels maintaining Bivens in its current scope, but does not support changing the status quo to constrict Bivens, as the Court does today. Congress, [*527] after all, has recognized and relied on the Bivens cause of action in creating and amending other remedies, including the FTCA. By nevertheless [****64] repeatedly amending the legal standard that applies to Bivens claims and whittling down the number of claims that remain viable, the Court itself is making a policy choice for Congress. Whatever the merits of that choice, the Courts decision today is no exercise in judicial modesty.

***

This Courts precedents recognize that suits for damages play a critical role in deterring unconstitutional conduct by federal law enforcement officers and in ensuring that those whose constitutional rights have been violated receive meaningful redress. The Courts decision today ignores our repeated recognition of the importance [**1824] of Bivens actions, particularly in the Fourth Amendment search-and-seizure context, and closes the door to Bivens suits by many who will suffer serious constitutional violations at the hands of federal agents. I respectfully dissent from the Courts treatment of Boules Fourth Amendment claim.

Dobbs v. Jackson Women's Health Org.

Supreme Court of the United States

December 1, 2021, Argued; June 24, 2022, Decided

No. 19-1392.

Reporter
597 U.S. 215 *; 142 S. Ct. 2228 **; 213 L. Ed. 2d 545 ***; 2022 U.S. LEXIS 3057 ****; 29 Fla. L. Weekly Fed. S 486; 2022 WL 2276808

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL., PETITIONERS v. JACKSON WOMENS HEALTH ORGANIZATION, ET AL.

Notice:

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Prior History:

[****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 2019 U.S. App. LEXIS 36957, 2019 WL 6799650 (5th Cir. Miss., Dec. 13, 2019)

Disposition:

945 F. 3d 265, reversed and remanded.

Syllabus

[*215] [**2234] Mississippis Gestational Age Act provides that [e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn

human being has been determined to be greater than fifteen (15) weeks. Miss. Code Ann. 41-41-191(4)(b). RespondentsJackson Womens Health Organization, an abortion clinic, and one of its doctorschallenged the Act in Federal District Court, alleging that it violated this Courts precedents establishing a constitutional right to abortion, in particular Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, and Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning that Mississippis 15-week restriction on abortion violates this Courts cases forbidding States to ban abortion pre-viability. The Fifth Circuit affirmed. Before this Court, petitioners defend the Act on the grounds that Roe and Casey were wrongly decided and that the Act is constitutional because it satisfies rational-basis review.

Held: The Constitution does not [****2] confer a right to abortion; Roe and Casey are overruled; and the authority to regulate abortion is returned to the people and their elected representatives. Pp. 8-79.

(a) The critical question is whether the Constitution, properly understood, confers a right to obtain an abortion. Caseys controlling opinion skipped over that question and reaffirmed Roe solely on the basis of stare decisis. A proper application of stare decisis, however, requires an assessment of the strength of the grounds on which Roe was based. The Court therefore turns to the question that the Casey plurality did not consider. Pp. 8-32.

(1) First, the Court reviews the standard that the Courts cases have used to determine whether the Fourteenth Amendments reference to liberty protects [**2235] a particular right. The Constitution makes no express reference to a right to obtain an abortion, but several constitutional provisions have been offered as potential homes for an implicit constitutional right. Roe held that the abortion right is part of a right [*216] to privacy that springs from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. See 410 U.S., at 152-153, 93 S. Ct. 705, 35 L. Ed. 2d 147. The Casey Court grounded its decision solely on the theory that the right to obtain an abortion is part of the liberty protected by the Fourteenth Amendments Due Process Clause. Others have suggested that support [****3] can be found in the Fourteenth Amendments Equal Protection Clause, but that theory is squarely foreclosed by the Courts precedents, which establish that a States regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications. See Geduldig v. Aiello, 417 U.S. 484, 496, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256; Bray v. Alexandria Womens Health Clinic, 506 U.S. 263, 273-274, 113 S. Ct. 753, 122 L. Ed. 2d 34. Rather, regulations and prohibitions of abortion are governed by the same standard of review as other health and safety measures. Pp. 9-11.

(2) Next, the Court examines whether the right to obtain an abortion is rooted in the Nations history and tradition and whether it is an essential component of ordered liberty. The Court finds that the right to abortion is not deeply rooted in the Nations history and tradition. The underlying theory on which Casey restedthat the Fourteenth Amendments Due Process Clause

provides substantive, as well as procedural, protection for libertyhas long been controversial. The Courts decisions have held that the Due Process Clause protects two categories of substantive rightsthose rights guaranteed by the first eight Amendments to the Constitution and those rights deemed fundamental that are not mentioned anywhere in the Constitution. In deciding whether a right falls into either of these categories, the question is whether the right is deeply rooted in [our] history and tradition [****4] and whether it is essential to this Nations scheme of ordered liberty. Timbs v. Indiana, 586 U.S. ___, ___, 139 S. Ct. 682, 203 L. Ed. 2d 11 (internal quotation marks omitted). The term liberty alone provides little guidance. Thus, historical inquiries are essential whenever the Court is asked to recognize a new component of the liberty interest protected by the Due Process Clause. In interpreting what is meant by liberty, the Court must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Courts own ardent views about the liberty that Americans should enjoy. For this reason, the Court has been reluctant to recognize rights that are not mentioned in the Constitution. Collins v. Harker Heights, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261.

Guided by the history and tradition that map the essential components of the Nations concept of ordered liberty, the Court finds the Fourteenth Amendment clearly does not protect the right to an abortion. Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state [*217] constitutional provision had recognized such a right. Until a few years before Roe, no federal or state court had recognized such a right. Nor had any scholarly treatise. Indeed, abortion had long been a crime in every single State. At common law, abortion [****5] was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s [**2236] expanded criminal liability for abortions. By the time the Fourteenth Amendment was adopted, three-quarters of the States had made abortion a crime at any stage of pregnancy. This consensus endured until the day Roe was decided. Roe either ignored or misstated this history, and Casey declined to reconsider Roes faulty historical analysis.

Respondents argument that this history does not matter flies in the face of the standard the Court has applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the Fourteenth Amendment. The Solicitor General repeats Roes claim that it is doubtful . . . abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus, 410 U.S., at 136, 93 S. Ct. 705, 35 L. Ed. 2d 147, but the great common-law authoritiesBracton, Coke, Hale, and Blackstoneall wrote that a post-quickening abortion was a crime. Moreover, many authorities asserted that even a pre-quickening abortion was unlawful and that, as a result, an abortionist [****6] was guilty of murder if the woman died from the attempt. The Solicitor General suggests that history supports an abortion right because of the common laws failure to criminalize abortion before quickening, but the insistence on quickening was not universal, see Mills v. Commonwealth, 13 Pa. 631, 633; State v. Slagle, 83 N. C. 630, 632, and regardless, the fact that many States in the late 18th and

early 19th century did not criminalize pre[illegible]ckening abortions does not mean that anyone thought the States lacked the authority to do so.

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of Roe and Casey contend that the abortion right is an integral part of a broader entrenched right. Roe termed this a right to privacy, 410 U. S., at 154, 93 S. Ct. 705, 35 L. Ed. 2d 147, and Casey described it as the freedom to make intimate and personal choices that are central to personal dignity and autonomy, 505 U.S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Ordered liberty sets limits and defines the boundary between competing interests. Roe and Casey each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed potential life. Roe, 410 U.S., at 150, 93 S. Ct. 705, 35 L. Ed. 2d 147; Casey, 505 U.S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But the people of the various States may evaluate those interests differently. The Nations historical understanding of ordered liberty [****7] does not prevent [*218] the peoples elected representatives from deciding how abortion should be regulated. Pp. 11-30.

(3) Finally, the Court considers whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents. The Court concludes the right to obtain an abortion cannot be justified as a component of such a right. Attempts to justify abortion through appeals to a broader right to autonomy and to define ones concept of existence prove too much. Casey, 505 U.S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. What sharply distinguishes the abortion right from the rights recognized in the cases on which Roe and Casey rely is something that both those decisions acknowledged: Abortion is different because it destroys what Roe termed potential life and what the law challenged in this case calls an unborn human being. None of the other decisions cited by Roe and Casey involved the critical moral question posed by abortion. Accordingly, those cases do not support the right to obtain an abortion, and the Courts conclusion that the Constitution does not confer [**2237] such a right does not undermine [****8] them in any way. Pp. 30-32.

(b) The doctrine of stare decisis does not counsel continued acceptance of Roe and Casey. Stare decisis plays an important role and protects the interests of those who have taken action in reliance on a past decision. It reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation. Kimble v. Marvel Entertainment, LLC, 576 U. S. 446, 455, 135 S. Ct. 2401, 192 L. Ed. 2d 463. It contributes to the actual and perceived integrity of the judicial process. Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720. And it restrains judicial hubris by respecting the judgment of those who grappled with important questions in the past. But stare decisis is not an inexorable command, Pearson v. Callahan, 555 U. S. 223, 233, 129 S. Ct. 808, 172 L. Ed. 2d 565, and is at its weakest when [the Court] interpret[s] the Constitution, Agostini v. Felton, 521 U. S. 203, 235, 117 S. Ct. 1997, 138 L. Ed. 2d 391. Some of the Courts most important constitutional decisions have overruled prior precedents. See, e.g.,Brown v. Board of Education, 347 U. S. 483, 491, 74 S. Ct. 686, 98 L. Ed. 873 (overruling the

infamous decision in Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, and its progeny).

The Courts cases have identified factors that should be considered in deciding when a precedent should be overruled. Janus v. State, County, and Municipal Employees, 585 U. S. ___, ___-___. Five factors discussed below weigh strongly in favor of overruling Roe and Casey. Pp. 39-66.

(1) The nature of the Courts error. Like the infamous decision in Plessy v. Ferguson, Roe was also egregiously wrong and on a collision course with the [****9] Constitution from the day it was decided. Casey perpetuated [*219] its errors, calling both sides of the national controversy to resolve their debate, but in doing so, Casey necessarily declared a winning side. Those on the losing sidethose who sought to advance the States interest in fetal lifecould no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who disagreed with Roe. Pp. 43-45.

(2) The quality of the reasoning. Without any grounding in the constitutional text, history, or precedent, Roe imposed on the entire country a detailed set of rules for pregnancy divided into trimesters much like those that one might expect to find in a statute or regulation. See 410 U.S., at 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147. Roes failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Then, after surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee, and did not explain why the sources on which it relied shed light on the meaning of the [****10] Constitution. As to precedent, citing a broad array of cases, the Court found support for a constitutional right of personal privacy. Id., at 152, 93 S. Ct. 705, 35 L. Ed. 2d 147. But Roe conflated the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. See Whalen v. Roe, 429 U. S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64. None of these decisions involved what is distinctive about abortion: its effect on what Roe termed potential life. When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were consistent with, among other things, the relative [**2238] weights of the respective interests involved and the demands of the profound problems of the present day. Roe, 410 U. S., at 165, 93 S. Ct. 705, 35 L. Ed. 2d 147. These are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme Roe produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body. An even more glaring deficiency was Roes failure to justify the critical distinction it drew between pre- and post-viability abortions. See id., at 163, 93 S. Ct. 705, 35 L. Ed. 2d 147. The arbitrary viability line, which Casey termed Roes central rule, has not found [****11] much support among philosophers and ethicists who have attempted to justify a right to abortion. The most obvious problem with any such argument is that viability has changed over time and is heavily dependent on factorssuch

as medical advances and the availability of quality medical carethat have nothing to do with the characteristics of a fetus.

When Casey revisited Roe almost 20 years later, it reaffirmed Roes central holding, but pointedly refrained from endorsing most of its reasoning. [*220] The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendments Due Process Clause. 505 U.S., at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674. The controlling opinion criticized and rejected Roes trimester scheme, 505 U. S., at 872, 112 S. Ct. 2791, 120 L. Ed. 2d 674, and substituted a new and obscure undue burden test. Casey, in short, either refused to reaffirm or rejected important aspects of Roes analysis, failed to remedy glaring deficiencies in Roes reasoning, endorsed what it termed Roes central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than Roes status as precedent, and imposed a new test with no firm grounding in constitutional text, history, or precedent. Pp. 45-56.

(3) Workability. Deciding [****12] whether a precedent should be overruled depends in part on whether the rule it imposes is workablethat is, whether it can be understood and applied in a consistent and predictable manner. Caseys undue burden test has scored poorly on the workability scale. The Casey plurality tried to put meaning into the undue burden test by setting out three subsidiary rules, but these rules created their own problems. And the difficulty of applying Caseys new rules surfaced in that very case. Compare 505 U. S., at 881-887, 112 S. Ct. 2791, 120 L. Ed. 2d 674, with id., at 920-922, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Stevens, J., concurring in part and dissenting in part). The experience of the Courts of Appeals provides further evidence that Caseys line between permissible and unconstitutional restrictions has proved to be impossible to draw with precision. Janus, 585 U. S., at ___. Casey has generated a long list of Circuit conflicts. Continued adherence to Caseys unworkable undue burden test would undermine, not advance, the evenhanded, predictable, and consistent development of legal principles. Payne, 501 U.S., at 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720. Pp. 56-62.

(4) Effect on other areas of law. Roe and Casey have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. See Ramos v. Louisiana, 590 U. S. ___, ___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (Kavanaugh, J., concurring in [****13] part). Pp. 62-63.

(5) Reliance interests. Overruling Roe and Casey will not upend concrete reliance interests like those that develop in cases involving property and contract rights. Payne, 501 U. S., at 828, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720. In Casey, the controlling opinion conceded [**2239] that traditional reliance interests were not implicated because getting an abortion is generally unplanned activity, and reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions. 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Instead, the opinion perceived a more intangible form of reliance, namely, that people [had] organized intimate relationships and [*221] made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event

that contraception should fail and that [t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. Ibid. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women as well as the status of the fetus. The Casey pluralitys speculative attempt to weigh the relative importance [****14] of the interests of the fetus and the mother represent a departure from the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies. Ferguson v. Skrupa, 372 U.S. 726, 729-730, 83 S. Ct. 1028, 10 L. Ed. 2d 93.

The Solicitor General suggests that overruling Roe and Casey would threaten the protection of other rights under the Due Process Clause. The Court emphasizes that this decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion. Pp. 63-66.

(c) Casey identified another concern, namely, the danger that the public will perceive a decision overruling a controversial watershed decision, such as Roe, as influenced by political considerations or public opinion. 505 U.S., at 866-867, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But the Court cannot allow its decisions to be affected by such extraneous concerns. A precedent of this Court is subject to the usual principles of stare decisis under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like Plessy would still be the law. The Courts job is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly. [****15] Pp. 66-69.

(d) Under the Courts precedents, rational-basis review is the appropriate standard to apply when state abortion regulations undergo constitutional challenge. Given that procuring an abortion is not a fundamental constitutional right, it follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot substitute their social and economic beliefs for the judgment of legislative bodies. Ferguson, 372 U.S., at 729-730, 83 S. Ct. 1028, 10 L. Ed. 2d 93. That applies even when the laws at issue concern matters of great social significance and moral substance. A law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity. Heller v. Doe, 509 U. S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257. It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. Id., at 320, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257.

[*222] Mississippis Gestational Age Act is supported by the Mississippi Legislatures specific findings, which include the States asserted interest in protecting the life of the unborn. 2(b)(i)(7). These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents constitutional challenge must fail. Pp. 76-78.

[**2240] (e) [****16] Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roe and Casey arrogated that authority. The Court overrules those decisions and returns that authority to the people and their elected representatives. Pp. 78-79.

945F. 3d 265, reversed and remanded.

Counsel: Scott G. Stewart argued the cause for petitioners.

Julie Rikelman argued the cause for respondents.

Elizabeth B. Prelogar argued the cause for respondents.

Judges: Alito, J., delivered the opinion of the Court, in which Thomas, Gorsuch, Kavanaugh, and Barrett, JJ., joined. Thomas, J., and Kavanaugh, J., filed concurring opinions. Roberts, C. J., filed an opinion concurring in the judgment. Breyer, Sotomayor, and Kagan, JJ., filed a dissenting opinion.

Opinion by: ALITO

Opinion

[*223] [***557] Justice Alito delivered the opinion of the Court.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that [*224] abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a womans right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion [*225] should be allowed under some but not all circumstances, and those within this group hold a variety of views about [****17] the particular restrictions that should be imposed.

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided Roe v. Wade, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim [*226] that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (e.g., its discussion of abortion in antiquity) to the plainly incorrect (e.g., its assertion that abortion [*227] was probably never a crime under the common law). After cataloging a wealth of other information having [***558] no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

[*228] [**2241] Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve viability, i.e., the ability to

survive outside the womb[****18] Although the Court acknowledged that States had a legitimate interest in protecting potential life,1

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Roe v. Wade, 410 U.S. 113, 163, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

it found that this interest could not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend Roes reasoning. One prominent constitutional scholar wrote that he would vote for a statute very much like the one the Court end[ed] up drafting if he were a legislator, but his assessment of Roe was memorable and brutal: Roe was not constitutional law at all and gave almost no sense of an obligation to try to be.2

2

J. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L. J. 920, 926, 947 (1973) (Ely) (emphasis deleted).

At the time of Roe, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but Roe abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State.3

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L. Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 2 (1973) (Tribe).

As Justice Byron White aptly put it in his dissent, the decision represented the exercise of raw judicial power, 410 U.S., [*229] at 222, 163, 93 S. Ct. 705, 35 L. Ed. 2d 147, and it sparked a national controversy that has embittered our political culture for a half century.4

4

See R. Ginsburg, Speaking in a Judicial Voice, 67 N. Y. U. L. Rev. 1185, 1208 (1992) (Roe. . . halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue).

Eventually, in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), the [****19] Court revisited Roe, but the Members of the Court split three ways. Two Justices expressed no desire to change Roe in any way.5

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See 505 U.S., at 911, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Stevens, J., concurring in part and dissenting in part); id., at 922, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

Four others wanted to overrule the decision in its entirety.6

6

See id., at 944, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); id., at 979, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Scalia, J., concurring in judgment in part and dissenting in part).

And the three remaining Justices, who jointly signed the controlling opinion, took a third position.7

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See id., at 843, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (joint opinion of OConnor, Kennedy, and Souter, JJ.).

Their opinion did not endorse Roes reasoning, and it even hinted that one or more of its authors might [***559] have reservations about whether the Constitution protects a right to abortion.8

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Id., at 853, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

But the opinion concluded that stare decisis, which calls for prior decisions to be followed in most instances, required adherence to what it called Roes central holdingthat a State may not constitutionally protect fetal life before viabilityeven if that holding was wrong.9

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Id., at 860, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

[**2242] Paradoxically, the judgment in Casey did a fair amount of overruling. Several important abortion decisions were overruled in toto, and Roe itself was overruled in part.10

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Id., at 861, 870, 873, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (overruling Akron v. Akron Center for Reproductive Health, Inc., 462 U. S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U. S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986)).

[*230] Casey threw out Roes trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an undue burden on a womans right to have an abortion. [****20] 11

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505 U. S., at 874, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

The decision provided no clear guidance about the difference between a due and an undue burden. But the three Justices who authored the controlling opinion call[ed] the contending sides of a national controversy to end their national division by treating the Courts decision as the final settlement of the question of the constitutional right to abortion.12

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Id., at 867, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

As has become increasingly apparent in the intervening years, Casey did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule Roe and Casey and allow the States to regulate or prohibit pre-viability abortions.

Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancyseveral weeks before the point at which a fetus is now regarded as viable outside the womb. In defending this law, the [****21] States primary argument is that we should reconsider and overrule Roe and Casey and once again allow each State to regulate abortion as its citizens wish. On the other side, respondents and the Solicitor General ask us to reaffirm Roe and Casey, and they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after 15 weeks of pregnancy, they argue, would be no different than overruling Casey and Roe entirely. Brief for Respondents 43. They contend that no [*231] half-measures are available and that we must either reaffirm or overrule Roe and Casey. Brief for Respondents 50.

[***560] We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly relythe Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be deeply rooted in this Nations history and tradition and implicit in the concept of ordered liberty. Washington v. Glucksberg, 521 U. S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (internal quotation marks omitted).

The right to abortion does not fall within this category. Until the latter part of the 20th century, such [****22] a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion [**2243] a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendments protection of liberty. Roes defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both Roe and Casey acknowledged, because it destroys what those decisions called fetal life and what the law now before us describes as an unborn human being.13

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Miss. Code Ann. 41-41-191(4)(b) (2018).

Stare decisis, the doctrine on which Caseys controlling opinion was based, does not compel unending adherence to Roes abuse of judicial authority. Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the [*232] abortion issue, Roe and Casey have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the peoples elected representatives. The permissibility of abortion, [****23] and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. Casey, 505 U.S., at 979, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.

I

The law at issue in this case, Mississippis Gestational Age Act, see Miss. Code Ann. 41-41-191 (2018), contains this central provision: Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks. 4(b).14

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The Act defines gestational age to be the age of an unborn human being as calculated from the first day of the last menstrual period of the pregnant woman. 3(f).

To support this Act, the legislature made a series of factual findings. It [***561] began by noting that, at the time of enactment, only six countries besides the United States permit[ted] nontherapeutic or elective abortion-on-demand after the twentieth week of gestation.15

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Those other six countries were Canada, China, the Netherlands, North Korea, Singapore, and Vietnam. See A. Baglini, Charlotte Lozier Institute, Gestational Limits on Abortion in the United States Compared to International Norms 6-7 (2014); M. Lee, Is the United States One of Seven Countries That Allow Elective Abortions After 20 Weeks of Pregnancy? Wash. Post (Oct. 8, 2017), www.washingtonpost.com/ news/ fact-checker/ wp/ 2017/ 10/ 09/ is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-preganacy (stating that the claim made by the Mississippi Legislature and the Charlotte Lozier Institute was backed by data). A more recent compilation from the Center for Reproductive Rights indicates that Iceland and Guinea-Bissau are now also similarly permissive. See The Worlds Abortion Laws, Center for Reproductive Rights (Feb. 23, 2021), https:/ / reproductiverights.org/ maps/ worlds-abortion-laws/ .

2(a). The legislature [*233] then found that at 5 or 6 weeks gestational age an unborn human beings heart begins beating; at 8 weeks the unborn human being begins to move about in the womb; at 9 weeks all basic physiological functions are [****24] present; at 10 weeks vital organs begin to function, and [h]air, fingernails, and toenails . . . begin [**2244] to form; at 11 weeks an unborn human beings diaphragm is developing, and he or she may move about freely in the womb; and at 12 weeks the unborn human being has taken on the human form in all relevant respects. 2(b)(i) (quoting Gonzales v. Carhart, 550 U. S. 124, 160, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007)). It found that most abortions after 15 weeks employ dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child, and it concluded that the intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession. 2(b)(i)(8).

Respondents are an abortion clinic, Jackson Womens Health Organization, and one of its doctors. On the day the Gestational Age Act was enacted, respondents filed suit in Federal District Court against various Mississippi officials, alleging that the Act violated this Courts precedents establishing a constitutional right to abortion. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning that viability marks [****25] the earliest point at which the States interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions and that 15 weeks gestational age is prior to viability. Jackson [*234] Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 539-540 (SD Miss. 2019) (internal quotation marks omitted). The Fifth Circuit affirmed. 945 F. 3d 265 (2019).

We granted certiorari, 593 U.S. ___, 141 S. Ct. 2619, 209 L. Ed. 2d 748, 2021 U.S. LEXIS 2556, 89 U.S.L.W. 3388 (2021), to resolve the question whether all pre-viability prohibitions on elective abortions are unconstitutional, Pet. for Cert. i. Petitioners primary defense of the Mississippi Gestational Age Act is that Roe and Casey were wrongly decided and that the Act is constitutional because it satisfies rational-basis review. Brief for Petitioners 49. Respondents answer that allowing Mississippi to ban pre-viability abortions would be no different than overruling Casey and Roe entirely. Brief for Respondents 43. They tell us that no half-measures [***562] are available: We must either reaffirm or overrule Roe and Casey. Brief for Respondents 50.

II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in Casey reaffirmed Roes central holding based solely on the doctrine of stare decisis, but as we will [****26] explain, proper application of stare decisis required an assessment of the strength of the grounds on which Roe was based. See infra, at 45-56.

We therefore turn to the question that the Casey plurality did not consider, and we address that question in three steps. First, we explain the standard that our cases have used in determining

whether the Fourteenth Amendments reference to liberty protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nations history and tradition and whether it is an essential component of what we have described as ordered liberty. Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

[*235] A

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Constitutional analysis must begin with the language of the instrument, Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 186-189, 6 [**2245] L. Ed. 23 (1824), which offers a fixed standard for ascertaining what our founding document means, 1 J. Story, Commentaries on the Constitution of the United States 399, p. 383 (1833). The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.

Roe, however, was remarkably [****27] loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. See 410 [***563] U.S., at 152-153, 163, 93 S. Ct. 705, 35 L. Ed. 2d 147. And that privacy right, Roe observed, had been found to spring from no fewer than five different constitutional provisionsthe First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Id., at 152, 163, 93 S. Ct. 705, 35 L. Ed. 2d 147.

The Courts discussion left open at least three ways in which some combination of these provisions could protect the abortion right. One possibility was that the right was founded . . . in the Ninth Amendments reservation of rights to the people. Id., at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147. Another was that the right was rooted in the First, Fourth, or Fifth Amendment , or in some combination of those provisions, and that this right had been incorporated into the Due Process Clause of the Fourteenth Amendment just as many other Bill of Rights provisions had by then been incorporated. Ibid; see also McDonald v. Chicago, 561 U. S. 742, 763-766, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (majority opinion) (discussing incorporation). And a third path was that the First, Fourth, and Fifth Amendments played no role and that the right was simply a component of the liberty protected by the Fourteenth Amendments Due Process Clause. Roe, 410 U.S., at 153, 163, 93 S. Ct. 705, 35 L. Ed. 2d 147. Roe expressed the feel[ing] [*236] that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found somewhere in the Constitution and that specifying its exact location was not of [****28] paramount importance.16

16

The Courts words were as follows: This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as

the District Court determined, in the Ninth Amendments reservation of rights to the people, is broad enough to encompass a womans decision whether or not to terminate her pregnancy. 410 U.S., at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147.

The Casey Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the liberty protected by the Fourteenth Amendments Due Process Clause.

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents amici have now offered as yet another potential home for the abortion right: the Fourteenth Amendments Equal Protection Clause. See Brief for United States as Amicus Curiae 24 (Brief for United States); see also Brief for Equal Protection Constitutional Law Scholars as Amici Curiae. Neither Roe nor Casey saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a States regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications.17

17

See, e.g., Sessions v. Morales-Santana, 582 U.S. 47, ___, 137 S. Ct. 1678, 198 L. Ed. 2d 150 (2017) (slip op., at 8).

The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional [**2246] scrutiny unless the regulation is a mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other. Geduldig v. Aiello, 417 U. S. 484, 496, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974). And as the Court has stated, the goal of preventing abortion does not constitute [****29] invidiously discriminatory animus against women. Bray v. Alexandria [*237] Womens Health Clinic, 506 U.S. 263, 273-274, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) (internal quotation marks omitted). Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.18

18

We discuss this standard in Part VI of this opinion.

With this new theory addressed, we turn to Caseys bold assertion that the abortion right is an aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment. 505 U.S., at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674; Brief for Respondents 17; Brief for United States 21-22.

2

The underlying theory on which this argument reststhat the Fourteenth Amendments Due Process Clause provides substantive, as well as procedural, protection for libertyhas long been

controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

[***564] The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 7 Pet. 243, 247-251, 8 L. Ed. 672 (1833) (opinion for the Court by Marshall, C. J.), but this Court has held that the Due Process Clause of the Fourteenth Amendment incorporates the great majority of those rights and thus makes them equally applicable to the States. See McDonald, 561 U.S., at 763-767, 130 S. Ct. 3020, 177 L. Ed. 2d 894, and nn. 12-13. The second categorywhich is the one in question herecomprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding [****30] whether a right falls into either of these categories, the Court has long asked whether the right is deeply rooted in [our] history and tradition and whether it is essential to our Nations scheme of ordered liberty. Timbs v. [*238] Indiana, 586 U. S. ___, ___, 139 S. Ct. 682, 203 L. Ed. 2d 11, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2019) (slip op., at 3) (internal quotation marks omitted); McDonald, 561 U.S., at 764, 767, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (internal quotation marks omitted); Glucksberg, 521 U.S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (internal quotation marks omitted).19

19

See also, e.g., Duncan v. Louisiana, 391 U. S. 145, 148, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (asking whether a right is among those fundamental principles of liberty and justice which lie at the base of our civil and political institutions); Palko v. Connecticut, 302 U. S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937) (requiring a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental (quoting Snyder v. Massachusetts, 291 U. S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934))).

And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue.

Justice Ginsburgs opinion for the Court in Timbs is a recent example. In concluding that the Eighth Amendments protection against excessive fines is fundamental to our scheme of ordered liberty and deeply rooted in this Nations history and tradition, 586 U.S., at ___, 139 S. Ct. 682, 685, 203 L. Ed. 2d 11 (internal quotation marks omitted), her opinion traced the right back to Magna Carta, Blackstones Commentaries, and 35 of the 37 state constitutions in effect at the [**2247] ratification of the Fourteenth Amendment. 586 U. S., at ___-___, 139 S. Ct. 682, 697, 203 L. Ed. 2d 11.

A similar inquiry was undertaken in McDonald, which held that the Fourteenth Amendment protects the right to keep and bear arms. The lead opinion surveyed the origins of the Second Amendment, the debates in Congress about the adoption of the Fourteenth Amendment, the state constitutions in effect when that Amendment was ratified (at least 22 of the 37 States protected the right [****31] to keep and bear arms), federal laws enacted during the same period, and other relevant historical evidence. 561 U.S., at 767-777, 130 S. Ct. 3020, 177 L. Ed. 2d 894.

Only then did the opinion conclude that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty. Id., at 778, 130 S. Ct. 3020, 177 L. Ed. 2d 894; see also id., at 822-850, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (Thomas, J., concurring in part and concurring in judgment) (surveying history and reaching the [***565] same [*239] result under the Fourteenth Amendments Privileges or Immunities Clause).

Timbs and McDonald concerned the question whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution. Thus, in Glucksberg, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of Anglo-American common law tradition, 521 U.S., at 711, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772, and made clear that a fundamental right must be objectively, deeply rooted in this Nations history and tradition, id., at 720-721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the liberty protected by the Due Process Clause because the term liberty alone provides little guidance. Liberty is a capacious term. As Lincoln once said: We [****32] all declare for Liberty; but in using the same word we do not all mean the same thing.20

20

Address at Sanitary Fair at Baltimore, Md. (Apr. 18, 1864), reprinted in 7 The Collected Works of Abraham Lincoln 301 (R. Basler ed. 1953).

In a well-known essay, Isaiah Berlin reported that [h]istorians of ideas had cataloged more than 200 different senses in which the term had been used.21

21

Four Essays on Liberty 121 (1969).

In interpreting what is meant by the Fourteenth Amendments reference to liberty, we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been reluctant to recognize rights that are not mentioned in the Constitution. Collins v. Harker Heights, 503 U. S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). Substantive due process has at times been a treacherous field for this Court, Moore v. East Cleveland, 431 U. S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion), and it has sometimes led the Court to usurp authority that the Constitution [*240] entrusts to the peoples elected representatives. See Regents of Univ. of Mich. v. Ewing, 474 U. S. 214, 225-226, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985). As the Court cautioned in Glucksberg, [w]e must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process

Clause be subtly transformed into the policy preferences [***2248] of the Members of this Court. 521 U. S., at 720 (internal quotation marks and citation omitted).

On occasion, when the Court has ignored the [a]ppropriate limits imposed by respect for the [****33] teachings of history, Moore, 431 U. S., at 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (plurality opinion), it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nations concept of ordered liberty, [***566] we must ask what the Fourteenth Amendment means by the term liberty. When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.22

22

That is true regardless of whether we look to the Amendments Due Process Clause or its Privileges or Immunities Clause. Some scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights. See, e.g., McDonald v. Chicago, 561 U. S. 742, 813-850, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (Thomas, J., concurring in part and concurring in judgment); Duncan, 391 U.S., at 165-166, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (Black, J., concurring); A. Amar, Bill of Rights: Creation and Reconstruction 163-180 (1998) (Amar); J. Ely, Democracy and Distrust 22-30 (1980); 2 W. Crosskey, Politics and the Constitution in the History of the United States 1089-1095 (1953). But even on that view, such a right would need to be rooted in the Nations history and tradition. See Corfield v. Coryell, 6 F. Cas. 546, 551-552, F. Cas. No. 3230 (No. 3,230) (CC ED Pa. 1823) (describing unenumerated rights under the Privileges and Immunities Clause, Art. IV, 2, as those fundamental rights which have, at all times, been enjoyed by the citizens of the several states); Amar 176 (relying on Corfield to interpret the Privileges or Immunities Clause); cf. McDonald, 561 U.S., at 819-820, 832, 854, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (opinion of Thomas, J.) (reserving the question whether the Privileges or Immunities Clause protects any rights besides those enumerated in the Constitution).

[*241] B

1

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before Roe was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before Roe.23

23

See R. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N. C. L. Rev. 730 (1968) (Lucas); see also D. Garrow, Liberty and Sexuality 334-335 (1994) (Garrow) (stating that Lucas was undeniably the first person to fully articulate on paper the argument that a womans right to choose abortion was a fundamental individual freedom protected by the U. S. Constitutions guarantee of personal liberty).

Not only was there no support for such a constitutional right until shortly before Roe, but abortion [****34] had long been a crime in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, [**2249] and the remaining States would soon follow.

Roe either ignored or misstated this history, and Casey declined to reconsider Roes faulty historical analysis. It is therefore important to set the record straight.

[*242] 2

a

We begin with the common law, under which abortion was a crime at least after quickeningi.e., the first felt movement of the fetus in the [***567] womb, which usually occurs between the 16th and 18th week of pregnancy.24

24

The exact meaning of quickening is subject to some debate. Compare Brief for Scholars of Jurisprudence as Amici Curiae 12-14, and n. 32 (emphasis deleted) (a quick child meant simply a live child, and under the eras outdated knowledge of embryology, a fetus was thought to become quick at around the sixth week of pregnancy), with Brief for American Historical Association et al. as Amici Curiae 6, n. 2 (quick and quickening consistently meant the womans perception of fetal movement). We need not wade into this debate. First, it suffices for present purposes to show that abortion was criminal by at least the 16th or 18th week of pregnancy. Second, as we will show, during the relevant periodi.e., the period surrounding the enactment of the Fourteenth Amendmentthe quickening distinction was abandoned as States criminalized abortion at all stages of pregnancy. See infra, at 21-25.

The eminent common-law authorities (Blackstone, Coke, Hale, and the like), Kahler v. Kansas, 589 U. S. ___, ___, 140 S. Ct. 1021, 206 L. Ed. 2d 312 (2020) (slip op., at 7), all describe abortion after quickening as criminal. Henry de Bractons 13th-century treatise explained that if a person has struck a pregnant woman, or has given her poison, whereby he has caused [****35]

abortion, if the foetus be already formed and animated, and particularly if it be alive at the time that commits homicide. 2 De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879); see also 1 Fleta, c. 23, reprinted in 72 Selden Soc. 60-61 (H. Richardson & G. Sayles eds. 1955) (13th-century treatise).25

25

Even before Bractons time, English law imposed punishment for the killing of a fetus. See Leges Henrici Primi 222-223 (L. Downer ed. 1972) (imposing penalty for any abortion and treating a woman who aborted a quick child as if she were a murderess).

Sir Edward Cokes 17th-century treatise likewise asserted that abortion of a quick child was murder if the childe be born alive and a great misprision if the childe dieth in her body. 3 Institutes of the Laws of England 50-51 (1644). [*243] (Misprision referred to some heynous offence under the degree of felony. Id., at 139.) Two treatises by Sir Matthew Hale likewise described abortion of a quick child who died in the womb as a great crime and a great misprision. Pleas of the Crown 53 (P. Glazebrook ed. 1972); 1 History of the Pleas of the Crown 433 (1736) (Hale). And writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a quick child was by the ancient law homicide or manslaughter (citing Bracton), and at least a very heinous misdemeanor (citing Coke). 1 Commentaries on the Laws of England 129-130 (7th ed. 1775) (Blackstone). [****36]

English cases dating all the way back to the 13th century corroborate the treatises statements that abortion was a crime. See generally J. Dellapenna, Dispelling the Myths of Abortion History 126, and n. 16, 134-142, 188-194, and nn. 84-86 (2006) (Dellapenna); J. Keown, Abortion, Doctors and the Law 3-12 (1988) (Keown). In 1732, for example, Eleanor Beare was convicted of destroying the Foetus in the Womb of another woman and thereby causing her [**2250] to miscarry.26

26

2 Gentlemans Magazine 931 (Aug. 1732).

For that crime and another misdemeanor, Beare was sentenced to two days in the pillory and three years imprisonment.27

27

Id., at 932.

Although a pre-quickening abortion was not itself considered homicide, it [***568] does not follow that abortion was permissible at common lawmuch less that abortion was a legal right. Cf. Glucksberg, 521 U.S., at 713, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (removal of common laws harsh sanctions did not represent an acceptance of suicide). Quite to the contrary, in the 1732 case mentioned above, the judge said of the charge of abortion (with no mention of quickening) that he had never met with a case so barbarous and unnatural.28

28

Ibid.

Similarly, an indictment from 1602, which did not distinguish between a pre-quickening and post-quickening abortion, described abortion as pernicious [****37] [*244] and against the peace of our Lady the Queen, her crown and dignity. Keown 7 (discussing R. v. Webb, Calendar of Assize Records, Surrey Indictments 512 (1980)).

That the common law did not condone even pre-quickening abortions is confirmed by what one might call a proto-felony-murder rule. Hale and Blackstone explained a way in which a pre-quickening abortion could rise to the level of a homicide. Hale wrote that if a physician gave a woman with child a potion to cause an abortion, and the woman died, it was murder because the potion was given unlawfully to destroy her child within her. 1 Hale 429-430 (emphasis added). As Blackstone explained, to be murder a killing had to be done with malice aforethought, . . . either express or implied. 4 Blackstone 198 (emphasis deleted). In the case of an abortionist, Blackstone wrote, the law will imply [malice] for the same reason that it would imply malice if a person who intended to kill one person accidentally killed a different person:

[I]f one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one [****38] lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. So also, if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it. Id., at 200-201 (emphasis added; footnote omitted).29

29

Other treatises restated the same rule. See 1 W. Russell & C. Greaves, Crimes and Misdemeanors 540 (5th ed. 1845) (So where a person gave medicine to a woman to procure an abortion, and where a person put skewers into the womb of a woman for the same purpose, by which in both cases the women were killed, these acts were clearly held to be murder (footnotes omitted)); 1 E. East, Pleas of the Crown 230 (1803) (similar).

Notably, Blackstone, like Hale, did not state that this proto-felony-murder rule required that the woman be with [*245] quick childonly that she be with child. Id., at 201. And it is revealing that Hale and Blackstone treated abortionists differently from other physicians or surgeons who caused the death of a patient without any intent of doing [the patient] any bodily hurt. Hale 429; see 4 Blackstone 197. These other physicianseven if unlicensedwould not be guilty of murder or manslaughter. Hale 429. But a physician performing an abortion would, precisely because his aim was an unlawful one.

[**2251] In sum, although common-law authorities differed on the severity of [***569] punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely [****39] suggests a positive right to procure an abortion at any stage of pregnancy.

b

In this country, the historical record is similar. The most important early American edition of Blackstones Commentaries, District of Columbia v. Heller, 554 U. S. 570, 594, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), reported Blackstones statement that abortion of a quick child was at least a heinous misdemeanor, 2 St. George Tucker, Blackstones Commentaries 129-130 (1803), and that edition also included Blackstones discussion of the proto-felony-murder rule, 5 id., at 200-201. Manuals for justices of the peace printed in the Colonies in the 18th century typically restated the common-law rule on abortion, and some manuals repeated Hales and Blackstones statements that anyone who prescribed medication unlawfully to destroy the child would be guilty of murder if the woman died. See, e.g., J. Parker, Conductor Generalis 220 (1788); 2 R. Burn, Justice of the Peace, and Parish Officer 221-222 (7th ed. 1762) (English manual stating the same).30

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For manuals restating one or both rules, see J. Davis, Criminal Law 96, 102-103, 339 (1838); Conductor Generalis 194-195 (1801) (printed in Philadelphia); Conductor Generalis 194-195 (1794) (printed in Albany); Conductor Generalis 220 (1788) (printed in New York); Conductor Generalis 198 (1749) (printed in New York); G. Webb, Office and Authority of a Justice of Peace 232 (1736) (printed in Williamsburg); Conductor Generalis 161 (1722) (printed in Philadelphia); see also J. Conley, Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America, 6 J. Legal Hist. 257, 265, 267 (1985) (noting that these manuals were the justices primary source of legal reference and of practical value for a wider audience than the justices).

For cases stating the proto-felony-murder rule, see, e.g., Commonwealth v. Parker, 50 Mass. 263, 265, 9 Metc. 263 (1845); People v. Sessions, 58 Mich. 594, 595-596, 26 N. W. 291, 292-293 (1886); State v. Moore, 25 Iowa 128, 131-132 (1868); Smith v. State, 33 Me. 48, 54-55 (1851).

[*246] The few cases available from the early colonial period corroborate that abortion was a crime. See generally Dellapenna 215-228 (collecting cases). In Maryland in 1652, for example, an indictment charged that a man Murtherously endeavoured to destroy [****40] or Murther the Child by him begotten in the Womb. Proprietary v. Mitchell, 10 Md. Archives 80, 183 (1652) (W. Browne ed. 1891). And by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime. See, e.g., Smith v. Gaffard, 31 Ala. 45, 51 (1857); Smith v. State, 33 Me. 48, 55 (1851); State v. Cooper, 22 N. J. L. 52, 52-55 (1849); Commonwealth v. Parker, 50 Mass. 263, 264-268, 9 Metc. 263 (1845).

c

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages,31

31

See E. Rigby, A System of Midwifery 73 (1841) (Under all circumstances, the diagnosis of pregnancy must ever be difficult and obscure during the early months); see also id., at 74-80 (discussing rudimentary techniques for detecting early pregnancy); A. Taylor, A Manual of Medical Jurisprudence 418-421 (6th Am. ed. 1866) (same).

and thus, as one court put it in 1872: [U]ntil the period of quickening [**2252] there is no evidence [***570] of life; and whatever may be said of the feotus, the law has fixed upon this [*247] period of gestation as the time when the child is endowed with life because foetal movements are the first clearly marked and well defined evidences of life. Evans v. People, 49 N. Y. 86, 90, 1 Cow. Cr. 494 (emphasis added); Cooper, 22 N. J. L., at 56 (In contemplation of law life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it (emphasis added)).

The Solicitor General offers a different explanation of the basis for the quickening [****41] rule, namely, that before quickening the common law did not regard a fetus as having a separate and independent existence. Brief for United States 26 (quoting Parker, 50 Mass., at 266, 9 Metc. 263). But the case on which the Solicitor General relies for this proposition also suggested that the criminal laws quickening rule was out of step with the treatment of prenatal life in other areas of law, noting that to many purposes, in reference to civil rights, an infant in ventre sa mere is regarded as a person in being. Ibid. (citing 1 Blackstone 129); see also Evans, 49 N. Y., at 89, 90, 1 Cow. Cr. 494; Mills v. Commonwealth, 13 Pa. 631, 633 (1850); Morrow v. Scott, 7 Ga. 535, 537 (1849); Hall v. Hancock, 32 Mass. 255, 258, 15 Pick. 255 (1834); Thellusson v. Woodford, 4 Ves. 227, 321-322, 31 Eng. Rep. 117, 163 (1789).

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. During that period, treatise writers and commentators criticized the quickening distinction as neither in accordance with the result of medical experience, nor with the principles of the common law. F. Wharton, Criminal Law 1220, p. 606 (rev. 4th ed. 1857) (footnotes omitted); see also J. Beck, Researches in Medicine and Medical Jurisprudence 26-28 (2d ed. 1835) (describing the quickening distinction as absurd and injurious).32

32

See Mitchell v. Commonwealth, 78 Ky. 204, 209-210 (1879) (acknowledging the common-law rule but arguing that the law should punish abortions and miscarriages, willfully produced, at any time during the period of gestation); Mills v. Commonwealth, 13 Pa., 631, 633 (1850) (the quickening rule never ought to have been the law anywhere); J. Bishop, Commentaries on the

Law of Statutory Crimes 344, p. 471 (1873) (If we look at the reason of the law, we shall prefer a rule that discard[s] this doctrine of the necessity of a quickening); I. Dana, Report of the Committee on the Production of Abortion, in 5 Transactions of the Maine Medical Association 37-39 (1866); Report on Criminal Abortion, in 12 Transactions of the American Medical Association 75-77 (1859); W. Guy, Principles of Forensic Medicine 133-134 (1845); J. Chitty, Practical Treatise on Medical Jurisprudence 438 (2d Am. ed. 1836); 1 T. Beck & J. Beck, Elements of Medical Jurisprudence 293 (5th ed. 1823); 2 T. Percival, The Works, Literary, Moral and Medical 430 (1807); see also Keown 38-39 (collecting English authorities).

In [*248] 1803, the British Parliament made abortion a crime at all stages [****42] of pregnancy and authorized the imposition of severe punishment. See Lord Ellenboroughs Act, 43 Geo. 3, c. 58 (1803). One scholar has suggested that Parliaments decision may partly have been attributable to the medical mans concern that fetal life should be protected by the law at all stages of gestation. Keown 22.

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion [***571] at all stages of pregnancy. See Appendix A, infra (listing state statutory provisions in chronological order).33

33

See generally Dellapenna 315-319 (cataloging the development of the law in the States); E. Quay, Justifiable AbortionMedical and Legal Foundations, 49 Geo. L. J. 395, 435-437, 447-520 (1961) (Quay) (same); J. Witherspoon, Reexamining Roe: Nineteenth-Century Abortion Statutes and The Fourteenth Amendment, 17 St. Marys L. J. 29, 34-36 (1985) (Witherspoon) (same).

By 1868, the year when the [**2253] Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.34

34

Some scholars assert that only 27 States prohibited abortion at all stages. See, e.g., Dellapenna 315; Witherspoon 34-35, and n. 15. Those scholars appear to have overlooked Rhode Island, which criminalized abortion at all stages in 1861. See Acts and Resolves R. I. 1861, ch. 371, 1, p. 133 (criminalizing the attempt to procure the miscarriage of any pregnant woman or any woman supposed by such person to be pregnant, without mention of quickening). The amicus brief for the American Historical Association asserts that only 26 States prohibited abortion at all stages, but that brief incorrectly excludes West Virginia and Nebraska from its count. Compare Brief for American Historical Association 27-28 (citing Quay), with Appendix A, infra.

See ibid. Of the nine States that had not yet [*249] criminalized abortion at all stages, all but one did so by 1910. See ibid.

The trend in the Territories that would become the last 13 States was similar: All of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico). See Appendix B, infra; see also Casey, 505 U.S., at 952, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); Dellapenna

317319. By the end of the 1950s, according to the Roe Courts own count, statutes [****43] in all but four States and the District of Columbia prohibited abortion however and whenever performed, unless done to save or preserve the life of the mother. 410 U.S., at 139, 93 S. Ct. 705, 35 L. Ed. 2d 147.35

35

The statutes of three States (Massachusetts, New Jersey, and Pennsylvania) prohibited abortions performed unlawfully or without lawful justification. Roe, 410 U.S., at 139, 93 S. Ct. 705, 35 L. Ed. 2d 147 (internal quotation marks omitted). In Massachusetts, case law held that abortion was allowed when, according to the judgment of physicians in the relevant community, the procedure was necessary to preserve the womans life or her physical or emotional health. Commonwealth v. Wheeler, 315 Mass. 394, 395, 53 N. E. 2d 4, 5 (1944). In the other two States, however, there is no clear support in case law for the proposition that abortion was lawful where the mothers life was not at risk. See State v. Brandenburg, 137 N. J. L. 124, 58 A. 2d 709 (1948); Commonwealth v. Trombetta, 131 Pa. Super. 487, 200 A. 107 (1938).

Statutes in the two remaining jurisdictions (the District of Columbia and Alabama) permitted abortion to preserve the mothers health. Roe, 410 U. S., at 139, 93 S. Ct. 705, 35 L. Ed. 2d 147. Case law in those jurisdictions does not clarify the breadth of these exceptions.

This overwhelming consensus endured until the day Roe was decided. At that time, also by the Roe Courts own count, a substantial majority30 Statesstill prohibited abortion at all stages except to save the life of the mother. [*250] See id., at 118, 93 S. Ct. 705, 35 L. Ed. 2d 147, and n. 2 (listing States). And though Roe discerned a trend toward liberalization in about one-third of the States, those States still criminalized some abortions and regulated them more stringently than Roe would allow. Id., at 140, 93 S. Ct. 705, 35 L. Ed. 2d 147, and n. 37; Tribe 2. In short, the Courts opinion in Roe itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people. Thornburgh v. American College of [***572] Obstetricians and Gynecologists, 476 U. S. 747, 793, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986) (White, J., dissenting).

d

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nations history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment [**2254] persisted from the earliest days of the common law until 1973. The Court in Roe could have said of abortion exactly what Glucksberg said of assisted suicide: Attitudes [****44] toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice]. 521 U.S., at 719, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.

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Respondents and their amici have no persuasive answer to this historical evidence.

Neither respondents nor the Solicitor General disputes the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy. See Brief for Petitioners 12-13; see also Brief for American Historical Association et al. as Amici Curiae 27-28, and nn. 14-15 (conceding that 26 out of 37 States prohibited abortion before quickening); Tr. of Oral Arg. 74-75 (respondents counsel conceding the same). Instead, respondents are forced to argue that it does [not] matter that some States prohibited abortion at the time Roe was decided or when the Fourteenth Amendment [*251] was adopted. Brief for Respondents 21. But that argument flies in the face of the standard we have applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the Fourteenth Amendment.

Not only are respondents and their amici unable to show that a constitutional right to abortion was established when the Fourteenth Amendment was adopted, but they have found no support for the existence of [****45] an abortion right that predates the latter part of the 20th centuryno state constitutional provision, no statute, no judicial decision, no learned treatise. The earliest sources called to our attention are a few district court and state court decisions decided shortly before Roe and a small number of law review articles from the same time period.36

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See 410 U.S., at 154-155, 93 S. Ct. 705, 35 L. Ed. 2d 147 (collecting cases decided between 1970 and 1973); C. Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About To Arise From the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty? 17 N. Y. L. Forum 335, 337-339 (1971) (Means II); C. Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality, 14 N. Y. L. Forum 411 (1968) (Means I); Lucas 730.

A few of respondents amici muster historical arguments, but they are very weak. The Solicitor General repeats Roes claim that it is doubtful . . . abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus. Brief for United States 26 (quoting Roe, 410 U. S., at 136, 93 S. Ct. 705, 35 L. Ed. 2d 147). But as we have seen, great common-law authorities like Bracton, Coke, Hale, and Blackstone all wrote that a post-quickening abortion was a crimeand a serious one at that. Moreover, [***573] Hale and Blackstone (and many other authorities following them) asserted that even a pre-quickening abortion was unlawful and that, as a result, an abortionist was guilty of murder if the woman died from the attempt.

[*252] Instead of following these authorities, Roe relied largely on two articles by a pro-abortion advocate who claimed that Coke had intentionally misstated [****46] the common law because of his strong anti-abortion views.37

37

See 410 U. S., at 136, n. 26, 93 S. Ct. 705, 35 L. Ed. 2d 147 (citing Means II); 410 U. S., at 132-133, n. 21, 93 S. Ct. 705, 35 L. Ed. 2d 147 (citing Means I).

These articles have been discredited,38

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For critiques of Meanss work, see, e.g., Dellapenna 143-152, 325-331; Keown 3-12; J. Finnis, Shameless Acts in Colorado: Abuse of Scholarship in Constitutional Cases, 7 Academic Questions 10, 11-12 (1994); R. Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 63 Cal. L. Rev. 1250, 1267-1282 (1975); R. Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Ford. L. Rev. 807, 814-829 (1973).

and it has come to light that even [**2255] members of Jane Roes legal team did not regard them as serious scholarship. An internal memorandum characterized this authors work as donning the guise of impartial scholarship while advancing the proper ideological goals.39

39

Garrow 500-501, and n. 41 (internal quotation marks omitted).

Continued reliance on such scholarship is unsupportable.

The Solicitor General next suggests that history supports an abortion right because the common laws failure to criminalize abortion before quickening means that at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages.40

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In any event, Roe, Casey, and other related abortion decisions imposed substantial restrictions on a States capacity to regulate abortions performed after quickening. See, e.g., June Medical Services L. L. C. v. Russo, 591 U. S. ___, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (2020) (holding a law requiring doctors performing abortions to secure admitting privileges to be unconstitutional); Whole Womans Health v. Hellerstedt, 579 U. S. 582, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016) (similar); Casey, 505 U.S., at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (declaring that prohibitions on abortion before viability are unconstitutional); id., at 887-898, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (holding that a spousal notification provision was unconstitutional). In addition, Doe v. Bolton, 410 U. S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), has been interpreted by some to protect a broad right to obtain an abortion at any stage of pregnancy provided that a physician is willing to certify that it is needed due to a womans emotional needs or familial concerns. Id., at 192, 93 S. Ct. 739, 35 L. Ed. 2d 201. See, e.g., Womens Medical Professional Corp. v. Voinovich, 130 F. 3d 187, 209 (CA6 1997), cert. denied, 523 U.S. 1036, 118 S. Ct. 1347, 140 L. Ed. 2d 496 (1998); but see id., at 1039 (Thomas, J., dissenting from denial of certiorari).

Brief for [*253] United States 26-27; see also Brief for Respondents 21. But the insistence on quickening was not universal, see Mills, 13 Pa., at 633; State v. Slagle, 83 N. C. 630, 632 (1880), and regardless, the

fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so. When legislatures began to exercise that authority as the century wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right. [****47] That is not surprising since common-law authorities had repeatedly condemned abortion and described it as an unlawful act without regard to whether it occurred before or after quickening. See supra, at 16-21.

[***574] Another amicus brief relied upon by respondents (see Brief for Respondents 21) tries to dismiss the significance of the state criminal statutes that were in effect when the Fourteenth Amendment was adopted by suggesting that they were enacted for illegitimate reasons. According to this account, which is based almost entirely on statements made by one prominent proponent of the statutes, important motives for the laws were the fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to shir[k their] maternal duties. Brief for American Historical Association et al. as Amici Curiae 20.

Resort to this argument is a testament to the lack of any real historical support for the right that Roe and Casey recognized. This Court has long disfavored arguments based on alleged legislative motives. See, e.g., City of Erie v. Pap's A.M., 529 U. S. 277, 292, 120 S. Ct. 1382, 146 L. Ed. 2d [**2256] 265 (2000) (plurality opinion); Turner Broadcasting System, Inc. v. FCC, 512 U. S. 622, 652, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994); United States v. OBrien, 391 U. S. 367, 383, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968); Arizona v. California, 283 U. S. 423, 455, 51 S. Ct. 522, 75 L. Ed. 1154 (1931) (collecting cases). The Court has recognized that inquiries into legislative motives [****48] are a hazardous matter. OBrien, 391 U. S., at 383, 88 S. Ct. 1673, 20 L. Ed. 2d 672. Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we [*254] have been reluctant to attribute those motives to the legislative body as a whole. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. Id., at 384, 88 S. Ct. 1673, 20 L. Ed. 2d 672.

Here, the argument about legislative motive is not even based on statements by legislators, but on statements made by a few supporters of the new 19th-century abortion laws, and it is quite a leap to attribute these motives to all the legislators whose votes were responsible for the enactment of those laws. Recall that at the time of the adoption of the Fourteenth Amendment, over three-quarters of the States had adopted statutes criminalizing abortion (usually at all stages of pregnancy), and that from the early 20th century until the day Roe was handed down, every single State had such a law on its books. Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?

There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion [****49] kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point. See, e.g., Nash v. Meyer, 54 Idaho 283, 301, 31 P. 2d 273, 280 (1934); State v. Ausplund, 86 Ore. 121, 131-132, 167 P. 1019, 1022-1023 (1917); Trent v. State, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916); State v. Miller, 90 Kan. 230, 233, 133 P. 878, 879 (1913); State v. Tippie, 89 Ohio St. 35, 39-40, 105 N. E. 75, 77 (1913); State v. Gedicke, 43 N. J. L.

86, 90 (1881); Dougherty v. People, 1 Colo. 514, 522-523 (1873); State v. Moore, 25 Iowa 128, 131-132 (1868); Smith, 33 Me., at 57; see also Memphis Center for Reproductive Health v. Slatery, 14 F. 4th 409, 446, and n. 11 (CA6 2021) [***575] (Thapar, J., concurring in judgment in part and dissenting in part) (citing cases).

One may disagree with this belief (and our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests), but even Roe and Casey did not question the good faith of abortion [*255] opponents. See, e.g., Casey, 505 U. S., at 850 (Men and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy even in its earliest stage). And we see no reason to discount the significance of the state laws in question based on these amicis suggestions about legislative motive.41

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Other amicus briefs present arguments about the motives of proponents of liberal access to abortion. They note that some such supporters have been motivated by a desire to suppress the size of the African-American population. See Brief for African-American Organization et al. as Amici Curiae 14-21; see also Box v. Planned Parenthood of Ind. and Ky., Inc., 587 U. S. ___, ___-___, 141 S. Ct. 184, 207 L. Ed. 2d 1112 (2019) (Thomas, J., concurring) (slip op., at 1-4). And it is beyond dispute that Roe has had that demographic effect. A highly disproportionate percentage of aborted fetuses are Black. See, e.g., Dept. of Health and Human Servs., Centers for Disease Control and Prevention (CDC), K. Kortsmit et al., Abortion SurveillanceUnited States, 2019, 70 Morbidity and Mortality Report, Surveillance Summaries, p. 20 (Nov. 26, 2021) (Table 6). For our part, we do not question the motives of either those who have supported or those who have opposed laws restricting abortions.

[**2257] C

1

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of Roe and Casey contend that the abortion right is an integral part of a broader entrenched right. Roe termed this a right to privacy, 410 U.S., at 154, 93 S. Ct. 705, 35 L. Ed. 2d 147, and Casey described it as the freedom to make intimate and personal choices that are central to personal dignity and autonomy, 505 U.S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. [****50] Casey elaborated: At the heart of liberty is the right to define ones own concept of existence, of meaning, of the universe, and of the mystery of human life. Ibid.

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free tothink and to say what they wish about existence, meaning, the universe, and the [*256] mystery of human life, they are not always free to act in

accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of liberty, but it is certainly not ordered liberty.

Ordered liberty sets limits and defines the boundary between competing interests. Roe and Casey each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed potential life. Roe, 410 U. S., at 150, 93 S. Ct. 705, 35 L. Ed. 2d 147 (emphasis deleted); Casey, 505 U. S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that Roe and Casey recognized. Voters in other States [***576] may wish to impose tight restrictions based on their belief that abortion destroys [****51] an unborn human being. Miss. Code Ann. 41-41-191(4)(b). Our Nations historical understanding of ordered liberty does not prevent the peoples elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. Casey relied on cases involving the right to marry a person of a different race, Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); the right to marry while in prison, Turner v. Safley, 482 U. S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); the right to obtain contraceptives, Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), Eisenstadt v. Baird, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), Carey v. Population Services Intl, 431 U. S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977); the right to reside with relatives, Moore v. East Cleveland, 431 U. S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977); the right to make decisions about the education of ones children, Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); the right not to be sterilized without consent, Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, Winston v. Lee, 470 U. S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985), Washington v. Harper, 494 U. S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990), [*257] Rochin v. California, 342 U. S. 165, [**2258] 72 S. Ct. 205, 96 L. Ed. 183 (1952). Respondents and the Solicitor General also rely on post-Casey decisions like Lawrence v. Texas, 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (right to engage in private, consensual sexual acts), and Obergefell v. Hodges, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (right to marry a person of the same sex). See Brief for Respondents 18; Brief for United States 23-24.

These attempts to justify abortion through appeals to a broader right to autonomy and to define ones concept of existence prove too much. Casey, 505 U.S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Those criteria, at a high level of generality, could license fundamental rights to illicit [****52] drug use, prostitution, and the like. See Compassion in Dying v. Washington, 85 F. 3d 1440, 1444 (CA9 1996) (OScannlain, J., dissenting from denial of rehearing en banc). None of these rights has any claim to being deeply rooted in history. Id., at 1440, 1445.

What sharply distinguishes the abortion right from the rights recognized in the cases on which Roe and Casey rely is something that both those decisions acknowledged: Abortion destroys what those decisions call potential life and what the law at issue in this case regards as the life of an unborn human being. See Roe, 410 U.S., at 159, 93 S. Ct. 705, 35 L. Ed. 2d 147 (abortion is inherently different); Casey, 505 U. S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (abortion is a unique act). None of the other decisions cited by Roe and Casey involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, [***577] and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

2

In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute Caseys claim (which we accept for the sake of argument) that the specific practices of States at the time of the adoption of the Fourteenth Amendment do not mar[k] the outer limits of the substantive sphere of liberty which the [****53] Fourteenth Amendment [*258] protects. 505 U. S., at 848, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

Defenders of Roe and Casey do not claim that any new scientific learning calls for a different answer to the underlying moral question, but they do contend that changes in society require the recognition of a constitutional right to obtain an abortion. Without the availability of abortion, they maintain, people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.

Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy;42

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See, e.g., Pregnancy Discrimination Act, 92 Stat. 2076, 42 U. S. C. 2000e(k) (federal law prohibiting pregnancy discrimination in employment); Dept. of Labor, Womens Bureau, Employment Protections for Workers Who Are Pregnant or Nursing, https:/ / www.dol.gov/ agencies/ wb/ pregnant-nursing-employment-protections (showing that 46 States and the District of Columbia have employment protections against pregnancy discrimination).

that leave for pregnancy and childbirth are [**2259] now guaranteed by law in many cases;43

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See,e.g., Family and Medical Leave Act of 1993, 107 Stat. 9, 29 U. S. C. 2612 (federal law guaranteeing employment leave for pregnancy and birth); Bureau of Labor Statistics, Access to Paid and Unpaid Family Leave in 2018, https:/ / www.bls.gov/ opub/ ted/ 2019/ access-to-paid-and-unpaid-family-leave-in-2018.htm (showing that 89 percent of civilian workers had access to unpaid family leave in 2018).

that the costs of medical care associated with pregnancy are covered by insurance or government assistance;44

44

The Affordable Care Act (ACA) requires non-grandfathered health plans in the individual and small group markets to cover certain essential health benefits, which include maternity and newborn care. See 124 Stat. 163, 42 U. S. C. 18022(b)(1)(D). The ACA also prohibits annual limits, see 300gg-11, and limits annual cost-sharing obligations on such benefits, 18022(c). State Medicaid plans must provide coverage for pregnancy-related servicesincluding, but not limited to, prenatal care, delivery, and postpartum careas well as services for other conditions that might complicate the pregnancy. 42 CFR 440.210(a)(2)(i)-(ii) (2020). State Medicaid plans are also prohibited from imposing deductions, cost-sharing, or similar charges for pregnancy-related services for pregnant women. 42 U. S. C. 1396o(a)(2)(B), (b)(2)(B).

that States have increasingly adopted safe haven laws, [*259] which generally allow [***578] women to drop off [****54] babies anonymously;45

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Since Casey, all 50 States and the District of Columbia have enacted such laws. Dept. of Health and Human Servs., Childrens Bureau, Infant Safe Haven Laws 1-2 (2016), https:/ / www.childwelfare.gov/ pubPDFs/ safehaven.pdf (noting that safe haven laws began in Texas in 1999).

and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.46

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See, e.g., CDC, Adoption Experiences of Women and Men and Demand for Children To Adopt by Women 18-44 Years of Age in the United States 16 (Aug. 2008) ([N]early 1 million women were seeking to adopt children in 2002 (i.e., they were in demand for a child), whereas the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent); CDC, National Center for Health Statistics, Adoption and Nonbiological Parenting, https:/ / www.cdc.gov/ nchs/ nsfg/ key_statistics/ a-keystat.htm# adoption (showing that approximately 3.1 million women between the ages of 18-49 had ever [t]aken steps to adopt a child based on data collected from 2015-2019).

They also claim that many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.

Both sides make important policy arguments, but supporters of Roe and Casey must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.

[*260] D

1

The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a deeply rooted one, in this Nations history and tradition. Glucksberg, 521 U.S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772; see post, at 12-14 (joint opinion of Breyer, Sotomayor, and Kagan, JJ.). The dissent does not identify any pre-Roe authority that supports such a rightno state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise. Compare [****55] post, at 12-14, n. 2, with supra, at 15-16, and n. 23. Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a [**2260] trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion however and whenever performed except if necessary to save the life of the mother, Roe, 410 U.S., at 139, 93 S. Ct. 705, 35 L. Ed. 2d 147; and that when Roe was decided in 1973 similar statutes were still in effect in 30 States. Compare post, at 12-14, nn. 2-3, with supra, at 23-25, and nn. 33-34.47

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By way of contrast, at the time Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), was decided, the Connecticut statute at issue was an extreme outlier. See Brief for Planned Parenthood Federation of America, Inc. as Amicus Curiae in Griswold v. Connecticut, O. T. 1964, No. 496, p. 27.

[***579] The dissents failure to engage with this long tradition is devastating to its position. We have held that the established method of substantive-due-process analysis requires that an unenumerated right be deeply rooted in this Nations history and tradition before it can be recognized as a component of the liberty protected in the Due Process Clause. Glucksberg, 521 U. S., at 721; cf. Timbs, 586 U.S., at ___, 139 S. Ct. 682, 203 L. Ed. 2d 11 (slip op., at 7). But despite the dissents professed fidelity to stare [*261] decisis, it fails to seriously engage with that important precedentwhich [****56] it cannot possibly satisfy.

The dissent attempts to obscure this failure by misrepresenting our application of Ginsberg. The dissent suggests that we have focused only on the legal status of abortion in the 19th century, post, at 26, but our review of this Nations tradition extends well past that period. As explained, for more than a century after 1868including another half-century after women gained the constitutional right to vote in 1920, see post, at 15; Amdt. 19it was firmly established that laws prohibiting abortion like the Texas law at issue in Roe were permissible exercises of state regulatory authority. And today, another half century later, more than half of the States have asked us to overrule Roe and Casey. The dissent cannot establish that a right to abortion has ever been part of this Nations tradition.

2

Because the dissent cannot argue that the abortion right is rooted in this Nations history and tradition, it contends that the constitutional tradition is not captured whole at a single moment, and that its meaning gains content from the long sweep of our history and from successive judicial precedents. Post, at 18 (internal quotation marks omitted). This vague formulation [****57] imposes no clear restraints on what Justice White called the exercise of raw judicial power, Doe, 410 U.S., at 222, 93 S. Ct. 705, 35 L. Ed. 2d 201 (dissenting opinion), and while the dissent claims that its standard does not mean anything goes, post, at 17, any real restraints are hard to discern.

The largely limitless reach of the dissenters standard is illustrated by the way they apply it here. First, if the long sweep of history imposes any restraint on the recognition of unenumerated rights, then Roe was surely wrong, since abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years before that decision was handed down. Second, it is impossible to [*262] defend Roe based on prior precedent because all of the precedents Roe cited, including Griswold and Eisenstadt, were critically different for a reason that we have explained: None of those cases involved the destruction of what Roe called potential life. See supra, at 32.

[**2261] So without support in history or relevant precedent, Roes reasoning cannot be defended even under the dissents proposed test, and the dissent is forced to rely solely on the fact that a constitutional right to abortion was recognized in Roe and later decisions that accepted Roes interpretation. Under [****58] the doctrine of stare decisis, those precedents are entitled to [***580] careful and respectful consideration, and we engage in that analysis below. But as the Court has reiterated time and time again, adherence to precedent is not an inexorable command. Kimble v. Marvel Entertainment, LLC, 576 U. S. 446, 455, 135 S. Ct. 2401, 192 L. Ed. 2d 463 (2015). There are occasions when past decisions should be overruled, and as we will explain, this is one of them.

3

The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States interest in protecting fetal life. This is evident in the analogy that the dissent draws between the abortion right and the rights recognized in Griswold (contraception), Eisenstadt (same), Lawrence (sexual conduct with member of the same sex), and Obergefell (same-sex marriage). Perhaps this is designed to stoke unfounded fear that our decision will imperil those other rights, but the dissents analogy is objectionable for a more important reason: what it reveals about the dissents views on the protection of what Roe called potential life. The exercise of the rights at issue in Griswold, Eisenstadt, Lawrence, and Obergefell does not destroy a potential life, but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in Roe [****59] and Casey, the implication is clear: The Constitution does not permit the States to regard the destruction of a potential life as a matter of any significance.

[*263] That view is evident throughout the dissent. The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a States interest in protecting prenatal life. The dissent repeatedly praises the balance, post, at 2, 6, 8, 10, 12, that the viability line strikes between a womans liberty interest and the States interest in prenatal life. But for reasons we discuss later, see infra, at 50-54, 55-56, and given in the opinion of The Chief Justice, post, at 2-5 (opinion concurring in judgment), the viability line makes no sense. It was not adequately justified in Roe, and the dissent does not even try to defend it today. Nor does it identify any other point in a pregnancy after which a State is permitted to prohibit the destruction of a fetus.

Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, [****60] would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution requires the States to regard a fetus as lacking even the most basic human rightto liveat least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nations legal traditions authorizes the Court to adopt that theory of life. Post, at 8.

III

We next consider whether the doctrine of stare decisis counsels continued acceptance of Roe and Casey. Stare decisis plays an important role [***581] in our case law, and we have explained that it serves many valuable ends. It protects the interests of [**2262] those who have taken action in reliance on a past decision. See Casey, 505 U.S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (joint opinion); see also Payne v. Tennessee, 501 U. S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720

(1991). It reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation. [*264] Kimble, 576 U. S., at 455, 135 S. Ct. 2401, 192 L. Ed. 2d 463. It fosters evenhanded decisionmaking by requiring that like cases be decided in a like manner. Payne, 501 U. S., at 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720. It contributes to the actual and perceived integrity of the judicial process. Ibid. And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. Precedent [****61] is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges. N. Gorsuch, A Republic, If You Can Keep It 217 (2019).

We have long recognized, however, that stare decisis is not an inexorable command, Pearson v. Callahan, 555 U. S. 223, 233, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (internal quotation marks omitted), and it is at its weakest when we interpret the Constitution, Agostini v. Felton, 521 U. S. 203, 235, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). It has been said that it is sometimes more important that an issue be settled than that it be settled right. Kimble, 576 U. S., at 455, 135 S. Ct. 2401, 192 L. Ed. 2d 463 (quoting Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 406, 52 S. Ct. 443, 76 L. Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (1932) (Brandeis, J., dissenting)). But when it comes to the interpretation of the Constitutionthe great charter of our liberties, which was meant to endure through a long lapse of ages, Martin v. Hunters Lessee, 14 U.S. 304, 1 Wheat. 304, 326, 4 L. Ed. 97 (1816) (opinion for the Court by Story, J.)we place a high value on having the matter settled right. In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. See Art. V; Kimble, 576 U.S., at 456, 135 S. Ct. 2401, 192 L. Ed. 2d 463. Therefore, in appropriate circumstances we must be willing to reconsider and, [****62] if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Court repudiated [*265] the separate but equal doctrine, which had allowed States to maintain racially segregated schools and other facilities. Id., at 488, 74 S. Ct. 686, 98 L. Ed. 873 (internal quotation marks omitted). In so doing, the Court overruled the infamous decision in Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule. See Brown, 347 U. S., at 491, 74 S. Ct. 686, 98 L. Ed. 873.

In West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937), the Court overruled Adkins [***582] v. Children's Hosp., 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923), which had held that a law setting minimum wages for women violated the liberty protected by the Fifth Amendments Due Process Clause. Id., at 545, 43 S. Ct. 394, 67 L. Ed. 785. West Coast Hotel signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation. See Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (holding invalid a law setting

maximum working hours); Coppage v. Kansas, [**2263] 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915) (holding invalid a law banning contracts forbidding employees to join a union); Jay Burns Baking Co. v. Bryan, 264 U. S. 504, 44 S. Ct. 412, 68 L. Ed. 813 (1924) (holding invalid laws fixing the weight of loaves of bread).

Finally, in West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), after the lapse of only three years, the Court overruled Minersville School Dist. v. Gobitis, 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940), and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. Barnette stands out because [****63] nothing had changed during the intervening period other than the Courts belated recognition that its earlier decision had been seriously wrong.

On many other occasions, this Court has overruled important constitutional decisions. (We include a partial list in the footnote that follows.48

48

See, e.g., Obergefell v. Hodges, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (right to same-sex marriage), overruling Baker v. Nelson, 409 U. S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972); Citizens United v. Federal Election Commn, 558 U. S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (right to engage in campaign-related speech), overruling Austin v. Michigan Chamber of Commerce, 494 U. S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990), and partially overruling McConnell v. Federal Election Commn, 540 U. S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003); Montejo v. Louisiana, 556 U. S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (Sixth Amendment right to counsel), overruling Michigan v. Jackson, 475 U. S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986); Crawford v. Washington, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (Sixth Amendment right to confront witnesses), overruling Ohio v. Roberts, 448 U. S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); Lawrence v. Texas, 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (right to engage in consensual, same-sex intimacy in ones home), overruling Bowers v. Hardwick, 478 U. S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986); Ring v. Arizona, 536 U. S. 584, 122 S. Ct. 2428, [***583] 153 L. Ed. 2d 556 (2002) (Sixth Amendment right to a jury trial in capital prosecutions), overruling Walton v. Arizona, 497 U. S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); Agostini v. Felton, 521 U. S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (evaluating whether government aid violates the Establishment Clause), overruling Aguilar v. Felton, 473 U. S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (1985), and School Dist. of Grand Rapids v. Ball, 473 U. S. 373, 105 S. Ct. 3216, 87 L. Ed. 2d 267 (1985); Seminole Tribe of Fla. v. Florida, 517 U. S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (lack of congressional power under the Indian Commerce Clause to abrogate States Eleventh Amendment immunity), overruling Pennsylvania v. Union Gas Co., 491 U. S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989); Payne v. Tennessee, 501 U. S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (the Eighth Amendment does not erect a per se bar to the admission of victim impact evidence during the penalty phase of a capital trial), overruling Booth v. Maryland, 482 U. S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), and South Carolina v. Gathers, 490 U. S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989);

Batsonv. Kentucky, 476 U. S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race), overruling Swain v. Alabama, 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965); Garcia v. San Antonio Metropolitan Transit Authority, 469 U. S. 528, 530, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) (rejecting the principle that the Commerce Clause does not empower Congress to enforce requirements, such as minimum wage laws, against the States in areas of traditional governmental functions), overruling National League of Cities v. Usery, 426 U. S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976); Illinois v. Gates, 462 U. S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (the Fourth Amendment requires a totality of the circumstances approach for determining whether an informants tip establishes probable cause), overruling Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and Spinelli v. United States, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); United States v. Scott, 437 U. S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) (the Double Jeopardy Clause does not apply to Government appeals from orders granting defense motions to terminate a trial before verdict), overruling United States v. Jenkins, 420 U. S. 358, 95 S. Ct. 1006, 43 L. Ed. 2d 250 (1975); Craig v. Boren, 429 U. S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (gender-based classifications are subject to intermediate scrutiny under the Equal Protection Clause), overruling Goesaert v. Cleary, 335 U. S. 464, 69 S. Ct. 198, 93 L. Ed. 163 (1948); Taylor v. Louisiana, 419 U. S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) (jury system which operates to exclude women from jury service violates the defendants Sixth and Fourteenth Amendment right to an impartial jury), overruling Hoyt v. Florida, 368 U. S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961); Brandenburg v. Ohio, 395 U. S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam) (the mere advocacy of violence is protected under the First Amendment unless it is directed to incite or produce imminent lawless action), overruling Whitney v. California, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927); Katz v. United States, 389 U. S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Fourth Amendment protects people, not places, and extends to what a person seeks to preserve as private), overruling Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), and Goldman v. United States, 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942); Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (procedural safeguards to protect the Fifth Amendment privilege against self-incrimination), overruling Crooker v. California, 357 U. S. 433, 78 S. Ct. 1287, 2 L. Ed. 2d 1448 (1958), and Cicenia v. Lagay, 357 U. S. 504, 78 S. Ct. 1297, 2 L. Ed. 2d 1523 (1958); Malloy v. Hogan, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) (the Fifth Amendment privilege against self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States), overruling Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908), and Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947); Wesberry v. Sanders, 376 U. S. 1, 7-8, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) (congressional districts should be apportioned so that as nearly as is practicable one mans vote in a congressional election is to be worth as much as anothers), overruling in effect Colegrove v. Green, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946); Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to counsel for indigent defendant in a criminal prosecution in state court under the Sixth and Fourteenth Amendments), overruling

Bettsv. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942); Baker v. Carr, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (federal courts have jurisdiction to consider constitutional challenges to state redistricting plans), effectively overruling in part Colegrove, 328 U. S. 549; Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961) (the exclusionary rule regarding the inadmissibility of evidence obtained in violation of the Fourth Amendment applies to the States), overruling Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949); Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944) (racial restrictions on the right to vote in primary elections violates the Equal Protection Clause of the Fourteenth Amendment), overruling Grovey v. Townsend, 295 U. S. 45, 55 S. Ct. 622, 79 L. Ed. 1292 (1935); United States v. Darby, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941) (congressional power to regulate employment conditions under the Commerce Clause), overruling Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918); Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) (Congress does not have the power to declare substantive rules of common law; a federal court sitting in diversity jurisdiction must apply the substantive state law), overruling Swift v. Tyson, 41 U.S. 1, 16 Pet. 1, 10 L. Ed. 865 (1842).

) Without these decisions, [**2264] American [*266] constitutional law as we know it would be unrecognizable, and this would be a different country.

No Justice of this Court has ever argued that the Court should never overrule a constitutional decision, but overruling [*267] a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be [*268] considered in making such a decision. Janus v. State, County, and Municipal Employees, 585 U. S. ___, ___-___, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018) (slip op., at 34-35); Ramos v. Louisiana, 590 U. S. ___, ___-___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) (Kavanaugh, J., concurring in part) (slip op., at 7-9).

[***584] [**2265] In this case, five factors weigh strongly in favor of overruling Roe and Casey: the nature of their error, the quality of their reasoning, the workability of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

A

The nature of the [****64] Courts error. An erroneous interpretation of the Constitution is always important, but some are more damaging than others.

The infamous decision in Plessy v. Ferguson, was one such decision. It betrayed our commitment to equality before the law. 163 U.S., at 562, 16 S. Ct. 1138, 41 L. Ed. 256 (Harlan, J., dissenting). It was egregiously wrong on the day it was decided, see Ramos, 590 U.S., at ___, 140 S. Ct. 1390,

206 L. Ed 2d 583 (opinion of Kavanaugh, J.) (slip op., at 7), and as the Solicitor General agreed at oral argument, it should have been overruled at the earliest opportunity, see Tr. of Oral Arg. 92-93.

Roe was also egregiously wrong and deeply damaging. For reasons already explained, Roes constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.

Roe was on a collision course with the Constitution from the day it was decided, Casey perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but raw judicial power, Doe, 410 U.S., at 222, 93 S. Ct. 739, 35 L. Ed. 2d 201 [*269] (White, J., dissenting), the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. Casey described [****65] itself as calling both sides of the national controversy to resolve their debate, but in doing so, Casey necessarily declared a winning side. Those on the losing sidethose who sought to advance the States interest in fetal lifecould no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from Roe. Roe fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. Casey, 505 U. S., at 995-996, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of Scalia, J.). Together, Roe and Casey represent an error that cannot be allowed to stand.

As the Courts landmark decision in West Coast Hotel illustrates, the [***585] Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process. As Justice White later explained, decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the peoples authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. [****66] For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken. Thornburgh, 476 U.S., at 787, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (dissenting opinion).

B

The quality of the reasoning. Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered. See Janus, 585 U. S., at ___ (slip op., at 38); Ramos, 590 U. S., at ___-___ (opinion [**2266] of [*270] Kavanaugh, J.) (slip op., at 7-8). In Part II, supra, we explained why Roe was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds.

Roefound that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution; it disregarded the fundamental difference between the precedents on which it relied and the question before the Court; it concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of [****67] anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule (that States cannot protect fetal life prior to viability) was never raised by any party and has never been plausibly explained. Roes reasoning quickly drew scathing scholarly criticism, even from supporters of broad access to abortion.

The Casey plurality, while reaffirming Roes central holding, pointedly refrained from endorsing most of its reasoning. It revised the textual basis for the abortion right, silently abandoned Roes erroneous historical narrative, and jettisoned the trimester framework. But it replaced that scheme with an arbitrary undue burden test and relied on an exceptional version of stare decisis that, as explained below, this Court had never before applied and has never invoked since.

1

a

The weaknesses in Roes reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute [*271] or regulation. See 410 U.S., at 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147. Dividing pregnancy into three trimesters, the Court imposed special rules for each. During the first trimester, [****68] the Court announced, the abortion decision and its effectuation must be left to the [***586] medical judgment of the pregnant womans attending physician. Id., at 164, 93 S. Ct. 705, 35 L. Ed. 2d 147. After that point, a States interest in regulating abortion for the sake of a womans health became compelling, and accordingly, a State could regulate the abortion procedure in ways that are reasonably related to maternal health. Ibid. Finally, in the stage subsequent to viability, which in 1973 roughly coincided with the beginning of the third trimester, the States interest in the potentiality of human life became compelling, and therefore a State could regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Id., at 164-165, 93 S. Ct. 705, 35 L. Ed. 2d 147.

This elaborate scheme was the Courts own brainchild. Neither party advocated the trimester framework; nor did either party or any amicus argue that viability should mark the point at which the scope of the abortion right and a States regulatory authority should be substantially transformed. See Brief for Appellant and Brief for Appellee in Roe v. Wade, O. T. 1972, No. 70-

18; see also C. Forsythe, Abuse of Discretion: [****69] The Inside Story of Roe v. Wade 127, 141 (2012).

b

Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources [**2267] on which constitutional decisions are usually based. We have already discussed Roes treatment of constitutional text, and the opinion failed to show that history, precedent, or any other cited source supported its scheme.

Roe featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to [*272] explain why it was included. For example, multiple paragraphs were devoted to an account of the views and practices of ancient civilizations where infanticide was widely accepted. See 410 U. S., at 130-132, 93 S. Ct. 705, 35 L. Ed. 2d 147 (discussing ancient Greek and Roman practices).49

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See, e.g., C. Patterson, Not Worth the Rearing: The Causes of Infant Exposure in Ancient Greece, 115 Transactions Am. Philological Assn. 103, 111-123 (1985); A. Cameron, The Exposure of Children and Greek Ethics, 46 Classical Rev. 105-108 (1932); H. Bennett, The Exposure of Infants in Ancient Rome, 18 Classical J. 341-351 (1923); W. Harris, Child-Exposure in the Roman Empire, 84 J. Roman Studies 1 (1994).

When it came to the most important historical facthow the States regulated abortion when the Fourteenth Amendment was adoptedthe Court said almost nothing. It allowed that States had tightened their abortion laws in the middle and late 19th century, id., at 139, 93 S. Ct. 705, 35 L. Ed. 2d 147, but it implied that these laws might have been enacted not to protect fetal life but to further a Victorian social concern about illicit sexual conduct, id., at 148, 93 S. Ct. 705, 35 L. Ed. 2d 147.

Roes failure even to note the [****70] overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Relying on two discredited articles by an abortion advocate, the Court erroneously suggestedcontrary to Bracton, Coke, Hale, Blackstone, and a wealth of other authority [***587] that the common law had probably never really treated post-quickening abortion as a crime. See id., at 136, 93 S. Ct. 705, 35 L. Ed. 2d 147 ([I]t now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus). This erroneous understanding appears to have played an important part in the Courts thinking because the opinion cited the lenity of the common law as one of the four factors that informed its decision. Id., at 165, 93 S. Ct. 705, 35 L. Ed. 2d 147.

After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee. This included a lengthy account of the

position of the American Medical Association and [t]he position of the American Public Health [*273] Association, as well as the vote by the American Bar Associations House of Delegates in February 1972 on proposed abortion legislation. Id., at 141, 144, 146, 93 S. Ct. 705, 35 L. Ed. 2d 147 (emphasis deleted). Also noted [****71] were a British judicial decision handed down in 1939 and a new British abortion law enacted in 1967. Id., at 137-138, 93 S. Ct. 705, 35 L. Ed. 2d 147. The Court did not explain why these sources shed light on the meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that Roe imposed on the country.

Finally, after all this, the Court turned to precedent. Citing a broad array of cases, the Court found support for a constitutional right of personal privacy, id., at 152, 93 S. Ct. 705, 35 L. Ed. 2d 147, but it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. See Whalen v. Roe, 429 U. S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, [**2268] and some of the cases in that category involved personal decisions that were obviously very, very far afield. See Pierce, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (right to send children to religious school); Meyer, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (right to have children receive German language instruction).

What remained was a handful of cases having something to do with marriage, Loving, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (right to marry a person of a different race), or procreation, Skinner, 316 U. S. 535, 62 S. Ct. 1252, 86 L. Ed. 1595 (right not to be sterilized); Griswold, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (right of married persons to obtain [****72] contraceptives); Eisenstadt, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (same, for unmarried persons). But none of these decisions involved what is distinctive about abortion: its effect on what Roe termed potential life.

When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were consistent with the following: (1) the relative weights of the respective interests involved, (2) the lessons and examples of medical and legal history, (3) the lenity of the common law, and (4) the demands of the profound problems of the [*274] present day. Roe, 410 U. S., at 165, 93 S. Ct. 705, 35 L. Ed. 2d 147. Put aside the second and third factors, which were [***588] based on the Courts flawed account of history, and what remains are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme Roe produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.

c

What Roe did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a womans health? The Courts only explanation was that mortality [****73] rates for abortion at

that stage were lower than the mortality rates for childbirth, id., at 163, 93 S. Ct. 705, 35 L. Ed. 2d 147. But the Court did not explain why mortality rates were the only factor that a State could legitimately consider. Many health and safety regulations aim to avoid adverse health consequences short of death. And the Court did not explain why it departed from the normal rule that courts defer to the judgments of legislatures in areas fraught with medical and scientific uncertainties. Marshall v. United States, 414 U. S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974).

An even more glaring deficiency was Roes failure to justify the critical distinction it drew between pre- and post-viability abortions. Here is the Courts entire explanation:

With respect to the States important and legitimate interest in potential life, the compelling point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb. 410 U. S., at 163, 93 S. Ct. 705, 35 L. Ed. 2d 147.

As Professor Laurence Tribe has written, [c]learly, this mistakes a definition for a syllogism. Tribe 4 (quoting Ely [*275] 924). The definition of a viable fetus is one that is capable of surviving outside the womb, but why is this the point at which the States interest becomes compelling? If, as Roe held, a States interest in protecting [****74] prenatal life is compelling after viability, 410 U. S., at 163, 93 S. Ct. 705, 35 L. Ed. 2d 147, why isnt that interest equally compelling before viability? Webster v. Reproductive Health Services, 492 U. S. 490, 519, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989) (plurality opinion) (quoting Thornburgh, 476 U. S., [**2269] at 795, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (White, J., dissenting)). Roe did not say, and no explanation is apparent.

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. Some have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a person. Among the characteristics that have been offered as essential attributes of personhood are sentience, self-awareness, the ability to reason, or some combination thereof.50

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See, e.g., P. Singer, Rethinking Life & Death 218 (1994) (defining a person as a being with awareness of her or his own existence over time, and the capacity to have wants and plans for the future); B. Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses 9-13 (1992) (arguing that the possession of interests is both necessary and sufficient for moral status and that the capacity for conscious awareness is a necessary condition for the possession of interests (emphasis deleted)); M. Warren, On the Moral and Legal Status of Abortion, 57 The Monist 1, 5 (1973) (arguing that, to qualify as a person, a being must have at least one of five traits that are central to the concept of personhood: (1) consciousness (of objects and events external and/ or internal to the being), and in particular the capacity to feel pain; (2) reasoning (the developed capacity to solve new and relatively complex problems); (3) self-motivated activity (activity which is relatively independent of either genetic or direct external control); (4) the capacity to communicate, by whatever means, messages of an indefinite variety of types; and (5) the presence of self-concepts, and self-awareness, either individual or racial, or both (emphasis

deleted)); M. Tooley, Abortion & Infanticide, 2 Philosophy & Pub. Affairs 37, 49 (Autumn 1972) (arguing that having a right to life presupposes that one is capable of desiring to continue existing as a subject of experiences and other mental states).

By this logic, it would be an open question [*276] whether even born individuals, including young children or [***589] those afflicted with certain developmental or medical conditions, merit protection as persons. But even if one takes the view that personhood begins when a certain attribute or combination of attributes is acquired, it is very hard to see why viability should mark the point where personhood begins.

The most obvious problem with any such argument is that viability is heavily dependent on factors that [****75] have nothing to do with the characteristics of a fetus. One is the state of neonatal care at a particular point in time. Due to the development of new equipment and improved practices, the viability line has changed over the years. In the 19th century, a fetus may not have been viable until the 32d or 33d week of pregnancy or even later.51

51

See W. Lusk, Science and the Art of Midwifery 74-75 (1882) (explaining that [w]ith care, the life of a child born within [the eighth month of pregnancy] may be preserved); id., at 326 (Where the choice lies with the physician, the provocation of labor is usually deferred until the thirty-third or thirty-fourth week); J. Beck, Researches in Medicine and Medical Jurisprudence 68 (2d ed. 1835) (Although children born before the completion of the seventh month have occasionally survived, and been reared, yet in a medico-legal point of view, no child ought to be considered as capable of sustaining an independent existence until the seventh month has been fully completed); see also J. Baker, The Incubator and the Medical Discovery of the Premature Infant, J. Perinatology 322 (2000) (explaining that, in the 19th century, infants born at seven to eight months gestation were unlikely to survive beyond the first days of life).

When Roe was decided, viability was gauged at roughly 28 weeks. See 410 U. S., at 160, 93 S. Ct. 705, 35 L. Ed. 2d 147. Today, respondents draw the line at 23 or 24 weeks. Brief for Respondents 8. So, according to Roes logic, States now have a compelling interest in protecting a fetus with a gestational age of, say, 26 weeks, but in 1973 States did [**2270] not have an interest in protecting an identical fetus. How can that be?

Viability also depends on the quality of the available medical facilities. Colautti v. Franklin, 439 U. S. 379, 396, 99 S. Ct. 675, 58 L. Ed. 2d 596 [*277] (1979). Thus, a 24-week-old fetus may be viable if a woman gives birth in a city with hospitals that provide advanced care for very premature babies, but if the woman travels to a remote area far from any such hospital, the fetus may no longer be viable. On what ground could the constitutional status of a fetus depend on the pregnant womans location? And if viability is meant to mark a line having universal moral significance, [****76] can it be that a fetus that is viable in a big city in the United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country?

[***590] In addition, as the Court once explained, viability is not really a hard-and-fast line. Ibid. A physician determining a particular fetuss odds of surviving outside the womb must consider a

number of variables, including gestational age, fetal weight, a womans general health and nutrition, the quality of the available medical facilities, and other factors. Id., at 395-396, 99 S. Ct. 675, 58 L. Ed. 2d 596. It is thus only with difficulty that a physician can estimate the probability of a particular fetuss survival. Id., at 396, 99 S. Ct. 675, 58 L. Ed. 2d 596. And even if each fetuss probability of survival could be ascertained with certainty, settling on a probabilit[y] of survival that should count as viability is another matter. Ibid. Is a fetus viable with a 10 percent chance of survival? 25 percent? 50 percent? Can such a judgment be made by a State? And can a State specify a gestational age limit that applies in all cases? Or must these difficult questions be left entirely to the individual attending physician on the particular facts of the case before him? Id., at 388, 99 S. Ct. 675, 58 L. Ed. 2d 596.

The viability line, [****77] which Casey termed Roes central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line.52

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According to the Center for Reproductive Rights, only the United States and the Netherlands use viability as a gestational limit on the availability of abortion on-request. See Center for Reproductive Rights, The Worlds Abortion Laws (Feb. 23, 2021), https:/ / reproductiverights.org/ maps/ worlds-abortion-laws.

The Court thus asserted raw judicial power to impose, as a matter of constitutional [*278] law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy.

d

All in all, Roes reasoning was exceedingly weak, and academic commentators, including those who agreed with the decision as a matter of policy, were unsparing in their criticism. John Hart Ely famously wrote that Roe was not constitutional law and g[ave] almost no sense of an obligation to try to be. Ely 947 (emphasis deleted). Archibald Cox, who served as Solicitor General under President Kennedy, commented that Roe read[s] like a set of hospital rules and regulations that [n]either historian, layman, nor lawyer will be persuaded . . . are part of . . . the Constitution. The Role of the Supreme Court in American Government 113-114 (1976). Laurence Tribe wrote that even if there is a need to divide pregnancy into several segments with lines that clearly identify the limits of governmental power, interest-balancing of the form the Court pursues [****78] fails to justify any of the lines actually drawn. Tribe 4-5. Mark Tushnet termed Roe a totally unreasoned judicial opinion. Red, White, and Blue: A Critical Analysis of Constitutional Law 54 (1988). See also P. Bobbitt, Constitutional Fate 157 (1982); [**2271] A. Amar, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 110 (2000).

Despite Roes weaknesses, its reach was steadily extended in the years that followed. The Court struck down laws requiring that second-trimester abortions be performed only in hospitals, Akron

v. Akron Center for Reproductive Health, Inc., 462 U. S. 416, 433-439, 103 S. Ct. 2481, 76 L. Ed. 2d 687 [***591] (1983); that minors obtain parental consent, Planned Parenthood of Central Mo. v. Danforth, 428 U. S. 52, 74, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976); that women give written consent after being informed of the status of the developing prenatal life and the risks of abortion, Akron, 462 U. S., [*279] at 442-445, 103 S. Ct. 2481, 76 L. Ed. 2d 687; that women wait 24 hours for an abortion, id., at 449-451, 103 S. Ct. 2481, 76 L. Ed. 2d 687; that a physician determine viability in a particular manner, Colautti, 439 U. S., at 390-397, 99 S. Ct. 675, 58 L. Ed. 2d 596; that a physician performing a post-viability abortion use the technique most likely to preserve the life of the fetus, id., at 397-401, 99 S. Ct. 675, 58 L. Ed. 2d 596; and that fetal remains be treated in a humane and sanitary manner, Akron, 462 U. S., at 451-452, 103 S. Ct. 2481, 76 L. Ed. 2d 687.

Justice White complained that the Court was engaging in unrestrained imposition of its own extraconstitutional value preferences. Thornburgh, 476 U. S., at 794, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (dissenting opinion). And the United States as amicus curiae asked the Court to overrule Roe five times in the decade [****79] before Casey, see 505 U. S., at 844, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (joint opinion), and then asked the Court to overrule it once more in Casey itself.

2

When Casey revisited Roe almost 20 years later, very little of Roes reasoning was defended or preserved. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendments Due Process Clause. 505 U. S., at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674. The Court did not reaffirm Roes erroneous account of abortion history. In fact, none of the Justices in the majority said anything about the history of the abortion right. And as for precedent, the Court relied on essentially the same body of cases that Roe had cited. Thus, with respect to the standard grounds for constitutional decisionmakingtext, history, and precedentCasey did not attempt to bolster Roes reasoning.

The Court also made no real effort to remedy one of the greatest weaknesses in Roes analysis: its much-criticized discussion of viability. The Court retained what it called Roes central holdingthat a State may not regulate pre-viability abortions for the purpose of protecting fetal lifebut it provided no principled defense of the viability line. [*280] 505 U. S., at 860, 870-871, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Instead, it merely rephrased what Roe had said, stating that viability marked the point at which the independent existence of a second life can [****80] in reason and fairness be the object of state protection that now overrides the rights of the woman. 505 U. S., at 870, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Why reason and fairness demanded that the line be drawn at viability the Court did not explain. And the Justices who authored the controlling opinion conspicuously failed to say that they agreed with the viability rule; instead, they candidly acknowledged the reservations [some] of us may have in reaffirming [that] holding of Roe. Id., at 853.

The controlling opinion criticized and rejected Roes trimester scheme, 505 U. S., at 872, 112 S. Ct. 2791, 120 L. Ed. 2d 674, [***592] and substituted a new undue burden test, but the basis for this test was obscure. And as we will explain, the test is full of ambiguities and is difficult to apply.

[**2272] Casey, in short, either refused to reaffirm or rejected important aspects of Roes analysis, failed to remedy glaring deficiencies in Roes reasoning, endorsed what it termed Roes central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than Roes status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent.

As discussed below, Casey also deployed a novel version of the doctrine of stare decisis [****81] . See infra, at 64-69. This new doctrine did not account for the profound wrongness of the decision in Roe, and placed great weight on an intangible form of reliance with little if any basis in prior case law. Stare decisis does not command the preservation of such a decision.

C

Workability. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workablethat [*281] is, whether it can be understood and applied in a consistent and predictable manner. Montejo v. Louisiana, 556 U. S. 778, 792, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009); Patterson v. McLean Credit Union, 491 U. S. 164, 173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U. S. 271, 283-284, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988). Caseys undue burden test has scored poorly on the workability scale.

1

Problems begin with the very concept of an undue burden. As Justice Scalia noted in his Casey partial dissent, determining whether a burden is due or undue is inherently standardless. 505 U. S., at 992, 112 S. Ct. 2791, 120 L. Ed. 2d 674; see also June Medical Services L. L. C. v. Russo, 591 U. S. ___, ___, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (2020) (Gorsuch, J., dissenting) (slip op., at 17) ([W]hether a burden is deemed undue depends heavily on which factors the judge considers and how much weight he accords each of them (internal quotation marks and alterations omitted)).

The Casey plurality tried to put meaning into the undue burden test by setting out three subsidiary rules, but these rules created their own problems. The first rule is [****82] that a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. 505 U. S., at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (emphasis added); see also id., at 877, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But

whether a particular obstacle qualifies as substantial is often open to reasonable debate. In the sense relevant here, substantial means of ample or considerable amount, quantity, or size. Random House Websters Unabridged Dictionary 1897 (2d ed. 2001). Huge burdens are plainly substantial, and trivial ones are not, but in between these extremes, there is a wide gray area.

This ambiguity is a problem, and the second rule, which applies at all [***593] stages of a pregnancy, muddies things further. It states that measures designed to ensure that the womans choice is informed are constitutional so long as they do [*282] not impose an undue burden on the right. Casey, 505 U. S., at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674. To the extent that this rule applies to pre-viability abortions, it overlaps with the first rule and appears to impose a different standard. Consider a law that imposes an insubstantial obstacle but serves little purpose. As applied to a pre-viability abortion, would such a regulation be constitutional on the ground that it [****83] does not impose a substantial obstacle? Or would it be unconstitutional [**2273] on the ground that it creates an undue burden because the burden it imposes, though slight, outweighs its negligible benefits? Casey does not say, and this ambiguity would lead to confusion down the line. Compare June Medical, 591 U. S., at ___-___, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (plurality opinion) (slip op., at 1-2), with id., at ___-___ (Roberts, C. J., concurring) (slip op., at 5-6).

The third rule complicates the picture even more. Under that rule, [u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right. Casey, 505 U. S., at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (emphasis added). This rule contains no fewer than three vague terms. It includes the two already discussedundue burden and substantial obstacleeven though they are inconsistent. And it adds a third ambiguous term when it refers to unnecessary health regulations. The term necessary has a range of meaningsfrom essential to merely useful. See Blacks Law Dictionary 928 (5th ed. 1979); American Heritage Dictionary of the English Language 877 (1971). Casey did not explain the sense in which the term is used in this rule.

In addition to these problems, one [****84] more applies to all three rules. They all call on courts to examine a laws effect on women, but a regulation may have a very different impact on different women for a variety of reasons, including their places of residence, financial resources, family situations, work and personal obligations, knowledge about fetal development and abortion, psychological and emotional disposition and condition, and the firmness of their desire to obtain abortions. In order to determine whether a regulation presents [*283] a substantial obstacle to women, a court needs to know which set of women it should have in mind and how many of the women in this set must find that an obstacle is substantial.

Casey provided no clear answer to these questions. It said that a regulation is unconstitutional if it imposes a substantial obstacle in a large fraction of cases in which [it] is relevant, 505 U. S., at 895, 112 S. Ct. 2791, 120 L. Ed. 2d 674, but there is obviously no clear line between a fraction that is large and one that is not. Nor is it clear what the Court meant by cases in which a regulation is relevant. These ambiguities have caused confusion and disagreement. Compare Whole Womans

Health v. Hellerstedt, 579 U. S. 582, 627-628, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016), with id., at 666-667, and n. 11, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (Alito, J., dissenting).

[***594] 2

The difficulty of applying Caseys new rules [****85] surfaced in that very case. The controlling opinion found that Pennsylvanias 24-hour waiting period requirement and its informed-consent provision did not impose undue burden[s], Casey, 505 U. S., at 881-887, 112 S. Ct. 2791, 120 L. Ed. 2d 674, but Justice Stevens, applying the same test, reached the opposite result, id., at 920-922, 12 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion concurring in part and dissenting in part). That did not bode well, and then-Chief Justice Rehnquist aptly observed that the undue burden standard presents nothing more workable than the trimester framework. Id., at 964-966, 12 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion concurring in judgment in part and dissenting in part).

The ambiguity of the undue burden test also produced disagreement in later cases. In Whole Womans Health, the Court adopted the cost-benefit interpretation of the test, stating that [t]he rule announced in Casey . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. 579 U. S., at 607, 136 [**2274] S. Ct. 2292, 195 L. Ed. 2d 665 (emphasis added). But five years later, a majority of the Justices rejected that interpretation. See June Medical, 591 U. S. ___, 140 S. Ct. 2103, 207 L. Ed. 2d 566. Four Justices reaffirmed Whole Womans Healths instruction to weigh a laws benefits against [*284] the burdens it imposes on abortion access. 591 U. S., at ___, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (plurality opinion) (slip op., at 2) (internal quotation marks omitted). But The Chief Justicewho cast the deciding voteargued that [n]othing about Casey suggested [****86] that a weighing of costs and benefits of an abortion regulation was a job for the courts. Id., at ___ (opinion concurring in judgment) (slip op., at 6). And the four Justices in dissent rejected the pluralitys interpretation of Casey. See 591 U. S., at ___, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (opinion of Alito, J., joined in relevant part by Thomas, Gorsuch, and Kavanaugh, JJ.) (slip op., at 4); id., at ___-___ (opinion of Gorsuch, J.) (slip op., at 15-18); id., at ___-___ (opinion of Kavanaugh, J.) (slip op., at 1-2) ([F]ive Members of the Court reject the Whole Womans Health cost-benefit standard).

This Courts experience applying Casey has confirmed Chief Justice Rehnquists prescient diagnosis that the undue-burden standard was not built to last. Casey, 505 U. S., at 965, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion concurring in judgment in part and dissenting in part).

3

The experience of the Courts of Appeals provides further evidence that Caseys line between permissible and unconstitutional restrictions has proved to be impossible to draw with precision. Janus, 585 U. S., at ___ (slip op., at 38).

Caseyhas generated a long list of Circuit conflicts. Most recently, the Courts of Appeals have disagreed about whether the balancing test from Whole Womans Health correctly states the undue-burden framework.53

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Compare Whole Womans Health v. Paxton, 10 F. 4th 430, 440 (CA5 2021), EMW Womens Surgical Center, P.S.C. v. Friedlander, 978 F. 3d 418, 437 (CA6 2020), and Hopkins v. Jegley, 968 F. 3d 912, 915 (CA8 2020) (per curiam), with Planned Parenthood of Ind. & Ky., Inc. v. Box, 991 F. 3d 740, 751-752 (CA7 2021).

[***595] They have disagreed on the legality of parental notification rules.54

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Compare Planned Parenthood of Blue Ridge v. Camblos, 155 F. 3d 352, 367 (CA4 1998), with Planned Parenthood of Ind. & Ky., Inc. v. Adams, 937 F. 3d 973, 985-990 (CA7 2019), cert. granted, judgment vacated, 591 U. S. ___ (2020), and Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F. 3d 1452, 1460 (CA8 1995).

[*285] They [****87] have disagreed about bans on certain dilation and evacuation procedures.55

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Compare Whole Womans Health v. Paxton, 10 F. 4th, at 435-436, with West Ala. Womens Center v. Williamson, 900 F. 3d 1310, 1319, 1327 (CA11 2018), and EMW Womens Surgical Center, P.S.C. v. Friedlander, 960 F. 3d 785, 806-808 (CA6 2020).

They have disagreed about when an increase in the time needed to reach a clinic constitutes an undue burden.56

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Compare Tucson Womans Clinic v. Eden, 379 F. 3d 531, 541 (CA9 2004), with Womens Medical Professional Corp. v. Baird, 438 F. 3d 595, 605 (CA6 2006), and Greenville Womens Clinic v. Bryant, 222 F. 3d 157, 171-172 (CA4 2000).

And they have disagreed on whether a State may regulate abortions performed because of the fetuss race, sex, or disability.57

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Compare Preterm-Cleveland v. McCloud, 994 F. 3d 512, 520-535 (CA6 2021), with Little Rock Family Planning Servs. v. Rutledge, 984 F. 3d 682, 688-690 (CA8 2021).

The Courts of Appeals have experienced particular difficulty in applying the large-fraction-of-relevant-cases test. They have criticized the assignment while reaching [**2275] unpredictable results.58

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See,e.g., Bristol Regional Womens Center, P.C. v. Slatery, 7 F. 4th 478, 485 (CA6 2021); Reproductive Health Servs. v. Strange, 3 F. 4th 1240, 1269 (CA11 2021) (per curiam); June Medical Servs., L.L.C. v. Gee, 905 F. 3d 787, 814 (CA5 2020), revd, 591 U. S. ___; Preterm-Cleveland, 994 F. 3d, at 534; Planned Parenthood of Ark. & Eastern Okla. v. Jegley, 864 F. 3d 953, 958-960 (CA8 2017); McCormack v. Herzog, 788 F. 3d 1017, 1029-1030 (CA9 2015); compare A Womans Choice-East Side Womens Clinic v. Newman, 305 F. 3d 684, 699 (CA7 2002) (Coffey, J., concurring), with id., at 708 (Wood, J., dissenting).

And they have candidly outlined Caseys many other problems.59

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See, e.g., Memphis Center for Reproductive Health v. Slatery, 14 F. 4th 409, 451 (CA6 2021) (Thapar, J., concurring in judgment in part and dissenting in part); Preterm-Cleveland, 994 F. 3d, at 524; Planned Parenthood of Ind. & Ky., Inc. v. Commissioner of Ind. State Dept. of Health, 888 F. 3d 300, 313 (CA7 2018) (Manion, J., concurring in judgment in part and dissenting in part); Planned Parenthood of Ind. & Ky., Inc. v. Box, 949 F. 3d 997, 999 (CA7 2019) (Easterbrook, J., concurring in denial of rehg en banc) (How much burden is undue is a matter of judgment, which depends on what the burden would be . . . and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators)); Nat'l Abortion Fed'n v. Gonzales, 437 F. 3d 278, 290-296 (CA2 2006) (Walker, C. J., concurring); Planned Parenthood of Rocky Mountains Servs. Corp. v. Owens, 287 F. 3d 910, 931 (CA10 2002) (Baldock, J., dissenting).

[*286] Caseys undue burden test has proved to be unworkable. [P]lucked from nowhere, 505 U. S., at 965, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of Rehnquist, C. J.), it seems calculated to perpetuate give-it-a-try litigation before judges assigned an unwieldy and inappropriate task. Lehnert v. Ferris Faculty Assn., 500 U. S. 507, 551, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). Continued adherence to that standard would undermine, not [***596] advance, the evenhanded, predictable, and consistent development of legal principles. Payne, 501 U. S., at 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720.

D

Effect on other areas of law. Roe and Casey have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those [****88] decisions. See Ramos, 590 U. S., at ___ (opinion of Kavanaugh, J.) (slip op., at 8); Janus, 585 U. S., at ___ (slip op., at 34).

Members of this Court have repeatedly lamented that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. Thornburgh, 476 U. S., at 814 (OConnor, J., dissenting); see Madsen v.

Womens Health Center, Inc., 512 U. S. 753, 785, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994) (Scalia, J., concurring in judgment in part and dissenting in part); Whole Womans Health, 579 U. S., at 631-633, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (Thomas, J., dissenting); id., at 645-666, 678-684, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (Alito, J., dissenting); June Medical, 591 U. S., at ___-___ (Gorsuch, J., dissenting) (slip op., at 1-15).

The Courts abortion cases have diluted the strict standard for facial constitutional challenges. 60

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Compare United States v. Salerno, 481 U. S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), with Casey, 505 U. S., at 895, 112 S. Ct. 2791, 120 L. Ed. 2d 674; see also supra, at 56-59.

They have ignored the [*287] Courts third-party standing doctrine.61

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Compare Warth v. Seldin, 422 U. S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), and Elk Grove Unified School Dist. v. Newdow, 542 U. S. 1, 15, 17-18, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004), with June Medical, 591 U. S., at ___ (Alito, J., dissenting) (slip op., at 28), id., at ___-___ (Gorsuch, J., dissenting) (slip op., at 6-7) (collecting cases), and Whole Womans Health, 579 U. S., at 632, n. 1, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (Thomas, J., dissenting).

[**2276] They have disregarded standard res judicata principles.62

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Compare id., at 598-606, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (majority opinion), with id., at 645-666, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (Alito, J., dissenting).

They have flouted the ordinary rules on the severability of unconstitutional provisions,63

63

Compare id., at 623-626, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (majority opinion), with id., at 644-645, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (Alito, J., dissenting).

as well as the rule that statutes should be read where possible to avoid unconstitutionality.64

64

See Stenberg v. Carhart, 530 U. S. 914, 977-978, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000) (Kennedy, J., dissenting); id., at 996-997, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (Thomas, J., dissenting).

And they have distorted First Amendment doctrines.65

65

See Hill v. Colorado, 530 U. S. 703, 741-742, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) (Scalia, J., dissenting); id., at 765, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (Kennedy, J., dissenting).

When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine has failed to deliver the principled and intelligible development [****89] of the law that stare decisis purports to secure. Id., at ___ [***597] (Thomas, J., dissenting) (slip op., at 19) (quoting Vasquez v. Hillery, 474 U. S. 254, 265, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)).

E

Reliance interests. We last consider whether overruling Roe and Casey will upend substantial reliance interests. See Ramos, 590 U. S., at ___ (opinion of Kavanaugh, J.) (slip op., at 15); Janus, 585 U. S., at ___-___ (slip op., at 34-35).

1

Traditional reliance interests arise where advance planning of great precision is most obviously a necessity. Casey, 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (joint opinion); see also Payne, 501 U. S., at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720. In Casey, the controlling opinion conceded [*288] that those traditional reliance interests were not implicated because getting an abortion is generally unplanned activity, and reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions. 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. For these reasons, we agree with the Casey plurality that conventional, concrete reliance interests are not present here.

2

Unable to find reliance in the conventional sense, the controlling opinion in Casey perceived a more intangible form of reliance. It wrote that people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail and that [****90] [t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. Ibid. But this Court is ill-equipped to assess generalized assertions about the national psyche. Id., at 957, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of Rehnquist, C. J.). Caseys notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in cases involving property and contract rights. Payne, 501 U. S., at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720.

[**2277] When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the Casey plurality is another

matter. That form of reliance depends on an empirical question that is hard for anyoneand in particular, for a courtto assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. Compare Brief for Petitioners 34-36; Brief for Women Scholars et al. as Amici Curiae 13-20, 29-41, with Brief for [*289] Respondents 36-41; Brief for National Womens [****91] Law Center et al. as Amici Curiae 15-32. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the Casey pluralitys speculations and weighing of the relative importance of the fetus and [***598] mother represent a departure from the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies. Ferguson v. Skrupa, 372 U. S. 726, 729-730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963).

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.66

66

See Dept. of Commerce, U. S. Census Bureau (Census Bureau), An Analysis of the 2018 Congressional Election 6 (Dec. 2021) (Fig. 5) (showing that women made up over 50 percent of the voting population in every congressional election between 1978 and 2018).

In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi,67

67

Census Bureau, QuickFacts, Mississippi (July 1, 2021), https:/ / www.census.gov/ quickfacts/ MS.

constituted 55.5 percent of the voters who cast ballots.68

68

Census Bureau, Voting and Registration in the Election of November 2020, Table 4b: Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2020, https:/ / www.census.gov/ data/ tables/ time-series/ demo/ voting-and-registration/ p20-585.html.

3

Unable to show concrete reliance on Roe and Casey themselves, the Solicitor General suggests that overruling [****92] those decisions would threaten the Courts precedents holding [*290] that the Due Process Clause protects other rights. Brief for United States 26 (citing Obergefell,

Lawrence, 539 U. S. 558, 135 S. Ct. 2584, 192 L. Ed. 2d 609; Griswold, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510). That is not correct for reasons we have already discussed. As even the Casey plurality recognized, [a]bortion is a unique act because it terminates life or potential life. 505 U. S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674; see also Roe, 410 U. S., at 159, 93 S. Ct. 705, 35 L. Ed. 2d 147 (abortion is inherently different from marital intimacy, marriage, or procreation). And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast [**2278] doubt on precedents that do not concern abortion.

IV

Having shown that traditional stare decisis factors do not weigh in favor of retaining Roe or Casey, we must address one final argument that featured prominently in the Casey plurality opinion.

The argument was cast in different terms, but stated simply, it was essentially as follows. The American peoples belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not social and political pressures. 505 U. S., at 865, 112 S. Ct. 2791, 120 L. Ed. 2d 674. There is a special danger that the [****93] public will perceive a decision as having been made for unprincipled reasons when the Court [***599] overrules a controversial watershed decision, such as Casey, 505 U. S., at 866-867, 112 S. Ct. 2791, 120 L. Ed. 2d 674. A decision overruling Roe would be perceived as having been made under fire and as a surrender to political pressure, 505 U. S., at 867, 112 S. Ct. 2791, 120 L. Ed. 2d 674, and therefore the preservation of public approval of the Court weighs heavily in favor of retaining Roe, see 505 U. S., at 869, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

This analysis starts out on the right foot but ultimately veers off course. The Casey plurality was certainly right that it is important for the public to perceive that our decisions [*291] are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the publics reaction to our work. Cf. Texas v. Johnson, 491 U. S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); Brown, 347 U. S. 483. That is true both when we initially decide a constitutional issue and when we consider whether to overrule a prior decision. As Chief Justice Rehnquist explained, The Judicial Branch derives its legitimacy, not from following public opinion, [****94] but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of stare decisis is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task. Casey, 505 U. S., at 963, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion concurring in judgment in part and

dissenting in part). In suggesting otherwise, the Casey plurality went beyond this Courts role in our constitutional system.

The Casey plurality call[ed] the contending sides of a national controversy to end their national division, and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. Id., at 867, 112 S. Ct. 2791, 120 L. Ed. 2d 674. That unprecedented claim exceeded the power vested in us by the Constitution. As Alexander Hamilton famously put it, the Constitution gives the judiciary neither Force nor Will. The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Our sole authority is to exercise judgmentwhich is to say, the authority to judge what the law means and how it should apply to the case at hand. Ibid. The Court has no authority to decree that an erroneous precedent is permanently exempt from evaluation [****95] under traditional stare decisis principles. A precedent of this Court is subject to the usual principles of [*292] stare decisis under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like Plessy and Lochner [**2279] would still be the law. That is not how stare decisis operates.

The Casey plurality also misjudged the practical limits of this Courts influence. Roe certainly did not succeed in ending division on the issue of abortion. On the contrary, Roe inflamed a national issue that has remained bitterly divisive for the past half century. Casey, 505 U. S., at 995, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of Scalia, J.); see also R. [***600] Ginsburg, Speaking in a Judicial Voice, 67 N. Y. U. L. Rev. 1185, 1208 (1992) (Roe may have halted a political process, prolonged divisiveness, and deferred stable settlement of the issue). And for the past 30 years, Casey has done the same.

Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. Indeed, in this case, 26 States expressly ask us to overrule Roe and Casey and to return the issue of abortion to the people and their elected representatives. This Courts inability to end debate on the issue should not have been surprising. This Court cannot bring about the permanent resolution [****96] of a rancorous national controversy simply by dictating a settlement and telling the people to move on. Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise raw judicial power. Doe, 410 U. S., at 222, 93 S. Ct. 739, 35 L. Ed. 2d 201 (White, J., dissenting).

We do not pretend to know how our political system or society will respond to todays decision overruling Roe and Casey. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly.

We therefore hold that the Constitution does not confer a right to abortion. Roe and Casey must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.

[*293] V

A

1

The dissent argues that we have abandon[ed] stare decisis, post, at 30, but we have done no such thing, and it is the dissents understanding of stare decisis that breaks with tradition. The dissents foundational contention is that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless [****97] the Court can poin[t] to major legal or factual changes undermining [the] decisions original basis. Post, at 37. To support this contention, the dissent claims that Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, and other landmark cases overruling prior precedents responded to changed law and to changed facts and attitudes that had taken hold throughout society. Post, at 43. The unmistakable implication of this argument is that only the passage of time and new developments justified those decisions. Recognition that the cases they overruled were egregiously wrong on the day they were handed down was not enough.

The Court has never adopted this strange new version of stare decisisand with good reason. Does the dissent really maintain that overruling Plessy was not justified until the country had experienced more than a half-century of state-sanctioned segregation and generations of Black school children had suffered all its effects? Post, at 44-45.

[**2280] Here is another example. On the dissents view, it must have been [***601] wrong for West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, to overrule Minersville School Dist. v. Gobitis, 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375, a bare three years after it was handed down. In both cases, children who were Jehovahs Witnesses refused on religious grounds to salute the flag or recite the pledge of allegiance. The Barnette Court [****98] did not claim that its reexamination of the issue was prompted by any intervening legal or factual developments, so if the Court had followed the dissents new version of stare decisis, it would [*294] have been compelled to adhere to Gobitis and countenance continued First Amendment violations for some unspecified period.

Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, stare decisis is not a straitjacket. And indeed, the dissent eventually admits that a decision could be overruled just because it is terribly wrong, though the dissent does not explain when that would be so. Post, at 45.

2

Even if the dissent were correct in arguing that a grossly wrong decision should (almost) never be overruled unless its mistake is later highlighted by major legal or factual changes, reexamination of Roe and Casey would be amply justified. We have already mentioned a number of post-Casey developments, see supra, at 33-34, 59-63, but the most profound change may be the failure of the Casey pluralitys call for the contending sides in the controversy about abortion to end their national division, 505 U. S., at 867, 112 S. Ct. 2791, 120 L. Ed. 2d 674. That has not happened, [****99] and there is no reason to think that another decision sticking with Roe would achieve what Casey could not.

The dissent, however, is undeterred. It contends that the very controversy surrounding Roe and Casey is an important stare decisis consideration that requires upholding those precedents. See post, at 55-57. The dissent characterizes Casey as a precedent about precedent that is permanently shielded from further evaluation under traditional stare decisis principles. See post, at 57. But as we have explained, Casey broke new ground when it treated the national controversy provoked by Roe as a ground for refusing to reconsider that decision, and no subsequent case has relied on that factor. Our decision today simply applies longstanding stare decisis factors instead of applying a version of the doctrine that seems to apply only in abortion cases.

[*295] 3

Finally, the dissent suggests that our decision calls into question Griswold, Eisenstadt, Lawrence, and Obergefell. Post, at 4-5, 26-27, n. 8. But we have stated unequivocally that [n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion. Supra, at 66. We have also explained why that is so: rights regarding contraception and same-sex relationships are [****100] inherently different from [***602] the right to abortion because the latter (as we have stressed) uniquely involves what Roe and Casey termed potential life. Roe, 410 U. S., at 150, 93 S. Ct. 705, 35 L. Ed. 2d 147 (emphasis deleted); Casey, 505 U. S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by appeals to a broader right to autonomy. Supra, at 32. It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, [**2281] there is a further point that the dissent ignores: Each precedent is subject to its own stare decisis analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.

B

1

We now turn to the concurrence in the judgment, which reproves us for deciding whether Roe and Casey should be retained or overruled. That opinion (which for convenience we will call simply the concurrence) recommends a more measured course, which it defends based on what it claims is a straightforward stare decisis analysis. Post, at 1 (opinion of Roberts, C. J.). The concurrence would leave for another day whether to reject any right to an abortion at all, post, at 7, [****101] and would hold only that if the Constitution protects any such right, the right ends once women have had a reasonable opportunity to obtain an abortion, post, at 1. The concurrence does not specify what period of time is sufficient [*296] to provide such an opportunity, but it would hold that 15 weeks, the period allowed under Mississippis law, is enoughat least absent rare circumstances. Post, at 2, 10.

There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party. As we have recounted, both parties and the Solicitor General have urged us either to reaffirm or overrule Roe and Casey. See supra, at 4-5. And when the specific approach advanced by the concurrence was broached at oral argument, both respondents and the Solicitor General emphatically rejected it. Respondents counsel termed it completely unworkable and less principled and less workable than viability. Tr. of Oral Arg. 54. The Solicitor General argued that abandoning the viability line would leave courts and others with no continued guidance. Id., at 101. What is more, the concurrence has not identified any of the more than 130 amicus briefs filed in this case that advocated [****102] its approach. The concurrence would do exactly what it criticizes Roe for doing: pulling out of thin air a test that [n]o party or amicus asked the Court to adopt. Post, at 3.

2

The concurrences most fundamental defect is its failure to offer any principled basis for its approach. The concurrence would discar[d] the rule from Roe and Casey that a womans right to terminate her pregnancy extends up to the point that the fetus is regarded as viable outside the womb. Post, at 2. [***603] But this rule was a critical component of the holdings in Roe and Casey, and stare decisis is a doctrine of preservation, not transformation, Citizens United v. Federal Election Commn, 558 U. S. 310, 384, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (Roberts, C. J., concurring). Therefore, a new rule that discards the viability rule cannot be defended on stare decisis grounds.

The concurrence concedes that its approach would not be available if the rationale of Roe and Casey were inextricably [*297] entangled with and dependent upon the viability standard. Post, at 7. But the concurrence asserts that the viability line is separable from the constitutional right they recognized, and can therefore be discarded without disturbing any past precedent. Post, at 7-8. That is simply incorrect.

Roes trimester rule was expressly tied to viability, [****103] see 410 U. S., at 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147, and viability played a critical role in later abortion decisions. For example,

[**2282] in Planned Parenthood of Central Mo. v. Danforth, 428 U. S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788, the Court reiterated Roes rule that a State may regulate an abortion to protect the life of the fetus and even may proscribe abortion at the stage subsequent to viability. 428 U. S., at 61, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (emphasis added). The Court then rejected a challenge to Missouris definition of viability, holding that the States definition was consistent with Roes. 428 U. S., at 63-64, 96 S. Ct. 2831, 49 L. Ed. 2d 788. If viability was not an essential part of the rule adopted in Roe, the Court would have had no need to make that comparison.

The holding in Colautti v. Franklin, 439 U. S. 379, 99 S. Ct. 675, 58 L. Ed. 2d 596, is even more instructive. In that case, the Court noted that prior cases had stressed viability and reiterated that [v]iability is the critical point under Roe. 439 U. S., at 388-389, 99 S. Ct. 675, 58 L. Ed. 2d 596. It then struck down Pennsylvanias definition of viability, id., at 389-394, 99 S. Ct. 675, 58 L. Ed. 2d 596, and it is hard to see how the Court could have done that if Roes discussion of viability was not part of its holding.

When the Court reconsidered Roe in Casey, it left no doubt about the importance of the viability rule. It described the rule as Roes central holding, 505 U. S., at 860, 112 S. Ct. 2791, 120 L. Ed. 2d 674, and repeatedly stated that the right it reaffirmed was the right of the woman to choose to have an abortion before viability. Id., at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (emphasis added). See id., at 871, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (The womans [****104] right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce (emphasis added)); id., at 872, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (A woman has a right to choose to terminate or [*298] continue her pregnancy before viability (emphasis added)); id., at 879, 112 S. Ct. 2791, 120 L. Ed. 2d 674 ([A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability (emphasis added)).

Our subsequent cases have continued to recognize the centrality of the viability rule. See Whole Womans Health, 579 U. S., at 589-590, 136 S. Ct. 2292, 195 L. Ed. 2d 665 ([A] provision of law is constitutionally [***604] invalid, if the purpose or effect of the provision is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability (emphasis deleted and added)); id., at 627, 136 S. Ct. 2292, 195 L. Ed. 2d 665 ([W]e now use viability as the relevant point at which a State may begin limiting womens access to abortion for reasons unrelated to maternal health (emphasis added)).

Not only is the new rule proposed by the concurrence inconsistent with Caseys unambiguous language, post, at 8, it is also contrary to the judgment in that case and later abortion cases. In Casey, the Court held that Pennsylvanias spousal-notification provision was facially [****105] unconstitutional, not just that it was unconstitutional as applied to abortions sought prior to the time when a woman has had a reasonable opportunity to choose. See 505 U. S., at 887-898, 112 S. Ct. 2791, 120 L. Ed. 2d 674. The same is true of Whole Womens Health, which held that certain rules that required physicians performing abortions to have admitting privileges at a nearby hospital were facially unconstitutional because they placed a substantial obstacle in the path of

women seeking a previability abortion. 579 U. S., at 591, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (emphasis added).

For all these reasons, stare decisis cannot justify the new reasonable opportunity rule propounded by the concurrence. If that rule is to become the law of the land, it must stand on its own, but the concurrence makes no attempt to show that this rule represents a correct interpretation of the Constitution. The concurrence does not claim that the right to a reasonable opportunity [**2283] to obtain an abortion is deeply rooted in this Nations history and tradition and implicit in the concept of ordered liberty. Glucksberg, 521 U. S., [*299] at 720-721, 117 S. Ct. 1997, 138 L. Ed. 2d 391. Nor does it propound any other theory that could show that the Constitution supports its new rule. And if the Constitution protects a womans right to obtain an abortion, the opinion does not explain [****106] why that right should end after the point at which all reasonable women will have decided whether to seek an abortion. While the concurrence is moved by a desire for judicial minimalism, we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. Citizens United, 558 U. S., at 375, 130 S. Ct. 876, 175 L. Ed. 2d 753 (Roberts, C. J., concurring). For the reasons that we have explained, the concurrences approach is not.

3

The concurrence would leave for another day whether to reject any right to an abortion at all, post, at 7, but another day would not be long in coming. Some States have set deadlines for obtaining an abortion that are shorter than Mississippis. See, e.g., Memphis Center for Reproductive Health v. Slatery, 14 F. 4th, at 414 (considering law with bans at cascading intervals of two to three weeks beginning at six weeks), rehg en banc granted, 18 F.4th 550 (CA6 2021). If we held only that Mississippis 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The measured course charted by the concurrence would be fraught [***605] with turmoil until the Court answered the question that the concurrence seeks to defer.

Even if the Court ultimately adopted the new rule suggested by the concurrence, [****107] we would be faced with the difficult problem of spelling out what it means. For example, if the period required to give women a reasonable opportunity to obtain an abortion were pegged, as the concurrence seems to suggest, at the point when a certain percentage of women make that choice, see post, at 1-2, 9-10, we would have to identify the relevant percentage. It would also be necessary to explain what the concurrence means when it refers to rare circumstances that might justify an exception. [*300] Post, at 10. And if this new right aims to give women a reasonable opportunity to get an abortion, it would be necessary to decide whether factors other than promptness in deciding might have a bearing on whether such an opportunity was available.

In sum, the concurrences quest for a middle way would only put off the day when we would be forced to confront the question we now decide. The turmoil wrought by Roe and Casey would be

prolonged. It is far better for this Court and the country to face up to the real issue without further delay.

VI

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate [****108] standard.

A

Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history. See supra, at 8-39.

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged [**2284] under the Constitution, courts cannot substitute their social and economic beliefs for the judgment of legislative bodies. Ferguson, 372 U. S., at 729-730; see also Dandridge v. Williams, 397 U. S. 471, 484-486, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970); United States v. Carolene Products Co., 304 U. S. 144, 152, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance. See, e.g., Board of Trustees of Univ. of Ala. v. Garrett, 531 U. S. 356, 365-368, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (treatment of the disabled); Glucksberg, 521 U. S., at 728 (assisted suicide); San Antonio Independent School Dist. v. Rodriguez, 411 U. S. 1, 32-35, 55, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (financing public education).

[*301] A law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity. Heller v. Doe, 509 U. S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. Id., at 320; FCC v. Beach Communications, Inc., [***606] 508 U. S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993); New Orleans v. Dukes, 427 U. S. 297, 303, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976) (per curiam); Williamson v. Lee Optical of Okla., Inc., 348 U. S. 483, 491, 75 S. Ct. 461, 99 L. Ed. 563 (1955). These legitimate interests include respect for and preservation of prenatal life at all stages of development, Gonzales, 550 U. S., at 157-158, 127 S. Ct. 1610, 167 L. Ed. 2d 480; the protection [****109] of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. See id., at 156-157, 127 S. Ct. 1610, 167 L. Ed. 2d 480; Roe, 410 U. S., at 150, 93 S. Ct. 705, 35 L. Ed. 2d 147; cf. Glucksberg, 521 U. S., at 728-731 (identifying similar interests).

B

These legitimate interests justify Mississippis Gestational Age Act. Except in a medical emergency or in the case of a severe fetal abnormality, the statute prohibits abortion if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks. Miss. Code Ann. 41-41-191(4)(b). The Mississippi Legislatures findings recount the stages of human prenatal development and assert the States interest in protecting the life of the unborn. 2(b)(i). The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession. 2(b)(i)(8); see also Gonzales, 550 U. S., at 135-143 (describing such procedures). These legitimate interests provide a rational basis for [****110] the Gestational Age Act, and it follows that respondents constitutional challenge must fail.

[*302] VII

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roeand Casey arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

[**2285] The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDICES

A

This appendix contains statutes criminalizing abortion at all stages of pregnancy in the States existing in 1868. The statutes appear in chronological order.

1. Missouri (1825):

Sec. 12. That every person who shall wilfully and maliciously administer or cause to be administered to or taken by any person, any poison, or other noxious, poisonous or destructive substance or liquid, with an intention to harm him or her thereby to murder, or thereby to cause or procure the miscarriage of [***607] any woman then being with child, and shall thereof be

duly convicted, shall suffer imprisonment not exceeding seven years, and be fined not exceeding [****111] three thousand dollars.69

69

1825 Mo. Laws p. 283 (emphasis added); see also, Mo. Rev. Stat., Art. II, 10, 36 (1835) (extending liability to abortions performed by instrument and establishing differential penalties for pre- and post-quickening abortion) (emphasis added).

2. Illinois (1827):

Sec. 46. Every person who shall wilfully and maliciously administer, or cause to be administered to, or taken by any person, any poison, or other noxious or [*303] destructive substance or liquid, with an intention to cause the death of such person, or to procure the miscarriage of any woman, then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and be fined in a sum not exceeding one thousand dollars.70

70

Ill. Rev. Code 46 (1827) (emphasis added); see also Ill. Rev. Code 46 (1833) (same); 1867 Ill. Laws p. 89 (extending liability to abortions by means of any instrument[s] and raising penalties to imprisonment not less than two nor more than ten years).

3. New York (1828):

Sec. 9. Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall be deemed guilty of manslaughter in the second degree.

Sec. 21. Every person who shall willfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or [****112] other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.71

71

N. Y. Rev. Stat., pt. 4, ch. 1, Tit. 2, 9 (emphasis added); Tit. 6, 21 (1828) (emphasis added); 1829 N. Y. Laws p. 19 (codifying these provisions in the revised statutes).

[*304] 4. Ohio (1834):

[**2286] Sec. 1. Be it enacted by the General Assembly of State of Ohio, That any physician, or other person, who shall wilfully administer to any pregnant woman any medicine, drug,

substance, or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

[***608] Sec. 2. That any physician, or other person, who shall administer to any woman pregnant with a quick [****113] child, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such child or mother in consequence thereof, be deemed guilty of high misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary not more than seven years, nor less than one year.72

72

1834 Ohio Laws pp. 20-21 (emphasis deleted and added).

5. Indiana (1835):

Sec. 3. That every person who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall upon conviction be punished [*305] by imprisonment in the county jail any term of [time] not exceeding twelve months and be fined any sum not exceeding five hundred dollars.73

73

1835 Ind. Laws p. 66 (emphasis added).

6. Maine (1840):

Sec. 13. Every person, who shall administer to any woman pregnant with child, whether such child be quick or not, any [****114] medicine, drug or substance whatever, or shall use or employ any instrument or other means whatever, with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done as necessary to preserve the life of the mother, shall be punished by imprisonment in the state prison, not more than five years, or by fine, not exceeding one thousand dollars, and imprisonment in the county jail, not more than one year.

Sec. 14. Every person, who shall administer to any woman, pregnant with child, whether such child shall be quick or not, any medicine, drug or substance whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of such

woman, unless the same shall have been done, as necessary to preserve her life, shall be punished by imprisonment in the county jail, not more than one year, or by fine, not exceeding one thousand dollars.74

74

Me. Rev. Stat., Tit. 12, ch. 160, 13-14 (1840) (emphasis added).

7. Alabama (1841):

Sec. 2. Every person who shall wilfully administer to any pregnant woman [**2287] any medicines, drugs, substance or thing whatever, or shall use and employ any instrument or means whatever with intent thereby to procure the miscarriage [****115] of such woman, unless the same shall be necessary to preserve her life, or shall have been advised by a respectable physician to be necessary for that [*306] purpose, shall upon [***609] conviction, be punished by fine not exceeding five hundred dollars, and by imprisonment in the county jail, not less than three, and not exceeding six months.75

75

1841 Ala. Acts p. 143 (emphasis added).

8. Massachusetts (1845):

Ch. 27. Whoever, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow, any poison, drug, medicine or noxious thing, or shall cause or procure her with like intent, to take or swallow any poison, drug, medicine or noxious thing; and whoever maliciously and [***610] without lawful justification, shall use any instrument or means whatever with the like intent, and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned not more than twenty years, nor less than five years in the State Prison; and if the woman doth not die in consequence thereof, such [****116] offender shall be guilty of a misdemeanor, and shall be punished by imprisonment not exceeding seven years, nor less than one year, in the state prison or house of correction, or common jail, and by fine not exceeding two thousand dollars.76

76

1845 Mass. Acts p. 406 (emphasis added).

9. Michigan (1846):

Sec. 33. Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been [*307] advised by two physicians to be necessary for

such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter.

Sec. 34. Every person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment [****117] in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.77

77

Mich. Rev. Stat., Tit. 30, ch. 153, 33-34 (1846) (emphasis added).

10. Vermont (1846):

Sec. 1. Whoever maliciously, or without lawful justification with intent to cause and procure the miscarriage of a woman, then pregnant with child, shall administer [***611] to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing, or shall cause or procure her, with like intent, to take or swallow any poison, [**2288] drug, medicine or noxious thing, and whoever maliciously and without lawful justification, shall use any instrument or means whatever, with the like intent, [**2289] and every person, with the like intent, knowingly aiding and assisting such offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned in the state prison, not more than ten years, nor less than five years; and if the woman does not die in consequence thereof, such offenders shall be deemed guilty of a misdemeanor; and shall be punished by imprisonment in the state prison not exceeding [*308] three years, nor less than one year, and pay a fine not exceeding two hundred dollars.78

78

1846 Vt. Acts & Resolves pp. 34-35 (emphasis added).

11. Virginia [****118] (1848):

Sec. 9. Any free person who shall administer to any pregnant woman, any medicine, drug or substance whatever, or use or employ any instrument or other means with intent thereby to destroy the child with which such woman may be pregnant, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, unless the same shall have been done to preserve the life of such woman, shall be punished, if the death of a quick child be thereby produced, by confinement in the penitentiary, for not less than one nor more than five years, or if the death of a child, not quick, be thereby produced, by confinement in the jail for not less than one nor more than twelve months.79

79

1848 Va. Acts p. 96 (emphasis added).

12. New Hampshire (1849):

Sec. 1. That every person, who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or means whatever with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by [****119] imprisonment in the county jail not more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment at the discretion of the Court.

Sec. 2. Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument [*309] or means whatever, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for such purpose, shall, upon conviction, be punished by fine not exceeding one thousand dollars, and by confinement to hard labor not less than one year, nor more than ten years.80

80

1849 N. H. Laws p. 708 (emphasis added).

13. New Jersey (1849):

That if any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine, or noxious thing; and if any person or persons maliciously, and without lawful justification, shall use any instrument or means whatever, with the like intent; and every person, with [****120] the like intent, knowingly aiding and assisting such offender or offenders, shall, on conviction thereof, be adjudged guilty of a high misdemeanor; and if the woman die in consequence thereof, shall be punished by fine, not exceeding one thousand dollars, or imprisonment at hard labour for any term not exceeding fifteen years, or both; and if the woman doth not die in consequence thereof, such offender shall, on conviction thereof, be adjudged guilty of a misdemeanor, and be punished by fine, not exceeding five hundred dollars, or imprisonment at hard labour, for any term not exceeding seven years, or both.81

81

1849 N. J. Laws pp. 266-267 (emphasis added).

14. California (1850):

Sec. 45. And every person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments [*310] whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof

duly convicted, shall be punished by imprisonment in the State Prison for a term not less than two years, nor more than five years: Provided, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the [****121] miscarriage of any woman in order to save her life.82

82

1850 Cal. Stats. p. 233 (emphasis added and deleted).

15. Texas (1854):

Sec. 1. If any person, with the intent to procure the miscarriage of any woman being with child, unlawfully and maliciously shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or any means whatever, with like intent, every such offender, and every person counselling or aiding or abetting such offender, shall be punished by confinement to hard labor in the Penitentiary not exceeding ten years.83

83

1854 Tex. Gen. Laws p. 58 (emphasis added).

16. Louisiana (1856):

Sec. 24. Whoever shall feloniously administer or cause to be administered any drug, potion, or any other thing to any woman, for the purpose of procuring a premature delivery, and whoever shall administer or cause to be administered to any woman pregnant with child, any drug, potion, or any other thing, for the purpose of procuring abortion, or a premature delivery, shall be imprisoned at hard labor, for not less than one, nor more than ten years.84

84

La. Rev. Stat. 24 (1856) (emphasis added).

17. Iowa (1858):

Sec. 1. That every person who shall willfully administer to any pregnant woman, any medicine, drug, substance [*311] or thing whatever, or shall use or employ any instrument [***612] or other means [****122] whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman, shall upon conviction thereof, be punished by imprisonment in the county jail for a term of not exceeding one year, and be fined in a sum not exceeding one thousand dollars.85

85

1858 Iowa Acts p. 93 (codified in Iowa Rev. Laws 4221) (emphasis added).

18. Wisconsin (1858):

[**2290] Sec. 11. Every person who shall administer to any woman pregnant with a child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.86

86

Wis. Rev. Stat., ch. 164, 11, ch. 169, 58 (1858) (emphasis added).

Sec. 58. Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman to take, any medicine, drug, or substance or thing whatever, or shall use or employ any instrument or other means whatever, or advise or procure the same to be used, with intent thereby to procure the miscarriage of [****123] any such woman, shall upon conviction be punished by imprisonment in a county jail, not more than one year nor less than three months, or by fine, not exceeding five hundred dollars, or by both fine and imprisonment, at the discretion of the court.

[*312] 19. Kansas (1859):

Sec. 10. Every person who shall administer to any woman, pregnant with a quick child, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree.

Sec. 37. Every physician or other person who shall wilfully administer to any pregnant woman any medicine, drug or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall, upon conviction, be adjudged guilty of a misdemeanor, [****124] and punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.87

87

1859 Kan. Laws pp. 233, 237 (emphasis added).

20. Connecticut (1860):

Sec. 1. That any person with intent to procure the miscarriage or [***613] abortion of any woman, shall give or administer to her, prescribe for her, or advise, or direct, or cause or procure her to take, any medicine, drug or substance whatever, or use or advise the use of any instrument, or other means whatever, with the like intent, unless the same shall have been necessary to preserve the life of such woman, or of her unborn child, shall be deemed guilty of felony, and

upon due conviction thereof shall be punished by imprisonment in the Connecticut [*313] state prison, not more than five years or less than one year, or by a fine of one thousand dollars, or both, at the discretion of the court.88

88

1860 Conn. Pub. Acts p. 65 (emphasis added).

21. Pennsylvania (1860):

[**2291] Sec. 87. If any person shall unlawfully administer to any woman, pregnant or quick with child, or supposed and believed to be pregnant or quick with child, any drug, poison, or other substance whatsoever, or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage [****125] of such woman, and such woman, or any child with which she may be quick, shall die in consequence of either of said unlawful acts, the person so offending shall be guilty of felony, and shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.

Sec. 88. If any person, with intent to procure the miscarriage of any woman, shall unlawfully administer to her any poison, drug or substance whatsoever, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, such person shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.89

89

1861 Pa. Laws pp. 404-405 (emphasis added).

22. Rhode Island (1861):

Sec. 1. Every person who shall be convicted of wilfully administering to any pregnant woman, or to any woman supposed by such person to be pregnant, anything whatever, or shall employ any means whatever, with intent thereby to procure the miscarriage of such [*314] woman, unless the same is necessary to preserve her life, shall be imprisoned not [****126] exceeding one year, or fined not exceeding one thousand dollars.90

90

1861 R. I. Acts & Resolves p. 133 (emphasis added).

23. Nevada (1861):

Sec. 42. [E]very person who shall administer, or cause to be administered or taken, any medicinal substance, or shall use, or cause to be used, any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison, for a term not less than two years,

nor more than five years; provided, that no physician shall be affected by the last clause of this section, who, in the discharge of his [***614] professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life.91

91

1861 Nev. Laws p. 63 (emphasis added and deleted).

24. West Virginia (1863):

West Virginias Constitution adopted the laws of Virginia when it became its own State:

Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature.92

92

W. Va. Const., Art. XI, 8 (1862).

The Virginia law in force in 1863 stated:

Sec. 8. Any free person who [****127] shall administer to, or cause to be taken, by a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy [**2292] such child, or produce such abortion or [*315] miscarriage, shall be confined in the penitentiary not less than one, nor more than five years. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child.93

93

Va. Code, Tit. 54, ch. 191, 8 (1849) (emphasis added); see also W. Va. Code, ch. 144, 8 (1870) (similar).

25. Oregon (1864):

Sec. 509. If any person shall administer to any woman pregnant with child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter.94

94

Ore. Gen. Laws, Crim. Code, ch. 43, 509 (1865).

26. Nebraska (1866):

Sec. 42. Every person who shall willfully and maliciously administer or cause to be administered to or taken by any person, any poison or other noxious or destructive substance or liquid, with the intention to cause the death of such person, and being [****128] thereof duly convicted, shall be punished by confinement in the penitentiary for a term not less than one year and not more than seven years. And every person who shall administer or cause to be administered or taken, any such poison, substance or liquid, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years in the penitentiary, and fined in a sum not exceeding one thousand dollars.95

95

Neb. Rev. Stat., Tit. 4, ch. 4, 42 (1866) (emphasis added); see also Neb. Gen. Stat., ch. 58, 6, 39 (1873) (expanding criminal liability for abortions by other means, including instruments).

[*316] 27. Maryland (1868):

Sec. 2. And be it enacted, That any person who shall knowingly [***615] advertise, print, publish, distribute or circulate, or knowingly cause to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference containing words or language, giving or conveying any notice, hint or reference to any person, or to the name of any person real or fictitious, from whom; or to any place, house, shop or office, when any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever; for the purpose of producing abortion, or who shall knowingly sell, or cause to be sold [****129] any such poison, drug, mixture, preparation, medicine or noxious thing or instrument of any kind whatever; or where any advice, direction, information or knowledge may be obtained for the purpose of causing the miscarriage or abortion of any woman pregnant with child, at any period of her pregnancy, or shall knowingly sell or cause to be sold any medicine, or who shall knowingly use or cause to be used any means whatsoever for that purpose, shall be punished by imprisonment in the penitentiary for not less than three years, or by a fine of not less than five hundred nor more than one thousand dollars, or by both, in the discretion of the Court; and in case of fine being imposed, one half thereof shall be paid to the State of Maryland, and one-half to the School [**2293] Fund of the city or county where the offence was committed; provided, however, that nothing herein contained shall be construed so as to prohibit the supervision and management by a regular practitioner of medicine of all cases of abortion occurring spontaneously, either as the result of accident, constitutional debility, or any other natural cause, or the production of abortion by a regular practitioner of medicine when, after [****130] consulting with one or more respectable physicians, [*317] he shall be satisfied that the foetus is dead, or that no other method will secure the safety of the mother.96

96

1868 Md. Laws p. 315 (emphasis deleted and added).

28. Florida (1868):

Ch. 3, Sec. 11. Every person who shall administer to any woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.

Ch. 8, Sec. 9. Whoever, with intent to procure miscarriage of any woman, unlawfully administers to her, or advises, or prescribes for her, or causes to be taken by her, any poison, drug, medicine, or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall, if the woman does not die in consequence thereof, be punished by imprisonment in the State penittentiary not exceeding [***616] seven years, nor less than [****131] one year, or by fine not exceeding one thousand dollars.97

97

1868 Fla. Laws, ch. 1637, pp. 64, 97 (emphasis added).

29. Minnesota (1873):

Sec. 1. That any person who shall administer to any woman with child, or prescribe for any such woman, or suggest to, or advise, or procure her to take any medicine, drug, substance or thing whatever, or who shall use or employ, or advise or suggest the use or employment of any instrument or other means or force whatever, with intent thereby to cause or procure the miscarriage [*318] or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for a term not more than ten (10) years nor less than three (3) years.

Sec. 2. Any person who shall administer to any woman with child, or prescribe, or procure, or provide for any such woman, or suggest to, or advise, or procure any such woman to take any medicine, drug, substance or thing whatever, or shall use or employ, or suggest, or advise the use or employment of any instrument or [****132] other means or force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, shall upon conviction thereof be punished by imprisonment in the state prison for a term not more than two years nor less than one year, or by fine not more than five thousand dollars nor less than five hundred dollars, or by such [**2294] fine and imprisonment both, at the discretion of the court.98

98

1873 Minn. Laws pp. 117-118 (emphasis added).

30. Arkansas (1875):

Sec. 1. That it shall be unlawful for any one to administer or prescribe medicine or drugs to any woman with child, with intent to produce an abortion, or premature delivery of any foetus before the period of quickening, or to produce or attempt to produce such abortion by any other means; and any person offending against the provision of this section, shall be fined in any sum not exceeding one thousand ($1000) dollars, and imprisoned in the penitentiary not less than one (1) nor more than five (5) years; provided, that this section shall not apply to any abortion produced by any regular practicing [*319] physician, for the purpose of saving the mothers life.99

99

1875 Ark. Acts p. 5 (emphasis added and deleted).

31. Georgia (1876):

Sec. 2. That every person who shall administer to any woman pregnant [****133] with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the [***617] death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder.

Sec. 3. That any person who shall wilfully administer to any pregnant woman any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia.100

100

1876 Ga. Acts & Resolutions p. 113 (emphasis added).

32. North Carolina (1881):

Sec. 1. That every person who shall wilfully administer to any woman either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall [****134] use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother, shall be guilty of a felony, and [*320] shall be imprisoned in the state penitentiary for not less than one year nor more than ten years, and be fined at the discretion of the court.

Sec. 2. That every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or any thing whatsoever, with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, shall be guilty of

a misdemeanor, and, on conviction, shall be imprisoned in the jail or state penitentiary for not less than one year or more than five years, and fined at the discretion of the court.101

101

1881 N.C. Sess. Laws pp. 584-585 (emphasis added).

[**2295] 33. Delaware (1883):

Sec. 2. Every person who, with the intent to procure the miscarriage of any pregnant woman or women supposed by such person to be pregnant, unless the same be necessary to preserve her life, shall administer to her, advise, or prescribe for her, or cause to be taken by [****135] her any poison, drug, medicine, or other noxious thing, or shall use any instrument or other means whatsoever, or shall aid, assist, or counsel any person so intending to procure a miscarriage, whether said miscarriage be accomplished or not, shall be guilty of a felony, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars and be imprisoned for a term not exceeding five years nor less than one year.102

102

1883 Del. Laws, ch. 226 (emphasis added).

34. Tennessee (1883):

Sec. 1. That every person who shall administer to any woman pregnant with child, whether such child be [*321] quick or not, any medicine, drug or substance whatever, or [***618] shall use or employ any instrument, or other means whatever with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done with a view to preserve the life of the mother, shall be punished by imprisonment in the penitentiary not less than one nor more than five years.

Sec. 2. Every person who shall administer any substance with the intention to procure the miscarriageof a woman then being with child, or shall use or employ any instrument or other means with such intent, unless the same [****136] shall have been done with a view to preserve the life of such mother, shall be punished by imprisonment in the penitentiary not less than one nor more than three years.103

103

1883 Tenn. Acts pp. 188-189 (emphasis added).

35. South Carolina (1883):

Sec. 1. That any person who shall administer to any woman with child, or prescribe for any such woman, or suggest to or advise or procure her to take, any medicine, substance, drug or thing whatever, or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to

preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the Penitentiary for a term not more than twenty years nor less than five years.

Sec. 2. That any person who shall administer to any woman with child, or prescribe or procure or provide [*322] for any such woman, or advise or procure any such woman to take, any medicine, drug, substance or thing whatever, or [****137] shall use or employ or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, shall, upon conviction thereof, be punished by imprisonment in the Penitentiary for a term not more than five years, or by fine not more than five thousand dollars, or by such fine and imprisonment both, at the discretion of the Court; but no conviction shall be [**2296] had under the provisions of Section 1 or 2 of this Act upon the uncorroborated evidence of such woman.104

104

1883 S.C. Acts pp. 547-548 (emphasis added).

36. Kentucky (1910):

Sec. 1. It shall be unlawful for any person to prescribe or administer to any pregnant woman, or to any woman whom he has reason to believe pregnant, at any time during the period of gestation, any drug, medicine or substance, whatsoever, with the intent thereby to procure the miscarriage of such woman, or with like intent, to use any instrument or means whatsoever, unless such miscarriage is necessary to preserve her life; and any person so offending, shall be punished by a fine of not less than five hundred [***619] nor more than one thousand dollars, and imprisoned in the State prison for not less than one nor [****138] more than ten years.

Sec. 2. If by reason of any of the acts described in Section 1 hereof, the miscarriage of such woman is procured, and she does miscarry, causing the death of the unborn child, whether before or after quickening time, the person so offending shall be guilty of a felony, and confined in the penitentiary for not less than two, nor more than twenty-one years.

[*323] Sec. 3. If, by reason of the commission of any of the acts described in Section 1 hereof, the woman to whom such drug or substance has been administered, or upon whom such instrument has been used, shall die, the person offending shall be punished as now prescribed by law, for the offense of murder or manslaughter, as the facts may justify.

Sec. 4. The consent of the woman to the performance of the operation or administering of the medicines or substances, referred to, shall be no defense, and she shall be a competent witness in any prosecution under this act, and for that purpose she shall not be considered an accomplice.105

105

1910 Ky. Acts pp. 189-190 (emphasis added).

37. Mississippi (1952):

Sec. 1. Whoever, by means of any instrument, medicine, drug, or other means whatever shall willfully and knowingly cause any woman pregnant with child to abort or miscarry, [****139] or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mothers life, shall be imprisoned in the state penitentiary no less than one (1) year, nor more than ten (10) years; or if the death of the mother results therefrom, the person procuring, causing, or attempting to procure or cause the abortion or miscarriage shall be guilty of murder.

Sec. 2. No act prohibited in section 1 hereof shall be considered as necessary for the preservation of the mothers life unless upon the prior advice, in writing, of two reputable licensed physicians.

Sec. 3. The license of any physician or nurse shall be automatically revoked upon conviction under the provisions of this act.[106]

[106]

1952 Miss. Laws p. 289 (codified at Miss. Code Ann. 2223 (1956) (emphasis added)).

[*324] B

This appendix contains statutes criminalizing abortion at all stages in each of the Territories that became States and in [**2297] the District of Columbia. The statutes appear in chronological order of enactment.

1. Hawaii (1850):

Sec. 1. Whoever maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing to a woman then with child, in order to produce her mis-carriage, or maliciously uses any instrument [****140] or other means with like intent, shall, if such woman be then quick with child, be punished by fine not exceeding one thousand [***620] dollars and imprisonment at hard labor not more than five years. And if she be then not quick with child, shall be punished by a fine not exceeding five hundred dollars, and imprisonment at hard labor not more than two years.

Sec. 2. Where means of causing abortion are used for the purpose of saving the life of the woman, the surgeon or other person using such means is lawfully justified.[107]

[107]

Haw. Penal Code, ch. 12, 1-2 (1850) (emphasis added). Hawaii became a State in 1959. See Presidential Proclamation No. 3309, 73 Stat. c74-c75.

2. Washington (1854):

Sec. 37. Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, on conviction thereof, be imprisoned in the penitentiary not more than twenty years, nor less than one year.

[*325] Sec. 38. Every person who shall administer to any pregnant woman, or to any woman who he supposes to be pregnant, any medicine, drug, or substance whatever, or shall [****141] use or employ any instrument, or other means, thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall on conviction thereof, be imprisoned in the penitentiary not more than five years, nor less than one year, or be imprisoned in the county jail not more than twelve months, nor less than one month, and be fined in any sum not exceeding one thousand dollars.108

108

Terr. of Wash. Stat., ch. 2, 37-38, p. 81 (1854) (emphasis added). Washington became a State in 1889. See Presidential Proclamation No. 8, 26 Stat. 1552-1553.

3. Colorado (1861):

Sec. 42. [E]very person who shall administer substance or liquid, or who shall use or cause to be used any instrument, of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and fined in a sum not exceeding one thousand dollars; and if any woman, by reason of such treatment, shall die, the person or persons administering, or causing to be administered, such poison, substance or liquid, or using or causing to be used, any instrument, as aforesaid, shall be deemed guilty of manslaughter, and if convicted, be punished accordingly.109

109

1861 Terr. of Colo. Gen. Laws pp. 296-297. Colorado became a State in 1876. See Presidential Proclamation No. 7, 19 Stat. 665-666.

4. Idaho (1864):

Sec. 42. [E]very person who shall administer or cause to be administered, or [****142] taken, any medicinal substance, or shall use or cause to be used, any instruments [**2298] whatever, with the intention to procure the miscarriage [*326] of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the territorial prison for a term not less than two [***621] years, nor more than five years: Provided, That no physician shall be

effected by the last clause of this section, who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life.110

110

1863-1864 Terr. of Idaho Laws p. 443. Idaho became a State in 1890. See 26 Stat. 215-219.

5. Montana (1864):

Sec. 41. [E]very person who shall administer, or cause to be administered, or taken, any medicinal substance, or shall use, or cause to be used, any instruments whatever, with the intention to produce the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years nor more than five years. Provided, That no physician shall be affected by the last clause of this section, who in the discharge of his professional duties deems it necessary to produce the miscarriage of any woman in order to save her life.111

111

1864 Terr. of Mont. Laws p. 184. Montana became a State in 1889. See Presidential Proclamation No. 7, 26 Stat. 1551-1552.

6. Arizona [****143] (1865):

Sec. 45. [E]very person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years nor more than five years: Provided, that no [*327] physician shall be affected by the last clause of this section, who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life.112

112

Howell Code, ch. 10, 45 (1865). Arizona became a State in 1912. See Presidential Proclamation of Feb. 14, 1912, 37 Stat. 1728-1729.

7. Wyoming (1869):

Sec. 25. [A]ny person who shall administer, or cause to be administered, or taken, any such poison, substance or liquid, or who shall use, or cause to be used, any instrument of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, in the penitentiary, and fined in a sum not exceeding one thousand dollars; and if any woman by reason of such treatment shall die, the person, or persons, administering, or causing to [****144] be administered such poison, substance, or liquid, or using or causing to be used, any instrument, as aforesaid, shall be deemed guilty of manslaughter, and if convicted, be punished by imprisonment

for a term not less than three years in the penitentiary, and fined in a sum not exceeding one thousand dollars, unless it appear that such miscarriage was procured or attempted by, or under advice of a physician or surgeon, with intent to save the life [***622] of such woman, or to prevent serious and permanent bodily injury to her.113

113

1869 Terr. of Wyo. Gen. Laws p. 104 (emphasis added). Wyoming became a State in 1890. See 26 Stat. 222-226.

[**2299] 8. Utah (1876):

Sec. 142. Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses [*328] or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the penitentiary not less than two nor more than ten years.114

114

Terr. of Utah Comp. Laws 1972 (1876) (emphasis added). Utah became a State in 1896. See Presidential Proclamation No. 9, 29 Stat. 876-877.

9. North Dakota (1877):

Sec. 337. Every person who administers to any pregnant woman, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever [****145] with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the territorial prison not exceeding three years, or in a county jail not exceeding one year.115

115

Dakota Penal Code 337 (1877) (codified at N. D. Rev. Code 7177 (1895)), and S. D. Rev. Penal Code Ann. 337 (1883). North and South Dakota became States in 1889. See Presidential Proclamation No. 5, 26 Stat. 1548-1551.

10. South Dakota (1877):Same as North Dakota.

11. Oklahoma (1890):

Sec. 2187. Every person who administers to any pregnant woman, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the Territorial prison not exceeding [*329] three years, or in a county jail not exceeding one year.116

116

Okla. Stat. 2187 (1890) (emphasis added). Oklahoma became a State in 1907. See Presidential Proclamation of Nov. 16, 1907, 35 Stat. 2160-2161.

12. Alaska (1899):

Sec. 8. That if any person shall administer to any woman pregnant with a child any medicine, drug, or substance whatever, or shall use any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter, and shall [****146] be punished accordingly.117

117

1899 Alaska Sess. Laws ch. 2, p. 3 (emphasis added). Alaska became a State in 1959. See Presidential Proclamation No. 3269, 73 Stat. c16.

13. New Mexico (1919):

Sec. 1. Any person who shall administer to any pregnant woman any medicine, drug or substance [***623] whatever, or attempt by operation or any other method or means to produce an abortion or miscarriage upon such woman, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than two thousand ($2,000.00) Dollars, nor less than five hundred ($500.00) Dollars, or imprisoned in the penitentiary for a period of not less than one nor more than five years, or by both such fine and [**2300] imprisonment in the discretion of the court trying the case.

Sec. 2. Any person committing such act or acts mentioned in section one hereof which shall culminate in the death of the woman shall be deemed guilty of murder in the second degree; Provided, however, an abortion may be produced when two physicians licensed to practice in [*330] the State of New Mexico, in consultation, deem it necessary to preserve the life of the woman, or to prevent serious and permanent bodily injury.

Sec. 3. For the purpose of the act, the term pregnancy is defined as that condition of a woman from the date of conception to the birth of her child.118

118

1919 N. M. Laws p. 6 (emphasis added). New Mexico became a State in 1912. See Presidential Proclamation of Jan. 6, 1912, 37 Stat. 1723-1724.

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District of Columbia [****147] (1901):

Sec. 809. Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.119

119

809, 31 Stat. 1322 (1901) (emphasis added).

Concur by: THOMAS; KAVANAUGH; ROBERTS

Concur

Justice Thomas, concurring.

I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. Respondents invoke one source for that right: the Fourteenth Amendments guarantee that no State shall deprive any person of life, liberty, or property without due process of law. The Court well explains why, under our substantive due process precedents, the purported right to abortion is not a form of liberty protected by the Due Process Clause. Such a right is neither deeply rooted in this Nations history and tradition nor implicit in the concept of ordered liberty. Washington v. Glucksberg, 521 U. S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (internal [*331] quotation marks omitted). [T]he idea that the Framers of the Fourteenth Amendment understood the Due Process Clause [****148] to protect a right to abortion is farcical. June Medical Services L.L.C. v. Russo, 591 U. S. ___, ___, 140 S. Ct. 2103, 207 L. Ed. 2d 566, 617 (2020) (Thomas, J., dissenting).

[***624] I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that due process of law merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. See, e.g., Johnson v. United States, 576 U. S. 591, 623, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (Thomas, J., concurring in judgment). Other sources, by contrast, suggest that due process of law prohibited legislatures from authorizing the deprivation of a persons life, liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England. United States v. Vaello Madero, 596 U. S. ___, ____, 142 S. Ct. 1539, 212 L. Ed. 2d 496, 504 (2022) (Thomas, J., concurring) (internal quotation [**2301] marks omitted). Either way, the Due Process Clause at most guarantees process. It does not, as the Courts substantive

due process cases suppose, forbi[d] the government to infringe certain fundamental liberty interests at all, no matter what process is provided. Reno v. Flores, 507 U. S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); see also, e.g., Collins v. Harker Heights, 503 U. S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992).

As I have previously explained, substantive due process is an oxymoron that lack[s] any basis in the Constitution. [****149] Johnson, 576 U. S., at 607-608, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (opinion of Thomas, J.); see also, e.g., Vaello Madero, 596 U. S., at ___, 142 S. Ct. 1539, 212 L. Ed. 2d 496, at 504 (Thomas, J., concurring) ([T]ext and history provide little support for modern substantive due process doctrine). The notion that a constitutional provision that guarantees only process before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words. McDonald v. Chicago, 561 U. S. 742, 811, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (Thomas, J., concurring in part and concurring [*332] in judgment); see also United States v. Carlton, 512 U. S. 26, 40, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (Scalia, J., concurring in judgment). The resolution of this case is thus straightforward. Because the Due Process Clause does not secure any substantive rights, it does not secure a right to abortion.

The Court today declines to disturb substantive due process jurisprudence generally or the doctrines application in other, specific contexts. Cases like Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (right of married persons to obtain contraceptives) *

*

Griswold v. Connecticut purported not to rely on the Due Process Clause, but rather reasoned that specific guarantees in the Bill of Rightsincluding rights enumerated in the First, Third, Fourth, Fifth, and Ninth Amendmentshave penumbras, formed by emanations, that create zones of privacy. 381 U. S., at 484, 85 S. Ct. 1678, 14 L. Ed. 2d 510. Since Griswold, the Court, perhaps recognizing the facial absurdity of Griswolds penumbral argument, has characterized the decision as one rooted in substantive due process. See, e.g., Obergefell v. Hodges, 576 U. S. 644, 663, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); Washington v. Glucksberg, 521 U. S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).

; Lawrence v. Texas, 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (right to engage in private, consensual sexual acts); and Obergefell v. Hodges, [***625] 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (right to same-sex marriage), are not at issue. The Courts abortion cases are unique, see ante, at 31-32, 66, 71-72, and no party has asked us to decide whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, McDonald, 561 U. S., at 813, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (opinion of Thomas, J.). Thus, I agree that [n]othing [****150] in [the Courts] opinion should be understood to cast doubt on precedents that do not concern abortion. Ante, at 66.

For that reason, in future cases, we should reconsider all of this Courts substantive due process precedents, including Griswold, Lawrence, and Obergefell. Because any substantive due process decision is demonstrably erroneous, Ramos v. Louisiana, 590 U. S. ___, ___, 140 S. Ct. 1390, 206 L. Ed. 2d 583, 618 (2020) (Thomas, J., concurring in judgment), we have a duty to correct

the error established in those precedents, Gamble v. United States, 587 U. S. ___, ___, 139 S. Ct. 1960, 204 L. Ed. 2d 322, 348 (2019) (Thomas, J., concurring). [*333] After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions [**2302] guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Courts substantive due process cases are privileges or immunities of citizens of the United States protected by the Fourteenth Amendment. Amdt. 14, 1; see McDonald, 561 U. S., at 806, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (opinion of Thomas, J.). To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects any rights that are not enumerated in the Constitution and, if so, how to identify those [****151] rights. See id., at 854, 130 S. Ct. 3020, 177 L. Ed. 2d 894. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach. See ante, at 15, n. 22.

Moreover, apart from being a demonstrably incorrect reading of the Due Process Clause, the legal fiction of substantive due process is particularly dangerous. McDonald, 561 U. S., at 811, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (opinion of Thomas, J.); accord, Obergefell, 576 U. S., at 722, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (Thomas, J., dissenting). At least three dangers favor jettisoning the doctrine entirely.

First, substantive due process exalts judges at the expense of the People from whom they derive their authority. Ibid. Because the Due Process Clause speaks only to process, the Court has long struggled to define what substantive rights it protects. Timbs v. Indiana, 586 U. S. ___, ___, 139 S. Ct. 682, 203 L. Ed. 2d 11, 21 (2019) (Thomas, J., concurring in judgment) (internal quotation marks omitted). In practice, the Courts approach for identifying those fundamental rights unquestionably involves policymaking rather than neutral legal analysis. Carlton, 512 U. S., at 41-42, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (opinion of Scalia, J.); see also McDonald, 561 U. S., at 812, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (opinion of Thomas, [***626] J.) (substantive due process is a jurisprudence devoid of a guiding [*334] principle). The Court divines new rights in line with its own, extraconstitutional value preferences [****152] and nullifies state laws that do not align with the judicially created guarantees. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U. S. 747, 794, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986) (White, J., dissenting).

Nowhere is this exaltation of judicial policymaking clearer than this Courts abortion jurisprudence. In Roe v. Wade, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the Court divined a right to abortion because it fe[lt] that the Fourteenth Amendments concept of personal liberty included a right of privacy that is broad enough to encompass a womans decision whether or not to terminate her pregnancy. Id., at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147. In Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), the Court likewise identified an abortion guarantee in the liberty protected by the Fourteenth Amendment, but, rather than a right of privacy, it invoked an ethereal right to define ones own concept of existence, of meaning, of the universe, and of the mystery of human life. Id.,

at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. As the Courts preferred manifestation of liberty changed, so, too, did the test used to protect it, as Roes author lamented. See Casey, 505 U. S., at 930, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part) ([T]he Roe framework is far more administrable, and far less manipulable, than the undue burden standard).

Now, in this case, the nature of the purported liberty supporting the abortion right has shifted yet again. Respondents [**2303] and the United States propose no fewer than three different interests [****153] that supposedly spring from the Due Process Clause. They include bodily integrity, personal autonomy in matters of family, medical care, and faith, Brief for Respondents 21, and womens equal citizenship, Brief for United States as Amicus Curiae 24. That 50 years have passed since Roe and abortion advocates still cannot coherently articulate the right (or rights) at stake proves [*335] the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification.

Second, substantive due process distorts other areas of constitutional law. For example, once this Court identifies a fundamental right for one class of individuals, it invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others. See, e.g., Eisenstadt v. Baird, 405 U. S. 438, 453-454, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) (relying on Griswold to invalidate a state statute prohibiting distribution of contraceptives to unmarried persons). Statutory classifications implicating certain nonfundamental rights, meanwhile, receive only cursory review. See, e.g., Armour v. Indianapolis, 566 U. S. 673, 680, 132 S. Ct. 2073, 182 L. Ed. 2d 998 (2012). Similarly, this Court deems unconstitutionally vague or overbroad those laws that impinge on its preferred rights, while letting slide those laws that implicate supposedly lesser values. See, e.g., Johnson, 576 U. S., at 618-621, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (opinion [****154] of Thomas, J.); United States v. Sineneng-Smith, 590 U. S. ___, ___-___, 140 S. Ct. 1575, [***627] 206 L. Ed. 2d 866 (2020) (Thomas, J., concurring) (slip op., at 3-5). In fact, our vagueness doctrine served as the basis for the first draft of the majority opinion in Roe v. Wade, and it since has been deployed . . . to nullify even mild regulations of the abortion industry. Johnson, 576 U. S., at 620-621, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (opinion of Thomas, J.). Therefore, regardless of the doctrinal context, the Court often demand[s] extra justifications for encroachments on preferred rights while relax[ing] purportedly higher standards of review for less-preferred rights. Whole Womans Health v. Hellerstedt, 579 U. S. 582, 640-642, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016) (Thomas, J., dissenting). Substantive due process is the core inspiration for many of the Courts constitutionally unmoored policy judgments.

Third, substantive due process is often wielded to disastrous ends. Gamble, 587 U. S., at ___, 139 S. Ct. 1960, 204 L. Ed. 2d 322, at 354 (Thomas, J., concurring). For instance, in Dred Scott v. Sandford, 60 U.S. 393, 19 How. 393, 15 L. Ed. 691 (1857), the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate [*336] slaves brought into the federal territories. See id., at 452, 19 How. 393, 15 L. Ed. 691. While Dred Scott was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, Obergefell, 576 U. S., at 696, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (Roberts, C. J.,

dissenting), that overruling was [p]urchased at the price of immeasurable human suffering, Adarand Constructors, Inc. v. Pena, 515 U. S. 200, 240, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (Thomas, J., concurring [****155] in part and concurring in judgment). Now today, the Court rightly overrules Roe and Casey two of this Courts most notoriously incorrect substantive due process decisions, Timbs, 586 U. S., at ___, 139 S. Ct. 682, 203 L. Ed. 2d 11, at 22 (opinion of Thomas, J.)after more than 63 million abortions have been performed, see National Right to Life Committee, Abortion Statistics (Jan. 2022), https:/ / www.nrlc.org/ uploads/ factsheets/ FS01AbortionintheUS.pdf. The harm caused by [**2304] this Courts forays into substantive due process remains immeasurable.

***

Because the Court properly applies our substantive due process precedents to reject the fabrication of a constitutional right to abortion, and because this case does not present the opportunity to reject substantive due process entirely, I join the Courts opinion. But, in future cases, we should follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away. Carlton, 512 U. S., at 42, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (opinion of Scalia, J.). Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest [****156] opportunity.

Justice Kavanaugh, concurring.

I write separately to explain my additional views about why Roe was wrongly decided, why Roe should be overruled at this time, and the future implications of todays decision.

[*337] [***628] I

Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.

On the one side, many pro-choice advocates forcefully argue that the ability to obtain an abortion is critically important for womens personal and professional lives, and for womens health. They contend that the widespread availability of abortion has been essential for women to advance in society and to achieve greater equality over the last 50 years. And they maintain that women must have the freedom to choose for themselves whether to have an abortion.

On the other side, many pro-life advocates forcefully argue that a fetus is a human life. They contend that all human life should be protected as a matter of human dignity and fundamental morality. And they stress that a significant percentage [****157] of Americans with pro-life views are women.

When it comes to abortion, one interest must prevail over the other at any given point in a pregnancy. Many Americans of good faith would prioritize the interests of the pregnant woman. Many other Americans of good faith instead would prioritize the interests in protecting fetal lifeat least unless, for example, an abortion is necessary to save the life of the mother. Of course, many Americans are conflicted or have nuanced views that may vary depending on the particular time in pregnancy, or the particular circumstances of a pregnancy.

The issue before this Court, however, is not the policy or morality of abortion. The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion. To be sure, this Court has held that the Constitution protects unenumerated rights that are deeply rooted in this Nations [*338] history and tradition, and implicit in the concept of ordered liberty. But a right to abortion is not deeply rooted in American history and tradition, as the Court today thoroughly explains.1

1

The Courts opinion today also recounts the pre-constitutional common-law history in England. That English history supplies background information on the issue of abortion. As I see it, the dispositive point in analyzing American history and tradition for purposes of the Fourteenth Amendment inquiry is that abortion was largely prohibited in most American States as of 1868 when the Fourteenth Amendment was ratified, and that abortion remained largely prohibited in most American States until Roe was decided in 1973.

[**2305] On the question [****158] of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congresslike the numerous other difficult questions of American social and economic policy that the Constitution does not address.

Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. The nine unelected Members of this Court do not possess the constitutional [***629] authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States.

Instead of adhering to the Constitutions neutrality, the Court in Roe took sides on the issue and unilaterally decreed that abortion was legal throughout the United States up to the point of viability (about 24 weeks of pregnancy). The Courts decision today properly returns the Court to a position of neutrality and restores the peoples authority to address the issue of abortion through the processes of democratic self-government established by the Constitution.

Someamicus briefs argue that the [****159] Court today should not only overrule Roe and return to a position of judicial neutrality on abortion, but should go further and hold that the [*339] Constitution outlaws abortion throughout the United States. No Justice of this Court has ever advanced that position. I respect those who advocate for that position, just as I respect those who argue that this Court should hold that the Constitution legalizes pre-viability abortion throughout the United States. But both positions are wrong as a constitutional matter, in my view. The Constitution neither outlaws abortion nor legalizes abortion.

To be clear, then, the Courts decision today does notoutlaw abortion throughout the United States. On the contrary, the Courts decision properly leaves the question of abortion for the people and their elected representatives in the democratic process. Through that democratic process, the people and their representatives may decide to allow or limit abortion. As Justice Scalia stated, the States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 979, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (opinion concurring in judgment in part and dissenting in part).

Todays decision therefore does not prevent the [****160] numerous States that readily allow abortion from continuing to readily allow abortion. That includes, if they choose, the amici States supporting the plaintiff in this Court: New York, California, Illinois, Maine, Massachusetts, Rhode Island, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Michigan, Wisconsin, Minnesota, New Mexico, Colorado, Nevada, Oregon, Washington, and Hawaii. By contrast, other States may maintain laws that more strictly limit abortion. After todays decision, all of the States may evaluate the competing interests and decide how to address this consequential issue.2

2

In his dissent in Roe, Justice Rehnquist indicated that an exception to a States restriction on abortion would be constitutionally required when an abortion is necessary to save the life of the mother. See Roe v. Wade, 410 U. S. 113, 173, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Abortion statutes traditionally and currently provide for an exception when an abortion is necessary to protect the life of the mother. Some statutes also provide other exceptions.

[*340] [**2306] In arguing for a constitutional right to abortion that would override the peoples choices in the democratic process, the plaintiff Jackson Womens Health Organization and its amici emphasize that the Constitution does not freeze the American peoples rights as of 1791 or 1868. I fully agree. To begin, I agree that constitutional [***630] rights apply to situations that were unforeseen in 1791 or 1868such as applying the First Amendment to the Internet or the Fourth Amendment to cars. Moreover, the Constitution authorizes the creation of new rightsstate and federal, statutory and constitutional. But when it comes to [****161] creating new rights, the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitutionstate legislation, state constitutional amendments, federal legislation, and federal constitutional amendments. See generally Amdt. 9; Amdt. 10; Art.

I, 8; Art. V; J. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 7-21, 203-216 (2018); A. Amar, Americas Constitution: A Biography 285-291, 315-347 (2005).

The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views. As Justice Rehnquist stated, this Court has not been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court. Furman v. Georgia, 408 U. S. 238, 467, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (dissenting opinion); see Washington v. Glucksberg, 521 U. S. 702, 720-721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997); Cruzan v. Director, Mo. Dept. of Health, 497 U. S. 261, 292-293, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (Scalia, J., concurring).

[*341] This Court therefore does not possess the authority either to declare a constitutional right to abortion or to declare a constitutional prohibition of abortion. See Casey, 505 U. S., at 953, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Rehnquist, C. J., concurring [****162] in judgment in part and dissenting in part); id., at 980, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of Scalia, J.); Roe v. Wade, 410 U. S. 113, 177, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (Rehnquist, J., dissenting); Doe v. Bolton, 410 U. S. 179, 222, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) (White, J., dissenting).

In sum, the Constitution is neutral on the issue of abortion and allows the people and their elected representatives to address the issue through the democratic process. In my respectful view, the Court in Roe therefore erred by taking sides on the issue of abortion.

II

The more difficult question in this case is stare decisisthat is, whether to overrule the Roe decision.

The principle of stare decisis requires respect for the Courts precedents and for the accumulated wisdom of the judges who have previously addressed the same issue. Stare decisis is rooted in Article III of the Constitution and is fundamental to the American judicial system and to the stability of American law.

Adherence to precedent is the norm, and stare decisis imposes a high bar before [**2307] this Court may overrule a precedent. This Courts history shows, however, that stare decisis is not absolute, and indeed cannot be absolute. Otherwise, as the Court today explains, many long-since-overruled cases such as Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896); Lochner v. New [***631] York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905); Minersville School Dist. v. Gobitis, 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940); and Bowers v. Hardwick, 478 U. S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), would never have been overruled and would still be the law.

In his canonicalBurnet opinion in 1932, Justice [****163] Brandeis stated that in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. [*342] Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 406-407, 52 S. Ct. 443, 76 L. Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (1932) (dissenting opinion). That description of the Courts practice remains accurate today. Every current Member of this Court has voted to overrule precedent. And over the last 100 years beginning with Chief Justice Tafts appointment in 1921, every one of the 48 Justices appointed to this Court has voted to overrule precedent. Many of those Justices have voted to overrule a substantial number of very significant and longstanding precedents. See, e.g., Obergefell v. Hodges, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (overruling Baker v. Nelson); Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (overruling Plessy v. Ferguson); West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937) (overruling Adkins v. Childrens Hospital of D. C. and in effect Lochner v. New York).

But that history alone does not answer the critical question: When precisely should the Court overrule an erroneous constitutional precedent? The history of stare decisis in this Court establishes that a constitutional precedent may be overruled only when (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, [****164] and (iii) overruling the prior decision would not unduly upset legitimate reliance interests. See Ramos v. Louisiana, 590 U. S. ___, ___-___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) (Kavanaugh, J., concurring in part) (slip op., at 7-8).

Applying those factors, I agree with the Court today that Roe should be overruled. The Court in Roe erroneously assigned itself the authority to decide a critically important moral and policy issue that the Constitution does not grant this Court the authority to decide. As Justice Byron White succinctly explained, Roe was an improvident and extravagant exercise of the power of judicial review because nothing in the language or history of the Constitution supports a constitutional right to abortion. Bolton, 410 U. S., at 221-222, 93 S. Ct. 739, 35 L. Ed. 2d 201 (dissenting opinion).

[*343] Of course, the fact that a precedent is wrong, even egregiously wrong, does not alone mean that the precedent should be overruled. But as the Court today explains, Roe has caused significant negative jurisprudential and real-world consequences. By taking sides on a difficult and contentious issue on which the Constitution is neutral, Roe overreached and exceeded this Courts constitutional authority; gravely distorted the Nations understanding of this Courts proper constitutional role; and caused significant harm to what Roe itself [****165] recognized as the States important and legitimate interest in protecting fetal life. 410 U. S., at 162, 93 S. Ct. 705, 35 L. Ed. 2d 147. All of that explains why tens of millions of Americansand [***632] the 26 States that explicitly [**2308] ask the Court to overrule Roedo not accept Roe even 49 years later. Under the Courts longstanding stare decisis principles, Roe should be overruled.3

3

I also agree with the Courts conclusion today with respect to reliance. Broad notions of societal reliance have been invoked in support of Roe, but the Court has not analyzed reliance in that way in the past. For example, American businesses and workers relied on Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), and Adkins v. Childrens Hospital of D. C., 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923), to construct a laissez-faire economy that was free of substantial regulation. In West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937), the Court nonetheless overruled Adkins and in effect Lochner. An entire region of the country relied on Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), to enforce a system of racial segregation. In Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Court overruled Plessy. Much of American society was built around the traditional view of marriage that was upheld in Baker v. Nelson, 409 U. S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972), and that was reflected in laws ranging from tax laws to estate laws to family laws. In Obergefell v. Hodges, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), the Court nonetheless overruled Baker.

But the stare decisis analysis here is somewhat more complicated because of Casey. In 1992, 19 years after Roe, Casey acknowledged the continuing dispute over Roe. The Court sought to find common ground that would resolve the abortion debate and end the national controversy. After careful and thoughtful consideration, the Casey plurality reaffirmed [*344] a right to abortion through viability (about 24 weeks), while also allowing somewhat more regulation of abortion than Roe had allowed.4

4

As the Court today notes, Caseys approach to stare decisis pointed in two directions. Casey reaffirmed Roes viability line, but it expressly overruled the Roe trimester framework and also expressly overruled two landmark post-Roe abortion casesAkron v. Akron Center for Reproductive Health, Inc., 462 U. S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U. S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986). See Casey, 505 U. S., at 870, 872-873, 878-879, 882, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Casey itself thus directly contradicts any notion of absolute stare decisis in abortion cases.

I have deep and unyielding respect for the Justices who wrote the Casey plurality opinion. And I respect the Casey pluralitys good-faith effort to locate some middle ground or compromise that could resolve this controversy for America.

But as has become increasingly evident over time, Caseys well-intentioned effort did not resolve the abortion debate. The national division has not ended. In recent years, [****166] a significant number of States have enacted abortion restrictions that directly conflict with Roe. Those laws cannot be dismissed as political stunts or as outlier laws. Those numerous state laws collectively represent the sincere and deeply held views of tens of millions of Americans who continue to fervently believe that allowing abortions up to 24 weeks is far too radical and far too extreme, and does not sufficiently account for what Roe itself recognized as the States important and legitimate

interest in protecting fetal life. 410 U. S., at 162, 93 S. Ct. 705, 35 L. Ed. 2d 147. In this case, moreover, a majority of the States26 in allask the Court to overrule Roe and return the abortion issue to the States.

In short, Caseys stare decisis analysis rested in part on a predictive judgment about the future development of state laws and of the peoples views on the abortion issue. But that predictive judgment has not borne out. As the [***633] Court today explains, the experience over the last 30 years conflicts [*345] with Caseys predictive judgment and [**2309] therefore undermines Caseys precedential force.5

5

To be clear, public opposition to a prior decision is not a basis for overruling (or reaffirming) that decision. Rather, the question of whether to overrule a precedent must be analyzed under this Courts traditional stare decisis factors. The only point here is that Casey adopted a special stare decisis principle with respect to Roe based on the idea of resolving the national controversy and ending the national division over abortion. The continued and significant opposition to Roe, as reflected in the laws and positions of numerous States, is relevant to assessing Casey on its own terms.

In any event, although Casey is relevant to the stare decisis analysis, the question of whether to overrule Roe cannot be dictated by Casey alone. To illustrate [****167] that stare decisis point, consider an example. Suppose that in 1924 this Court had expressly reaffirmed Plessy v. Ferguson and upheld the States authority to segregate people on the basis of race. Would the Court in Brown some 30 years later in 1954 have reaffirmed Plessy and upheld racially segregated schools simply because of that intervening 1924 precedent? Surely the answer is no.

In sum, I agree with the Courts application today of the principles of stare decisis and its conclusion that Roe should be overruled.

III

After todays decision, the nine Members of this Court will no longer decide the basic legality of pre-viability abortion for all 330 million Americans. That issue will be resolved by the people and their representatives in the democratic process in the States or Congress. But the parties arguments have raised other related questions, and I address some of them here.

First is the question of how this decision will affect other precedents involving issues such as contraception and marriagein particular, the decisions in Griswold v. Connecticut, [*346] 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); Eisenstadt v. Baird, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); and Obergefell v. Hodges, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). I emphasize

what the Court today states: Overruling Roe does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents. [****168]

Second, as I see it, some of the other abortion-related legal questions raised by todays decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before todays decision takes effect? In my view, the answer is no based on the Due Process Clause or the Ex Post Facto Clause. Cf. Bouie v. City of Columbia, 378 U. S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

Other abortion-related legal questions may emerge in the future. But this Court will no longer decide the fundamental question of whether abortion must be allowed throughout the United States through 6 weeks, or [***634] 12 weeks, or 15 weeks, or 24 weeks, or some other line. The Court will no longer decide how to evaluate the interests of the pregnant woman and the interests in protecting fetal life throughout pregnancy. Instead, those difficult moral and policy questions will be decided, as the Constitution dictates, by the people and their elected representatives through the constitutional processes of democratic self-government.

***

[**2310] The Roe Court took sides on a consequential [****169] moral and policy issue that this Court had no constitutional authority to decide. By taking sides, the Roe Court distorted the Nations understanding of this Courts proper role in the American constitutional system and thereby damaged the Court as an institution. As Justice Scalia explained, Roe destroyed [*347] the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. Casey, 505 U. S., at 995, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion concurring in judgment in part and dissenting in part).

The Courts decision today properly returns the Court to a position of judicial neutrality on the issue of abortion, and properly restores the peoples authority to resolve the issue of abortion through the processes of democratic self-government established by the Constitution.

To be sure, many Americans will disagree with the Courts decision today. That would be true no matter how the Court decided this case. Both sides on the abortion issue believe sincerely and passionately in the rightness of their cause. Especially in those difficult and fraught circumstances, the Court must scrupulously adhere to the Constitutions neutral position on the issue of abortion.

Since [****170] 1973, more than 20 Justices of this Court have now grappled with the divisive issue of abortion. I greatly respect all of the Justices, past and present, who have done so. Amidst extraordinary controversy and challenges, all of them have addressed the abortion issue in good

faith after careful deliberation, and based on their sincere understandings of the Constitution and of precedent. I have endeavored to do the same.

In my judgment, on the issue of abortion, the Constitution is neither pro-life nor pro-choice. The Constitution is neutral, and this Court likewise must be scrupulously neutral. The Court today properly heeds the constitutional principle of judicial neutrality and returns the issue of abortion to the people and their elected representatives in the democratic process.

Chief Justice Roberts, concurring in the judgment.

We granted certiorari to decide one question: Whether all pre-viability prohibitions on elective abortions are unconstitutional. [*348] Pet. for Cert. i. That question is directly implicated here: Mississippis Gestational Age Act, Miss. Code Ann. 41-41-191 (2018), generally prohibits abortion after the fifteenth week of pregnancyseveral weeks before a fetus is regarded as viable outside [****171] the womb. In urging our review, Mississippi stated that its case was an ideal vehicle to reconsider the bright-line viability rule, and that a judgment in [***635] its favor would not require the Court to overturn Roe v. Wade, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Pet. for Cert. 5.

Today, the Court nonetheless rules for Mississippi by doing just that. I would take a more measured course. I agree with the Court that the viability line established by Roe and Casey should be discarded under a straightforward stare decisis analysis. That line never made any sense. Our abortion precedents describe the right at issue as a womans right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any furthercertainly not all the way to viability. Mississippis law allows a woman three months to obtain an abortion, well [**2311] beyond the point at which it is considered late to discover a pregnancy. See A. Ayoola, Late Recognition of Unintended Pregnancies, 32 Pub. Health Nursing 462 (2015) (pregnancy is discoverable and ordinarily discovered by six weeks of gestation). I see no sound basis for questioning the adequacy of that opportunity.

But that is all I would [****172] say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating [*349] a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of stare decisis. The Courts opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us.

I

Let me begin with my agreement with the Court, on the only question we need decide here: whether to retain the rule from Roe and Casey that a womans right to terminate her pregnancy extends up to the point that the fetus is regarded as viable outside the womb. I agree that this rule should be discarded.

First, this Court seriously erred in Roe in adopting viability as the earliest point at which a State may legislate to advance [****173] its substantial interests in the area of abortion. See ante, at 50-53. Roe set forth a rigid three-part framework anchored to viability, which more closely resembled a regulatory code than a body of constitutional law. That framework, moreover, came out of thin air. Neither the Texas statute challenged in Roe nor the Georgia statute at issue in its companion case, Doe v. Bolton, 410 U. S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), included any gestational age limit. No party or amicus asked the Court to adopt a bright line viability rule. And as for Casey, arguments for or against the viability rule played only a de minimis role in the parties briefing and in the oral argument. See Tr. of Oral Arg. 17-18, 51 (fleeting discussion of the viability rule).

It is thus hardly surprising that neither Roe nor Casey made a persuasive [***636] or even colorable argument for why the time for terminating a pregnancy must extend to viability. The Courts jurisprudence on this issue is a textbook illustration of the perils of deciding a question neither presented nor briefed. As has been often noted, Roes defense of the line boiled down to the circular assertion that the States interest is compelling only when an unborn child can live [*350] outside the womb, because that is when the unborn child [****174] can live outside the womb. See 410 U. S., at 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147; see also J. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 924 (1973) (Roes reasoning mistake[s] a definition for a syllogism).

Twenty years later, the best defense of the viability line the Casey plurality could conjure up was workability. See 505 U. S., at 870, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But see ante, at 53 (opinion of the Court) (discussing the difficulties in applying the viability standard). Although the plurality attempted to add more content by opining that it might be said that a woman who fails to act before viability has consented to the States intervention on behalf of the developing child, Casey, 505 U. S., at 870, 112 S. Ct. 2791, 120 L. Ed. 2d 674, that mere suggestion provides no basis for choosing viability as the critical [**2312] tipping point. A similar implied consent argument could be made with respect to a law banning abortions after fifteen weeks, well beyond the point at which nearly all women are aware that they are pregnant, A. Ayoola, M. Nettleman, M. Stommel, & R. Canady, Time of Pregnancy Recognition and Prenatal Care Use: A Population-based Study in the United States 39 (2010) (Pregnancy Recognition). The dissent, which would retain the viability line, offers no justification for it either.

This Courts jurisprudence since Casey, moreover, has eroded the underpinnings of the viability line, such [****175] as they were. United States v. Gaudin, 515 U. S. 506, 521, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). The viability line is a relic of a time when we recognized only two state interests warranting regulation of abortion: maternal health and protection of potential life. Roe, 410 U. S., at 162-163, 93 S. Ct. 705, 35 L. Ed. 2d 147. That changed with Gonzales v. Carhart, 550 U. S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007). There, we recognized a broader array of interests, such as drawing a bright line that clearly distinguishes abortion and infanticide, maintaining societal ethics, and preserving the integrity of the medical profession. Id., at 157-160, 127 S. Ct. 1610, 167 L. Ed. 2d 480. The viability line has nothing to do with advancing such permissible goals. Cf. id., at 171, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (Ginsburg, [*351] J., dissenting) (Gonzales blur[red] the line, firmly drawn in Casey, between previability and postviability abortions); see also R. Beck, Gonzales, Casey, and the Viability Rule, 103 Nw. U. L. Rev. 249, 276-279 (2009).

Consider, for example, statutes passed in a number of jurisdictions that forbid abortions after twenty weeks of pregnancy, premised on the theory that a fetus can feel pain at that stage of development. See, e.g., Ala. Code 26-23B-2 (2018). Assuming that prevention of fetal pain is a legitimate state interest after Gonzales, there seems to be no reason why viability would be relevant to the permissibility of such laws. The same is [***637] true of laws designed to protect[ ] the integrity and ethics of the medical profession and restrict procedures [****176] likely to coarsen society to the dignity of human life. Gonzales, 550 U. S., at 157, 127 S. Ct. 1610, 167 L. Ed. 2d 480. Mississippis law, for instance, was premised in part on the legislatures finding that the dilation and evacuation procedure is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession. Miss. Code Ann. 41-41-191(2)(b)(i)(8). That procedure accounts for most abortions performed after the first trimestertwo weeks before the period at issue in this caseand involve[s] the use of surgical instruments to crush and tear the unborn child apart. Ibid.; see also Gonzales, 550 U. S., at 135, 127 S. Ct. 1610, 167 L. Ed. 2d 480. Again, it would make little sense to focus on viability when evaluating a law based on these permissible goals.

In short, the viability rule was created outside the ordinary course of litigation, is and always has been completely unreasoned, and fails to take account of state interests since recognized as legitimate. It is indeed telling that other countries almost uniformly eschew a viability line. Ante, at 53 (opinion of the Court). Only a handful of countries, among them China and North Korea, permit elective abortions after twenty weeks; the rest have coalesced around a 12-week line. See The Worlds Abortion Laws, Center for Reproductive Rights (Feb. 23, [****177] 2021) (online source archived [*352] at www.supremecourt.gov) (Canada, China, Iceland, Guinea-Bissau, the Netherlands, North Korea, Singapore, and Vietnam permit elective abortions after twenty weeks). The Court rightly rejects the arbitrary viability rule today.

[**2313] II

None of this, however, requires that we also take the dramatic step of altogether eliminating the abortion right first recognized in Roe. Mississippi itself previously argued as much to this Court in this litigation.

When the State petitioned for our review, its basic request was straightforward: clarify whether abortion prohibitions before viability are always unconstitutional. Pet. for Cert. 14. The State made a number of strong arguments that the answer is no, id., at 15-26arguments that, as discussed, I find persuasive. And it went out of its way to make clear that it was not asking the Court to repudiate entirely the right to choose whether to terminate a pregnancy: To be clear, the questions presented in this petition do not require the Court to overturn Roe or Casey. Id., at 5. Mississippi tempered that statement with an oblique one-sentence footnote intimating that, if the Court could not reconcile Roe and Casey with current facts or [****178] other cases, it should not retain erroneous precedent. Pet. for Cert. 5-6, n. 1. But the State never argued that we should grant review for that purpose.

After we granted certiorari, however, Mississippi changed course. In its principal brief, the State bluntly announced that the Court should overrule Roe and Casey. The Constitution does not protect a right to an abortion, it argued, and a State should be able to prohibit elective abortions if a rational basis supports doing so. See Brief for Petitioners 12-13.

[***638] The Court now rewards that gambit, noting three times that the parties presented no half-measures and argued that we must either reaffirm or overrule Roe and Casey. [*353] Ante, at 5, 8, 72. Given those two options, the majority picks the latter.

This framing is not accurate. In its brief on the merits, Mississippi in fact argued at length that a decision simply rejecting the viability rule would result in a judgment in its favor. See Brief for Petitioners 5, 38-48. But even if the State had not argued as much, it would not matter. There is no rule that parties can confine this Court to disposing of their case on a particular groundlet alone when review was sought and granted on a different one. [****179] Our established practice is instead not to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Washington State Grange v. Washington State Republican Party, 552 U. S. 442, 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (quoting Ashwander v. TVA, 297 U. S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring)); see also United States v. Raines, 362 U. S. 17, 21, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

Following that fundamental principle of judicial restraint, Washington State Grange, 552 U. S., at 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151, we should begin with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand. See, e.g., Office of Personnel Management v. Richmond, 496 U. S. 414, 423, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990). It is only where there is no valid narrower ground of decision that we should go on to address a broader issue, such as whether a constitutional decision should be overturned. See Federal Election Commn v. Wisconsin Right to Life, Inc., 551 U. S. 449, 482, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (opinion of Roberts, C. J.) (declining to address the claim that a

constitutional decision should be overruled when the appellant prevailed on its narrower constitutional argument).

[**2314] Here, there is a clear path to deciding this case correctly without overruling Roe all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all. See Webster v. Reproductive Health Services, 492 U. S. 490, 518, 521, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989) (plurality opinion) [*354] (rejecting Roes viability line as rigid and indeterminate, while also finding no occasion to revisit the holding of Roe that, under the Constitution, [****180] a State must provide an opportunity to choose to terminate a pregnancy).

Of course, such an approach would not be available if the rationale of Roe and Casey was inextricably entangled with and dependent upon the viability standard. It is not. Our precedents in this area ground the abortion right in a womans right to choose. See Carey v. Population Services Intl, 431 U. S. 678, 688-689, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (underlying foundation of the holdings in Roe and Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), was the right of decision in matters of childbearing); Maher v. Roe, 432 U. S. 464, 473, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977) (Roe and other cases recognize a constitutionally protected interest in making certain [***639] kinds of important decisions free from governmental compulsion (internal quotation marks omitted)); id., at 473-474, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (Roe did not declare an unqualified constitutional right to an abortion, but instead protected the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy (internal quotation marks omitted)); Webster, 492 U. S., at 520, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (plurality opinion) (Roe protects the claims of a woman to decide for herself whether or not to abort a fetus she [is] carrying); Gonzales, 550 U. S., at 146, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy). If that is the basis for Roe, Roes viability line should be scrutinized from the same perspective. And there is nothing [****181] inherent in the right to choose that requires it to extend to viability or any other point, so long as a real choice is provided. See Webster, 492 U. S., at 519, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (plurality opinion) (finding no reason why the States interest in protecting potential human life should come into existence only at the point of viability).

To be sure, in reaffirming the right to an abortion, Casey termed the viability rule Roes central holding. 505 U. S., at 860, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Other cases of ours have repeated that language. [*355] See, e.g., Gonzales, 550 U. S., at 145-146, 127 S. Ct. 1610, 167 L. Ed. 2d 480. But simply declaring it does not make it so. The question in Roe was whether there was any right to abortion in the Constitution. See Brief for Appellants and Brief for Appellees, in Roe v. Wade, O. T. 1971, No. 70-18. How far the right extended was a concern that was separate and subsidiary, andnot surprisinglyentirely unbriefed.

The Court in Roe just chose to address both issues in one opinion: It first recognized a right to choose to terminate [a] pregnancy under the Constitution, see 410 U. S., at 129-159, 93 S. Ct.

705, 35 L. Ed. 2d 147, and then, having done so, explained that a line should be drawn at viability such that a State could not proscribe abortion before that period, see id., at 163, 93 S. Ct. 705, 35 L. Ed. 2d 147. The viability line is a separate rule fleshing out the metes and bounds of Roes core holding. Applying [****182] principles of stare decisis, I would excise that additional ruleand only that rulefrom our jurisprudence.

The majority lists a number of cases that have stressed the importance of the [**2315] viability rule to our abortion precedents. See ante, at 73-74. I agree thatwhether it was originally holding or dictumthe viability line is clearly part of our past precedent, and the Court has applied it as such in several cases since Roe. Ante, at 73. My point is that Roe adopted two distinct rules of constitutional law: one, that a woman has the right to choose to terminate a pregnancy; two, that such right may be overridden by the States legitimate interests when the fetus is viable outside the womb. The latter is obviously distinct from the former. I would abandon that timing rule, but see no need in this case to consider the basic right.

The Court contends that it is impossible to address Roes conclusion that [***640] the Constitution protects the womans right to abortion, without also addressing Roes rule that the States interests are not constitutionally adequate to justify a ban on abortion until viability. See ibid. But we have partially overruled precedents before, see, e.g., United [*356] States v. Miller, 471 U. S. 130, 142-144, 105 S. Ct. 1811, 85 L. Ed. 2d 99 (1985); Daniels v. Williams, 474 U. S. 327, 328-331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); Batson v. Kentucky, 476 U. S. 79, 90-93, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and certainly have never [****183] held that a distinct holding defining the contours of a constitutional right must be treated as part and parcel of the right itself.

Overruling the subsidiary rule is sufficient to resolve this case in Mississippis favor. The law at issue allows abortions up through fifteen weeks, providing an adequate opportunity to exercise the right Roe protects. By the time a pregnant woman has reached that point, her pregnancy is well into the second trimester. Pregnancy tests are now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation. See A. Branum & K. Ahrens, Trends in Timing of Pregnancy Awareness Among US Women, 21 Maternal & Child Health J. 715, 722 (2017). Almost all know by the end of the first trimester. Pregnancy Recognition 39. Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. See I. Adibi et al., Abortion, 22 Geo. J. Gender & L. 279, 303 (2021). Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. See Centers for Disease Control and Prevention, Abortion SurveillanceUnited States 1 (2020). Presumably most of the remainder would also take place earlier if later abortions were not a legal option. Ample evidence [****184] thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman to decide for herself whether to terminate her pregnancy. Webster, 492 U. S., at 520, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (plurality opinion).*

*

The majority contends that nothing like [my approach] was recommended by either party. Ante, at 72. But as explained, Mississippi in fact pressed a similar argument in its filings before this

Court. See Pet. for Cert. i-25; Brief for Petitioners 5, 38-48 (urging the Court to reject the viability rule and reverse); Reply Brief 20-22 (same). The approach also finds support in prior opinions. See Webster, 492 U. S., at 518-521, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (plurality opinion) (abandoning key elements of the Roe framework under stare decisis while declining to reconsider Roes holding that the Constitution protects the right to an abortion).

[*357] III

Whether a precedent should be overruled is a question entirely within the discretion of the court. Hertz v. Woodman, 218 U. S. 205, 212, 30 S. Ct. 621, 54 L. Ed. 1001, T.D. 1636 (1910); see also Payne v. Tennessee, 501 U. S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (stare decisis is a principle of policy). In my respectful [**2316] view, the sound exercise of that discretion should have led the Court to resolve the case on the narrower grounds set forth above, rather than overruling Roe and Casey entirely. The Court says there is no principled basis for this approach, ante, at 73, but in fact it is firmly grounded in basic principles of stare decisis and judicial restraint.

The Courts decision to overrule Roe and Casey is a serious jolt to the legal [***641] systemregardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case.

Our cases say that the effect of overruling a precedent on reliance interests is a factor to consider in deciding whether to take such a step, and respondents argue that generations of women have relied on the right to an abortion [****185] in organizing their relationships and planning their futures. Brief for Respondents 36-41; see also Casey, 505 U. S., at 856 (making the same point). The Court questions whether these concerns are pertinent under our precedents, see ante, at 64-65, but the issue would not even arise with a decision rejecting only the viability line: It cannot reasonably be argued that women have shaped their lives in part on the assumption that they would be able to abort up to viability, as opposed to fifteen weeks.

In support of its holding, the Court cites three seminal constitutional decisions that involved overruling prior precedents: [*358] Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), and West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937). See ante, at 40-41. The opinion in Brown was unanimous and eleven pages long; this one is neither. Barnette was decided only three years after the decision it overruled, three Justices having had second thoughts. And West Coast Hotel was issued against a backdrop of unprecedented economic despair that focused attention on the fundamental flaws of existing precedent. It also was part of a sea change in this Courts interpretation of the Constitution, signal[ing] the demise of an entire line of important precedents, ante, at 40a feature the Court expressly disclaims in todays decision, see ante, at 32, 66. [****186] None of these leading cases, in short, provides a template for what the Court does today.

The Court says we should consider whether to overrule Roe and Casey now, because if we delay we would be forced to consider the issue again in short order. See ante, at 76-77. There would be turmoil until we did so, according to the Court, because of existing state laws with shorter deadlines or no deadline at all. Ante, at 76. But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that the viability rule has had on our constitutional debate. The same could be true, for that matter, with respect to legislative consideration in the States. We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective.

***

Both the Courts opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot [*359] share. I am not sure, for example, [***642] that a ban on terminating a pregnancy from the [****187] moment of [**2317] conception must be treated the same under the Constitution as a ban after fifteen weeks. A thoughtful Member of this Court once counseled that the difficulty of a question admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case. Whitehouse v. Illinois Central R. Co., 349 U. S. 366, 372-373, 75 S. Ct. 845, 99 L. Ed. 1155 (1955) (Frankfurter, J., for the Court). I would decide the question we granted review to answerwhether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.

I therefore concur only in the judgment.

Dissent by: KAGAN

Dissent

Justice Breyer, Justice Sotomayor, and Justice Kagan, dissenting.

For half a century, Roe v. Wade, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), have protected the liberty and equality of women. Roe held, and Casey reaffirmed, that the Constitution safeguards a womans right to decide for herself whether to bear a child. Roe held, and Casey reaffirmed, that in the first stages of pregnancy, the government could not make

that choice for women. The government could not control a womans body or the course [****188] of a womans life: It could not determine what the womans future would be. See Casey, 505 U. S., at 853, 112 S. Ct. 2791, 120 L. Ed. 2d 674; Gonzales v. Carhart, 550 U. S. 124, 171-172, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007) (Ginsburg, J., dissenting). Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and Casey well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans [*360] hold profoundly different views about the moral[ity] of terminating a pregnancy, even in its earliest stage. Casey, 505 U. S., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And the Court recognized that the State has legitimate interests from the outset of the pregnancy in protecting the life of the fetus that may become a child. Id., at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674. So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a womans life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a substantial obstacle on a womans right to elect the procedure as she (not the government) [****189] thought proper, in light of all the circumstances and complexities of her own life. Ibid.

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force [***643] her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions. The Mississippi law at issue here bars abortions after the 15th week of pregnancy. Under the majoritys ruling, though, another States law could do so after ten weeks, or five or three or oneor, again, from the moment [**2318] of fertilization. States have already passed such laws, in anticipation of todays ruling. More will follow. Some States have enacted laws extending to all forms of abortion procedure, including taking medication in ones own home. They have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapists child or a [****190] young girl [*361] her fathersno matter if doing so will destroy her life. So too, after todays ruling, some States may compel women to carry to term a fetus with severe physical anomaliesfor example, one afflicted with Tay-Sachs disease, sure to die within a few years of birth. States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm. Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child.

Enforcement of all these draconian restrictions will also be left largely to the States devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of todays decision, a state law will criminalize the womans conduct too, incarcerating or fining her for daring to seek or

obtain an abortion. And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.

The majority tries to hide the geographically [****191] expansive effects of its holding. Todays decision, the majority says, permits each State to address abortion as it pleases. Ante, at 79. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from todays decision. In any event, interstate restrictions will also soon be in the offing. After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States abortion services. Most threatening of all, no language in todays decision stops the Federal Government from prohibiting abortions nationwide, [*362] once again from the moment of conception and without exceptions for rape or incest. If that happens, the views of [an individual States] citizens will not matter. Ante, at 1. The challenge for a woman will be to finance a trip not to New York [or] California but to Toronto. Ante, at 4 (Kavanaugh, J., concurring).

[***644] Whatever the exact scope of the coming [****192] laws, one result of todays decision is certain: the curtailment of womens rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each womans reproductive freedom, the Constitution also protected [t]he ability of women to participate equally in [this Nations] economic and social life. Casey, 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the States assertion of power. Othersthose without money or childcare or [**2319] the ability to take time off from workwill not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the [****193] least, they will incur the cost of losing control of their lives. The Constitution will, todays majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right Roe and Casey recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the [*363] right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); Eisenstadt v. Baird, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See Lawrence v. Texas, 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); Obergefell v. Hodges, 576 U. S.

644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does cast[s] doubt on precedents that do not concern abortion. Ante, at 66; cf. ante, at 3 (Thomas, J., concurring) (advocating the overruling of Griswold, Lawrence, and Obergefell). But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not deeply rooted in [****194] history: Not until Roe, the majority argues, did people think abortion fell within the Constitutions guarantee of liberty. Ante, at 32. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, there was no support in American law for a constitutional right to obtain [contraceptives]. Ante, at 15. So one of two things must be true. Either the majority does not [***645] really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majoritys opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majoritys cavalier approach to overturning this Courts precedents. Stare decisis is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in todays opinion. The majority [*364] has [****195] no good reason for the upheaval in law and society it sets off. Roe and Casey have been the law of the land for decades, shaping womens expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework Roe and Casey developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in Casey already found all of that to be true. Casey is a precedent about precedent. It reviewed the same arguments made here in support of overruling Roe, and it found that doing so was not warranted. The [**2320] Court reverses course today for one reason and one reason only: because the composition of this Court has changed. Stare decisis, this Court has often said, contributes to the actual and perceived integrity of the judicial process by ensuring that decisions are founded in the law rather than in the proclivities of individuals. Payne v. Tennessee, 501 U. S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); Vasquez v. Hillery, 474 U. S. 254, 265, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986). Today, the proclivities of individuals rule. The Court departs from its obligation [****196] to faithfully and impartially apply the law. We dissent.

I

We start with Roe and Casey, and with their deep connections to a broad swath of this Courts precedents. To hear the majority tell the tale, Roe and Casey are aberrations: They came from

nowhere, went nowhereand so are easy to excise from this Nations constitutional law. That is not true. After describing the decisions themselves, we explain how they are rooted inand themselves led toother rights giving individuals control over their bodies and their most personal and intimate associations. The majority does not wish to talk about these matters for obvious reasons; to do [*365] so would both ground Roe and Casey in this Courts precedents and reveal the broad implications of todays decision. But the facts will not so handily disappear. Roe and Casey were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. So [****197] we do not (as the majority insists today) place everything within [***646] the reach of majorities and [government] officials. West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individualsyes, including womento make their own choices and chart their own futures. Or at least, we did once.

A

Some half-century ago, Roe struck down a state law making it a crime to perform an abortion unless its purpose was to save a womans life. The Roe Court knew it was treading on difficult and disputed ground. It understood that different peoples experiences, values, and religious training and beliefs led to opposing views about abortion. 410 U. S., at 116, 93 S. Ct. 705, 35 L. Ed. 2d 147. But by a 7-to-2 vote, the Court held that in the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor. The Court explained that a long line of precedents, founded in the Fourteenth Amendments concept of personal liberty, protected individual decisionmaking related to marriage, procreation, contraception, family relationships, and child rearing and education. Id., at 152-153, 93 S. Ct. 705, 35 L. Ed. 2d 147 (citations omitted). For the same reasons, the Court [****198] held, the Constitution must protect a womans decision [*366] whether or not to terminate her pregnancy. Id., at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147. The Court recognized the myriad ways bearing a child can alter the life and future of a woman and other members of her family. Ibid. A State could not, by adopting one theory of life, override all rights of the pregnant woman. Id., at 162, 93 S. Ct. 705, 35 L. Ed. 2d 147.

[**2321] At the same time, though, the Court recognized valid interest[s] of the State in regulating the abortion decision. Id., at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147. The Court noted in particular important interests in protecting potential life, maintaining medical standards, and safeguarding [the] health of the woman. Id., at 154, 93 S. Ct. 705, 35 L. Ed. 2d 147. No absolut[ist] account of the womans right could wipe away those significant state claims. Ibid.

The Court therefore struck a balance, turning on the stage of pregnancy at which the abortion would occur. The Court explained that early on, a womans choice must prevail, but that at some point the state interests become dominant. Id., at 155, 93 S. Ct. 705, 35 L. Ed. 2d 147. It then set some guideposts. In the first trimester of pregnancy, the State could not interfere at all with the decision to terminate a pregnancy. At any time after that point, the State could regulate to protect the pregnant womans health, [****199] such as by insisting that abortion providers and facilities meet safety requirements. And after the fetuss viabilitythe point when the fetus has the capability of meaningful life outside the mothers wombthe State could ban abortions, except when necessary to preserve the womans life or health. Id., at 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147.

In the 20 years between Roe and Casey, the Court expressly reaffirmed Roe on two occasions, and applied it on many more. Recognizing that arguments [against Roe] continue to be [***647] made, we responded that the doctrine of stare decisis demands respect in a society governed by the rule of law. Akron v. Akron Center for Reproductive Health, Inc., 462 U. S. 416, 419-420, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983). And we avowed that the vitality of constitutional principles cannot be allowed to yield simply because of disagreement with them. [*367] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U. S. 747, 759, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986). So the Court, over and over, enforced the constitutional principles Roe had declared. See, e.g., Ohio v. Akron Center for Reproductive Health, 497 U. S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990); Hodgson v. Minnesota, 497 U. S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990); Simopoulos v. Virginia, 462 U. S. 506, 103 S. Ct. 2532, 76 L. Ed. 2d 755 (1983); Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U. S. 476, 103 S. Ct. 2517, 76 L. Ed. 2d 733 (1983); H. L. v. Matheson, 450 U. S. 398, 101 S. Ct. 1164, 67 L. Ed. 2d 388 (1981); Bellotti v. Baird, 443 U. S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979); Planned Parenthood of Central Mo. v. Danforth, 428 U. S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976).

Then, in Casey, the Court considered the matter anew, and again upheld Roes core precepts. Casey is in significant measure a precedent about the doctrine of precedentuntil today, one of the Courts most important. But we leave for later that aspect of the Courts decision. The key thing now is the substantive aspect of the Courts considered conclusion that the essential holding of [****200] Roe v. Wade should be retained and once again reaffirmed. 505 U. S., at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

Central to that conclusion was a full-throated restatement of a womans right to choose. Like Roe, Casey grounded that right in the Fourteenth Amendments guarantee of liberty. That guarantee encompasses realms of conduct not specifically referenced in the Constitution: Marriage is mentioned nowhere in that document, yet the Court was no doubt correct to protect the freedom to marry against state interference. 505 U. S., at 847-848, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And the guarantee of liberty encompasses conduct today that was not protected at the time of the [**2322] Fourteenth Amendment. See id., at 848, 112 S. Ct. 2791, 120 L. Ed. 2d 674. It is settled now, the Court saidthough it was not always sothat the Constitution places limits on a States right to interfere with a persons most basic decisions about family and parenthood, as well as

bodily integrity.Id., at 849, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (citations omitted); see id., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (similarly describing the constitutional protection given to personal decisions relating to marriage, procreation, contraception, [and] family relationships). Especially important in this web of [*368] precedents protecting an individuals most personal choices were those guaranteeing the right to contraception. Ibid.; see id., at 852-853, 112 S. Ct. 2791, 120 L. Ed. 2d 674. In those cases, the Court had recognized the right of the individual [****201] to make the vastly consequential decision whether to bear a child. Id., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (emphasis deleted). So too, Casey reasoned, the liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision [***648] about abortion was central, in the same way, to her capacity to chart her lifes course. See id., at 853, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

In reaffirming the right Roe recognized, the Court took full account of the diversity of views on abortion, and the importance of various competing state interests. Some Americans, the Court stated, deem [abortion] nothing short of an act of violence against innocent human life. 505 U. S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And each State has an interest in the protection of potential lifeas Roe itself had recognized. 505 U. S., at 871, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion). On the one hand, that interest was not conclusive. The State could not resolve the moral and spiritual questions raised by abortion in such a definitive way that a woman lacks all choice in the matter. Id., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (majority opinion). It could not force her to bear the pain and physical constraints of carr[ying] a child to full term when she would have chosen an early abortion. Id., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But on the other hand, the State had, as Roe had held, an exceptionally significant interest in disallowing abortions [****202] in the later phase of a pregnancy. And it had an ever-present interest in ensur[ing] that the womans choice is informed and in presenting the case for choos[ing] childbirth over abortion. 505 U. S., at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion).

So Casey again struck a balance, differing from Roes in only incremental ways. It retained Roes central holding that the State could bar abortion only after viability. 505 U. S., at 860, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (majority opinion). The viability line, Casey thought, was more workable than any other in marking the place where the womans liberty interest gave way to a [*369] States efforts to preserve potential life. Id., at 870, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion). At that point, a second life was capable of independent existence. Ibid. If the woman even by then had not acted, she lacked adequate grounds to object to the States intervention on [the developing childs] behalf. Ibid. At the same time, Casey decided, based on two decades of experience, that the Roe framework did not give States sufficient ability to regulate abortion prior to viability. In that period, Casey now made clear, the State could regulate not only to protect the womans health but also to promot[e] prenatal life. 505 U. S., at 873, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion). In particular, the State could ensure informed choice [****203] and could try to promote childbirth. See id., at 877-878, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But the State still could not place an undue burdenor substantial obstaclein the path of a woman seeking

an abortionId., at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Prior to viability, the woman, consistent with the constitutional meaning of [**2323] liberty, must retain the ultimate control over her destiny and her body. Id., at 869, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

We make one initial point about this analysis in light of the majoritys insistence that Roe and Casey, and we in defending them, are dismissive of a States interest in protecting prenatal life. Ante, at 38. Nothing could get those decisions more wrong. As just described, [***649] Roe and Casey invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the womans liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment.1

1

For this reason, we do not understand the majoritys view that our analogy between the right to an abortion and the rights to contraception and same-sex marriage shows that we think [t]he Constitution does not permit the States to regard the destruction of a potential life as a matter of any significance. Ante, at 38. To the contrary. The liberty interests underlying those rights are, as we will describe, quite similar. See infra, at 22-24. But only in the sphere of abortion is the state interest in protecting potential life involved. So only in that sphere, as both Roe and Casey recognized, may a State impinge so far on the liberty interest (barring abortion after viability and discouraging it before). The majoritys failure to understand this fairly obvious point stems from its rejection of the idea of balancing interests in this (or maybe in any) constitutional context. Cf. New York State Rifle & Pistol Assn., Inc. v. Bruen, 597 U. S. ___, ___, ___-___ (2022) (slip op., at 8, 15-17). The majority thinks that a woman has no liberty or equality interest in the decision to bear a child, so a States interest in protecting fetal life necessarily prevails.

But what Roe and Casey also recognizedwhich [*370] todays majority does notis that a womans freedom and equality are likewise involved. That factthe presence of countervailing interestsis what made the abortion question hard, and what necessitated balancing. The majority scoffs at that idea, castigating us [****204] for repeatedly prais[ing] the balance the two cases arrived at (with the word balance in scare quotes). Ante, at 38. To the majority balance is a dirty word, as moderation is a foreign concept. The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a womans rights to equality and freedom. Todays Court, that is, does not think there is anything of constitutional significance attached to a womans control of her body and the path of her life. Roe and Casey thought that one-sided view misguided. In some sense, that is the difference in a nutshell between our precedents and the majority opinion. The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the womans interest and recognizes only the States (or the Federal Governments).

B

The majority makes this change based on a single question: Did the reproductive right recognized in Roe and Casey exist in 1868, the year when the Fourteenth Amendment was ratified? Ante, at 23. The majority says (and with [*371] this much we agree) that the answer to this question [****205] is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. See ante, at 17. But that turns out to be wheel-spinning. First, it is not clear what relevance [**2324] such early history should have, even to the majority. See New York State Rifle & Pistol Assn., Inc. v. Bruen, 597 U. S. ___, ___ [***650] (2022) (slip op., at 26) (Historical evidence that long predates [ratification] may not illuminate the scope of the right). If the early history obviously supported abortion rights, the majority would no doubt say that only the views of the Fourteenth Amendments ratifiers are germane. See ibid. (It is better not to go too far back into antiquity, except if olden law survived to become our Founders law). Secondand embarrassingly for the majorityearly law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before quickeningthe point when the fetus moved in the womb.2

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See, e.g., 1 W. Blackstone, Commentaries on the Laws of England 129-130 (7th ed. 1775) (Blackstone); E. Coke, Institutes of the Laws of England 50 (1644).

And early American law followed the common-law rule.3

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See J. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800-1900, pp. 3-4 (1978). The majority offers no evidence to the contraryno example of a founding-era law making pre-quickening abortion a crime (except when a woman died). See ante, at 20-21. And even in the mid-19th century, more than 10 States continued to allow pre-quickening abortions. See Brief for American Historical Association et al. as Amici Curiae 27, and n. 14.

So the criminal law of that early time might be taken as roughly consonant with Roes and Caseys different treatment of [****206] early and late abortions. Better, then, to move forward in time. On the other side of 1868, the majority occasionally notes that many States barred abortion up to the [*372] time of Roe. See ante, at 24, 36. That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text. New York State Rifle & Pistol Assn., Inc., 597 U. S., at ___-___ (slip op., at 27-28). Had the pre-Roe liberalization of abortion laws occurred more quickly and more widely in the 20th century, the majority would say (once again) that only the ratifiers views are germane.

The majoritys core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. See ante, at 47 ([T]he most important historical fact [is] how the States regulated

abortion when the Fourteenth Amendment was adopted); see also ante, at 5, 16, and n. 24, 23, 25, 28. If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive [****207] rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the people who ratified the Fourteenth Amendment: What rights did those people have in their heads at the time? But, of course, people did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for womens liberty, or for their capacity to participate as equal [***651] members of our Nation. Indeed, the ratifiersboth in 1868 and when the original Constitution was approved in 1788did not understand women as full members of the community [**2325] embraced by the phrase We the People. In 1868, the first wave of American feminists were explicitly toldof course by menthat it was not their time to seek constitutional [*373] protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. [****208] Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize womens rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

Casey itself understood this point, as will become clear. See infra, at 23-24. It recollected with dismay a decision this Court issued just five years after the Fourteenth Amendments ratification, approving a States decision to deny a law license to a woman and suggesting as well that a woman had no legal status apart from her husband. See 505 U. S., at 896-897, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (majority opinion) (citing Bradwell v. State, 83 U.S. 130, 16 Wall. 130, 21 L. Ed. 442 (1873)). There was a time, Casey explained, when the Constitution did not protect men and women alike. 505 U. S., at 896, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But times had changed. A womans place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was no longer consistent with our understanding of the Constitution. Id., at 897, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Now, [t]he Constitution protects all individuals, male or female, from the abuse of governmental power or unjustified state interference. [****209] Id., at 896, 898, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

So how is it that, as Casey said, our Constitution, read now, grants rights to women, though it did not in 1868? How is it that our Constitution subjects discrimination against them to heightened judicial scrutiny? How is it that our Constitution, through the Fourteenth Amendments liberty clause, guarantees access to contraception (also not legally protected [*374] in 1868) so that women can decide for themselves whether and when to bear a child? How is it that until today,

that same constitutional clause protected a woman's right, in the event contraception failed, to end a pregnancy in its earlier stages?

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. The Founders, we recently wrote, knew they were writing a document designed to apply to ever-changing circumstances over centuries. NLRB v. Noel Canning, 573 U. S. 513, 533-534, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014). Or in the words of the great Chief Justice John Marshall, our Constitution is intended to endure for ages to come, and must adapt itself to a future seen dimly, if at all. [***652] McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 415, 4 L. Ed. 579 (1819). That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the [****210] time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

[**2326] Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of liberty and equality for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example Obergefell used a few years ago. The Court there confronted a claim, based on Washington v. Glucksberg, 521 U. S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997), that the Fourteenth Amendment must be defined in a most circumscribed manner, with central reference to specific historical practices—exactly the view today's majority follows. Obergefell, 576 U. S., at 671, 135 S. Ct. 2584, 192 L. Ed. 2d 609. [*375] And the Court specifically rejected that view.4

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The majority ignores that rejection. See ante, at 5, 13, 36. But it is unequivocal: The Glucksberg test, Obergefell said, may have been appropriate in considering physician-assisted suicide, but is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. 576 U. S., at 671, 135 S. Ct. 2584, 192 L. Ed. 2d 609.

In doing so, the Court reflected on what the proposed, historically circumscribed approach would have meant for interracial marriage. See ibid. The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. [****211] Yet the Court in Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), read the Fourteenth Amendment to embrace the Lovings' union. If, Obergefell explained, rights were defined by who exercised them in the past, then received practices could serve as their own continued justification—even when they conflict with liberty and equality as later and more broadly understood. 576 U. S., at 671, 135 S. Ct. 2584, 192 L. Ed. 2d 609. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or

(2) surrender to judges own ardent views, ungrounded in law, about the liberty that Americans should enjoy. Ante, at 14. At least, that idea is what the majority sometimes tries to convey. At other times, the majority (or, rather, most of it) tries to assure the public that it has no designs on rights (for example, to contraception) that arose only in the back half of the 20th centuryin other words, that it is happy to pick and choose, in accord with individual preferences. See ante, at 32, 66, 71-72; [***653] ante, at 10 (Kavanaugh, J., concurring); but see ante, at 3 (Thomas, J., concurring). But that is a matter [****212] we discuss [*376] later. See infra, at 24-29. For now, our point is different: It is that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a States ban on contraceptive use. Judges, he said, are not free to roam where unguided speculation might take them. Poe v. Ullman, 367 U. S. 497, 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (dissenting opinion). Yet they also must recognize that the constitutional tradition of this country is not captured whole at a single moment. Ibid. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedentseach looking to the last and each seeking to apply the Constitutions most fundamental commitments to new conditions. [**2327] That is why Americans, to go back to Obergefells example, have a right to marry across racial lines. And it is why, to go back to Justice Harlans case, Americans have a right to use contraceptives so they can choose for themselves whether to have children.

All that is what Casey understood. Casey explicitly rejected the present majoritys method. [T]he specific [****213] practices of States at the time of the adoption of the Fourteenth Amendment, Casey stated, do not mark[ ] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. 505 U. S., at 848, 112 S. Ct. 2791, 120 L. Ed. 2d 674.5

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In a perplexing paragraph in its opinion, the majority declares that it need not say whether that statement from Casey is true. See ante, at 32-33. But how could that be? Has not the majority insisted for the prior 30 or so pages that the specific practice[ ] respecting abortion at the time of the Fourteenth Amendment precludes its recognition as a constitutional right? Ante, at 33. It has. And indeed, it has given no other reason for overruling Roe and Casey. Ante, at 15-16. We are not mindreaders, but here is our best guess as to what the majority means. It says next that [a]bortion is nothing new. Ante, at 33. So apparently, the Fourteenth Amendment might provide protection for things wholly unknown in the 19th century; maybe one day there could be constitutional protection for, oh, time travel. But as to anything that was known back then (such as abortion or contraception), no such luck.

To hold otherwiseas [*377] the majority does todaywould be inconsistent with our law. Id., at 847, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Why? Because the Court has vindicated [the] principle over and over that (no matter the sentiment in 1868) there is a realm of personal liberty which the government may not enterespecially relating to bodily integrity and family life. Id., at 847, 849, 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Casey described in detail the Courts contraception cases. See id., at 848-849, 851-853, 112 S. Ct. 2791, 120 L. Ed. 2d 674. It noted decisions protecting the right to marry, including to someone of another

race. See id., at 847-848, 112 S. Ct. 2791, 120 L. Ed. 2d 674 ([I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference). In reviewing [***654] decades and decades of constitutional law, Casey could draw but one conclusion: Whatever was true in 1868, [i]t is settled now, as it was when the Court heard arguments in Roe v. Wade, that the Constitution places limits on a States right to interfere with a persons most basic decisions about family and parenthood. Id., at 849, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

And that conclusion still [****214] held good, until the Courts intervention here. It was settled at the time of Roe, settled at the time of Casey, and settled yesterday that the Constitution places limits on a States power to assert control over an individuals body and most personal decisionmaking. A multitude of decisions supporting that principle led to Roes recognition and Caseys reaffirmation of the right to choose; and Roe and Casey in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. It (literally) rattles them off in a single paragraph; and it implies that they have nothing to do with each other, or with the right to terminate an early pregnancy. See ante, at 31-32 (asserting that recognizing a relationship among them, as addressing aspects of personal autonomy, would ineluctably [*378] license fundamental rights to illegal drug use [and] prostitution). But that is flat wrong. The Courts precedents about bodily autonomy, sexual and familial relations, and procreation are all interwovenall part of the fabric of our constitutional law, and because that is so, of our lives. Especially womens lives, where they safeguard a right to self-determination. [****215]

[**2328] And eliminating that right, we need to say before further describing our precedents, is not taking a neutral position, as Justice Kavanaugh tries to argue. Ante, at 2-3, 5, 7, 11-12 (concurring opinion). His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being scrupulously neutral if it allowed New York and California to ban all the guns they want? Ante, at 3. If the Court allowed some States to use unanimous juries and others not? If the Court told the States: Decide for yourselves whether to put restrictions on church attendance? We could go onand in fact we will. Suppose Justice Kavanaugh were to say (in line with the majority opinion) that the rights we just listed are more textually or historically grounded than the right to choose. What, then, of the right to contraception or same-sex marriage? Would it be scrupulously neutral for the Court to eliminate those rights too? The point of all these examples is that when it comes to rights, the Court does not act neutrally when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right [****216] against all comers. And to apply that point to the case here: When the Court decimates a right women have held for 50 years, the Court is not being scrupulously neutral. It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so. Justice Kavanaugh cannot obscure that point by appropriating the rhetoric of even-handedness. His position just is what [***655] it is: A brook-no-compromise refusal to recognize a womans right [*379] to choose, from the first day of a pregnancy. And that position, as we will now show, cannot be squared with this Courts longstanding view that women indeed have rights (whatever

the state of the world in 1868) to make the most personal and consequential decisions about their bodies and their lives.

Consider first, then, the line of this Courts cases protecting bodily integrity. Casey, 505 U. S., at 849, 112 S. Ct. 2791, 120 L. Ed. 2d 674. No right, in this Courts time-honored view, is held more sacred, or is more carefully guarded, than the right of every individual to the possession and control of his own person. Union Pacific R. Co. v. Botsford, 141 U. S. 250, 251, 11 S. Ct. 1000, 35 L. Ed. 734 (1891); see Cruzan v. Director, Mo. Dept. of Health, 497 U. S. 261, 269, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (Every adult has a right to determine what shall be done with his own body). Or to put it more simply: Everyone, including [****217] women, owns their own bodies. So the Court has restricted the power of government to interfere with a persons medical decisions or compel her to undergo medical procedures or treatments. See, e.g., Winston v. Lee, 470 U. S. 753, 766-767, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) (forced surgery); Rochin v. California, 342 U. S. 165, 166, 173-174, 72 S. Ct. 205, 96 L. Ed. 183 (1952) (forced stomach pumping); Washington v. Harper, 494 U. S. 210, 229, 236, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) (forced administration of antipsychotic drugs).

Casey recognized the doctrinal affinity between those precedents and Roe. 505 U. S., at 857, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And that doctrinal affinity is born of a factual likeness. There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth. For every woman, those experiences involve all manner of physical changes, medical treatments (including the possibility of a cesarean section), and medical risk. Just as one example, an American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion. See Whole Womans Health v. Hellerstedt, 579 U. S. 582, 618, [**2329] 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016). That women happily undergo those burdens and hazards of their own accord does not lessen how far a State impinges on a womans body when it compels her to bring a pregnancy to term. And [*380] for some women, as Roe recognized, abortions are medically necessary to prevent harm. See 410 U. S., at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147. The majority does not saywhich is itself ominouswhether a State may prevent a woman from obtaining [****218] an abortion when she and her doctor have determined it is a needed medical treatment.

So too, Roe and Casey fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. See Casey, 505 U. S., at 851, 857, 112 S. Ct. 2791, 120 L. Ed. 2d 674; Roe, 410 U. S., at 152-153, 93 S. Ct. 705, 35 L. Ed. 2d 147; see also ante, at 31-32 (listing the myriad decisions of this kind that Casey relied on). Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise [***656] childrenand crucially, whether and when to have children. In varied cases, the Court explained that those choicesthe most intimate and personal a person can makereflect fundamental aspects of personal identity; they define the very attributes of personhood. Casey, 505 U. S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And they inevitably shape the nature and future course of a persons life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claimbecause they would not have seen the person making [****219] it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. Compare Obergefell, 576 U. S., at 672-675, 135 S. Ct. 2584, 192 L. Ed. 2d 609, with ante, at 10-11. So before Roe and Casey, the Court expanded in successive cases those who could claim the right to marrythough their relationships [*381] would have been outside the laws protection in the mid-19th century. See, e.g., Loving, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (interracial couples); Turner v. Safley, 482 U. S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (prisoners); see also, e.g., Stanley v. Illinois, 405 U. S. 645, 651-652, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (offering constitutional protection to untraditional family unit[s]). And after Roe and Casey, of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. See Lawrence, 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508; Obergefell, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609. In considering that question, the Court held, [h]istory and tradition, especially as reflected in the course of our precedent, guide and discipline [the] inquiry. Id., at 664, 135 S. Ct. 2584, 192 L. Ed. 2d 609. But the sentiments of 1868 alone do not and cannot rule the present. Ibid.

Casey similarly recognized the need to extend the [****220] constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. See supra, at 15. A woman then, Casey wrote, had no [**2330] legal existence separate from her husband. 505 U. S., at 897, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Women were seen only as the center of home and family life, without full and independent legal status under the Constitution. Ibid. But that could not be true any longer: The State could not now insist on the historically dominant vision of the womans role. Id., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And equal citizenship, Casey realized, was inescapably connected to reproductive rights. The ability of women to participate equally in the life of the Nationin all its economic, social, [***657] political, and legal aspectshas been facilitated by their ability to control their reproductive lives. Id., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Without the ability to decide whether and when to have children, women could notin the way men took for granteddetermine how they would live their lives, and how they would contribute to the society around them.

[*382] For much that reason, Casey made clear that the precedents Roe most closely tracked were those involving [****221] contraception. Over the course of three cases, the Court had held that a right to use and gain access to contraception was part of the Fourteenth Amendments guarantee of liberty. See Griswold, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510; Eisenstadt, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349; Carey v. Population Services Intl, 431 U. S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977). That clause, we explained, necessarily conferred a right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a

person as the decision whether to bear or beget. Eisenstadt, 405 U. S., at 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349; see Carey, 431 U. S., at 684-685, 97 S. Ct. 2010, 52 L. Ed. 2d 675. Casey saw Roe as of a piece: In critical respects the abortion decision is of the same character. 505 U. S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. [R]easonable people, the Court noted, could also oppose contraception; and indeed, they could believe that some forms of contraception similarly implicate a concern with potential life. Id., at 853, 859, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Yet the views of others could not automatically prevail against a womans right to control her own body and make her own choice about whether to bear, and probably to raise, a child. When an unplanned pregnancy is involvedbecause either contraception or abortion is outlawedthe liberty of the woman is at stake in a sense unique to the human condition. Id., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. No State could undertake to resolve the moral questions raised in such a definitive way as to deprive a woman of all choice. Id., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

Faced with all these connections between [****222] Roe/ Casey and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) Todays decision, the majority first says, does not undermine the decisions cited by Roe and Caseythe ones involving marriage, procreation, contraception, [and] family relationshipsin any way. Ante, at 32; Casey, 505 U. S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. [*383] Note that this first assurance does not extend to rights recognized after Roe and Casey, and partly based on themin particular, rights to same-sex intimacy and marriage. See supra, at 23.6

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And note, too, that the author of the majority opinion recently joined a statement, written by another member of the majority, lamenting that Obergefell deprived States of the ability to resolve th[e] question [of same-sex marriage] through legislation. Davis v. Ermold, 592 U. S. ___, ___, 141 S. Ct. 3, 208 L. Ed. 2d 137, 137 (2020) (statement of Thomas, J.). That might sound familiar. Cf. ante, at 44 (lamenting that Roe short-circuited the democratic process). And those two Justices hardly seemed content to let the matter rest: The Court, they said, had created a problem that only it can fix. Davis, 592 U. S., at ___, 141 S. Ct. 3, 208 L. Ed. 2d 137, at 139.

On [**2331] its later tries, though, the majority [***658] includes those too: Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion. Ante, at 66; see ante, at 71-72. That right is unique, the majority asserts, because [abortion] terminates life or potential life. Ante, at 66 (internal quotation marks omitted); see ante, at 32, 71-72. So the majority depicts todays decision as a restricted railroad ticket, good for this day and train only. Smith v. Allwright, 321 U. S. 649, 669, 64 S. Ct. 757, 88 L. Ed. 987 (1944) (Roberts, [****223] J., dissenting). Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

The first problem with the majoritys account comes from Justice Thomass concurrencewhich makes clear he is not with the program. In saying that nothing in todays opinion casts doubt on non-abortion precedents, Justice Thomas explains, he means only that they are not at issue in this

very case. See ante, at 7 ([T]his case does not present the opportunity to reject those precedents). But he lets us know what he wants to do when they are. [I]n future cases, he says, we should reconsider all of this Courts substantive due process precedents, including Griswold, Lawrence, and Obergefell. Ante, at 3; see also supra, at 25, and n. 6. And when we reconsider them? Then we have a duty to overrul[e] these demonstrably erroneous decisions. Ante, at 3. [*384] So at least one Justice is planning to use the ticket of todays decision again and again and again.

Even placing the concurrence to the side, the assurance in todays opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning Roe and Casey: the legal status of abortion in the 19th century. [****224] Except in the places quoted above, the state interest in protecting fetal life plays no part in the majoritys analysis. To the contrary, the majority takes pride in not expressing a view about the status of the fetus. Ante, at 65; see ante, at 32 (aligning itself with Roes and Caseys stance of not deciding whether life or potential life is involved); ante, at 38-39 (similar). The majoritys departure from Roe and Casey rests insteadand onlyon whether a womans decision to end a pregnancy involves any Fourteenth Amendment liberty interest (against which Roe and Casey balanced the state interest in preserving fetal life).7

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Indulge a few more words about this point. The majority had a choice of two different ways to overrule Roe and Casey. It could claim that those cases underrated the States interest in fetal life. Or it could claim that they overrated a womans constitutional liberty interest in choosing an abortion. (Or both.) The majority here rejects the first path, and we can see why. Taking that route would have prevented the majority from claiming that it means only to leave this issue to the democratic processthat it does not have a dog in the fight. See ante, at 38-39, 65. And indeed, doing so might have suggested a revolutionary proposition: that the fetus is itself a constitutionally protected person, such that an abortion ban is constitutionally mandated. The majority therefore chooses the second path, arguing that the Fourteenth Amendment does not conceive of the abortion decision as implicating liberty, because the law in the 19th century gave that choice no protection. The trouble is that the chosen pathwhich is, again, the solitary rationale for the Courts decisionprovides no way to distinguish between the right to choose an abortion and a range of other rights, including contraception.

According to the majority, no liberty interest is presentbecause (and only because) the law offered no [***659] protection to the womans choice in the [**2332] 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other [*385] things. It did not protect the rights recognized in Lawrence and Obergefell to same-sex intimacy and marriage. It did not protect the right recognized in Loving to marry across racial lines. It did not protect the right recognized in Griswold to contraceptive use. For that matter, it did not protect the right recognized in Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), not to be sterilized without consent. So if the majority is [****225] right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States toowhatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threatendoes not even undermineany number of other constitutional rights. Ante, at 32.8

8

The majority briefly (very briefly) gestures at the idea that some stare decisis factors might play out differently with respect to these other constitutional rights. But the majority gives no hint as to why. And the majoritys (mis)treatment of stare decisis in this case provides little reason to think that the doctrine would stand as a barrier to the majoritys redoing any other decision it considered egregiously wrong. See infra, at 30-57.

Nor does it even help just to take the majority at its word. Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scouts honor. Still, the future significance of todays opinion will be decided in the future. And law often has a way of evolving without regard to original intentionsa way of actually following where logic leads, rather than tolerating hard-to-explain lines. Rights can expand in that way. Dissenting in Lawrence, Justice Scalia explained why he took no comfort in the Courts statement that a decision recognizing the right to same-sex intimacy did not involve same-sex marriage. 539 U. S., at 604, 123 S. Ct. 2472, 156 L. Ed. 2d 508. That could be true, he wrote, only if one entertains the belief that principle and logic have nothing to do with [****226] the decisions of this Court. Id., at 605, 123 S. Ct. 2472, 156 L. Ed. 2d 508. Score one [*386] for the dissent, as a matter of prophecy. And logic and principle are not one-way ratchets. Rights can contract in the same way and for the same reasonbecause whatever todays majority might say, one thing really does lead to another. We fervently hope that does not happen because of todays decision. We hope that we will not join Justice Scalia in the book of prophets. But we cannot understand how anyone can be confident that todays opinion will be the last of its kind.

Consider, as our last word on this issue, contraception. The Constitution, of course, does not mention that word. And there is no historical right to contraception, of the kind the majority insists on. To the contrary, the American legal landscape in the decades [***660] after the Civil War was littered with bans on the sale of contraceptive devices. So again, there seem to be two choices. See supra, at 5, 26-27. If the majority is serious about its historical approach, then Griswold and its progeny are in the line of fire too. Or if it is not serious, then . . . what is the basis of todays decision? If we had to guess, we suspect the prospects of this Court approving bans on contraception [****227] are low. But once again, the future significance of todays opinion will be decided in the future. At the least, todays opinion will fuel the fight to get contraception, and any other issues with a moral dimension, out of the Fourteenth Amendment and into state legislatures.9

9

As this Court has considered this case, some state legislators have begun to call for restrictions on certain forms of contraception. See I. Stevenson, After Roe Decision, Idaho Lawmakers May Consider Restricting Some Contraception, Idaho Statesman (May 10, 2022), https://www.idahostatesman.com/news/politics-government/state-politics/article261207007.html; T. Weinberg, Anythings on the Table: Missouri Legislature May Revisit Contraceptive Limits Post-Roe, Missouri Independent (May 20, 2022),

https://www.missouriindependent.com/2022/05/20/anything-on-the-table-missouri-legislature-may-revisit-contraceptive-limits-post-roe/ .

[**2333] Anyway, todays decision, taken on its own, is catastrophic enough. As a matter of constitutional method, the majoritys [*387] commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional principles, the whole course of the Nations history and traditions, and the step-by-step evolution of the Courts precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds.

As a matter of constitutional substance, the majoritys opinion has all the flaws its method [****228] would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant womaneven in the first days of her pregnancythat she could do nothing but bear a child, it can once more impose that command. Todays decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the States will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendments terms, it takes away her liberty. Even before we get to stare decisis, we dissent.

II

By overruling Roe, Casey, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons stare decisis, a principle central to the rule of law. Stare decisis means to stand by things decided. Blacks Law Dictionary 1696 (11th ed. 2019). [*388] Blackstone [***661] called it the established rule to abide by former precedents. 1 Blackstone 69. Stare decisis promotes the evenhanded, predictable, [****229] and consistent development of legal principles. Payne, 501 U. S., at 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720. It maintains a stability that allows people to order their lives under the law. See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 568-569 (1994).

Stare decisis also contributes to the integrity of our constitutional system of government by ensuring that decisions are founded in the law rather than in the proclivities of individuals. Vasquez, 474 U. S., at 265, 106 S. Ct. 617, 88 L. Ed. 2d 598. As Hamilton wrote: It avoid[s] an arbitrary discretion in the courts. The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). And as Blackstone said before him: It keep[s] the scale of justice even and steady, and not liable to waver with every new judges opinion. 1 Blackstone 69. The glory of our legal system

is that it gives preference to precedent rather than . . . jurists. H. Humble, Departure From Precedent, 19 Mich. L. Rev. 608, 614 (1921). That is why, the story goes, Chief Justice John [**2334] Marshall donned a plain black robe when he swore the oath of office. That act personified an American tradition. Judges personal preferences do not make law; rather, the law speaks through them.

That means the Court may not overrule a decision, even a constitutional one, without [****230] a special justification. Gamble v. United States, 587 U. S. ___, ___, 139 S. Ct. 1960, 204 L. Ed. 2d 322, 350 (2019). Stare decisis is, of course, not an inexorable command; it is sometimes appropriate to overrule an earlier decision. Pearson v. Callahan, 555 U. S. 223, 233, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). But the Court must have a good reason to do so over and above the belief that the precedent was wrongly decided. Halliburton Co. v. Erica P. John Fund, Inc., 573 U. S. 258, 266, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014). [I]t is not alone sufficient that we would decide a case differently now than we did then. Kimble v. Marvel Entertainment, LLC, 576 U. S. 446, 455, 135 S. Ct. 2401, 192 L. Ed. 2d 463 (2015).

[*389] The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling Roe and Casey. But none does, as further described below and in the Appendix. See infra, at 61-66. In some, the Court only partially modified or clarified a precedent. And in the rest, the Court relied on one or more of the traditional stare decisis factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. (The majority is wrong when it says that we insist on a test of changed law or fact alone, although that is present in most of the cases. See ante, at 69.) None of those factors apply [****231] here: Nothingand in particular, no significant legal or factual changesupports overturning a half-century of settled law giving women control over their reproductive lives.

First, for all the reasons we have given, Roe and Casey were correct. In holding that a State could not resolve [***662] the debate about abortion in such a definitive way that a woman lacks all choice in the matter, the Court protected womens liberty and womens equality in a way comporting with our Fourteenth Amendment precedents. Casey, 505 U. S., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Contrary to the majoritys view, the legal status of abortion in the 19th century does not weaken those decisions. And the majoritys repeated refrain about usurp[ing] state legislatures power to address a publicly contested question does not help it on the key issue here. Ante, at 44; see ante, at 1. To repeat: The point of a right is to shield individual actions and decisions from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Barnette, 319 U. S., at 638, 63 S. Ct. 1178, 87 L. Ed. 1628; supra, at 7. However divisive, a right is not at the peoples mercy.

[*390] In any event [w]hether or not we . . . agree with a prior precedent is the beginning, [****232] not the end, of our analysisand the remaining principles of stare decisis weigh heavily

against overruling Roe and Casey. Dickerson v. United States, 530 U. S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). Casey itself applied those principles, in one of this Courts most important precedents about precedent. After assessing the traditional stare decisis factors, Casey reached the only conclusion possiblethat stare decisis operates powerfully here. It still does. The standards Roe and Casey set out are perfectly workable. No changes in either law or fact have eroded the two decisions. And tens of millions of American women have [**2335] relied, and continue to rely, on the right to choose. So under traditional stare decisis principles, the majority has no special justification for the harm it causes.

And indeed, the majority comes close to conceding that point. The majority barely mentions any legal or factual changes that have occurred since Roe and Casey. It suggests that the two decisions are hard for courts to implement, but cannot prove its case. In the end, the majority says, all it must say to override stare decisis is one thing: that it believes Roe and Casey egregiously wrong. Ante, at 70. That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees. [****233] So how does that approach prevent the scale of justice from waver[ing] with every new judges opinion? 1 Blackstone 69. It does not. It makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled Roe and Casey for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

A

Contrary to the majoritys view, there is nothing unworkable about Caseys undue burden standard. Its primary focus on whether a State has placed a substantial obstacle [*391] on a woman seeking an abortion is the sort of inquiry familiar to judges across a variety of contexts. June Medical Services L.L.C. v. Russo, 591 U. S. ___, ___, [***663] 140 S. Ct. 2103, 207 L. Ed. 2d 566, 601 (2020) (Roberts, C. J., concurring in judgment). And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day.

General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. When called on to give effect to the Constitutions broad principles, this Court often crafts flexible standards that can be applied case-by-case to a myriad [****234] of unforeseeable circumstances. See Dickerson, 530 U. S., at 441, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (No court laying down a general rule can possibly foresee the various circumstances in which it must apply). So, for example, the Court asks about undue or substantial burdens on speech, on voting, and on interstate commerce. See, e.g., Arizona Free Enterprise Clubs Freedom Club PAC v. Bennett, 564 U. S. 721, 748, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); Burdick v. Takushi, 504 U. S. 428, 433-434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992); Pike v. Bruce Church, Inc., 397 U. S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). The Casey undue burden standard is the same. It also resembles general standards that courts work with daily in other legal sphereslike the rule

of reason in antitrust law or the arbitrary and capricious standard for agency decisionmaking. See Standard Oil Co. of N. J. v. United States, 221 U. S. 1, 62, 31 S. Ct. 502, 55 L. Ed. 619 (1911); Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U. S. 29, 42-43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). Applying general standards to particular cases is, in many contexts, just what it means to do law.

And the undue burden standard has given rise to no unusual difficulties. Of course, it has provoked some disagreement among judges. Casey knew it would: That much is to be expected in the application of any legal standard which must accommodate lifes complexity. 505 U. S., at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion). Which is to say: That much is to be expected in the application of any legal standard. But the majority vastly overstates the divisions among judges applying [*392] the standard. We [**2336] count essentially two. The Chief Justice disagreed with other Justices in the June Medical majority about whether Casey called for [****235] weighing the benefits of an abortion regulation against its burdens. See 591 U. S., at ___-___, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (slip op., at 6-7); ante, at 59, 60, and n. 53.10

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Some lower courts then differed over which opinion in June Medical was controllingbut that is a dispute not about the undue burden standard, but about the Marks rule, which tells courts how to determine the precedential effects of a divided decision.

We agree that the June Medical difference is a differencebut not one that would actually make a difference in the result of most cases (it did not in June Medical), and not one incapable of resolution were it ever to matter. As for lower courts, there is now a one-year-old, one-to-one Circuit split about how the undue burden standard applies to state laws that ban abortions for certain reasons, like fetal abnormality. See ante, at 61, and n. 57. That [***664] is about it, as far as we can see.11

11

The rest of the majoritys supposed splits are, shall we say, unimpressive. The majority says that lower courts have split over how to apply the undue burden standard to parental notification laws. See ante, at 60, and n. 54. But that is not so. The state law upheld had an exemption for minors demonstrating adequate maturity, whereas the ones struck down did not. Compare Planned Parenthood of Blue Ridge v. Camblos, 155 F. 3d 352, 383-384 (CA4 1998), with Planned Parenthood of Ind. & Ky., Inc. v. Adams, 937 F. 3d 973, 981 (CA7 2019), cert. granted, judgment vacated, 591 U. S. ___, 141 S. Ct. 187, 207 L. Ed. 2d 1112 (2020), and Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F. 3d 1452, 1460 (CA8 1995). The majority says there is a split about bans on certain types of abortion procedures. See ante, at 61, and n. 55. But the one court to have separated itself on that issue did so based on a set of factual findings significantly different from those in other cases. Compare Whole Womans Health v. Paxton, 10 F.4th 430, 447-453 (CA5 2021), with EMW Womens Surgical Center, P.S.C. v. Friedlander, 960 F. 3d 785, 798-806 (CA6 2020), and West Ala. Womens Center v. Williamson, 900 F. 3d 1310, 1322-1324 (CA11 2018). Finally, the majority says there is a split about whether an increase in travel time to reach a clinic is an undue burden. See ante, at 61, and n. 56. But the cases to which the majority refers predate

this Courts decision in Whole Womans Health v. Hellerstedt, 579 U. S. 582, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016), which clarified how to apply the undue burden standard to that context.

And that is not much. This Court mostly does not even [*393] grant certiorari on one-year-old, one-to-one Circuit splits, because we know that a bit of disagreement is an inevitable part of our legal system. To borrow an old saying that might apply here: Not one or even a couple of swallows can make the majoritys summer.

Anyone concerned about workability should consider the majoritys substitute standard. The majority says a law regulating or banning abortion must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. Ante, at 77. [****236] And the majority lists interests like respect for and preservation of prenatal life, protection of maternal health, elimination of certain medical procedures, mitigation of fetal pain, and others. Ante, at 78. This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a womans life and health? And if so, exactly when? How much risk to a womans life can a State force her to incur, before the Fourteenth Amendments protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendments protection of liberty and [**2337] equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management? See generally L. Harris, Navigating Loss of Abortion ServicesA Large Academic Medical Center Prepares for the [****237] Overturn of Roe v. Wade, 386 New England J. Med. 2061 (2022).12

12

To take just the last, most medical treatments for miscarriage are identical to those used in abortions. See Kaiser Family Foundation (Kaiser), G. Weigel, L. Sobel, & A. Salganicoff, Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws (Dec. 4, 2019), https:/ / www.kff.org/ womens-health-policy/ issue-brief/ understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-andfetal-harm-laws/ . Blanket restrictions on abortion procedures and medications therefore may be understood to deprive women of effective treatment for miscarriages, which occur in about 10 to 30 percent of pregnancies. See Health Affairs, J. Strasser, C. Chen, S. Rosenbaum, E. Schenk, & E. Dewhurst, Penalizing Abortion Providers Will Have Ripple Effects Across Pregnancy Care (May 3, 2022), https:/ / www.healthaffairs.org/ do/ 10.1377/ forefront.20220503.129912/ .

[*394] Finally, the majoritys ruling today invites a host of questions about interstate [***665] conflicts. See supra, at 3; see generally D. Cohen, G. Donley, & R. Rebouch鬠The New Abortion Battleground, 123 Colum. L. Rev. (forthcoming 2023), https:/ / ssrn.com/ abstract=4032931. Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State

interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so todays ruling will give rise to a host of new constitutional questions. Far from removing the Court from the abortion issue, the majority puts the Court at the center of the coming interjurisdictional abortion wars. Id., at ___ (draft, at 1).

In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated. It forces the Court to wade further into hotly contested [****238] issues, including moral and philosophical ones, that the majority criticizes Roe and Casey for addressing.

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decisions original basis. A review of the Appendix to this dissent proves the point. See infra, at 61-66. [*395] Most successful proponent[s] of overruling precedent, this Court once said, have carried the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by stare decisis yield in favor of a greater objective. Vasquez, 474 U. S., at 266, 106 S. Ct. 617, 88 L. Ed. 2d 598. Certainly, that was so of the main examples the majority cites: Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937). But it is not so today. Although nodding to some arguments others have made about modern developments, the majority does not really rely on them, no doubt seeing their slimness. Ante, at 33; see ante, at 34. The majority briefly invokes the current controversy over abortion. See ante, at 70-71. But it has to acknowledge that the same dispute has existed for decades: Conflict [**2338] over abortion is not a change but a constant. (And as we will later discuss, the presence of that continuing division provides more of a reason to stick with, [****239] than to jettison, existing precedent. See infra, at 55-57.) In the end, the majority throws longstanding precedent to the winds without showing that anything significant has changed [***666] to justify its radical reshaping of the law. See ante, at 43.

1

Subsequent legal developments have only reinforced Roe and Casey. The Court has continued to embrace all the decisions Roe and Casey cited, decisions which recognize a constitutional right for an individual to make her own choices about intimate relationships, the family, and contraception. Casey, 505 U. S., at 857, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Roe and Casey have themselves formed the legal foundation for subsequent decisions protecting these profoundly personal choices. As discussed earlier, the Court relied on Casey to hold that the Fourteenth Amendment protects same-sex intimate relationships. See Lawrence, 539 U. S., at 578, 123 S. Ct.

2472, 156 L. Ed. 2d 508supra, at 23. The Court later invoked the same set of precedents to accord constitutional recognition to same-sex marriage. See Obergefell, 576 U. S., at 665-666, 135 S. Ct. 2584, 192 L. Ed. 2d 609; [*396] supra, at 23. In sum, Roe and Casey are inextricably interwoven with decades of precedent about the meaning of the Fourteenth Amendment. See supra, at 21-24. While the majority might wish it otherwise, Roe and Casey are the very opposite of obsolete constitutional thinking. Agostini v. Felton, 521 U. S. 203, 236, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting Casey, 505 U. S., at 857, 112 S. Ct. 2791, 120 L. Ed. 2d 674).

Moreover, no subsequent factual developments have undermined [****240] Roe and Casey. Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. Even an uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. For some women, pregnancy and childbirth can mean life-altering physical ailments or even death. Today, as noted earlier, the risks of carrying a pregnancy to term dwarf those of having an abortion. See supra, at 22. Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase.13

13

See L. Harris, Navigating Loss of Abortion ServicesA Large Academic Medical Center Prepares for the Overturn of Roe v. Wade, 386 New England J. Med. 2061, 2063 (2022). This projected racial disparity reflects existing differences in maternal mortality rates for black and white women. Black women are now three to four times more likely to die during or after childbirth than white women, often from preventable causes. See Brief for Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae 18.

Pregnancy and childbirth may also impose large-scale financial costs. The majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. See ante, at 33-34. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare [*397] services [***667] may be far away.14

14

See Centers for Medicare and Medicaid Services, Issue Brief: Improving Access to Maternal Health Care in Rural Communities 4, 8, 11 (Sept. 2019), https:/ / www.cms.gov/ About-CMS/ Agency-Information/ OMH/ equity-initiatives/ rural-health/ 09032019-Maternal-Health-Care-in-Rural-Communities.pdf. In Mississippi, for instance, 19 percent of women of reproductive age are uninsured and 60 percent of counties lack a single obstetrician-gynecologist. Brief for Lawyers Committee for Civil Rights Under Law et al. as Amici Curiae 12-13.

[**2339] Women also continue to face pregnancy [****241] discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most. Only 20 percent

of private-sector workers have access to paid family leave, including a mere 8 percent of workers in the bottom quartile of wage earners.15

15

Dept. of Labor, National Compensation Survey: Employee Benefits in the United States, Table 31 (Sept. 2020), https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf#page=299.

The majority briefly notes the growing prevalence of safe haven laws and demand for adoption, see ante, at 34, and nn. 45-46, but, to the degree that these are changes at all, they too are irrelevant.16

16

Safe haven laws, which allow parents to leave newborn babies in designated safe spaces without threat of prosecution, were not enacted as an alternative to abortion, but in response to rare situations in which birthing mothers in crisis would kill their newborns or leave them to die. See Centers for Disease Control and Prevention (CDC), R. Wilson, J. Klevens, D. Williams, & L. Xu, Infant Homicides Within the Context of Safe Haven LawsUnited States, 2008-2017, 69 Morbidity and Mortality Weekly Report 1385 (2020).

Neither reduces the health risks or financial costs of going through pregnancy and childbirth. Moreover, the choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. The reality is that few women denied an abortion will choose adoption.17

17

A study of women who sought an abortion but were denied one because of gestational limits found that only 9 percent put the child up for adoption, rather than parenting themselves. See G. Sisson, L. Ralph, H. Gould, & D. Foster, Adoption Decision Making Among Women Seeking Abortion, 27 Womens Health Issues 136, 139 (2017).

The vast majority [*398] will continue, just as in Roe and Caseys time, to shoulder the costs of childrearing. Whether or not they choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose.18

18

The majority finally notes the claim that people now have a new appreciation of fetal life, partly because of viewing sonogram images. Ante, at 34. It is hard to know how anyone would evaluate such a claim and as we have described above, the majoritys reasoning does not rely on any reevaluation of the interest in protecting fetal life. See supra, at 26, and n. 7. It is worth noting that sonograms became widely used in the 1970s, long before Casey. Today, 60 percent of women seeking abortions have at least one child, and one-third have two or more. See CDC, K. Kortsmit et al., Abortion SurveillanceUnited States, 2019, 70 Morbidity and Mortality Weekly Report 6

(2021). These women know, even as they choose to have an abortion, what it is to look at a sonogram image and to value a fetal life.

Mississippis own record illustrates how little facts on the ground have changed since Roe and Casey, notwithstanding the majoritys [****242] supposed modern developments. Ante, at 33. Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from [***668] demonstrating proper contraceptive use.19

19

Guttmacher Institute, K. Kost, Unintended Pregnancy Rates at the State Level: Estimates for 2010 and Trends Since 2002, Table 1 (2015), https:/ / www.guttmacher.org/ sites/ default/ files/ report_pdf/ stateup10.pdf; Kaiser, State Requirements for Insurance Coverage of Contraceptives (May 1, 2022), https:/ / www.kff.org/ state-category/ womens-health/ family-planning; Miss. Code Ann. 37-13-171(2)(d) (Cum. Supp. 2021) (In no case shall the instruction or program include any demonstration of how condoms or other contraceptives are applied).

The State [**2340] neither bans pregnancy discrimination nor requires provision of paid parental leave. Brief for Yale Law School Information Society Project as Amicus Curiae 13 (Brief for Yale Law School); Brief for National Womens Law Center et al. as Amici Curiae 32. It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without [*399] basic medical care or enough food. See Brief for 547 Deans, Chairs, Scholars and Public Health Professionals et al. as Amici Curiae 32-34 (Brief for 547 Deans). Although 86 percent of pregnancy-related deaths in the State are due to postpartum complications, Mississippi rejected federal funding to provide a years worth of Medicaid coverage to women after giving birth. See Brief for Yale Law School 12-13. Perhaps unsurprisingly, health outcomes in Mississippi are abysmal for both women and children. Mississippi has the highest infant mortality rate in the country, and [****243] some of the highest rates for preterm birth, low birthweight, cesarean section, and maternal death.20

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See CDC, Infant Mortality Rates by State (Mar. 3, 2022), https:/ / www.cdc.gov/ nchs/ pressroom/ sosmap/ infant_mortality_rates/ infant_mortality.htm; Mississippi State Dept. of Health, Infant Mortality Report 2019 & 2020, pp. 18-19 (2021), https:/ / www.msdh.ms.gov/ msdhsite/ _static/ resources/ 18752.pdf; CDC, Percentage of Babies Born Low Birthweight by State (Feb. 25, 2022), https:/ / www.cdc.gov/ nchs/ pressroom/ sosmap/ lbw_births/ lbw.htm; CDC, Cesarean Delivery Rate by State (Feb. 25, 2022), https:/ / www.cdc.gov/ nchs/ pressroom/ sosmap/ cesarean_births/ cesareans.htm; Mississippi State Dept. of Health, Mississippi Maternal Mortality Report 2013-2016, pp. 5, 25 (Mar. 2021), https:/ / www.msdh.ms.gov/ msdhsite/ _static/ resources/ 8127.pdf.

It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion. See Brief for 547 Deans 9-10. We do not say that every State is Mississippi, and we are

sure some have made gains since Roe and Casey in providing support for women and children. But a state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in womens and childrens health. See Brief for 547 Deans 23-34.

The only notable change we can see since Roe and Casey cuts in favor of adhering to precedent: It is that American abortion law has become more and more aligned with other nations. The majority, like the Mississippi Legislature, claims that the United States is an extreme outlier when it [*400] comes to abortion regulation. See ante, at 6, and n. 15. The global trend, however, has been toward increased provision of legal and safe abortion care. A number of countries, including New Zealand, the Netherlands, and Iceland, permit abortions up to a roughly similar time as Roe and Casey set. See Brief for [****244] International and Comparative Legal Scholars as Amici Curiae 18-22. Canada has decriminalized abortion at any point in a pregnancy. See id., at 13-15. Most Western European countries impose restrictions on [***669] abortion after 12 to 14 weeks, but they often have liberal exceptions to those time limits, including to prevent harm to a womans physical or mental health. See id., at 24-27; Brief for European Law Professors as Amici Curiae 16-17, Appendix. They also typically make access to early abortion easier, for example, by helping cover its cost.21

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See D. Grossman, K. Grindlay, & B. Burns, Public Funding for Abortion Where Broadly Legal, 94 Contraception 451, 458 (2016) (discussing funding of abortion in European countries).

Perhaps most notable, [**2341] more than 50 countries around the worldin Asia, Latin America, Africa, and Europehave expanded access to abortion in the past 25 years. See Brief for International and Comparative Legal Scholars as Amici Curiae 28-29. In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.

In sum, the majority can point to neither legal nor factual developments in support of its decision. Nothing that has happened in this country or the world in recent decades undermines the core insight of Roe and Casey. It continues to be true that, within the constraints those decisions [****245] established, a woman, not the government, should choose whether she will bear the burdens of pregnancy, childbirth, and parenting.

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In support of its holding, see ante, at 40, the majority invokes two watershed cases overruling prior constitutional [*401] precedents: West Coast Hotel Co. v. Parrish and Brown v. Board of Education. But those decisions, unlike todays, responded to changed law and to changed facts and attitudes that had taken hold throughout society. As Casey recognized, the two cases are relevant only to showby stark contrasthow unjustified overturning the right to choose is. See 505 U. S., at 861-864, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

West Coast Hotel overruled Adkins v. Childrens Hospital of D. C., 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923), and a whole line of cases beginning with Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). Adkins had found a state minimum-wage law unconstitutional because, in the Courts view, the law interfered with a constitutional right to contract. 261 U. S., at 554-555, 43 S. Ct. 394, 67 L. Ed. 785. But then the Great Depression hit, bringing with it unparalleled economic despair. The experience undermined—in fact, it disproved—Adkinss assumption that a wholly unregulated market could meet basic human needs. As Justice Jackson (before becoming a Justice) wrote of that time: The older world of laissez faire was recognized everywhere outside the Court to be dead. The Struggle for Judicial Supremacy 85 (1941). In West Coast Hotel, the Court caught [****246] up, recognizing through the lens of experience the flaws of existing legal doctrine. See also ante, at 11 (Roberts, C. J., concurring in judgment). The havoc the Depression had worked on ordinary Americans, the Court noted, was common knowledge through the length and breadth of the land. 300 U. S., at 399, 57 S. Ct. 578, 81 L. Ed. 703. The laissez-faire approach had led to the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living. Ibid. And [***670] since Adkins was decided, the law had also changed. In several decisions, the Court had started to recognize the power of States to implement economic policies designed to enhance their citizens economic well-being. See, e.g., Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934); OGorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251, 51 S. Ct. 130, 75 L. Ed. 324 (1931). The statements in those decisions, West Coast Hotel explained, were impossible to reconcile [*402] with Adkins. 300 U. S., at 398, 57 S. Ct. 578, 81 L. Ed. 703. There was no escaping the need for Adkins to go.

Brown v. Board of Education overruled Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), along with its doctrine of separate but equal. By 1954, decades of Jim Crow had made clear what Plessys turn of phrase actually meant: inherent[ ] [in]equal[ity]. Brown, 347 U. S., at 495, 74 S. Ct. 686, 98 L. Ed. 873. Segregation was not, and could not ever be, consistent with [**2342] the Reconstruction Amendments, ratified to give the former slaves full citizenship. Whatever might have been thought in Plessys time, the Brown Court explained, [****247] both experience and modern authority showed the detrimental effect[s] of state-sanctioned segregation: It affect[ed] [childrens] hearts and minds in a way unlikely ever to be undone. 347 U. S., at 494, 74 S. Ct. 686, 98 L. Ed. 873. By that point, too, the law had begun to reflect that understanding. In a series of decisions, the Court had held unconstitutional public graduate schools exclusion of black students. See, e.g., Sweatt v. Painter, 339 U. S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950); Sipuel v. Board of Regents of Univ. of Okla., 332 U. S. 631, 68 S. Ct. 299, 92 L. Ed. 247 (1948) (per curiam); Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938). The logic of those cases, Brown held, appl[ied] with added force to children in grade and high schools. 347 U. S., at 494, 74 S. Ct. 686, 98 L. Ed. 873. Changed facts and changed law required Plessys end.

The majority says that in recognizing those changes, we are implicitly supporting the half-century interlude between Plessy and Brown. See ante, at 70. That is not so. First, if the Brown Court had used the majoritys method of constitutional construction, it might not ever have overruled

Plessy whether 5 or 50 or 500 years later. Brown thought that whether the ratification-era history supported desegregation was [a]t best . . . inconclusive. 347 U. S., at 489, 74 S. Ct. 686, 98 L. Ed. 873. But even setting that aside, we are not saying that a decision can never be overruled just because it is terribly wrong. Take West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, which the majority also relies on. See ante, at 40-41, 70. [*403] That overruling took place just three [****248] years after the initial decision, before any notable reliance interests had developed. It happened as well because individual Justices changed their minds, not because a new majority wanted to undo the decisions of their predecessors. Both Barnette and Brown, moreover, share another feature setting them apart from the Courts ruling today. They protected individual rights with a strong basis in the Constitutions most fundamental commitments; they did not, as the majority does [***671] here, take away a right that individuals have held, and relied on, for 50 years. To take that action based on a new and bare majoritys declaration that two Courts got the result egregiously wrong? And to justify that action by reference to Barnette? Or to Browna case in which the Chief Justice also wrote an (11-page) opinion in which the entire Court could speak with one voice? These questions answer themselves.

Casey itself addressed both West Coast Hotel and Brown, and found that neither supported Roes overruling. In West Coast Hotel, Casey explained, the facts of economic life had proved different from those previously assumed. 505 U. S., at 862, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And even though Plessy was wrong the day it was decided, the passage of time had made that ever more clear to ever more citizens: Societys understanding [****249] of the facts in 1954 was fundamentally different than in 1896. Id., at 863, 112 S. Ct. 2791, 120 L. Ed. 2d 674. So the Court needed to reverse course. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations. Id., at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And because such dramatic change had occurred, the public could understand why the Court was acting. [T]he Nation could accept each decision as a response to the Courts constitutional duty. Ibid. But that would not be true of a reversal of Roe[b]ecause neither the factual underpinnings of Roes central holding nor our understanding of it has changed. 505 U. S., at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

[**2343] That is just as much so today, because Roe and Casey continue to reflect, not diverge from, broad trends in American [*404] society. It is, of course, true that many Americans, including many women, opposed those decisions when issued and do so now as well. Yet the fact remains: Roe and Casey were the product of a profound and ongoing change in womens roles in the latter part of the 20th century. Only a dozen years before Roe, the Court described women as the center of home and family life, with special responsibilities that precluded their full legal status under the Constitution. Hoyt v. Florida, 368 U. S. 57, 62, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961). By 1973, when the Court decided Roe, fundamental social change [****250] was underway regarding the place of womenand the law had begun to follow. See Reed v. Reed, 404 U. S. 71, 76, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971) (recognizing that the Equal Protection Clause prohibits sex-based discrimination). By 1992, when the Court decided Casey, the traditional view

of a womans role as only a wife and mother was no longer consistent with our understanding of the family, the individual, or the Constitution. 505 U. S., at 897, 112 S. Ct. 2791, 120 L. Ed. 2d 674; see supra, at 15, 23-24. Under that charter, Casey understood, women must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions. Nothing since Caseyno changed law, no changed facthas undermined that promise.

C

The reasons for retaining Roe and Casey gain further strength from the overwhelming reliance interests those decisions have created. The Court adheres to precedent not just [***672] for institutional reasons, but because it recognizes that stability in the law is an essential thread in the mantle of protection that the law affords the individual. Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn., 450 U. S. 147, 154, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981) (Stevens, J., concurring). So when overruling precedent would dislodge [individuals] settled rights and expectations, stare decisis has added force. Hilton v. South Carolina Public Railways Commn, 502 U. S. 197, 202, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991). Casey understood that [*405] to deny individuals reliance on Roe was to refuse to face the fact[s]. 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Today [****251] the majority refuses to face the facts. The most striking feature of the [majority] is the absence of any serious discussion of how its ruling will affect women. Ante, at 37. By characterizing Caseys reliance arguments as generalized assertions about the national psyche, ante, at 64, it reveals how little it knows or cares about womens lives or about the suffering its decision will cause.

In Casey, the Court observed that for two decades individuals have organized intimate relationships and made significant life choices in reliance on the availability of abortion in the event that contraception should fail. 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Over another 30 years, that reliance has solidified. For half a century now, in Caseys words, [t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. Ibid.; see supra, at 23-24. Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of Roes and Caseys protections.

The disruption of overturning Roe and Casey will therefore be profound. Abortion is a common medical procedure and a familiar experience in womens lives. About 18 percent [****252] of pregnancies in this country end in abortion, and about one quarter of [**2344] American women will have an abortion before the age of 45.22

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See CDC, K. Kortsmit et al., Abortion SurveillanceUnited States, 2019, 70 Morbidity and Mortality Weekly Report 7 (2021); Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae 9.

Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As Casey understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. [*406] Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes womens opportunities [***673] to participate fully and equally in the Nations political, social, and economic life. See Brief for Economists as Amici [****253] Curiae 13 (showing that abortion availability has large effects on womens education, labor force participation, occupations, and earnings (footnotes omitted)).

The majoritys response to these obvious points exists far from the reality American women actually live. The majority proclaims that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions. Ante, at 64 (quoting Casey, 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674).23

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Astoundingly, the majority casts this statement as a conce[ssion] from Casey with which it agree[s]. Ante, at 64. In fact, Casey used this language as part of describing an argument that it rejected. See 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. It is only todays Court that endorses this profoundly mistaken view.

The facts are: 45 percent of pregnancies in the United States are unplanned. See Brief for 547 Deans 5. Even the most effective contraceptives fail, and effective contraceptives are not universally accessible.24

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See Brief for 547 Deans 6-7 (noting that 51 percent of women who terminated their pregnancies reported using contraceptives during the month in which they conceived); Brief for Lawyers Committee for Civil Rights Under Law et al. as Amici Curiae 12-14 (explaining financial and geographic barriers to access to effective contraceptives).

Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. See Brief for Legal Voice et al. as Amici Curiae 18-19. The Mississippi [*407] law at issue here, for example, has no exception for rape or incest, even for underage women. Finally, the majority ignores, as explained above, that some women decide to have an abortion because their circumstances change during a pregnancy. See supra, at 49. Human bodies care little for hopes and plans. Events can occur after conception, from [****254] unexpected medical risks to changes in family circumstances, which profoundly alter what it means to carry a pregnancy to term. In all these situations, women have expected

that they will get to decide, perhaps in consultation with their families or doctors but free from state interference, whether to continue a pregnancy. For those who will now have to undergo that pregnancy, the loss of Roe and Casey could be disastrous.

That is especially so for women without money. When we count[ ] the cost of [Roes] repudiation on women who once relied on that decision, it is not hard to see [**2345] where the greatest burden will fall. Casey, 505 U. S., at 855, 112 S. Ct. 2791, 120 L. Ed. 2d 674. In States that bar abortion, women of means will still be able to travel to obtain the services they need.25

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This statement of course assumes that States are not successful in preventing interstate travel to obtain an abortion. See supra, at 3, 36-37. Even assuming that is so, increased out-of-state demand will lead to longer wait times and decreased availability of service in States still providing abortions. See Brief for State of California et al. as Amici Curiae 25-27. This is what happened in Oklahoma, Kansas, Colorado, New Mexico, and Nevada last fall after Texas effectively banned abortions past six weeks of gestation. See United States v. Texas, 595 U. S. ___, ___, 142 S. Ct. 14, 211 L. Ed. 2d 225 (2021) (Sotomayor, J., concurring in part and dissenting in part) (slip op., at 6).

It is women who cannot afford to do so who will suffer most. These [***674] are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line. See Brief for 547 Deans 7; Brief for Abortion Funds and Practical Support Organizations as [****255] Amici Curiae 8 (Brief for Abortion Funds). [*408] Even with Roes protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy. See Brief for Abortion Funds 7-12. 26

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The average cost of a first-trimester abortion is about $500. See Brief for Abortion Funds 7. Federal insurance generally does not cover the cost of abortion, and 35 percent of American adults do not have cash on hand to cover an unexpected expense that high. Guttmacher Institute, M. Donovan, In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact (Jan. 5, 2017), https:/ / www.guttmacher.org/ gpr/ 2017/ 01/ real-life-federal-restrictions-abortion-coverage-and-women-they-impact#:~:text=Although%20the%20Hyde%20Amendment%20bars,provide%20abortion%20coverage%20to%20enrollees; Brief for Abortion Funds 11.

After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care. They will not have the money to make the trip necessary; or to obtain childcare for that time; or to take time off work. Many will endure the costs and risks of pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives.27

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Mississippi is likely to be one of the States where these costs are highest, though history shows that it will have company. As described above, Mississippi provides only the barest financial support to pregnant women. See supra, at 41-42. The State will greatly restrict abortion care without addressing any of the financial, health, and family needs that motivate many women to seek it. The effects will be felt most severely, as they always have been, on the bodies of the poor. The history of state abortion restrictions is a history of heavy costs exacted from the most vulnerable women. It is a history of women seeking illegal abortions in hotel rooms and home kitchens; of women trying to self-induce abortions by douching with bleach, injecting lye, and penetrating themselves with knitting needles, scissors, and coat hangers. See L. Reagan, When Abortion Was a Crime 42-43, 198-199, 208-209 (1997). It is a history of women dying.

Finally, the expectation of reproductive control is integral to many womens identity and their place in the Nation. See Casey, 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. That expectation helps define a woman as an equal citizen[ ], with all the rights, privileges, and obligations that status entails. Gonzales, 550 U. S., at 172, 127 S. Ct. 1610, 167 L. Ed. 2d 480 [*409] (Ginsburg, J., dissenting); see supra, at 23-24. It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to [****256] others and to the government. It helps define a [**2346] sphere of freedom, in which a person has the capacity to make choices free of government control. As Casey recognized, the right order[s] her thinking as well as her living. 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants.

[***675] Withdrawing a womans right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of todays Court has wrenched this choice from women and given it to the States. To allow a State to exert control over one of the most intimate and personal choices a woman may make is not only to affect the course of her life, monumental as those effects might be. Id., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. It is to alter her views of [herself] and her understanding of her place[ ] in society as someone with the recognized dignity and authority to make these choices. Id., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Women have relied on Roe and Casey in this way for 50 years. Many have never known anything else. When Roe and Casey disappear, the loss of power, control, and dignity will be immense.

The Courts failure to perceive the whole swath of expectations Roe and Casey created reflects [****257] an impoverished view of reliance. According to the majority, a reliance interest must be very concrete, like those involving property or contract. Ante, at 64. While many of this Courts cases addressing reliance have been in the commercial context, Casey, 505 U. S., at 855, 112 S. Ct. 2791, 120 L. Ed. 2d 674, none holds that interests must be analogous to commercial ones to warrant stare decisis protection.28

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The majoritys sole citation for its concreteness requirement is Payne v. Tennessee, 501 U. S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). But Payne merely discounted reliance interests in cases involving procedural and evidentiary rules. Id., at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720. Unlike the individual right at stake here, those rules do not alter primary conduct. Hohn v. United States, 524 U. S. 236, 252, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998). Accordingly, they generally do not implicate the reliance interests of private parties at all. Alleyne v. United States, 570 U. S. 99, 119, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (Sotomayor, J., concurring).

This unprecedented assertion is, at bottom, a radical [*410] claim to power. By disclaiming any need to consider broad swaths of individuals interests, the Court arrogates to itself the authority to overrule established legal principles without even acknowledging the costs of its decisions for the individuals who live under the law, costs that this Courts stare decisis doctrine instructs us to privilege when deciding whether to change course.

The majority claims that the reliance interests women have in Roe and Casey are too intangible for the Court to consider, even if it were inclined to do so. Ante, at 65. This is to ignore as judges what we know as men and women. The interests women have in Roe and Casey are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and [****258] whether to try to become pregnant than they would have when Roe served as a backstop. Other women will carry pregnancies to term, with all the costs and risk of harm that involves, when they would previously have chosen to obtain an abortion. For millions of women, Roe and Casey have been critical in giving them control of their bodies and their lives. Closing our eyes to the suffering todays decision will impose will not make that suffering disappear. The majority cannot escape its obligation to count[ ] the cost[s] of its decision by invoking the conflicting arguments of contending sides. Casey, [***676] 505 U. S., at 855, 112 S. Ct. [**2347] 2791, 120 L. Ed. 2d 674; ante, at 65. Stare decisis requires that the Court calculate the costs of a decisions repudiation on those who have relied on the decision, not on those who have disavowed it. See Casey, 505 U. S., at 855, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

More broadly, the majoritys approach to reliance cannot be reconciled with our Nations understanding of constitutional [*411] rights. The majoritys insistence on a concrete, economic showing would preclude a finding of reliance on a wide variety of decisions recognizing constitutional rightssuch as the right to express opinions, or choose whom to marry, or decide how to educate children. The Court, on the majoritys logic, [****259] could transfer those choices to the State without having to consider a persons settled understanding that the law makes them hers. That must be wrong. All those rights, like the right to obtain an abortion, profoundly affect and, indeed, anchor individual lives. To recognize that people have relied on these rights is not to dabble in abstractions, but to acknowledge some of the most concrete and familiar aspects of human life and liberty. Ante, at 64.

All those rights, like the one here, also have a societal dimension, because of the role constitutional liberties play in our structure of government. See, e.g., Dickerson, 530 U. S., at 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (recognizing that Miranda warnings have become part of

our national culture in declining to overrule Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight. Roe and Casey have of course aroused controversy and provoked disagreement. But the right those decisions conferred and reaffirmed is part of societys understanding of constitutional law and of how the [****260] Court has defined the liberty and equality that women are entitled to claim.

After today, young women will come of age with fewer rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away. The majoritys refusal even to consider the life-altering consequences of reversing Roe and Casey is a stunning indictment of its decision.

[*412] D

One last consideration counsels against the majoritys ruling: the very controversy surrounding Roe and Casey. The majority accuses Casey of acting outside the bounds of the law to quell the conflict over abortionof imposing an unprincipled settlement of the issue in an effort to end national division. Ante, at 67. But that is not what Casey did. As shown above, Casey applied traditional principles of stare decisiswhich the majority today ignoresin reaffirming Roe. Casey carefully assessed changed circumstances (none) and reliance interests (profound). It considered every aspect of how Roes framework operated. It adhered to the law in its analysis, and [***677] it reached the conclusion that the law required. True enough that Casey took notice of the national controversy [****261] about abortion: The Court knew in 1992, as it did in 1973, that abortion was a divisive issue. Casey, 505 U. S., at 867-868, 112 S. Ct. 2791, 120 L. Ed. 2d 674; see Roe, 410 U. S., at 116, 93 S. Ct. 705, 35 L. Ed. 2d 147. But Caseys reason for acknowledging public conflict was the exact opposite of what the majority insinuates. Casey addressed the national controversy in order to emphasize how important it was, in that case of all cases, [**2348] for the Court to stick to the law. Would that todays majority had done likewise.

Consider how the majority itself summarizes this aspect of Casey:

The American peoples belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not social and political pressures. There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial watershed decision, such as Roe. A decision overruling Roe would be perceived as having been made under fire and as a surrender to political pressure. Ante, at 66-67 (citations omitted).

[*413] That seems to us a good description. And it seems to us right. The majority responds (if we understand it correctly): well, yes, but we have to apply the law. See ante, at 67. To which Casey would have [****262] said: That is exactly the point. Here, more than anywhere, the Court needs to apply the lawparticularly the law of stare decisis. Here, we know that citizens will continue to contest the Courts decision, because [m]en and women of good conscience deeply disagree about abortion. Casey, 505 U. S., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674. When that contestation takes placebut when there is no legal basis for reversing coursethe Court needs to be steadfast, to stand its ground. That is what the rule of law requires. And that is what respect for this Court depends on.

The promise of constancy, once given in so charged an environment, Casey explained, binds its maker for as long as the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. Id., at 868, 112 S. Ct. 2791, 120 L. Ed. 2d 674. A breach of that promise is nothing less than a breach of faith. Ibid. [A]nd no Court that broke its faith with the people could sensibly expect credit for principle. Ibid. No Court breaking its faith in that way would deserve credit for principle. As one of Caseys authors wrote in another case, Our legitimacy requires, above all, that we adhere to stare decisis in sensitive political contexts where partisan controversy abounds. Bush v. Vera, 517 U. S. 952, 985, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (opinion of OConnor, [****263] J.).

Justice Jackson once called a decision he dissented from a loaded weapon, ready to hand for improper uses. Korematsu v. United States, 323 U. S. 214, 246, 65 S. Ct. 193, 89 L. Ed. 194 (1944). We fear that todays decision, departing from stare decisis for no legitimate reason, is its own loaded weapon. Weakening stare decisis threatens to upend bedrock legal doctrines, far beyond any single decision. [***678] Weakening stare decisis creates profound legal instability. And as Casey recognized, weakening stare decisis in a hotly contested case like this one calls into question this Courts commitment to legal principle. It [*414] makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, todays decision takes aim, we fear, at the rule of law.

III

Power, not reason, is the new currency of this Courts decisionmaking. Payne, 501 U. S., at 844, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (Marshall, J., dissenting). Roe has stood for fifty years. Casey, a precedent about precedent specifically confirming Roe, has stood for thirty. And the doctrine of stare decisisa critical element of the rule of lawstands foursquare behind their continued existence. The right those decisions established and preserved is embedded in our constitutional law, both originating in and leading to other rights protecting bodily [**2349] integrity, personal [****264] autonomy, and family relationships. The abortion right is also embedded in the lives of womenshaping their expectations, influencing their choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality. Since the rights recognition (and affirmation), nothing has changed to support what the majority does today.

Neither law nor facts nor attitudes have provided any new reasons to reach a different result than Roe and Casey did. All that has changed is this Court.

Mississippiand other States tooknew exactly what they were doing in ginning up new legal challenges to Roe and Casey. The 15-week ban at issue here was enacted in 2018. Other States quickly followed: Between 2019 and 2021, eight States banned abortion procedures after six to eight weeks of pregnancy, and three States enacted all-out bans.29

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Guttmacher Institute, E. Nash, State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century (Dec. 16, 2021), https:/ / www.guttmacher.org/ article/ 2021/ 12/ state-policy-trends-2021-worst-year-abortion-rights-almost-half-century; Guttmacher Institute, E. Nash, L. Mohammed, O. Cappello, & S. Naide, State Policy Trends 2020: Reproductive Health and Rights in a Year Like No Other (Dec. 15, 2020), https:/ / www.guttmacher.org/ article/ 2020/ 12/ state-policy-trends-2020reproductive-health-and-rights-year-no-other; Guttmacher Institute, E. Nash, L. Mohammed, O. Cappello, & S. Naide, State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back (Dec. 10, 2019), https:/ / www.guttmacher.org/ article/ 2019/ 12/ state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back.

Mississippi itself decided in 2019 that it had not gone [*415] far enough: The year after enacting the law under review, the State passed a 6-week restriction. A state senator who championed both Mississippi laws said the obvious out loud. [A] lot of people thought, he explained, that finally, we have a conservative Court and so now would be a good time [****265] to start testing the limits of Roe.30

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A. Pittman, Mississippis Six-Week Abortion Ban at 5th Circuit Appeals Court Today, Jackson Free Press (Oct. 7, 2019), https:/ / www.jacksonfreepress.com/ news/ 2019/ oct/ 07/ mississippis-six-week-abortion-ban-5th-circuit-app/ .

In its petition for certiorari, the State had exercised a smidgen of restraint. It had urged the Court merely to roll back Roe and Casey, specifically assuring the Court that the questions presented in this petition do not require the Court to overturn those precedents. Pet. for Cert. 5; see ante, at 5-6 (Roberts, C. J., concurring [***679] in judgment). But as Mississippi grew ever more confident in its prospects, it resolved to go all in. It urged the Court to overrule Roe and Casey. Nothing but everything would be enough.

Earlier this Term, this Court signaled that Mississippis stratagem would succeed. Texas was one of the fistful of States to have recently banned abortions after six weeks of pregnancy. It added to that flagrantly unconstitutional restriction an unprecedented scheme to evade judicial scrutiny. Whole Womans Health v. Jackson, 594 U. S. ___, ___, 141 S. Ct. 2494, 210 L. Ed. 2d 1014, 1017 (2021) (Sotomayor, J., dissenting). And five Justices acceded to that cynical maneuver. They let Texas defy this Courts constitutional rulings, nullifying Roe and Casey ahead of schedule in the Nations second largest State.

And now the other shoe drops, courtesy of that same five-person majority. (We believe that The Chief Justices [*416] opinion is wrong too, [****266] but no one should think that there is not a large difference between upholding a 15-week ban on the [**2350] grounds he does and allowing States to prohibit abortion from the time of conception.) Now a new and bare majority of this Courtacting at practically the first moment possibleoverrules Roe and Casey. It converts a series of dissenting opinions expressing antipathy toward Roe and Casey into a decision greenlighting even total abortion bans. See ante, at 57, 59, 63, and nn. 61-64 (relying on former dissents). It eliminates a 50-year-old constitutional right that safeguards womens freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Courts legitimacy.

Casey itself made the last point in explaining why it would not overrule Roethough some members of its majority might not have joined Roe in the first instance. Just as we did here, Casey explained the importance of stare decisis; the inappositeness of West Coast Hotel and Brown; the absence of any changed circumstances (or other reason) justifying the reversal of precedent. 505 U. S., at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674; see supra, at 30-33, 37-47 [****267] . [T]he Court, Casey explained, could not pretend that overruling Roe had any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. 505 U. S., at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And to overrule for that reason? Quoting Justice Stewart, Casey explained that to do soto reverse prior law upon a ground no firmer than a change in [the Courts] membershipwould invite the view that this institution is little different from the two political branches of the Government. Ibid. No view, Casey thought, could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve. Ibid. For overruling Roe, Casey concluded, the Court would pay a terrible price. 505 U. S., at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

[*417] The Justices who wrote those wordsOConnor, Kennedy, and Souterthey were judges of wisdom. They would not have won any contests for the kind of ideological purity [***680] some court watchers want Justices to deliver. But if there were awards for Justices who left this Court better than they found it? And who for that reason left this country better? And the rule of law stronger? Sign those Justices up.

They knew that the legitimacy of the Court [is] earned over time. Id., at 868, 112 S. Ct. 2791, 120 L. Ed. 2d 674. They also would have recognized that it can be destroyed much more quickly. They worked hard to avert that outcome in Casey. The American public, they thought, should never conclude that its constitutional protections hung by a threadthat a new majority, adhering to a new doctrinal school, could by dint of numbers alone expunge their rights. Id., at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674. It is hardno, it is impossibleto conclude that anything else has happened here. One of us once said that [i]t is not often in the law that so few have so quickly changed so much. S. Breyer, Breaking the Promise of Brown: The Resegregation of Americas Schools 30 (2022). For all of us, in our time on this Court, that has never been more true [****268] than today. In overruling Roe and Casey, this Court betrays its guiding principles.

With sorrowfor this Court, but more, for the many millions of American wo men who have today lost a fundamental constitutional protectionwe dissent.

APPENDIX

This Appendix analyzes in full each of the 28 cases the majority says support todays decision to overrule Roe v. Wade, [**2351] 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). As explained herein, the Court in each case relied on traditional stare decisis factors in overruling.

A great many of the overrulings the majority cites involve a prior precedent that had been rendered out of step with or [*418] effectively abrogated by contemporary case law in light of intervening developments in the broader doctrine. See Ramos v. Louisiana, 590 U. S. ___, ___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) (slip op., at 22) (holding the Sixth Amendment requires a unanimous jury verdict in state prosecutions for serious offenses, and overruling Apodaca v. Oregon, 406 U. S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972), because in the years since Apodaca, this Court ha[d] spoken inconsistently about its meaning and had undercut its validity on at least eight occasions); Ring v. Arizona, 536 U. S. 584, 608-609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (recognizing a Sixth Amendment right to have a jury find the aggravating factors necessary to impose a death sentence and, in so doing, rejecting Walton v. Arizona, 497 U. S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), as overtaken by and irreconcilable with Apprendi v. New Jersey, 530 U. S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)); Agostini v. Felton, 521 U. S. 203, 235-236, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (considering the Establishment Clauses constraint on government [****269] aid to religious instruction, and overruling Aguilar v. Felton, 473 U. S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (1985), in light of several related doctrinal developments that had so undermined Aguilar and the assumption on which it rested as to render it no longer good [***681] law); Batson v. Kentucky, 476 U. S. 79, 93-96, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (recognizing that a defendant may make a prima facie showing of purposeful racial discrimination in selection of a jury venire by relying solely on the facts in his case, and, based on subsequent developments in equal protection law, rejecting part of Swain v. Alabama, 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), which had imposed a more demanding evidentiary burden); Brandenburg v. Ohio, 395 U. S. 444, 447-448, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam) (holding that mere advocacy of violence is protected by the First Amendment, unless intended to incite it or produce imminent lawlessness, and rejecting the contrary rule in Whitney v. California, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927), as having been thoroughly discredited by later decisions); Katz v. United States, 389 U. S. 347, 351, 353, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (recognizing that the Fourth Amendment extends to material and communications that a person seeks to preserve as private, and rejecting the more limited construction [*419] articulated in Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), because we have since departed from the narrow view on which

that decision rested, and the underpinnings of Olmstead . . . have been so eroded by our subsequent decisions that the trespass doctrine there enunciated can no longer be regarded as controlling); Miranda v. Arizona, 384 U. S. 436, 463-467, 479, n. 48, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (recognizing that the [****270] Fifth Amendment requires certain procedural safeguards for custodial interrogation, and rejecting Crooker v. California, 357 U. S. 433, 78 S. Ct. 1287, 2 L. Ed. 2d 1448 (1958), and Cicenia v. Lagay, 357 U. S. 504, 78 S. Ct. 1297, 2 L. Ed. 2d 1523 (1958), which had already been undermined by Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964)); Malloy v. Hogan, 378 U. S. 1, 6-9, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) (explaining that the Fifth Amendment privilege against self-incrimination is also protected by the Fourteenth Amendment [**2352] against abridgment by the States, and rejecting Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908), in light of a marked shift in Fifth Amendment precedents that had necessarily repudiated the prior decision); Gideon v. Wainwright, 372 U. S. 335, 343-345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (acknowledging a right to counsel for indigent criminal defendants in state court under the Sixth and Fourteenth Amendments, and overruling the earlier precedent failing to recognize such a right, Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942));31

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We have since come to understand Gideon as part of a larger doctrinal shiftalready underway at the time of Gideonwhere the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. McDonald v. Chicago, 561 U. S. 742, 763, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010); see also id., at 766, 130 S. Ct. 3020, 177 L. Ed. 2d 894.

Smith v. Allwright, 321 U. S. 649, 659-662, 64 S. Ct. 757, 88 L. Ed. 987 (1944) (recognizing all-white primaries are unconstitutional after reconsidering in light of the unitary character of the electoral process recognized in United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941), and overruling Grovey v. [***682] Townsend, 295 U. S. 45, 55 S. Ct. 622, 79 L. Ed. 1292 (1935)); United States v. Darby, 312 U. S. 100, 115-117, 61 S. Ct. 451, 85 L. Ed. 609 (1941) (recognizing Congresss Commerce Clause power to regulate employment conditions and explaining as inescapable the conclusion . . . that Hammer [*420] v. Dagenhart, [247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918)], and its contrary rule had long since been overtaken by precedent construing the Commerce Clause power more broadly); Erie R. Co. v. Tompkins, 304 U. S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) (applying state substantive law in diversity actions in federal courts and overruling Swift v. Tyson, 41 U.S. 1, 16 Pet. 1, 10 L. Ed. 865 (1842), because an intervening decision had made clear the fallacy underlying the rule).

Additional cases the majority cites involved fundamental factual changes that had [****271] undermined the basic premise of the prior precedent. See Citizens United v. Federal Election Commn, 558 U. S. 310, 364, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (expanding First Amendment protections for campaign-related speech and citing technological changes that undermined the distinctions of the earlier regime and made workarounds easy, and overruling Austin v. Michigan Chamber of Commerce, 494 U. S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990), and partially overruling McConnell v. Federal Election Commn, 540 U. S. 93, 124 S. Ct.

619, 157 L. Ed. 2d 491 (2003)); Crawford v. Washington, 541 U. S. 36, 62-65, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (expounding on the Sixth Amendment right to confront witnesses and rejecting the prior framework, based on its practical failing to keep out core testimonial evidence, and overruling Ohio v. Roberts, 448 U. S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)); Mapp v. Ohio, 367 U. S. 643, 651-652, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961) (holding that the exclusionary rule under the Fourth Amendment applies to the States, and overruling the contrary rule of Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), after considering and rejecting the current validity of the factual grounds upon which Wolf was based).

Some cited overrulings involved both significant doctrinal developments and changed facts or understandings that had [**2353] together undermined a basic premise of the prior decision. See Janus v. State, County, and Municipal Employees, 585 U. S. ___, ___, ___-___, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018) (slip op., at 42, 47-49) (holding that requiring public-sector union dues from nonmembers violates the First Amendment, and overruling Abood v. Detroit Bd. of Ed., 431 U. S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), based on both factual and legal developments that had eroded the decisions underpinnings and left [*421] it an outlier among our First Amendment cases (internal quotation marks omitted)); Obergefell v. Hodges, 576 U. S. 644, 659-663, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (holding that the Fourteenth Amendment protects the right of same-sex couples to marry in light [****272] of doctrinal developments, as well as fundamentally changed social understanding); Lawrence v. Texas, 539 U. S. 558, 572-578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (overruling Bowers v. Hardwick, 478 U. S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), after finding anti-sodomy laws to be inconsistent with the Fourteenth Amendment in [***683] light of developments in the legal doctrine, as well as changed social understanding of sexuality); United States v. Scott, 437 U. S. 82, 101, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) (overruling United States v. Jenkins, 420 U. S. 358, 95 S. Ct. 1006, 43 L. Ed. 2d 250 (1975), three years after it was decided, because of developments in the Courts double jeopardy case law, and because intervening practice had shown that government appeals from midtrial dismissals requested by the defendant were practicable, desirable, and consistent with double jeopardy values); Craig v. Boren, 429 U. S. 190, 197-199, 210, n. 23, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (holding that sex-based classifications are subject to intermediate scrutiny under the Fourteenth Amendments Equal Protection Clause, including because Reed v. Reed, 404 U. S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), and other equal protection cases and social changes had overtaken any inconsistent suggestion in Goesaert v. Cleary, 335 U. S. 464, 69 S. Ct. 198, 93 L. Ed. 163 (1948)); Taylor v. Louisiana, 419 U. S. 522, 535-537, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) (recognizing as a foregone conclusion from the pattern of some of the Courts cases over the past 30 years, as well as from legislative developments at both federal and state levels, that women could not be excluded from jury service, and explaining that the prior decision approving such practice, Hoyt v. Florida, 368 U. S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961), had been rendered inconsistent with equal protection jurisprudence).

Other overrulings occurred very close in time to [****273] the original decision so did not engender substantial reliance and could not be described as having been embedded as part of our national culture. Dickerson v. United States, 530 U. S. 428, 443, [*422] 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); see Payne v. Tennessee, 501 U. S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (revising procedural rules of evidence that had barred admission of certain victim-impact evidence during the penalty phase of capital cases, and overruling South Carolina v. Gathers, 490 U. S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989), and Booth v. Maryland, 482 U. S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), which had been decided two and four years prior, respectively); Seminole Tribe of Fla. v. Florida, 517 U. S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (holding that Congress cannot abrogate state-sovereign immunity under its Article I commerce power, and rejecting the result in Pennsylvania v. Union Gas Co., 491 U. S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989), seven years later; the decision in Union Gas never garnered a majority); [**2354] Garcia v. San Antonio Metropolitan Transit Authority, 469 U. S. 528, 531, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) (holding that local governments are not constitutionally immune from federal employment laws, and overruling National League of Cities v. Usery, 426 U. S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), after eight years of experience under that regime showed Userys standard was unworkable and, in practice, undermined the federalism principles the decision sought to protect).

The rest of the cited cases were relatively minor in their effect, modifying part or an application of a prior precedents test or analysis. See Montejo v. Louisiana, 556 U. S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) [***684] (citing workability and practical concerns with additional layers of prophylactic procedural safeguards for defendants right to counsel, as had been enshrined in Michigan v. Jackson, 475 U. S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986)); Illinois v. Gates, 462 U. S. 213, 227-228, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (replacing a two-pronged test [****274] under Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and Spinelli v. United States, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), in favor of a traditional totality-of-the-circumstances approach to evaluate probable cause for issuance of a warrant); Wesberry v. Sanders, 376 U. S. 1, 4, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964), and Baker v. Carr, 369 U. S. 186, 202, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (clarifying that the political question passage of the minority opinion in Colegrove v. Green, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), was not controlling law).

[*423] In sum, none of the cases the majority cites is analogous to todays decision to overrule 50- and 30-year-old watershed constitutional precedents that remain unweakened by any changes of law or fact.

Pressley v. United States

United States District Court for the Southern District of Indiana, Terre Haute Division

October 11, 2023, Decided; October 11, 2023, Filed

No. 2:21-cv-00202-JMS-MG

Reporter
2023 U.S. Dist. LEXIS 182650 *; 2023 WL 6623024

JAMES R. PRESSLEY, et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.

Prior History: Pressley v. United States, 2023 U.S. Dist. LEXIS 103, 2023 WL 22192 (S.D. Ind., Jan. 3, 2023)

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Judges: Hon. Jane Magnus-Stinson, United States District Judge.

Opinion by: Jane Magnus-Stinson

Opinion

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT

The plaintiffs, inmates and former inmates at Terre Haute U.S. Penitentiary, brought this Federal Tort Claims Act (FTCA) suit alleging [*2] that federal prison officials acted with negligence toward the inmates' risk of being infected with COVID-19 in 2020. The United States has moved for summary judgment, arguing that the plaintiffs failed to exhaust their administrative remedies by completing the notice of tort claim process before suing. Because the designated evidence shows that the plaintiffs did not exhaust the tort claims process before bringing this action, the defendant's motion for summary judgment, dkt. [133], is granted.

I. Summary Judgment Standard

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A "material fact" is one that "might affect the outcome of the suit." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party must inform the court "of the basis for its motion" and specify evidence demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party meets this burden, the nonmoving party must "go beyond the pleadings" and identify "specific facts showing that there is a genuine issue for trial." Id. at 324.

In ruling on a motion for summary judgment, the Court views the evidence "in the light most favorable [*3] to the non-moving party and draw[s] all reasonable inferences in that party's favor." Zerante v. DeLuca, 555 F.3d 582, 584 (7th Cir. 2009) (citation omitted). It cannot weigh evidence or make credibility determinations on summary judgment because those tasks are left to the fact-finder. See O'Leary v. Accretive Health, Inc., 657 F.3d 625, 630 (7th Cir. 2011). The Court need only consider the cited materials, Fed. R. Civ. P. 56(c)(3), and the Seventh Circuit has repeatedly assured the district courts that they are not required to "scour every inch of the

record" for evidence that might be relevant to the summary judgment motion before them. Citation v. Trustees of Ind. Univ., 870 F.3d 562, 573-74 (7th Cir. 2017).

A dispute about a material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. If no reasonable jury could find for the non-moving party, then there is no "genuine" dispute. Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

II. Exhaustion Standard

On a motion for summary judgment, "[t]he applicable substantive law will dictate which facts are material." National Soffit & Escutcheons, Inc., v. Superior Sys., Inc., 98 F.3d 262, 265 (7th Cir. 1996) (citing Anderson, 477 U.S. at 248). The substantive law applicable to this motion for summary judgment is the FTCA. 28 U.S.C. 1346.

The United States cannot be sued without its consent. See United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941). The FTCA creates a limited waiver of this immunity by permitting suits against the United States for personal injuries caused by the "wrongful acts of federal employees [*4] acting within the scope of their employment under circumstances in which a private person would be liable to the plaintiff." Reynolds v. United States, 549 F.3d 1108, 1112 (7th Cir. 2008)(citing 28 U.S.C. 1346(b)(1)). The FTCA provides that "[a]n action shall not be instituted upon a claim against the United States for money damages for injury ... or personal injury ... caused by the negligent or wrongful act or omission of any employee of the government ... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing." 28 U.S.C. 2675(a) (emphasis added). The Supreme Court has interpreted 2675(a) as "requir[ing] complete exhaustion of Executive remedies before invocation of the judicial process." McNeil v. United States, 508 U.S. 106, 111, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993). Under 28 U.S.C. 2401(b), "a claimant must present his claims to the appropriate agency within two years of the date that the claims accrue." Augutis v. United States, 732 F.3d 749, 752 (7th Cir. 2013).

Meanwhile, the exhaustion requirement of the Prison Reform Litigation Act ("PLRA") requires all incarcerated individuals to exhaust administrative remedies, usually in the form of prison grievance processes, before suing over any aspect of prison life. 42 U.S.C. 1997e(a); Porter v. Nussle, 534 U.S. 516, 532, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002) ("the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances [*5] or particular episodes, and whether they allege excessive force or some other wrong") (cleaned up).

Thus, incarcerated plaintiffs suing the United States must exhaust available administrative remedies within the prison and also complete the tort claim process before filing their lawsuit. Because the defendants' motion for summary judgment focuses on the plaintiffs' failure to

exhaust the notice of tort claim process and that issue is dispositive, the Court does not address whether any plaintiff exhausted the grievance process under the PLRA.

III. Undisputed Facts

The plaintiffs claim that they became ill with COVID-19 in December 2020 based on the negligence of federal prison officials. However, none of the plaintiffs submitted a notice of tort claim within the two-year deadline to do so. Some requested notice of tort claim forms in December 2020 and January 2021, but were denied. See Ali Interrogatory Responses, dkt. 133-14 at 1; Dushane Interrogatory Responses, dkt. 133-26 at 2. Plaintiff Napier attests that he requested notice of tort claim forms from both Counselor Joselyn and from Counselor Edward, who replaced Joselyn when she retired near the end of 2020. Napier Interrogatory Responses, [*6] dkt. 133-30 at 3; Frank Declaration, dkt. 133-43 (attesting that Joslyn retired on December 26, 2020). But none of the plaintiffs had either Counselor Joselyn or Counselor Edward as their counselor after April 2022. Counselor Assignment Records, dkt. 133-12; dkt. 133-16; dkt. 133-20; dkt. 133-24; dkt. 133-28; dkt. 133-32; dkt. 133-36; dkt. 133-40. Plaintiff Ricker was transferred to a correctional facility in Arizona in January 2022. Dkt. 52. Plaintiff Strong was released from custody in January 2022 and Plaintiff Pressley was released in March 2022. Bureau of Prisons Inmate Locator, available online at https:// www.bop.gov/ inmateloc/ .

Plaintiff Brown attests that he submitted a tort claim, but Officer Hill told him that he was not going to file anything. Brown Interrogatory Responses, dkt. 133-22 at 1. Mr. Brown successfully submitted a notice of tort claim on December 19, 2020, regarding the confiscation of his property when he was transferred to the COVID isolation housing unit. Dkt. 133-4.

IV. Discussion

The plaintiffs acknowledge that they did not file tort claims before suing but argue that when they requested tort claim forms in December 2020 and January 2021, they were denied. [*7] Therefore, their argument goes, they should be excused from having to complete the tort claim process before bringing suit. This argument would likely carry the day under the PLRA, because it excuses the exhaustion requirement if prison officials render the administrative remedy unavailable. See Thomas v. Reese, 787 F.3d 845, 848 (7th Cir. 2015); Kaba v. Stepp, 458 F.3d 678, 686 (7th Cir. 2006). In Hill v. Snyder, 817 F.3d 1037, 1041 (2016), the Seventh Circuit held that if an inmate requests a grievance from a staff member who, under the grievance policy is required to provide one upon request, and the request is denied, the inmate need not ask other staff members for a grievance form.

But unlike prison grievance processes, which usually provide little time to start the process after a triggering event, plaintiffs have two years to file a notice of tort claim before pursuing an FTCA claim against the United States. 28 U.S.C. 2401(b). Thus, the fact that some plaintiffs were

denied notice of tort claim forms in late 2020 and early 2021 when their claims arose does excuse them from completing the tort claim process before suing. Denton v. United States, 440 F. App'x 498, 502-03 (7th Cir. 2011) (inmate not excused from exhausting tort claim process when he was denied a tort claim form shortly after his claim arose, but presented no evidence that he was denied forms later in the two-year filing period). [*8] The plaintiffs have presented no evidence that they were denied tort claim forms or were otherwise thwarted from exhausting their tort claims after the counselors who had denied their form requests were no longer their counselors. Even assuming that Counselors Jocelyn and Edward continually denied notice of tort claim forms to the plaintiffs for as long as they were assigned to be the plaintiffs' counselors, all of the plaintiffs had been transferred to other counselors by April 2022. The deadline to file a tort claim notice did not expire until December 2022.

In addition, the plaintiffs could have completed the tort claim process without the proper form. By regulation, a claim is considered presented when the agency receives, from the claimant or a legal representative, "an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages." 28 C.F.R. 14.2(a) (emphasis added). The Seventh Circuit has held that any written notification containing a statement of the essential facts sufficient to allow a legally trained reader to infer the legal cause of action can serve as a notice of tort claim. Palay v. United States, 349 F.3d 418, 425-26 (7th Cir.2003); Murrey v. United States, 73 F.3d 1448, 1452-53 (7th Cir.1996).

The record shows that the plaintiffs failed to exhaust administrative [*9] remedies before filing suit. Thus, this action must be dismissed with prejudice. McNeil v. United States, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993); Palay v. United States, 349 F.3d 418, 424 n2 (7th Cir. 2003) (because the time to file a notice of tort claim has expired, dismissal of the claim is final).

V. Conclusion

The defendant's motion for summary judgment, dkt. [133], is granted. Final judgment in accordance with this Order shall issue at this time.

SO ORDERED.

Date: 10/ 11/ 2023

/ s/ Jane Magnus-Stinson

Hon. Jane Magnus-Stinson

United States District Court

Southern District of Indiana

FINAL JUDGMENT

The Court now enters FINAL JUDGMENT. The action is dismissed with prejudice.

Date: 10/ 11/ 2023

/ s/ Jane Magnus-Stinson

Hon. Jane Magnus-Stinson

United States District Court

Southern District of Indiana

28 USCS 2680, Part 1 of 2

Current through Public Law 118-78, approved July 30, 2024.

United States Code Service

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (1 5001)

Part VI. Particular Proceedings (Chs. 151 190)

CHAPTER 171. Tort Claims Procedure (2671 2680)

2680. Exceptions

The provisions of this chapter [28 USCS 2671 et seq.] and section 1346(b) of this title [28 USCS 1346(b)] shall not apply to

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter [28 USCS 2671 et seq.] and section 1346(b) of this title [28 USCS 1346(b)] apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[.]

(d) Any claim for which a remedy is provided by subchapter 309 or 311 of title 46 [46 USCS 30901 et seq. or 31101 et seq.] relating to claims or suits in admiralty against the United States.

(e)Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 131 of Title 50, Appendix.

(f)Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g)[Repealed]

(h)Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 USCS 2671 et seq.] and section 1346(b) of this title [28 USCS 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, investigative or law enforcement officer means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i)Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j)Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k)Any claim arising in a foreign country.

(l)Any claim arising from the activities of the Tennessee Valley Authority.

(m)Any claim arising from the activities of the Panama Canal Company.

(n)Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

History

HISTORY:

June 25, 1948, ch 646, 62 Stat. 984; July 16, 1949, ch 340, 63 Stat. 446; Sept. 26, 1950, ch 1049, 2(a)(2), 64 Stat. 1038; Aug. 13(5), 1043; Aug. 18, 1959, P. L. 86-168, Title II, 202(b), 73 Stat. 389; March 16, 1974, P. L. 93-253, 2, 88 Stat. 50; April 25, 2000, P. L. 106-185, 3(a), 114 Stat. 211; Oct. 6, 2006, P. L. 109-304, 17(f)(4), 120 Stat. 1708.

28 USCS 2679

Current through Public Law 118-78, approved July 30, 2024.

United States Code Service

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (1 5001)

Part VI. Particular Proceedings (Chs. 151 190)

CHAPTER 171. Tort Claims Procedure (2671 2680)

2679. Exclusiveness of remedy

(a)The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title [28 USCS 1346(b)], and the remedies provided by this title in such cases shall be exclusive.

(b)

(1)The remedy against the United States provided by sections 1346(b) and 2672 of [28 USCS 1346(b) and 2672] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employees estate is precluded without regard to when the act or omission occurred.

(2)Paragraph (1) does not extend or apply to a civil action against an employee of the Government

(A)which is brought for a violation of the Constitution of the United States, or

(B)which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c)The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the

United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)

(1)Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2)Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3)In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4)Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title [28 USCS 1346(b)] and shall be subject to the limitations and exceptions applicable to those actions.

(5)Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title [28 USCS 2675(a)], such a claim shall be deemed to be timely presented under section 2401(b) of this title [28 USCS 2401(b)] if

(A)the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B)the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 [28 USCS 2677], and with the same effect.

History

HISTORY:

June 25, 1948, ch 646, 62 Stat. 984; Sept. 21, 1961, P. L. 87-258, 75 Stat. 539; July 18, 1966, P. L. 89-506, 5(a), 80 Stat. 307; Nov. 18, 1988, P. L. 100-694, 5, 6, 102 Stat. 4564.

ARTICLE: STATE LAW, THE WESTFALL ACT, AND THE NATURE OF THE BIVENS QUESTION

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Text

[*510]

Introduction

In the past few years, four courts of appeals have applied a presumption against recognition of a Bivens cause of action 1

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In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, the Supreme Court held that an individual had "a cause of action under the Fourth Amendment" and thus that he could sue directly under the Constitution "to recover money damages for any injuries he has suffered as a result of the [federal] agents' violation of the Amendment." 403 U.S. 388, 397 (1971).

in dismissing damages suits alleging constitutional violations arising out of federal officials' pursuit of various national security and counterterrorism policies. In each of these cases, the court's approach was based on the belief that allowing such suits to proceed would threaten undue interference with the executive branch's conduct of military and national security affairs - interference that should be tolerated, if ever, only where Congress has expressly so provided. As Fourth Circuit Judge J. Harvie Wilkinson III

explained in declining to recognize a Bivens claim that would have allowed Jose Padilla to seek compensation for his allegedly unconstitutional detention and treatment as an "enemy combatant," "To stay the judiciary's hand in fashioning the requested Bivens action, it suffices to observe that Padilla's enemy combatant classification and military detention raise fundamental questions incident to the conduct of armed conflict, and that Congress has not provided a damages remedy." 2

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Lebron v. Rumsfeld, 670 F.3d 540, 550 (4th Cir.) (citation and internal quotation marks omitted), cert. denied, 132 S. Ct. 2751 (2012).

The Second Circuit, sitting en banc, used similar reasoning in declining to recognize the right of Maher Arar to seek compensation for the allegedly unconstitutional injuries he received at the hands of government officers arising out of his extraordinary rendition to Syria. 3

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Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc), cert. denied, 130 S. Ct. 3409 (2010).

Other courts have sounded variations on this theme to preclude relief for claims by, for example, former Guantanamo detainees 4

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See, e.g., Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam) (holding in the alternative that "the danger of obstructing U.S. national security policy" was a "special factor[]" barring relief).

and U.S. citizens who were detained and allegedly abused by U.S. military personnel while working as [*511] military contractors in Iraq. 5

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See, e.g., Doe v. Rumsfeld, 683 F.3d 390, 394-97 (D.C. Cir. 2012) (rejecting the availability of a Bivens remedy when such a remedy would require scrutiny of military conduct and sensitive information). As this Article went to press, the Seventh Circuit, sitting en banc, reached a similar conclusion, holding in Vance v. Rumsfeld that Bivens remedies are categorically unavailable for "damages against soldiers who abusively interrogate or mistreat military prisoners, or fail to prevent improper detention and interrogation." 701 F.3d 193, 195 (7th Cir. 2012) (en banc).

In the view of each of these courts, concerns about judicial interference with national security justified their refusal to recognize a federal damages remedy for the injuries caused by the defendants' allegedly unconstitutional conduct.

We argue that the analysis employed by these courts of appeals to determine whether to recognize a Bivens action 6

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We call this question the "Bivens question."

improperly combines two problematic features. The first is the courts' conceptualization of the Bivens question as a choice between recognizing a Bivens action and leaving the plaintiff with no damages remedy at all. Because the reasons that led the courts to decline to recognize a Bivens action are reasons to preclude all judicial involvement in the cases, these courts clearly understood the choice before them as "Bivens or nothing." The second problematic feature is the courts' application of what the Arar court described as a "remarkably low" standard for declining to recognize a Bivens action. 7

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585 F.3d at 574; see also Lebron, 670 F.3d at 548 ("The Bivens cause of action is not amenable to casual extension, but rather is subject to a strict test .") (citation omitted) (internal quotation marks omitted).

In the words of the Arar court, all that is necessary to justify a decision not to recognize a Bivens claim is that the court have reason to "pause." 8

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585 F.3d at 574.

Considered separately, these two features of the courts' analysis are both highly problematic. When combined, they produce a wholly insupportable approach to the Bivens question.

The four appellate courts' conceptualization of the Bivens question as "Bivens or nothing" is decidedly at odds with the way the Supreme Court understood the Bivens question in Bivens itself. It was common ground among the Justices and the litigants in Bivens that, in the absence of a federal cause of action, persons harmed by federal officials' constitutional violations would be able to pursue an action for damages under state law. Consistent with a long history of recognizing common law remedies for constitutional violations, the Bivens Court understood the question before it to be whether common law remedies should be supplemented with a federal damages remedy. Justice Brennan's opinion for the majority ultimately held [*512] that state court remedies were inadequate, not that they were unavailable. 9

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See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971).

Even the dissenters, who insisted that the recognition of a new federal cause of action was a matter for Congress, understood the question to be whether state law remedies should continue to be the exclusive remedies for constitutional violations by federal officials. 10

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See, e.g., id. at 415-16, 422-24 (Burger, C.J., dissenting) (discussing the shortfalls of the federal remedy and envisioning roles for both federal and state alternative remedy schemes); id. at 429 (Black, J., dissenting) ("The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States.").

None of the Justices in Bivens equated the lack of a federal cause of action with functional immunity from suit. As the Court understood the Bivens question in Bivens itself, the choice before it was "Bivens or (only) state law."

Unlike the contemporary courts of appeals' conceptualization of the Bivens question as "Bivens or nothing," their application of a "remarkably low" standard for nonrecognition of a Bivens claim has some (albeit slender) grounding in the Bivens opinion. That grounding, however, is tied to the Bivens Court's understanding of the Bivens question as "Bivens or state law." The court in Arar derived its low standard from the Bivens Court's suggestion that nonrecognition of a Bivens action would be proper if there were "special factors counseling hesitation." "Hesitation," the court wrote in Arar, "is a pause, not a full stop, or an abstention . "Hesitation' is "counseled' whenever thoughtful discretion would pause even to consider." 11

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Arar, 585 F.3d at 574.

For this reason, the court of appeals concluded, the threshold for declining to recognize a Bivens claim is a "remarkably low" one. 12

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Id.

The Bivens Court's formulation of the question as whether "hesitation" was counseled reflects its understanding of the question before it as whether to recognize a new federal cause of action to supplement existing remedies. Given the Court's recognition of the long history of affording common law remedies to victims of federal officials' unconstitutional conduct, the Court could not have protected federal officials from all judicial interference - as the court of appeals in Arar purported to do - merely by "hesitating" to act. Protecting federal officials from all judicial interference requires the elimination of existing nonfederal remedies, and the elimination of such preexisting legal remedies involves not just a negative "staying" of "the judiciary's hand," as the Fourth Circuit put it in Lebron, 13

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Lebron v. Rumsfeld, 670 F.3d 540, 550 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012).

but the affirmative preemption or displacement of state law remedies. Taking away otherwise available [*513] remedies would require an affirmative act of federal lawmaking; mere "hesitation" to make new law would not accomplish the task.

Thus, the "remarkably low" standard that the courts of appeals have derived from Bivens is directly linked to the Bivens Court's understanding of the Bivens question as "Bivens or state law." Yet if the courts of appeals had so understood the Bivens question, they could not have based their nonrecognition of a Bivens claim on the need to protect federal officials in national

security cases from judicial interference. If anything, such national security concerns would have led the courts of appeals to prefer a federal remedial regime over one based on state law.

Indeed, we think that recognition that nonfederal remedies would exist whether or not a Bivens claim were recognized should generally lead courts to be less hesitant to recognize a federal cause of action against federal officials. Federal officials have a right to remove suits against them from state to federal courts upon the assertion of federal defenses. 14

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See 28 U.S.C. 1442(a) (2006); see also Mesa v. California, 489 U.S. 121, 139 (1989) (holding that a federal officer can remove under 1442(a) once he avers a federal defense).

Thus, even state causes of action against them will usually be adjudicated in the federal courts. As a result, recognition of a federal cause of action will not increase the caseload of the federal courts. At the same time, a federal remedial regime would be easier for the federal courts to administer, and it could be tailored more closely to the policies underlying the relevant constitutional provisions. (In the case of federal contractors, on the other hand, the costs and benefits of recognizing a federal cause of action play out differently. Because federal contractors do not have a general right to remove state law claims against them, 15

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Contractors would be able to remove suits arising under state law if (1) complete diversity exists; and (2) the contractor is not a local defendant. See 28 U.S.C. 1441(b)(2).

recognition of a federal cause of action would increase the federal caseload. Given this higher cost, the Court has properly required a stronger showing that state remedies against such defendants would be inadequate. 16

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See, e.g., Minneci v. Pollard, 132 S. Ct. 617, 620 (2012) ("Because we believe that in the circumstances present here state tort law authorizes adequate alternative damages actions - actions that provide both significant deterrence and compensation - we cannot [infer a Bivens remedy]."); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72-73 (2001) (noting the availability of a conventional negligence remedy in a suit against private prison contractors).

The analysis in the text leaves out of the equation (as the courts of appeals appear to have done) the constitutional need for some remedy to deter violations of the Constitution by federal officials and to compensate victims of such violations. When this additional consideration is taken into account (as we think it should be), the absence of a state remedy would, of course, counsel in favor of recognition of a federal remedy. This Article does not attempt an exhaustive examination of the constitutional questions, but we do bring constitutional concerns into the analysis in Part IV as an important reason to construe the Westfall Act as either preserving state remedies or as authorizing the courts to recognize a federal cause of action in circumstances in which state law remedies would previously have existed.

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[*514] In short, the courts of appeals have committed a fundamental error in combining the "Bivens or nothing" understanding of the Bivens question with a "remarkably low" standard for declining to recognize a Bivens action - unless, sometime after the Bivens decision, state tort remedies for injuries caused by federal officials' unconstitutional conduct became unavailable either through legislation or judicial decision. As we show below, such remedies did not become unavailable through judicial decision.

The claim that state tort remedies became unavailable through legislation is more plausible. In 1988, Congress passed the Westfall Act, which is widely understood to have preempted all state tort remedies against federal officials acting within the scope of their authority. 17

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See Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 5, 102 Stat. 4563, 4564 (amending 28 U.S.C. 2679(b)).

At the same time, the Act expressly preserved suits "brought for a violation of the Constitution," 18

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Id.

an exemption that is widely thought to have preserved only Bivens claims. 19

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See, e.g., Pollard, 132 S. Ct. at 623 ("Prisoners ordinarily cannot bring state-law tort actions against employees of the Federal Government." (citing Westfall Act, 28 U.S.C. 2671, 2679(b)(1))).

Although the courts of appeals in the cases discussed above did not rely on the Westfall Act, it might be argued that the prevailing understanding of that Act justified those courts' conception of the Bivens question as "Bivens or nothing."

We are not convinced. First, the Act's text does not exempt just Bivens claims. It exempts all suits "brought for a violation of the Constitution." This text is capacious enough to preserve state law remedies against federal officials who violate the Constitution, which the Supreme Court had recently described as the "traditional means" for obtaining redress for constitutional violations. 20

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Butz v. Economou, 438 U.S. 478, 507 n.34 (1978).

The Act's legislative history confirms that 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." 21

21

H.R. Rep. No. 100-700, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5949-50.

Thus, we think that the better interpretation of the Act is that it does not preempt state law remedies against federal officials for injuries caused by conduct that violates the Constitution.

[*515] We recognize, however, that the lower courts and most scholars and practitioners have read the Act to preempt such remedies, 22

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See, e.g., James E. Pfander & David Baltmanis, Rethinking Bivens: Legitimacy and Constitutional Adjudication, 98 Geo. L.J. 117, 123 (2009) ("Today, it has become "Bivens or nothing' for those who seek to vindicate constitutional rights.").

a reading that the Supreme Court in Minneci v. Pollard recently endorsed, albeit without analysis. 23

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See supra note 19.

If the Act is read to preempt preexisting state tort remedies for conduct that violates the Constitution, however, we think that it must also be read to preclude application of the "remarkably low" standard applied by the courts of appeals to decline to recognize Bivens claims in the cases discussed above. In light of the availability of common law remedies for injuries caused through constitutional violations by federal officials at the time of the Westfall Act's enactment, Congress's intent not to affect the ability of victims of constitutional violations to seek redress for those violations requires the conclusion that the previously available remedies remain available either as state law remedies or as federal remedies. For this and other reasons we discuss below (including the need to avoid constitutional problems), if the Westfall Act is construed to preempt state law remedies, then it must also be construed to preserve the previously available remedies as federal remedies.

We thus conclude that the Westfall Act either preserves state law remedies for injuries caused by federal officials' violations of the Constitution - in which case the courts of appeals erred in conceiving of the Bivens question as "Bivens or nothing" - or it legislatively authorizes a robust Bivens action encompassing at least the sorts of remedies previously available under the common law - in which case the courts of appeals are wrong to apply a "remarkably low" standard for declining to recognize a Bivens claim. By combining the "Bivens or nothing" conceptualization of the question with a "remarkably low" standard for nonrecognition of a Bivens claim, the courts of appeals have turned the law in force when Bivens was decided entirely on its head.

We develop these arguments as follows:

In Part I, we describe in greater detail the decisions that reflect the approach that we regard as mistaken, and we explicate our critique. As we make clear in this Part, we do not deny that the national security concerns that drove the courts of appeals to decline to recognize a Bivens claim might, in some cases, legitimately support the conclusion that such claims should not be

permitted to proceed. Our claim, rather, is that these concerns are not relevant to whether a Bivens claim should be recognized. There are a [*516] number of existing doctrines, such as official immunity and the state secrets privilege, that serve to limit or preclude the availability of remedies against government officials in both state and federal courts. National security concerns might be relevant to the application of one or more of these doctrines. Or, as separate panels of the D.C. and Fourth Circuits have held in dismissing state law suits arising out of alleged torture by military contractors overseas, the courts of appeals could conceivably recognize a new federal common law defense barring relief under any cause of action in any case implicating the concerns that these courts shoehorned into the Bivens analysis. 24

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See Al Shimari v. CACI Int'l, Inc. (Al Shimari I), 658 F.3d 413, 420 (4th Cir. 2011) (holding that the combatant activities exception to the Federal Tort Claims Act, which would bar such claims against U.S. servicemembers, authorizes federal courts to displace state law tort suits against federal military contractors arising out of the torture of detainees at Abu Ghraib), vacated, (Al Shimari II), 679 F.3d 205 (4th Cir. 2012) (en banc); Saleh v. Titan Corp., 580 F.3d 1, 9 (D.C. Cir. 2009) (same as Al Shimari I). The panel decision in Al Shimari was subsequently vacated by the en banc Fourth Circuit on the ground that the court of appeals lacked interlocutory appellate jurisdiction. See Al Shimari II, 679 F.3d at 224. But see id. at 225-30 (Wilkinson, J., dissenting) (endorsing the three-judge panel's analysis of the federal-contractor defense).

In deciding the cases on these grounds, however, the courts would not have been able to rest a decision in favor of the defendant officer on their reluctance to create a new federal remedy. They would not have been able to hold the defendant to the "remarkably low" burden of persuasion that the Arar court applied in determining whether to recognize a Bivens claim. 25

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See supra notes 7-8 and accompanying text.

To the contrary, since official immunity and the state secrets privilege are themselves regarded as federal common law doctrines, reluctance to make new law should have worked against the defendants seeking expansion of those doctrines or the creation of new defenses.

Parts II and III focus on the pre-Westfall Act approach to remedying injuries caused by the unconstitutional conduct of federal officials. Because Congress, in enacting the Westfall Act, did not intend to affect the redress available to victims of constitutional violations, understanding the traditional means of remedying such violations is crucial to the proper interpretation of that Act. Part II examines the theories under which victims of constitutional violations obtained damages against federal officials prior to Bivens. For most of our history, tort claims against federal officers were grounded in the "general" common law, which did not vary from state to state. Moreover, once Congress authorized federal officials sued in state court to remove such suits to federal court, 26

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See 28 U.S.C. 1442(a)(1) (2006).

the question of remedies would often be decided by federal courts, which, before Erie Railroad v. [*517] Tompkins, 27

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304 U.S. 64 (1938).

did not follow state court decisions on matters of general law. After Erie, the existing general common law of remedies for constitutional violations came to be treated as state law. The question the Court answered affirmatively in Bivens was whether these remedies should be supplemented with a new judicially created federal common law cause of action.

Part III turns to the Supreme Court's understanding of the Bivens question in Bivens itself and in subsequent cases. This Part demonstrates that neither Bivens nor any of the Court's more recent Bivens decisions can fairly be read to have preempted state law remedies against federal officials as a matter of federal common law. There is stray language in a few opinions that seems to overlook the fact that nonrecognition of a Bivens action would leave state causes of action in place, but, on the whole, the Supreme Court's decisions are consistent with its initial understanding of the Bivens question - and with the general structure of remedies that had prevailed prior to 1971. This conclusion is confirmed by decisions addressing the scope of the official immunity enjoyed by federal officials in suits alleging a constitutional violation. Part III concludes that state law remedies for injuries caused by the unconstitutional conduct of federal officials - the "traditional means" of seeking compensation for such injuries 28

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Butz v. Economou, 438 U.S. 478, 507 n.34 (1978).

- remained alive and well at the time of the enactment of the Westfall Act in 1988.

Part IV examines how, if at all, the Westfall Act changed the nature of the Bivens question. The Act generally immunizes federal employees from private lawsuits based on acts performed within the scope of their employment; subject to numerous limits and exceptions, the statute converts such grievances into a Federal Tort Claims Act (FTCA) suit against the United States. 29

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See 28 U.S.C. 2679(b).

But the Westfall Act also explicitly preserves actions "brought for a violation of the Constitution of the United States." 30

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Id. 2679(b)(2)(A).

The Court in Minneci v. Pollard recently endorsed the prevailing reading of the Westfall Act as preempting state law remedies against federal officials, even for conduct that violates the Constitution. 31

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See 132 S. Ct. 617, 623 (2012) ("Prisoners ordinarily cannot bring state-law tort actions against employees of the Federal Government." (citing 28 U.S.C. 2679(b)(1))).

Read this way, the Act leaves the federal Bivens action as the sole remedy against the official. If so, then nonrecognition of a Bivens claim would indeed be the equivalent of recognition of an immunity of such officials from suit for their unconstitutional acts.

As already noted, we think that the Westfall Act is better read as preserving state law remedies for injuries caused by the unconstitutional [*518] conduct of federal officials. If the Act is read to preempt such remedies, however, we think it must also be read as authorizing a robust approach to Bivens under which traditional common law remedies would presumptively be available. Thus, either the Bivens question remains "Bivens or state law," as it was before the Westfall Act, or the Act precludes the hesitant approach to recognizing Bivens claims reflected in the court of appeals cases discussed above. If interpreted to preempt state law remedies without authorizing equivalent federal remedies, the Westfall Act would have worked a silent but dramatic change in the structure of damages remedies for federal constitutional violations - and raised serious constitutional questions in the process.

I. The Bivens Question in Contemporary National Security Cases

In Bivens, the Supreme Court for the first time recognized a federal cause of action for damages against federal law enforcement officials who violate the Fourth Amendment. 32

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403 U.S. 388, 397 (1971).

At the same time, the Court suggested that "special factors" might "counsel[] hesitation" in recognizing such a cause of action in other contexts. 33

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Id. at 396.

Since then, the Court has decided a series of cases posing the question whether Bivens should be "extended" to new contexts. 34

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See, e.g., Wilkie v. Robbins, 551 U.S. 537, 550 (2007) ("We have seen no case for extending Bivens to claims against federal agencies or against private prisons." (citations omitted)); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001) (declining to extend Bivens to allow recovery against a private corporation operating a halfway house under contract with the Federal Bureau of Prisons); FDIC v. Meyer, 510 U.S. 471, 486 (1994) ("An extension of Bivens to agencies of the Federal Government is not supported by the logic of Bivens itself."). We recognize that it will often be contested whether a case requires the "extension" of Bivens to a "new context" or

instead merely the application of Bivens within a context in which a Bivens action has already been held to exist. We do not address how to determine whether an extension of Bivens is required in any given case. Rather, we address how the question should be approached once it has been framed that way. We also distinguish the "Bivens question," as framed above, from the related though distinct question of whether state law claims remain available in a given context once a Bivens action has been held to exist in that context. For discussion of the latter question, see infra text accompanying notes 186-98.

Although the Court has shifted over time in its willingness to extend Bivens, it has generally adhered to its initial conceptualization of the Bivens question. As understood by all of the Justices in Bivens and (with a few ambiguous exceptions) in all subsequent cases, the question has always been whether to recognize a federal cause of action for damages for constitutional violations by federal officials or instead to leave the availability of [*519] damages for such violations entirely to state law (or another existing federal remedial regime). 35

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See infra Section III.B.

Thus, in the absence of another available federal remedial regime, the alternative to recognition of a Bivens action has always been understood to be to leave the nature and scope of the damage remedy for federal officials' violations of the Constitution to state law. If the Bivens question is "Bivens or state law," as it has been understood by the Supreme Court since the Bivens decision, then it follows that a "special factor[] counselling hesitation" 36

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Bivens, 403 U.S. at 396.

is a reason to prefer a regime in which the susceptibility of federal officers to damages claims for their violations of the Constitution is governed by state law. 37

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As noted here, and as discussed more fully in Part III, the Court also considers the availability of other federal statutory remedies in deciding whether to recognize a Bivens claim. Nevertheless, for the sake of simplicity, we describe the contending versions of the Bivens question as "Bivens or state law" and "Bivens or nothing." Those were the options as they were understood, respectively, in Bivens itself and in the contemporary national security cases we discuss, in which other federal remedies were not available.

In light of the existence of nonfederal remedies, the need to protect federal officials from judicial interference would not support the refusal to recognize a Bivens claim.

A. Bivens and Post-9/ 11 National Security Litigation

Although the Supreme Court has not veered from this understanding of the Bivens question, the lower courts appear to be operating under a very different conception in some notable recent

cases alleging constitutional violations committed in the war on terror (and in some nonterrorism cases, as well). For example, in its widely noticed decision in Arar v. Ashcroft, the en banc Court of Appeals for the Second Circuit found "special factors" that counseled against recognition of a Bivens claim that would have allowed Maher Arar to seek damages from the various federal officials he had sued. 38

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585 F.3d 559, 565 (2d Cir. 2009) (en banc).

His suit alleged that those officials had detained him and subjected him to coercive interrogation in New York before transporting him against his will and without his knowledge to Syria, where he was detained and tortured by Syrian officials. 39

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Complaint and Demand for Jury Trial at paras. 1-5, Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. 04-0249) [hereinafter Arar Complaint].

Arar argued that these federal officers violated his substantive due process rights under the Fifth Amendment. 40

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Arar, 585 F.3d at 563. The majority assumed without deciding that Arar had substantive due process rights. See id. at 569.

As discussed in greater detail in Part II, the alleged acts of the federal officials would also have stated colorable claims under state tort law.

[*520] In considering whether Arar had stated a Bivens claim, all of the judges viewed the question before them as whether any cause of action for damages existed. The judges in the majority declined to recognize a Bivens claim, citing as "special factors counseling hesitation" the sensitive foreign policy concerns raised by the action, 41

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Id. at 573-76.

as well as the difficulties that would be posed by the classified nature of some of the evidence that would necessarily have to be presented. 42

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Id. at 576.

Their reasoning shows that they viewed the alternative to recognition of a Bivens claim as the denial of any claim, as the concerns that led them to deny a Bivens claim would have been equally implicated had Arar brought a state tort claim against the defendants for false imprisonment or assault. Although the four dissenters would have recognized a Bivens claim, they too seemed to regard the options as "Bivens or nothing." 43

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See, e.g., id. at 605 (Sack, J., concurring in part and dissenting in part) ("Arar has no other remedy for the alleged harms the defendant officers inflicted on him."); id. at 610 (Parker, J., dissenting) ("I write separately to underscore the miscarriage of justice that leaves Arar without a remedy in our courts."); id. at 627 (Pooler, J., dissenting) ("Ultimately, the majority concludes that the Constitution provides Arar no remedy for this wrong, that the judiciary must stay its hand in enforcing the Constitution because untested national security concerns have been asserted by the Executive branch."); id. at 630 (Calabresi, J., dissenting) (decrying "the result that a person - whom we must assume (a) was totally innocent and (b) was made to suffer excruciatingly (c) through the misguided deeds of individuals acting under color of federal law - is effectively left without a U.S. remedy").

Arar is perhaps the most notable of the cases adopting this approach to the Bivens question, but it is not alone. Other lower courts have deployed similar analyses, both in cases raising national security concerns 44

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For example, the D.C. Circuit invoked "the danger of obstructing U.S. national security policy" as a special factor counseling hesitation in declining to recognize a Bivens remedy for claims of torture and other abuse brought by former Guantanamo detainees. See Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam). In Wilson v. Libby, the D.C. Circuit refused to recognize a Bivens remedy against those responsible for the disclosure of a CIA agent's covert status. See 535 F.3d 697, 710 (D.C. Cir. 2008). It noted that, "if we were to create a Bivens remedy, the litigation of the allegations in the amended complaint would inevitably require judicial intrusion into matters of national security and sensitive intelligence information." Id. The D.C. Circuit drew an analogy to the litigation bar recognized in Totten v. United States, in which the Supreme Court held that no action could be brought to recover pay allegedly due under an espionage contract between President Lincoln and the claimant, because "if upon contracts of such a [secret] nature an action against the government could be maintained the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public." 92 U.S. 105, 106-07 (1875); see Wilson, 535 F.3d at 710. The Wilson court concluded that "we certainly must hesitate before we allow a judicial inquiry into these allegations that implicate the job risks and responsibilities of covert CIA agents . The concerns justifying the Totten doctrine provide further support for our decision that a Bivens cause of action is not warranted." 535 F.3d at 710.

and in [*521] cases not raising such concerns. 45

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Consider in this regard Benzman v. Whitman, in which the Second Circuit refused to recognize a Bivens remedy for residents of lower Manhattan based on claims that they had been misled about the air quality after the September 11th attacks. 523 F.3d 119, 126-29 (2d Cir. 2008). The court's

analysis overlooked the possible availability of state tort remedies, as its refusal to recognize a Bivens action turned on "the right of federal agencies to make discretionary decisions when engaged in disaster relief efforts without the fear of judicial second-guessing." Id. at 126 (citation omitted). Interestingly, the Second Circuit traced that right to "the Stafford Act's grant of discretionary function immunity to government officials engaged in administration of the Disaster Relief Act." Id. (citing In re World Trade Ctr. Disaster Site Litig., 521 F.3d 169, 192-93 (2d Cir. 2008)). The court of appeals did not explain why the existence of a statutory immunity in an analogous context counseled against inferring a Bivens remedy, rather than counseling in favor of recognizing a comparable form of immunity as a federal common law defense that would also apply in state court.

Perhaps the most detailed analysis of the justification for declining to recognize a Bivens remedy came from the Fourth Circuit, which held in Lebron v. Rumsfeld that Jose Padilla could not pursue a Bivens action against the federal officials who ordered his detention and alleged torture. 46

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670 F.3d 540, 556 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012).

As Judge Wilkinson explained,

Padilla's complaint seeks quite candidly to have the judiciary review and disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values. It takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security to the prospect of searching judicial scrutiny. It would affect future discussions as well, shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability. 47

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Id. at 551.

To similar effect is the D.C. Circuit's decision in Doe v. Rumsfeld. 48

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683 F.3d 390 (D.C. Cir. 2012).

There, a U.S. citizen sued various government officials for his allegedly unlawful detention and treatment arising out of his work as a military contractor in Iraq. 49

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Id. at 382.

The district court denied the government's motion to dismiss in part, concluding both that recognition of a Bivens remedy was appropriate under the unique circumstances of the case 50

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See Doe v. Rumsfeld, 800 F. Supp. 2d 94, 111 (D.D.C. 2011), rev'd, 683 F.3d 390.

and that, based on the facts alleged in Doe's complaint, the defendants were not entitled to qualified immunity at least as to Doe's substantive due process claim. 51

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See id. at 121.

With respect to recognition of a Bivens claim, Judge Gwin's analysis [*522] specifically suggested that the absence of alternative remedies militated in favor of inferring a Bivens cause of action. He explained that "where the Supreme Court has declined to recognize a cause of action under Bivens, that decision has always relied upon the presence of alternative remedies for the alleged constitutional violation or special factors counseling judicial hesitation." 52

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Id. at 106; see also id. at 107 ("Rumsfeld does not argue that remedies outside of Bivens damages exist for Doe's alleged constitutional injuries. Nor does the Court find any." (citations omitted)).

For this reason, and because a Bivens remedy would not unduly interfere with military or national security considerations, the district court allowed the case to proceed. 53

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See id. at 107-11 (discussing why there were no "special factors" counseling hesitation).

On interlocutory appeal, 54

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Although it is well settled that "an order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a "final' judgment subject to immediate appeal" under the collateral order doctrine, Behrens v. Pelletier, 516 U.S. 299, 307 (1996) (emphasis omitted); see also, e.g., Hartman v. Moore, 547 U.S. 250, 257 n.5 (2006), such appeals (1) do not bring the entire case before the appellate court; and (2) therefore have not usually encompassed the existence of a viable cause of action (such as Bivens), since appellate jurisdiction over collateral order appeals is necessarily limited to "issues significantly different from those that underlie the plaintiff's basic case," Johnson v. Jones, 515 U.S. 304, 314 (1995). But see Wilkie v. Robbins, 551 U.S. 537, 549 n.4 (2007) (holding, without analysis, that an interlocutory qualified immunity appeal also encompasses the "recognition of the entire cause of action").

the D.C. Circuit reversed. 55

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Doe, 683 F.3d 390.

Proceeding from the observation that "the implication of a Bivens action is not something to be undertaken lightly," Chief Judge Sentelle emphasized that "the Supreme Court has never implied a Bivens remedy in a case involving the military, national security, or intelligence." 56

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Id. at 394.

And in Doe's case particularly,

Doe's allegations against Secretary Rumsfeld implicate the military chain of command and the discretion Secretary Rumsfeld and other top officials gave to [Navy] agents to detain and question potential enemy combatants . Litigation of Doe's case would require testimony from top military officials as well as forces on the ground, which would detract focus, resources, and personnel from the mission in Iraq . Allowing such an action would hinder our troops from acting decisively in our nation's interest for fear of judicial review of every detention and interrogation. 57

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Id. at 396.

A different D.C. Circuit panel framed the point even more succinctly in Ali v. Rumsfeld: "Allowing a Bivens action to be brought against American military officials engaged in war would disrupt and hinder the ability of our [*523] armed forces "to act decisively and without hesitation in defense of our liberty and national interests.'" 58

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649 F.3d 762, 773 (D.C. Cir. 2011) (quoting In re Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 105 (D.D.C. 2007)).

Most recently, the Seventh Circuit, sitting en banc, reached a similar - if more categorical - conclusion in Vance v. Rumsfeld. 59

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701 F.3d 193 (7th Cir. 2012) (en banc).

Building on Arar, Lebron, and Doe, the Vance court concluded that courts should never "create an extra-statutory right of action for damages against military personnel who mistreat detainees," even where those detainees are U.S. citizens with clearly established constitutional rights. 60

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Id. at 3; see id. at 8 ("We do not think that the plaintiffs' citizenship is dispositive one way or the other . The Supreme Court has never suggested that citizenship matters to a claim under Bivens.").

Although Chief Judge Easterbrook framed the majority opinion as merely an extension of the Supreme Court's prior jurisprudence, 61

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See id. at 3-8.

Judge Hamilton's dissenting opinion emphasized that "the majority in effect creates a new absolute immunity from Bivens liability for all members of the U.S. military. 62

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Id. at 16 (Hamilton, J., dissenting); see also id. at 34 (Williams, J., dissenting) ("We risk creating a doctrine of constitutional triviality where private actions are permitted only if they cannot possibly offend anyone anywhere.").

The courts' analyses in all of these cases clearly reflect their conceptualization of the issue before them as "Bivens or nothing." The courts' national security concerns would obviously not have justified their nonrecognition of a federal damages remedy if they had understood state tort remedies to be available for the same injuries.

B. The Courts' "Remarkably Low" Standard and Their Scruples about Judicial Lawmaking

We do not argue that the concerns that led the Second Circuit in Arar, the Fourth Circuit in Lebron, the D.C. Circuit in Doe and Ali, and the Seventh Circuit in Vance to decline to recognize a Bivens claim are irrelevant to whether the claims should be allowed to proceed. Our contention, rather, is that those concerns are not relevant to the decision whether to recognize a Bivens claim. Instead, they are potentially relevant to questions of immunity, privilege, or preemption. The latter defenses would bar state remedies as well, whereas nonrecognition of a Bivens claim would leave them in place. 63

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Our analysis in this Part brackets the effect of the Westfall Act. Thus, we assume here that common law remedies have not been generally preempted by statute. The Westfall Act is the focus of Part IV.

[*524] Whether these factors are treated as relevant to the existence of a Bivens claim or instead to the defenses of immunity, privilege, or preemption will make a very real difference in the courts' treatment of the issues and, potentially, the outcome. Specifically, the court's concerns would have to do much heavier lifting to justify a dismissal on immunity, privilege, or preemption grounds than to justify nonrecognition of a Bivens claim.

According to the court in Arar, it takes very little to justify a decision to decline to recognize a Bivens claim. The court need merely have reason to "hesitate." 64

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Arar v. Ashcroft, 585 F.3d 559, 574 (2d Cir. 2009) (en banc), cert. denied, 130 S. Ct. 3409 (2010).

As Chief Judge Jacobs wrote, "The only relevant threshold a factor "counsels hesitation' - is remarkably low . Hesitation is a pause, not a full stop, or an abstention . "Hesitation' is "counseled' whenever thoughtful discretion would pause even to consider." 65

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Id. at 574.

The court's analysis in this respect was based on the suggestion in Bivens that it might be appropriate to decline to recognize a federal damage remedy if there are "special factors counselling hesitation." 66

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Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971). The Arar court's conclusion in this respect was based upon the inference that if the absence of "special factors counselling hesitation" militated in favor of - or at least permitted - recognizing a cause of action directly under the Constitution, then the presence of such factors must militate against implying such a cause of action.

Although we do not think that the Bivens Court had in mind a standard as weak as the one applied in the cases discussed above, the Supreme Court's subsequent jurisprudence does give greater prominence, and broader scope, to this language from Bivens.

The weakness of this standard derives from the courts' reluctance to engage in judicial lawmaking. Consistent with the view of the Bivens dissenters, 67

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See id. at 418 (Burger, C.J., dissenting) ("Today's holding seeks to fill one of the gaps of the suppression doctrine - at the price of impinging on the legislative and policy functions that the Constitution vests in Congress."); id. at 428 (Black, J., dissenting) ("The fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us."); id. at 430 (Blackmun, J., dissenting) ("It is the Congress and not this Court that should act."); see also Carlson v. Green, 446 U.S. 14, 34 (1980) (Rehnquist, J., dissenting) ("In my view, it is "an exercise of power that the Constitution does not give us' for this Court to infer a private civil damages remedy from the [Constitution]. The creation of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority." (citation omitted)).

the Bivens line of cases has come to be seen as an example of [*525] federal common lawmaking. 68

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For example, Bivens and its progeny appear in the "Federal Common Law" chapter of the leading Federal Courts casebook. See Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 726-42 (6th ed. 2009).

As such, it is subject to a criticism directed at all federal common lawmaking generally, the claim that such law is illegitimate because only Congress has the power to make law. 69

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See Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1248-49 (1996) ("Such open-ended lawmaking by courts raises constitutional concerns because it bears a troublesome resemblance to the exercise of legislative power - power apparently reserved by the Constitution to the political branches."); Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 2 (1985) ("Generally speaking, federal common law has been perceived as raising issues of federalism and separation of powers ."); Thomas W. Merrill, The Judicial Prerogative, 12 Pace L. Rev. 327, 344 (1992) ("There is something anomalous about federal common law, and it fits uncomfortably within the general jurisprudential assumptions about the role of federal courts under the Constitution.").

When Bivens was decided, the Court was less scrupulous about federal common lawmaking in general, and about recognition of implied rights of action in particular. 70

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See Bivens, 403 U.S. at 402, 406-08 (Harlan, J., concurring in the judgment) (relying in part on the judiciary's then-receptive approach to the implication of private rights of action under statutes).

But the Court has steadily become more hostile to the implication of remedies without clear congressional direction; it views the creation of such remedies as a matter for Congress. 71

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See, e.g., Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002); Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001).

The Court's retrenchment with respect to Bivens reflects a similar belief that recognizing new rights of action for constitutional violations is primarily a legislative function. 72

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See, e.g., Schweiker v. Chilicky, 487 U.S. 412, 429 (1988) ("Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program."); Bush v. Lucas, 462 U.S. 367, 390 (1983) ("We decline to create a new substantive legal liability without legislative aid and as at the common law, because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." (citation and internal quotation marks omitted)); see also Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("Bivens is a relic of the heady days in which this Court assumed common law powers to create causes of action - decreeing them to be "implied' by the mere existence of a statutory or constitutional prohibition."). For criticism of the tendency to treat

Bivens as implicating the same considerations as implied statutory causes of action, see generally Stephen I. Vladeck, Bivens Remedies and the Myth of the "Heady Days," 8 U. St. Thomas L.J. 513 (2011).

In later cases, the Justices favoring a robust approach to Bivens remedies resisted the characterization of Bivens claims as the product of federal common lawmaking. In Davis v. Passman, for example, Justice Brennan's opinion for the Court portrayed the Judiciary's recognition of a right of action under the Constitution as part and parcel of the Judiciary's proper role in enforcing the Constitution. 73

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442 U.S. 228, 241-42 (1979).

Even the Justices who have counseled a [*526] more restrained approach to judicial implication of private rights of action under federal statutes have recognized that there is greater justification for a more creative judicial role in recognizing remedies for violations of the Constitution. 74

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See Cannon v. Univ. of Chi., 441 U.S. 677, 733 n.3 (1979) (Powell, J., dissenting) ("This Court's traditional responsibility to safeguard constitutionally protected rights, as well as the freer hand we necessarily have in the interpretation of the Constitution, permits greater judicial creativity with respect to implied constitutional causes of action. Moreover, the implication of remedies to enforce constitutional provisions does not interfere with the legislative process in the way that the implication of remedies from statutes can."). As Justice Harlan observed in Bivens,

It would be at least anomalous to conclude that the federal judiciary - while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statutes or Constitution - is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.

403 U.S. at 403-04 (Harlan, J., concurring in the judgment).

But as noted, a more cautious approach to Bivens eventually took hold, reflecting the belief that recognition of new federal rights of action is properly a legislative function.

As we discuss in Part III, however, even the Justices most troubled by judicial lawmaking recognized that common law remedies typically remained available. Indeed, it is in the opinions of these Justices that we find the clearest articulation of the view that the alternative to recognition of a Bivens claim is the exclusivity of state common law as the source of the damage remedy against federal officials. 75

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See Carlson v. Green, 446 U.S. 14, 42 (1980); infra text accompanying note 209.

It is easy to see why: federal officials had been subject to common law remedies for their unconstitutional conduct since the beginning of our nation's history. 76

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See generally infra Part II.

Judges who object to judicial lawmaking would presumably object with equal fervor to the displacement of these remedies by any means other than legislation. Judges and scholars who question the legitimacy of federal common lawmaking do so on the ground that such lawmaking makes it too easy to displace state law. 77

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See sources cited supra note 69.

The constitutional structure, they argue (along with the Rules of Decision Act), 78

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See 28 U.S.C. 1652 (2006) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

presupposes that state law will apply unless displaced through the Article I legislative process. The federal legislative process was, in turn, made as onerous as it was in order to protect the states from having [*527] their laws displaced too easily. Federal common lawmaking is problematic because it circumvents the "carefully wrought" procedures set up by the Constitution for displacing state law. 79

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Clark, supra note 69, at 1269. For elaboration of these objections to federal common lawmaking, see, in addition to the sources cited supra note 69, Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321 (2001). For a response, see Carlos Manuel Vazquez, The Separation of Powers as a Safeguard of Nationalism, 83 Notre Dame L. Rev. 1601 (2008).

From this perspective, the displacement of common law remedies against federal officials would be just as much a legislative function as the creation of new federal rights of action, and the judicial displacement of such actions would have been just as objectionable. Judges who object to judicial lawmaking in general would insist that it is presumptively for Congress to change the legal status quo, and, as discussed in Part II, the status quo at the time of Bivens recognized the availability of common law remedies against federal officials.

Of course, several (primarily judge-made) doctrines might nevertheless foreclose recovery in any given case, depending on the facts. First, the official might be entitled to official immunity. The Court in Bivens recognized that the federal cause of action would be subject to such immunities, 80

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See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397-98 (1971) ("This question was not passed upon by the Court of Appeals, and accordingly we do not consider it here.").

and it has elsewhere made clear that the same is true of state tort actions. 81

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See, e.g., Gomez v. Toledo, 446 U.S. 635, 640 (1980) ("This Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question."); see also infra Section III.C.

Today, official immunity protects executive officials from damages liability unless they violate "clearly established" federal law. 82

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See, e.g., Camreta v. Greene, 131 S. Ct. 2020, 2032 (2011) ("With the law thus clearly established, officials who conduct [a warrantless] interview will not receive immunity .").

Second, evidentiary privileges, such as those relating to state secrets, may apply in suits arising out of clandestine governmental programs. 83

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See, e.g., Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1092-93 (9th Cir. 2010) (en banc) (dismissing case "at the outset" under the state secrets privilege after finding a "painful conflict between human rights and national security"), cert. denied, 131 S. Ct. 2442 (2011).

An evidentiary privilege based upon state secrets is similarly applicable whether the right of action is based on federal or state law. 84

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See, e.g., Crater Corp. v. Lucent Techs., Inc., 423 F.3d 1260, 1269 (Fed. Cir. 2005) (remanding for determination of whether the application of state secrets privilege would preclude a state law claim from going forward).

Third, state tort actions may be preempted by federal statute. For example, the Public Service Health Act, 42 U.S.C. 233(a), provides that

[*528]

the [Federal Tort Claims Act 85

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See 28 U.S.C. 1346(b), 2672-2680 (2006); infra notes 297-305 and accompanying text.

] remedy against the United States for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee . 86

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42 U.S.C. 233(a). Compare id., with 10 U.S.C. 1054(a), 1089(a), 22 U.S.C. 2702(a), 38 U.S.C. 7316(a), and 51 U.S.C. 20137(a).

The Supreme Court in Hui v. Castaneda held that this provision preempts Bivens claims against such officials, 87

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130 S. Ct 1845, 1852 (2010).

and the statute's plain text would equally cover analogous state tort remedies. 88

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As discussed in Part III, infra, the Court, citing Congress's establishment of a "comprehensive internal system of justice to regulate military life," has held that Bivens actions are unavailable to servicemembers injured by the unconstitutional actions of their superiors. United States v. Stanley, 483 U.S. 669, 679 (1987) (quoting Chappell v. Wallace, 462 U.S. 296, 302 (1983)); cf. Feres v. United States, 340 U.S. 135, 146 (1950) ("The Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."). If the regulatory system is comprehensive, it presumably preempts state law remedies as well. Cf., e.g., Estate of Himsel v. Alaska, 36 P.3d 35, 45 (Alaska 2001) (applying the Feres doctrine, which bars FTCA suits arising out of military service, in state court); Mangan v. Cline, 411 N.W.2d 9, 12 (Minn. Ct. App. 1987) (same); Wade v. Gill, 889 S.W.2d 208, 214 (Tenn. 1994) (same); Newth v. Adjutant Gen.'s Dep't, 883 S.W.2d 356, 360 (Tex. Ct. App. 1994) (same); Nyberg v. State Military Dep't, 65 P.3d 1241, 1249-50 (Wyo. 2003) (same).

In theory, state tort claims might also be displaced by federal common law, or even by the Constitution. The Supreme Court has found state tort remedies against federal contractors to be displaced as a matter of federal common law under certain limited circumstances. 89

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See Boyle v. United Techs. Corp., 487 U.S. 500, 504-05, 505 n.1 (1988) (recognizing a limited federal common law defense for contractors who design products for the military).

Similarly, scholars have argued that state criminal prosecution of federal officials should sometimes be held to be preempted by the Supremacy Clause. 90

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E.g., Seth P. Waxman & Trevor W. Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 Yale L.J. 2195, 2234 (2003).

Notably, however, these scholars were writing in response to a court decision declining to find such preemption. 91

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See Idaho v. Horiuchi, 215 F.3d 986, 997 (9th Cir. 2000) (distinguishing "Supremacy Clause immunity," which "protects a federal agent from being held to answer to state laws," from qualified immunity), vacated, 253 F.3d 359 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001) (en banc).

We are unaware of Supreme Court decisions holding common law remedies against federal officials to be displaced as a matter of [*529] federal common law or under the Constitution (as opposed to by statute). 92

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Except insofar as federal common law immunities or evidentiary privileges might be understood as partially displacing state tort claims. Cf. infra note 212 (discussing the Feres doctrine).

Indeed, such remedies have been available in the past even for constitutional violations occurring in war. 93

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See Trevor W. Morrison, Suspension and the Extrajudicial Constitution, 107 Colum. L. Rev. 1533, 1560-62 (2007) (explaining that common law remedies were available against federal officials for injuries committed during the Civil War, even while the writ of habeas corpus was suspended); Amanda L. Tyler, Suspension as an Emergency Power, 118 Yale L.J. 600, 651-55 (2009) (noting that, absent suspension of the writ of habeas corpus or legislation conferring immunity, federal officials were subject to common law tort remedies for injuries committed during the Civil War, though qualified immunity from suits was retroactively extended to federal officials through legislation following the war).

Nevertheless, it is conceivable that the courts might find such displacement with respect to suits implicating national security in particular ways, as they have done in state tort suits against military contractors. 94

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See supra note 24 and accompanying text.

This is not the place to explore the scope of these doctrines or their applicability to the facts of the cases under discussion. Our point, rather, is that these are the doctrines that address whether damages actions should proceed against federal officials. Immunity doctrine, in particular, reflects "an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also "the need to protect officials who are required to exercise

their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" 95

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Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (citation omitted) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

In performing this balance, the Court explicitly takes "national security" and "foreign policy" concerns into account where appropriate. 96

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Id. at 812; see also Mitchell v. Forsyth, 472 U.S. 511, 520-24 (1985) (rejecting argument that the Attorney General should enjoy absolute immunity from damages liability for his actions in furtherance of national security functions, because, inter alia, the secrecy of national security functions makes it "far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation," and because of the unavailability of alternative checks on unconstitutional action, which are just as necessary "in matters of national security as in other fields of governmental action").

By considering these factors instead in deciding whether to recognize a Bivens cause of action, the courts of appeals have pretermitted the proper analysis. Rather than grappling with the relevant concerns on both sides of the balance, as the Supreme Court has instructed, the courts of appeals' "remarkably low" standard effectively gives controlling weight to one side. If the factors that led the courts in these cases to deny a Bivens claim had been considered in connection with these other doctrines, the courts could not have ruled for the defendants merely because of a disinclination to engage [*530] in judicial lawmaking. Mere hesitation would not have produced rulings in the defendants' favor.

If a case does not fall within the established contours of any of these other doctrines, the defendant could certainly ask the court to expand the scope of one or more of these doctrines because of national security or state secrets concerns. But not all of the cases that have followed the lower courts' approach to the Bivens question summarized above have raised national security or state secrets concerns. 97

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See, e.g., Benzman v. Whitman, 523 F.3d 119, 123 (2d Cir. 2008) (describing the plaintiff's Bivens claim, which centered on the allegation that the defendant knowingly caused the EPA to release false statements about air quality at the World Trade Center disaster site).

More importantly for present purposes, the national security concerns would have to do much heavier lifting to justify an expansion of these doctrines than to justify nonrecognition of a Bivens action. The doctrine of qualified immunity and the state secrets privilege are themselves regarded as judicially created federal common law doctrines. 98

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See, e.g., Filarsky v. Delia, 132 S. Ct. 1657, 1660 (2012) (qualified immunity); United States v. Abu-Jihaad, 630 F.3d 102, 140-41 (2d Cir. 2010) (state secrets), cert. denied, 131 S. Ct. 3062 (2011).

If defendants were to ask a court to extend these doctrines, then the courts' reluctance to engage in judicial lawmaking would work against them.

Indeed, scruples about judicial lawmaking should make courts even more reluctant to expand an immunity or privilege than to recognize a new federal right of action. After all, a primary objection to federal common lawmaking is that it allows federal courts to displace state law too easily. 99

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See supra note 79 and accompanying text.

Expansion of an immunity or privilege would effectively preempt existing state law claims, whereas recognition of a new federal right of action would merely supplement state law. 100

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To be sure, the recognition of a new remedy would displace the state's decision to deny a remedy in cases not satisfying the elements of existing state causes of action. Still, we think that taking away an existing state remedy from state citizens injured by federal officials is more offensive to state interests than granting a remedy as a matter of federal law where existing state law would deny it, especially if the offending conduct is independently illegal as a matter of federal law.

A defendant seeking an expansion of an existing federal common law immunity or privilege would be asking the court to make law and hence to usurp the role of the legislature. For judges disinclined to make new law, a mere reason to hesitate - the "remarkably low" threshold applied by the lower courts in these recent cases - should suffice to deny the defendant the requested extension of immunity or privilege.

[*531]

II. Constitutional Torts Before Bivens

Had Bivens never been decided and the Westfall Act never enacted, someone in the shoes of Maher Arar, Jose Padilla, or the plaintiffs in Doe v. Rumsfeld or Vance v. Rumsfeld would have been able to maintain his lawsuit against the federal officials who violated his constitutional rights based on state tort law. Though he may have had to initiate his action in the state courts, the federal defendants would have been free to remove the case to the federal district court upon the assertion of a federal defense. 101

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See 28 U.S.C. 1442(a)(3) (2006); see also Mesa v. California, 489 U.S. 121, 139 (1989) (holding that a federal officer can remove under 1442(a) once he avers a federal defense).

Federal officials have never been categorically exempt from damages suits under the common law simply by virtue of their status as federal officers. From the beginning of the nation's history, federal (and state) officials have been subject to common law suits as if they were private individuals, just as English officials were at the time of the Founding. 102

102

See Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 1-2 (1963) ("From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown. And when it was necessary to sue the Crown eo nomine consent apparently was given as of course. Long before 1789 it was true that sovereign immunity was not a bar to relief.").

The fact that the defendant was a government official was relevant to the official's defense rather than the existence of a cause of action. If the claim was based on the official's conduct in performing his official duties, he could plead justification as a defense, though this defense would fail if he had exceeded his authority. 103

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See infra notes 104-06, 245-86 and accompanying text.

In the United States, federal (as well as state) officials were deemed to have exceeded their authority whenever they violated the Constitution, on the theory that the government lacks the power to authorize violations of the Constitution. 104

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See Note, Developments in the Law: Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 831-32 (1957) (explaining that damages suits against federal and state officers who exceeded their authority were "for some time the most important method employed to obtain monetary recovery"; the agents were relieved of liability only where "the action in question [was] authorized by a constitutional act of Congress"); cf. Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 523-24 (1954) (describing the similar rationale for suits requesting injunctive relief against state officials).

Violation of the Constitution would thus result in the loss of any defense of official justification, leaving the officer vulnerable to suit under the common law as if he were a private individual. The rationale for denying the official the immunity of the state and treating him as a private party was well captured in a famous passage from Ex parte Young explaining why state [*532] officers are not protected by the Eleventh Amendment when their conduct violates the Constitution:

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which

the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. 105

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209 U.S. 123, 159-60 (1908).

Because the violation of the Constitution was deemed to strip the official of his official or representative character, the law governing his liability was the state law imposing liability on private individuals who caused analogous injuries - not any special state law specifically applicable to government officials. 106

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See Developments in the Law, supra note 104, at 832 ("A government officer who acts without authority is subject to the same legal rules as any private person.").

Had Maher Arar brought suit under this pre-Bivens regime, the injuries that he suffered would have supported claims under a number of distinct common law theories. Had he been detained and interrogated by private individuals, his detention would clearly have given rise to a false imprisonment claim, 107

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See Restatement (Second) of Torts 35 (1965).

and his coercive interrogation would likely have satisfied the elements of assault, if not also battery. 108

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See id. 21 (assault); id. 13 (battery).

These claims would have been most likely to prevail against the John Doe defendants who directly detained and interrogated him. 109

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See Arar Complaint, supra note 39, paras. 22, 36-47 (alleging that Arar was "strip searched," "taken from his cell in chains and shackles," told false information, and denied basic constitutional rights).

These defendants would likely have defended on the ground that they were just doing their jobs as federal officials, perhaps pointing to instructions from higher-level officials. But this defense would have failed if their own conduct - or, if their defense rested on instructions from higher-level officials, the conduct of those officials - had [*533] been shown to have violated the Constitution. Arar also sued the higher-level officials who allegedly directed the tortious conduct. 110

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Id. para. 68.

Had he brought the suit under state tort law, his ability to maintain the claim against these defendants may have turned on state law concerning agency or conspiracy. 111

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See Restatement (Third) of Agency 1.01 (2006) (defining agency as a "fiduciary relationship" in which "the agent shall act on the principal's behalf and subject to the principal's control"). For a discussion of the common law "action on the statute," see infra text accompanying notes 136-43.

Again, the defense of justification would have failed if their actions had been shown to have contravened the Constitution. Of course, Arar suffered his most severe battery at the hands of the Syrian officials who tortured him. 112

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Arar Complaint, supra note 39, paras. 23-24, 49-52, 69.

Arar did not sue these foreign officials, but he did allege that they were acting in concert with, or had colluded with, the federal officials he did sue. 113

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Id. paras. 14-21, 68-70.

Again, had he sued under state tort law, his success might have depended, in the first instance, on whether he could have satisfied the relevant state law requirements for proving liability under principles of agency or conspiracy. Padilla's state tort claims would have unfolded in a similar manner, except that his claim of battery against the John Doe defendants would not have depended upon state law of agency or conspiracy, as those defendants were alleged to have physically abused him personally. 114

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See Lebron v. Rumsfeld, 670 F.3d 540, 545 (4th Cir.) ("Padilla was removed from civilian custody and transferred to the Naval Consolidated Brig at Charleston, South Carolina. While in military custody, Padilla claims that he was repeatedly abused, threatened with torture, deprived of basic necessities, and unjustifiably cut off from access to the outside world."), cert. denied, 132 S. Ct. 2751 (2012).

Common law suits against federal officials did differ in one important respect from suits against private individuals. Though federal officials have never enjoyed the immunity of the federal government, they have enjoyed a distinct immunity, now known as "official immunity." The foregoing analysis of Arar's and Padilla's likelihood of success under a state tort theory is therefore subject to a very large qualification: they would not have succeeded if the defendants had been protected by official immunity. But exactly the same obstacle would stand in their way

today had they been afforded a Bivens claim, as official immunity applies whatever the source of the cause of action. 115

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See infra note 126 and accompanying text.

The scope of official immunity has varied both over time and according to the sort of official involved. 116

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In this Part, we provide a brief overview of the doctrine of official immunity. For a closer look at the precise scope of official immunity at the time the Westfall Act was passed, with a focus on the immunity enjoyed by federal officials sued on a state tort theory for conduct violative of the Constitution, see infra Part III.

Certain types of officials - legislators, [*534] judges, and prosecutors - have long enjoyed an absolute immunity from suit for most of their acts. 117

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U.S. Const. art. I, 6, cl. 1 ("[Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same ."); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (recognizing immunity for state legislators "acting in a field where legislators traditionally have power to act"); Randall v. Brigham, 74 U.S. (7 Wall.) 523, 535 (1868) ("It is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction."); see also Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (holding that prosecutors have "the same absolute immunity under 1983" that they "enjoy[] at common law").

Executive officials were initially not entitled to any immunity at all but were instead strictly liable for torts committed in excess of their authority or otherwise contrary to law. 118

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See Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (finding an executive official strictly liable because even instructions given by the Executive could not "legalize an act which without those instructions would have been a plain trespass"); 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, 1864 (2010) (contrasting the lack of immunity given to executive officials under Little and Murray v. Schooner Charming Betty, 6 U.S. (2 Cranch) 64 (1804), with "modern official accountability rules," which are more lenient).

Over time, the courts came to recognize a common law immunity protecting such officials from liability under certain circumstances. But unlike the immunity of legislators, judges, and prosecutors, the

immunity enjoyed by other executive officials for injuries caused by conduct exceeding their authority has generally been a qualified one. 119

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See infra Section III.C.

The scope of the immunity enjoyed by executive officials has a complex history. For present purposes, two points are salient. First, while the scope of immunity fluctuated over time and varied depending on the types of conduct performed by the officer involved, the officers who enjoyed the narrowest scope of immunity were those who inflicted physical injury to persons or property, 120

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See Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 451 (1987) ("Direct invasions of person and tangible property are more traditionally actionable.").

as some of the officials sued by Arar and Padilla are alleged to have done. Officers who inflicted less tangible sorts of injuries once enjoyed a broader immunity. 121

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See id. Today the "clearly established law" standard of qualified immunity applies to all executive branch officials except those exercising prosecutorial functions and the President (acting in any capacity). See Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982) ("Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.").

Second, while there was much debate in the cases and in the academic commentary about the proper scope of liability of federal officials, this debate related to the scope of the immunity [*535] to which these officials were entitled, not to the existence of a cause of action. 122

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See Woolhander, supra note 120, at 451 ("Liability for harms to intangible economic interests, or economic expectations, traditionally was of less concern, as reflected in use of sovereign immunity to bar actions on government debt when no physical property invasions were alleged." (emphasis added) (footnote omitted)). As discussed below, the common law extended liability to wrongs producing intangible injuries as early as the fifteenth century. See infra text accompanying note 134.

That executive officials are subject to tort suits has always been uncontroversial. Thus, although many scholarly articles in the pre-Bivens era tackled the subject of official liability for tortious conduct, virtually all of them focused on the scope of immunity; 123

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See, e.g., Edwin M. Borchard, Government Liability in Tort, 34 Yale L.J. 1 (1924); Jaffe, supra note 102; Louis L. Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209 (1963); Developments in the Law, supra note 104.

the existence of a cause of action in tort was assumed.

By the middle of the twentieth century, the immunity of federal officials generally protected them from liability if they were acting in good faith. 124

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See, e.g., Butz v. Economou, 438 U.S. 478, 497-98 (1978) ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." (quoting Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974))). Before Butz, some "policy-making" officials were thought to enjoy an absolute immunity for discretionary conduct within the outer perimeter of their line of duty. See infra Section III.C. Butz clarified that this immunity did not apply to conduct in violation of the Constitution and held that, apart from prosecutors and other quasi-judicial officers, "qualified immunity from damages liability [is] the general rule for executive officials charged with constitutional violations." 438 U.S. at 508.

The Supreme Court refashioned this immunity in Harlow v. Fitzgerald so that it now protects officials unless they violate clearly established federal law. 125

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See 457 U.S. at 818 ("Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

The status of official immunity as federal or state law was unclear in the pre-Erie period. Today, the immunity is understood to have the status of federal common law, protecting federal officers whether sued under Bivens or state common law. 126

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See, e.g., Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst., 566 F.2d 289, 307 (D.C. Cir. 1977) (en banc) (Wilkey, J., concurring dubitante); see also, e.g., Cousins v. Lockyer, 568 F.3d 1063, 1072 (9th Cir. 2009). Some scholars and courts have suggested that federal officials enjoy a broader immunity from state tort suits than from federal causes of action. We address this claim in Section III.C, infra.

When precisely the immunity came to be understood as federal common law is unclear, but it certainly was so understood before the Supreme Court's decision in Bivens, as Justice Harlan mentioned as a reason for recognizing a federal cause of action the fact that the scope of liability would in any event be governed by federal law - [*536] apparently a reference to the doctrine of official immunity. 127

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See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring in the judgment) ("It seems to me entirely proper that these injuries be compensable, according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability.").

Thus, if a federal cause of action had not been recognized in Bivens, state law would have provided the affirmative basis for the cause of action in suits such as Arar's and Padilla's, and federal immunity law would have operated to circumscribe the cause of action. As of 1982 (when Harlow was decided), recovery would have been available only if the individual defendants had violated clearly established federal law.

To modern eyes unfamiliar with the history of damages claims against federal officials, the "common law cause of action/ federal defense" model no doubt seems odd. The federal interest in suits in federal court against federal officials alleged to have violated the Federal Constitution would appear to be strong, and that of the states comparatively weak. Moreover, application of state law would appear to present a number of potential problems. Federal courts today follow state court precedents when applying the common law. The elements of a common law cause of action could well vary from state to state, and thus a federal official would potentially be subject to differing levels of liability for violation of the same constitutional provision, depending on the state in which he was sued. Given divergent state choice-of-law rules, a single official susceptible to suit in more than one state might well face differing levels of liability depending on where the plaintiff chose to bring suit. 128

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Cf. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2086-87 (2011) (Kennedy, J., concurring) (objecting to the possibility that different rules might apply in different jurisdictions in national security cases, and suggesting instead that, "when faced with inconsistent legal rules in different jurisdictions, national officeholders should be given some deference for qualified immunity purposes").

More importantly, whether the elements of a state law tort action would advance the purposes of the constitutional provision that the officer violated would appear to be, at best, fortuitous. Finally, if the cause of action against state officials had its basis in state law, state legislatures would apparently be free to repeal the remedy, leaving persons injured by federal officials without recourse.

But, on closer inspection, these problems are less severe than they appear - and they were significantly less severe in the pre-Bivens era than they are today. First, states are unlikely to want to do away with remedies for their citizens against federal officers who injured them. More likely, states would want to be overly generous - a problem addressed by the tandem of [*537] the federal officer removal statute and the federal common law of official immunity. Moreover, the states are not completely unfettered by federal law in revising their common law in its applicability to federal officials alleged to have violated the Federal Constitution. The cases

denying government officers sovereign immunity suggest that officers who violate the Constitution must be treated by the states like private parties who cause analogous injuries. 129

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See supra text accompanying notes 105-06.

If so, the states would not be free to alter their common law only for suits against federal officials; they would have to revise their tort law generally. 130

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Professor Amar has proposed that the states enact "converse-1983" statutes establishing a statutory remedy for persons injured by action under color of federal law that violates the Constitution. Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1428 & n.15 (1987); Akhil Reed Amar, Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983, 64 U. Colo. L. Rev. 159, 160 (1993); Akhil Reed Amar, Five Views of Federalism: "Converse-1983" in Context, 47 Vand. L. Rev. 1229 (1994). If the analysis in the text is correct, the states may not be at liberty to establish special rules for the liability of federal officials. (The nondiscrimination principle, see infra note 131 and accompanying text, may also constrain the states in this regard.)

A similar conclusion would appear to follow from the principle that the states may not discriminate against federal law. 131

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See Testa v. Katt, 330 U.S. 386, 393 (1947) ("The policy of the federal Act is the prevailing policy in every state . [A] state court cannot refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." (citation omitted) (internal quotation marks omitted)); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 234 (1934) ("A state may not discriminate against rights arising under federal laws.").

As Professor Hill noted before Bivens, the nondiscrimination principle would appear to require a state to make its tort remedies available for injuries caused by violation of the Federal Constitution as long as it supplies a remedy for injuries caused by violation of analogous standards of care imposed by state law. 132

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See Alfred Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1144-46 (1969) ("As long as the state allows an action in negligence, its courts can hardly hold, as a matter of law, that a railroad was not negligent though in violation of a safety standard embodied in paramount federal law.").

It is true that the elements of common law torts will often not match up well with the purposes underlying the constitutional provision that was violated. For example, federal officials whose actions violated the Fourth Amendment were usually sued in trespass, which traditionally

required a physical injury to person or property, whereas the Fourth Amendment also protects less tangible interests. But, very often, if one common law cause of action would be inadequate to protect the constitutional interests involved, another cause of action will be available to fill that gap. Indeed, the common law has long been characterized by its flexibility and its openness to evolving [*538] to meet new needs. 133

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As discussed in Section III.A, the flexibility of the common law was one reason proffered by the Solicitor General in his argument against creating a federal cause of action in Bivens. See infra text accompanying note 185.

Thus, the inadequacies of the tort of trespass were addressed in the fifteenth century through the evolution of the tort of "trespass on the case," which provided for liability even where "the wrong complained of [did] not consist of the direct application of unlawful physical force to the body, lands, or goods of the plaintiff." 134

134

W.F. Maitland, Equity also The Forms of Action at Common Law: Two Courses of Lectures 54 (A.H. Chaytor & W.J. Whittaker eds., 1910).

From the tort of trespass on the case evolved such modern-day torts as defamation and libel, negligence, and deceit. 135

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See id. at 360-61.

More relevantly, contemporaneously with the development of trespass on the case, there developed from common law trespass the common law ""action on the statute' - a cause of action in tort resulting from activity in violation of a legislatively created duty or standard." 136

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Al Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. Pa. L. Rev. 1, 18 (1968); see also Hill, supra note 132, at 1134 ("The common law did not accommodate itself to paramount positive law only in allowance of a new right to overcome a defense. Actions directly upon statutes were quite common.").

As early as "the late fourteenth and fifteenth centuries, actions labeled "trespass' were being brought upon statutes whether or not they provided in terms for special penalties." 137

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Katz, supra note 136, at 20.

Although there was some retrenchment in the seventeenth and eighteenth centuries, the reluctance during this period to permit tort actions based on certain statutes extended only to statutes that

themselves provided for damages recovery by injured individuals, thereby suggesting that Parliament intended to exclude other remedies. 138

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Id. at 28 (explaining that in cases where recovery was denied, the statutes involved "provided for a mode of recovery that would compensate the plaintiff in money").

Decisions such as Ashby v. White 139

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1703) 92 Eng. Rep. 126 (K.B.) 136; 2 Ld. Raym. 938, 953-54 (Holt, C.J., dissenting) ("Where a new Act of Parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him."); see also Katz, supra note 136, at 25 ("The Chief Justice's dissenting opinion was accepted by the House of Lords, which reversed the King's Bench and entered judgment for the plaintiff.").

and Couch v. Steel 140

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1854) 118 Eng. Rep. 1193 (K.B.) 1197; 3 El. & Bl. 402, 412-13.

demonstrate that the "common law right" to recover for breach of a "duty created by statute" was alive and well in England during this period. 141

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Id.; see id. ("The common law right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law or is created by statute) is [not] taken away by reason of a penalty, recoverable by a common informer, being annexed as a punishment for the non-performance of the public duty.").

In the United States, the common law [*539] "action on the statute" is reflected in decisions that are today sometimes thought to have involved the implication of a cause of action under a statute, 142

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See Tex. & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916) ("A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law ." (emphasis added)).

as well as in the black letter tort of negligence per se. 143

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See Restatement (Second) of Torts 286 (1965) (setting out the circumstances under which a court may adopt the requirements of a legislative enactment or administrative regulation as the standard of conduct of a reasonable man); Prosser and Keeton on the Law of Torts 36, at 220 (W.

Page Keeton et al. eds, 5th ed. 1984) ("When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate."). For a contemporary Supreme Court decision involving negligence per se, see Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804 (1986). In Merrell Dow, the plaintiffs claimed that the misbranding of a drug in violation of federal law created a "rebuttable presumption of negligence." Id. at 805-06.

The common law tort of "action on the statute" and its modern-day manifestations are, of course, of direct relevance to the question of state tort remedies for violation of the Constitution. A state that recognizes this tort may well permit recovery for violation of duties or standards set forth in the Federal Constitution as well as those set forth in state law. Indeed, if a state permits the recovery of damages for violation of standards imposed by the state constitution, or perhaps even just by state statutes, its failure to permit recovery on the basis of the Federal Constitution may run afoul of the nondiscrimination principle mentioned above. 144

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See supra text accompanying notes 129-32.

Finally, disuniformity of remedies from state to state was not a significant problem throughout most of the pre-Bivens era because the pre-Bivens era was, for the most part, also the pre-Erie era. At that time, the common law was regarded as part of the "general" law. 145

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See Erie R.R. v. Tompkins, 304 U.S. 64, 71-73 (1938) (discussing how, in the past, "the federal courts assumed, in the broad field of "general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes").

During the long reign of Swift v. Tyson, 146

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41 U.S. (16 Pet.) 1 (1842), overruled by Erie, 304 U.S. 64.

federal courts did not follow state court precedents; they interpreted and applied the common law according to their own best judgment. 147

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See Erie, 304 U.S. at 71-73; Tony Freyer, Harmony & Dissonance: The Swift & Erie Cases in American Federalism 39-40 (1981) (analyzing the discretion given to federal judges under the Swift regime in deciding commercial cases); Morton J. Horwitz, The Transformation of American Law, 1780-1860 (1977); Herbert Hovenkamp, Enterprise and American Law 1836-1937, at 83-84 (1991) (discussing the Swift Court's failed attempt to create uniformity in commercial law); Clark, supra note 69, at 1276 (suggesting that "federal courts expanded the Swift doctrine to permit federal courts to disregard state judicial decisions on an ever-expanding range of issues"); Ann Woolhandler, The Common Law Origins of Constitutionally Compelled

Remedies, 107 Yale L.J. 77, 87-88 (1997) (highlighting the Court's willingness "to ignore both state statutes and common law in areas that were "general' rather than "local,'" partly in the "belief that the application of state law might exceed the territorial limits of state power in such cases").

Since 1948, all federal officials sued in state court have had the [*540] statutory right to remove such suits to federal court on the basis of a federal defense. 148

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See Pub. L. No. 80-773, 1442(a)(3), 62 Stat. 869, 938 (1948) (codified as amended at 28 U.S.C. 1442(a)(3) (2006)).

Before 1948, many - though not all - federal officials enjoyed such a right. 149

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See Fallon et al., supra note 68, at 746 (describing "myriad" federal rights and jurisdictional provisions that allowed for removal to federal courts before the right of removal was extended to all federal officers in 1948).

In addition, suits against federal officials could often be brought in federal court on the basis of diversity. As a result, the elements of the common law torts for which the officials were sued would very often be decided in the federal courts, subject to Supreme Court review. 150

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See Woolhandler, supra note 147, at 89-90.

Moreover, because the common law was characterized by its flexibility, it could be molded to the exigencies of constitutional litigation. As Ann Woolhandler has demonstrated, federal courts adjudicating common law tort actions against state and federal officials who were alleged to have violated the Constitution during the pre-Erie period did not slavishly follow state precedents regarding procedural or substantive issues, such as who the appropriate parties were, or even what the elements of the relevant torts were. 151

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See id. at 110-11 ("The federal courts in both law and equity showed considerable independence as to procedures and with respect to standing-to-sue and other elements of underlying causes of action.").

Instead, they deviated from state law precedents on these issues when they regarded such deviation to be necessary for the advancement of the federal interests involved. 152

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See id. at 162-63.

Matters changed when the Supreme Court decided Erie Railroad v. Tompkins in 1938. 153

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304 U.S. 64 (1938).

The Court disavowed the concept of "general law," and held that the common law was ordinarily state law. 154

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Id. at 78.

Federal courts were thenceforth required to interpret and apply the common law as would the courts of the state in which they sat. On the same day it decided Erie, the Court recognized that certain matters of uniquely federal concern would be governed by a federal common law. 155

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See Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (determining that the issue of interstate water rights "is a question of federal common law").

Federal common law differs from the [*541] general law in that it displaces inconsistent state law. State courts accordingly must follow federal precedent in interpreting and applying such law. 156

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See Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962) (holding that rules of federal common law articulated by the federal courts necessarily displace state law even in state courts); see also Henry J. Friendly, In Praise of Erie - And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 405, 421-22 (1964) (noting the vertical uniformity accomplished by post-Erie federal common law).

After Erie, Courts addressing the question of damages for constitutional violations could have framed the question as whether the previously available "common law" remedies should now be understood to have the status of federal common law. Because the availability of such remedies had been determined by federal courts largely independently of state decisions, and given the obvious federal interests involved, the federal courts' pre-Erie approach could easily and properly have been retained and recharacterized in post-Erie terms as the application of a federal common law of remedies for constitutional violations. Had this approach been taken, federal courts could have pursued the development of such remedies with sensitivity to the federal interests involved, including the need to give efficacy to the Constitution, without being tied to state precedents, much as they had done before Erie. Had the pre-Erie common law of remedies for federal officials' violations of the Constitution been recharacterized as federal common law, these remedies might well have been held to preempt the field, thus rendering the decision whether a federal cause of action existed in a particular context, effectively, "Bivens or nothing." But, if that approach had been taken, the question of federal remedies for constitutional violations would have been answered with a proper appreciation of the long tradition of providing remedies according to a common law technique notable for its flexibility in meeting constitutional needs.

The recognition of a federal remedy would not have been regarded as an act of judicial lawmaking so much as the continuation of a longstanding and, indeed, constitutionally contemplated remedial approach. 157

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The Solicitor General in Bivens argued that state tort remedies were the constitutionally contemplated remedies for federal officials' violations of the Constitution. See infra text accompanying notes 184-85.

The remedies would have been assumed to be available, as they had been before Erie, without having to be judicially created.

But that road was not taken. After Erie, the pre-existing common law remedies were assumed to be state law remedies, and the question eventually confronted by the Court was whether these state law claims should be supplemented, or perhaps replaced, by a federal cause of action. That is how [*542] the issue was posed, soon after Erie, in Bell v. Hood. 158

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327 U.S. 678 (1946).

The plaintiff, asserting a claim under the Federal Constitution, had brought suit against a federal official directly in federal court (rather than bringing suit in state court and waiting for the suit to be removed). 159

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Id. at 679.

The lower court dismissed for lack of subject matter jurisdiction, holding that the case did not arise under federal law. 160

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Id. at 680.

(Although the plaintiff had at a minimum raised a federal response to an anticipated defense, under the well-pleaded complaint rule, federal jurisdiction is lacking when the federal issue is introduced only by way of defense or replication. 161

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See Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 153 (1908) (requiring the plaintiff to present a federal question in a "statement of its cause of action" and not by anticipating a defense (citation omitted)).

) The Supreme Court found that the case arose under federal law because the question whether federal law provided a cause of action for violation of the Constitution was sufficiently substantial to support federal question jurisdiction. 162

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Bell, 327 U.S. at 684-85.

But the Court did not resolve whether federal law provided a cause of action for violation of the Constitution. Instead, the case was remanded to the district court, 163

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Id.

which held that federal law did not provide a cause of action. 164

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Bell v. Hood, 71 F. Supp. 813, 820-21 (S.D. Cal. 1947).

The decision in Bell v. Hood on remand was largely followed by the lower courts. 165

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See, e.g., United States v. Faneca, 332 F.2d 872, 875 (5th Cir. 1964); Johnston v. Earle, 245 F.2d 793, 796 (9th Cir. 1957) ("The federal government has created no cause of action enforceable in its courts for such torts under the state law, and hence the district court here lacked jurisdiction of the subject matter."); Koch v. Zuieback, 194 F. Supp. 651, 656 (S.D. Cal. 1961) ("An action for damages against a federal official whose acts constitute a denial of due process of law is not a case arising under the Fifth Amendment and presents no federal question."); Garfield v. Palmieri, 193 F. Supp. 582, 586 (E.D.N.Y.), aff'd per curiam, 290 F.2d 821 (2d Cir. 1960).

There matters stood when the courts were presented with the same question in Bivens.

III. Bivens and Its Aftermath

Although the judges of the en banc Second Circuit disagreed vehemently over the correct outcome in Arar v. Ashcroft, they (and their colleagues on the Fourth, Seventh, and D.C. Circuits) agreed on one point: the plaintiff either had a Bivens action or had no cause of action for damages at all. 166

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See supra Section I.A.

In this respect, the courts of appeals' recent approach to the Bivens question was very different from the Supreme Court's approach in Bivens itself: [*543] Consistent with the pre-Bivens approach to constitutional remedies described above, all of the Justices in Bivens, and all of the litigants, regarded the Bivens question as a choice between recognizing a federal right of action for damages directly under the Constitution or leaving the matter of damages for violations of the Constitution by federal officials to the common law. It was common ground in Bivens that, in the absence of a federal cause of action, damages would be available on the basis of the common law. 167

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See supra notes 9-10, 75-79 and accompanying text.

On this understanding of the nature of the Bivens question, the "special factors" that the Court said might "counsel[] hesitation" in recognizing a Bivens action 168

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Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

must be factors that favor leaving the question of damages to other existing remedial regimes, including state law. Factors that would favor leaving the plaintiff with no cause of action at all would bear instead on the question of defenses, such as official immunity.

A. The Bivens Case

Webster Bivens was arrested on narcotics charges and had his home searched by agents of the federal Bureau of Narcotics who lacked a warrant for either the arrest or the search. 169

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Id. at 389.

In his complaint, Bivens alleged that the agents had manacled him in front of his wife and children and threatened to arrest the whole family. Bivens was later taken to the station, where he was subjected to a strip search. 170

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Id.

He sued the agents in federal district court, alleging that they had caused him "great humiliation, embarrassment, and mental suffering." 171

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Id. at 389-90. For more on Webster Bivens's treatment, see also James E. Pfander, The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, in Federal Courts Stories 275 (Vicki C. Jackson & Judith Resnik eds., 2010).

He sought $ 15,000 from each agent for the violation of his "constitutional rights." 172

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Id. at 280-81; see also Bivens, 403 U.S. at 398 (Harlan, J., concurring in the judgment).

Although his pro se complaint did not refer specifically to the Fourth Amendment, 173

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Pfander, supra note 171, at 281.

it did allege that the search was conducted without a warrant and, according to the Supreme Court, "fairly read, it alleged as well that the arrest was made without probable cause." 174

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Bivens, 403 U.S. at 389.

The district court dismissed the complaint, citing the lower [*544] court's decision in Bell v. Hood on remand, 175

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Bivens v. 6 Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F. Supp. 12, 15 (E.D.N.Y. 1967).

and the Second Circuit affirmed. 176

176

Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 726 (2d Cir. 1969).

To grasp how the Bivens question was understood by the Supreme Court in Bivens, it is best to begin with the brief filed by President Nixon's Solicitor General, Erwin Griswold, who argued on behalf of the United States against recognition of a federal damages remedy. 177

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Brief for the Respondents, Bivens, 403 U.S. 388 (1971) (No. 301), 1970 WL 116900.

Griswold presented the question to the Court as whether an "additional" damage remedy should be recognized. 178

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Id. at 40.

He argued that a federal right of action for damages for violation of the Fourth Amendment was inconsistent with original intent. 179

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Id. at 4-6.

According to the Solicitor General, the Founders contemplated that injuries suffered as a result of acts of federal officials that contravened the Amendment would be compensated through common law actions such as trespass. 180

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Id.

As explained in Part II, the breach of the Constitution operated to defeat any defense of official justification, thereby leaving the official open to common law remedies. The Solicitor General added 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 a suit at common law for damages for the illegal act." 181

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Id. at 12 (citation omitted).

Thus, the original intent was not that a damages remedy would be unavailable until enacted by Congress; to the contrary, the Founders contemplated that a damages remedy would be available, namely, the remedy furnished by the common law. Solicitor General Griswold regarded the common law remedy not merely as the default damages remedy, but also as the constitutionally contemplated one.

Griswold conceded that judicial recognition of a federal remedy would be appropriate if such a remedy were "indispensable for vindicating constitutional rights." 182

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Id. at 24.

It was on this ground, in his view, that federal law had come to recognize the availability of injunctive relief for constitutional violations by state and federal officials. 183

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Id. at 17.

But recognition of a federal damages remedy was not necessary, he argued, because common law [*545] remedies were available. 184

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Id. at 40.

The Solicitor General acknowledged that common law remedies were sometimes inadequate, but he contended that the federal remedy would suffer from the same deficiencies, and he noted that the inadequacies could, in any event, be addressed within the common law model, as "growth and improvement have always been the great tradition of the common law." 185

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Id.

In short, the existence of common law remedies was central to the government's argument against recognizing a federal cause of action directly under the Constitution in two important ways: First, it was the damages remedy envisioned by the Framers. Second, the existence of the state remedy made a federal remedy unnecessary.

The Court in Bivens similarly took for granted the existence of common law damages remedies and understood the question before it as whether the common law remedy should remain the exclusive one. It rejected the government's argument for such exclusivity as "unduly restrictive," and it recognized an "independent" federal claim affording damages to victims of Fourth Amendment violations by federal officials, "regardless of whether the State in whose jurisdiction [the federal] power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." 186

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Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391-92, 395 (1971).

The Court, and Justice Harlan in his concurrence, also rejected the government's argument that a federal remedy need be "indispensable" for vindicating the Fourth Amendment. 187

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Id. at 392; see also id. at 406-07 (Harlan, J., concurring in the judgment).

In Justice Harlan's words, the question instead was whether damages were ""necessary' or "appropriate' to the vindication of the interest asserted." 188

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Id. at 407 (Harlan, J., concurring in the judgment).

The conception of the Bivens question as whether existing common law remedies should be supplemented with a federal one is perhaps most clearly reflected in the opinions of the dissenting Justices, who would have declined to recognize a federal cause of action on the ground that creating such remedies is a legislative function. In their view, the majority was usurping the power of Congress. 189

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See supra notes 67-68.

This rationale is consistent only with a determination to leave preexisting common law remedies in place. After all, a decision to displace state law and replace it with nothing is just as much an act of judicial legislation as a decision to displace state law and replace it [*546] with something. 190

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Henry Hart made this point forcefully (albeit in a different context) while noting that the Supreme Court had overlooked the point in certain cases. See Hart, supra note 104, at 534 & n.179. Hart wrote in 1954 that this "trend" (that is, the trend reflected in the cases overlooking our point in the text) had "never been adequately thought through, and can be expected to pass." Id. at 534. Lamentably, his prediction has not proved entirely accurate. See, e.g., Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 643-47 (1981) (recognizing that the antitrust laws preempt state rules of contribution but holding that federal courts lack the power to create a federal right of contribution for antitrust cases). But the Supreme Court's occasional lapses do not undermine the validity of Hart's point, which we embrace here. But cf. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2536 (2011) (noting that where federal law governs and "where, as here, borrowing the law of a particular State would be inappropriate, the Court remains mindful that it does not have creative power akin to that vested in Congress").

In the absence of congressional action, federal courts engage in judicial lawmaking when they decide to displace state law, whether because of a need for uniformity or for another reason. Having taken that step, the decision to replace a state law cause of action with a federal cause of action is no more an act of lawmaking or a usurpation of the role of the legislature than the decision to replace it with no cause of action at all. Leaving victims of constitutional violations with neither a federal cause of action nor their preexisting common law causes of action would be as much a usurpation of legislative power as providing them with a substitute federal cause of action.

To be clear, we do not argue that a decision that a state law cause of action is displaced as a matter of federal common law would in no circumstances be justified. 191

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As discussed in Part IV, infra, however, the Constitution itself may in certain circumstances require the availability of a damages remedy.

The point is merely that such a decision cannot rest on a claimed lack of legislative power. A lack of legislative power can only support a decision to leave the status quo in place, and, as discussed above, that status quo at the time Bivens was decided was that federal officers who violated the Constitution were subject to common law remedies. The reluctance of the dissenting Justices in Bivens to engage in judicial lawmaking is thus consistent only with the view that state law should continue to govern. For those Justices, the supplementation or supplanting of such actions was a decision for Congress, not the courts.

The Justices in the majority held a less restrictive view of the courts' discretion to make law in the absence of congressional action. 192

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Their decision to recognize a cause of action not explicitly authorized by Congress would not have been an act of lawmaking had they held that the Constitution implicitly required these remedies. As previously discussed, the Solicitor General seemed to argue that the Constitution required the availability of common law remedies as well as any additional remedies necessary for vindicating the Constitution. The Bivens Court did not reject this view, but neither did it suggest that the Constitution required the damages remedy the Court recognized insofar as it went beyond what was "indispensable for vindicating constitutional rights." Bivens, 403 U.S. at 406 (Harlan, J., concurring in the judgment) (citation omitted).

It is not [*547] entirely clear from the opinion whether these Justices understood the federal remedy they were creating as preemptive of or supplemental to the common law remedy. The majority never stated that it viewed the federal remedy as exclusive. It did assert that the interests underlying trespass law were sometimes hostile to those underlying the Fourth Amendment, but the examples it gave of such hostility mainly involved situations in which the common law underprotected Fourth Amendment interests. 193

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See id. at 394-95 (majority opinion) (noting that trespass law is more lenient to individuals asserting authority to enter as private citizens rather than as government agents). But cf. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 73 (2001) (noting that in Bivens the Court "found

alternative state tort remedies to be "inconsistent or even hostile' to a remedy inferred from the Fourth Amendment" (quoting Bivens, 403 U.S. at 394)).

If underprotection was the problem, then the solution would be to supplement the state cause of action with a federal cause of action, not to preempt the state cause of action. Any concern that common law liability would unduly restrict federal officials in the performance of their duties would have been addressed by those officials' "immunity from liability by virtue of their official position" 194

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Bivens, 403 U.S. at 397.

- an immunity that applies equally in common law and Bivens actions. 195

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See id. at 409 (Harlan, J., concurring in judgment) (noting "the very large element of federal law which must in any event control the scope of official defenses to liability," and citing pre-Bivens cases); see also infra Section III.C.

On the other hand, Justice Harlan's concurrence mentioned the benefits of uniformity and the undesirability of subjecting federal officials to "different rules of liability dependent on the State where the injury occurs." 196

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Bivens, 403 U.S. at 409 (Harlan, J., concurring in the judgment).

These considerations would support the conclusion that the Bivens action preempts preexisting common law damage remedies. Still, uniformity is not necessarily an overriding concern. The Federal Tort Claims Act, for example, exposes the federal government to liability under the laws of different states depending on where the injury occurred. 197

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See 28 U.S.C. 1346(b)(1) (2006) (granting federal court jurisdiction over suits against the United States for harms committed by its employees, "in accordance with the law of the place where the act or omission occurred").

Thus, following the Bivens decision, one prominent contemporaneous scholar concluded that "the existence of a federal substantive cause of action in no way forecloses continued access to state tort remedies for those plaintiffs who would favor [*548] the state cause of action . The federal remedy is independent, not preemptive, of the state common law causes of action." 198

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Walter E. Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1540 (1972).

In any event, the important question for present purposes is not whether common law remedies remain available in a particular context after a federal cause of action has been recognized in that context, but rather whether common law actions are preempted in contexts in which a federal cause of action has not yet been recognized. 199

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As noted above, the "Bivens question" that is the focus of this Article is the question whether to extend Bivens to a new context. See supra notes 6 & 34.

In other words, does Bivens hold that the liability of federal officials for damages is always exclusively a matter of federal law? Nothing in Bivens supports such a reading. The Court was careful to limit its holding to Fourth Amendment cases, and it expressed no views about causes of action for violations of other constitutional provisions. 200

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See Bivens, 403 U.S. at 397 ("The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.").

Further, the focus of the Justices, especially the dissenters, on whether the Court was usurping Congress's power is consistent only with the conclusion that they regarded the alternative to recognizing a Bivens claim to be leaving the question of damages for constitutional violations by federal officers as they found it. As discussed earlier, federal officers were subject to common law actions under the status quo ante Bivens. Thus, after Bivens, the question for courts considering whether to "extend Bivens to new contexts" continued to be, as it was in Bivens itself, whether to recognize a federal damages remedy or instead to retain the common law as the exclusive basis for the damages remedy. The special factors that might counsel hesitation in recognizing a Bivens claim must therefore be factors that militate in favor of leaving the question of damages to another existing remedial regime, including state law, not factors that militate against any right to damages at all.

B. After Bivens

The Supreme Court's subsequent cases addressing whether Bivens should be "extended to new contexts" are consistent with a conception of the Bivens question as "Bivens or state law." Few of the subsequent cases dwell on the existence of common law damages remedies as an alternative to a federal cause of action, but not because common law remedies were [*549] thought to be unavailable. As discussed below, the failure of those cases to focus on common law remedies stems from the fact that alternative federal remedies were available that were more appealing than those available under state law. Yet even these cases include language confirming that, as a general matter, common law remedies remained one alternative to a potential federal cause of action.

1. Initial Extensions of Bivens

Bivens was followed by two cases extending the federal cause of action to federal officials' violations of other constitutional provisions. In the first such case, Davis v. Passman, the Court recognized a federal cause of action for violation of the Due Process Clause of the Fifth Amendment. 201

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442 U.S. 228, 248-49 (1979).

The alleged violation of the Due Process Clause consisted of gender discrimination in staff hiring by a sitting Congressman. 202

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Id. at 231.

The alternative of suing under state law was not given extensive consideration, but only because the plaintiff conceded that she "had no cause of action under Louisiana law." 203

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Id. at 245 n.23 (quoting Brief for Petitioner at 19). The Court went on to suggest that a state cause of action might have been constitutionally unavailable, stating that "it is far from clear that a state court would have authority to effect a damages remedy against a United States Congressman for illegal actions in the course of his official conduct." Id. (emphasis added) (citing Tarble's Case, 80 U.S. (13 Wall.) 397 (1872)). The Court's doubts appear to have stemmed from the unique fact that the defendant was a U.S. Congressman; the Court was not suggesting that common law damages actions against federal officials were generally unavailable.

In the second case, Carlson v. Green, the Court recognized a federal cause of action against federal prison officials for violations of the Eighth Amendment's ban on cruel and unusual punishment. 204

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446 U.S. 14, 20 (1980).

The plaintiff alleged that the defendants' failure to provide medical treatment to a prisoner who subsequently died reflected "deliberate[] indifference to the prisoner's welfare." 205

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Id. at 16 & n.1.

The district court had upheld a claim by the prisoner's mother under an Indiana wrongful death statute, but the statute placed severe limits on the amount of recovery. 206

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Id. at 17 n.4.

In holding that a federal cause of action existed, the Court did not question the availability of this state remedy. Its analysis did not focus extensively on the alternative of recovery under state law because a better alternative was available through the Federal Tort [*550] Claims Act. 207

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See id. at 20 ("In the absence of a contrary expression from Congress, 2680(h) thus contemplates that victims of the kind of intentional wrongdoing alleged in the complaint still have an action under [the] FTCA against the United States as well as a Bivens action against the individual officials alleged to have infringed their constitutional rights." (emphasis added)).

The Court found even that alternative remedy to be inadequate for a variety of reasons, including the unavailability of punitive damages under the FTCA. 208

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See id. at 21-22 (discussing the inadequacy of an FTCA suit as a deterrent because of the statutory prohibition on punitive damages, whereas, in a Bivens suit, "punitive damages are "a particular remedial mechanism normally available in the federal courts'" (quoting Bivens, 403 U.S. at 397)). The Court was also concerned with a lack of uniformity under the FTCA, and noted that the FTCA cause of action "exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward," whereas "it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." Id. at 23. This analysis would also render the Bivens action preferable to an action under the common law.

It was left to Justice Rehnquist, in dissent, to confirm that the alternative to recognizing a federal right of action is generally to leave the common law as the exclusive source of the damages remedy. "It thus would seem," he wrote, "that the most reasonable explanation for Congress' failure explicitly to provide for damages in Bivens actions is that Congress intended to leave this responsibility to state courts in the application of their common law." 209

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Id. at 42 (Rehnquist, J., dissenting). His reference to state courts overlooked the fact that federal officers typically have a right to remove state law claims against them to federal court.

2. Subsequent Retrenchment

Following Carlson v. Green, a series of decisions declined to extend Bivens to new contexts. These decisions, too, are - with one ambiguous exception - consistent with the proposition that the alternative to recognizing a Bivens claim is to leave the question of damages to the common law. In most of these cases, as in both Davis and Carlson, the alternative of a common law remedy did not receive prominent consideration. But, as in Carlson, the failure to focus on state tort remedies stemmed from the fact that Congress had established an alternative federal remedial scheme. For example, in Chappell v. Wallace 210

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462 U.S. 296 (1983).

and United States v. Stanley, 211

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483 U.S. 669 (1986).

the Court declined to recognize a Bivens action in the military context at least in part because Congress had established "a comprehensive internal system of justice to regulate military life." 212

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Id. at 679 (quoting Chappell, 462 U.S. at 302). These decisions - especially Stanley - are sometimes invoked by the lower courts to support broader preclusion of Bivens remedies in military and national security cases. See, e.g., Al-Zahrani v. Rodriguez, 669 F.3d 315, 319-20 (D.C. Cir. 2012) (invoking Stanley as evidence that the Supreme Court has "precluded Bivens claims even where damages are the sole remedy by which the rights of plaintiffs and their decedents might be vindicated"). But a critical part of the reasoning in Stanley was that the plaintiff was seeking to challenge his treatment while he was a servicemember. As the Court had already established under the FTCA in Feres v. United States, there are special reasons to prevent servicemembers from using the courts to vindicate claims against their (former) superior officers, see 340 U.S. 135, 143-44 (1950) - reasons the Chappell and Stanley courts recognized as "special factors," 483 U.S. at 679; 462 U.S. at 298.

These "special factors" apply even to claims, like the FTCA claim in Feres, that are otherwise provided for by statute (and they appear to apply in state court, as well). See supra notes 88-89 and accompanying text. As Justice Scalia explained, the key in Stanley was that the ""special factors counseling hesitation,' - "the unique disciplinary structure of the Military Establishment and Congress's activity in the field - require abstention in the inferring of Bivens actions as extensive as the exception to the FTCA established by Feres and United States v. Johnson." Stanley, 483 U.S. at 683-84 (emphasis added) (citations omitted) (quoting Chappell, 462 U.S. at 304). In other words, the basis for not inferring a Bivens remedy was a unique immunity doctrine applicable to disputes between servicemembers and their superiors that the Court had already established for all claims arising under state or federal law. See Vance v. Rumsfeld, 701 F.3d 193, 228 (7th Cir. 2012) (en banc) (Williams, J., dissenting) ("Stanley describes its principal point unambiguously: Members of the military cannot invoke Bivens for injuries arising out of "activity incident to service.' Indeed, the Court reserved the possibility of Bivens suits by servicemen against military officials in other contexts." (quoting Stanley, 483 U.S. at 681)).

Similarly, in Bush v. Lucas 213

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462 U.S. 367 (1983).

and [*551] Schweiker v. Chilicky, 214

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487 U.S. 412 (1988).

the Court focused on the alternative remedial scheme that Congress had created to address the sorts of injuries that the plaintiffs had suffered. 215

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See id. at 429 (declining to extend a remedy for wrongful termination of benefits because Congress had "addressed the problems"); Bush, 462 U.S. at 388 ("[The question] is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.").

Where Congress has conferred remedies, the key question is whether Congress has implicitly or explicitly precluded other remedies.

Even so, the Court did note in some of these cases that common law remedies are ordinarily available. For example, in Chappell, the Court distinguished a nineteenth-century precedent, Wilkes v. Dinsman, 216

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48 (7 How.) 89 (1849), after remand, 53 U.S. (12 How.) 390 (1851).

on the ground that it "involved a well-recognized common law cause of action by a marine against his commanding officer for damages suffered as a result of punishment," and thus the plaintiff "did not ask the Court to imply a new kind of cause of action." 217

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Chappell, 462 U.S. at 305 n.2. The Court also noted that "since the time of Wilkes, significant changes have been made establishing a comprehensive system of military justice," id., thereby suggesting that the common law remedy recognized in Wilkes may subsequently have been preempted by congressional action.

And in Bush, the Court recognized that Bivens [*552] had "rejected the argument that a state tort action in trespass provided the only appropriate judicial remedy." 218

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Id. at 375 (emphasis added).

When the Bivens issue has arisen in a context in which Congress had not affirmatively provided an alternative federal remedial scheme, the availability of common law damage remedies has featured prominently in the Court's analysis. For example, in Correctional Services Corp. v. Malesko, the Court declined to recognize a Bivens action against a private corporation operating a halfway house under contract with the Federal Bureau of Prisons. 219

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534 U.S. 61, 72-73 (2001).

It relied heavily on the fact that prisoners injured by private corporations "enjoy a parallel tort remedy that is unavailable to prisoners housed in Government facilities." 220

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Id. The Court presumably meant that this parallel tort remedy was not available to prisoners housed in government facilities because the prison itself, or the government, is not suable. The Court had earlier distinguished between suits against the United States or the Bureau of Prisons and suits against the individuals who operate the prison. See id. at 72.

And in Wilkie v. Robbins, the Court declined to recognize a Bivens claim in part because the plaintiff "had a civil remedy in damages for trespass" against the offending federal officials. 221

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551 U.S. 537, 551 (2007).

The Wilkie Court cited Malesko's similar reliance on the existence of "state tort remedies in refusing to recognize a Bivens remedy." 222

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Id.

More recently, in Minneci v. Pollard, the Court relied on the availability of state tort remedies in declining to recognize a Bivens action against employees of privately run prisons. 223

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132 S. Ct. 617, 624-26 (2012).

Some post-Carlson opinions include language or reasoning that is in tension with the Court's understanding that the Bivens question poses a choice between federal and state remedies. In Stanley, for example, Justice Brennan's dissenting opinion seemed to equate the absence of a Bivens remedy with the existence of absolute immunity from liability. 224

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See 483 U.S. 669, 692 (Brennan, J., concurring in part and dissenting in part) ("The practical result of this decision is absolute immunity from liability for money damages for all federal officials who intentionally violate the constitutional rights of those serving in the military."); id. at 691-92 ("As a practical matter, the immunity inquiry and the "special factors' inquiry are the same; the policy considerations that inform them are identical, and a court can examine these considerations only once.").

So understood, the alternative to a Bivens remedy would indeed be no remedy at all, as an official's absolute immunity from suit would defeat both a Bivens remedy and any common law action. If the Bivens

question were understood as "Bivens or state law," the absence of a Bivens action would not amount to an absolute immunity from liability in damages, as the official could still be [*553] liable under the common law. Since Justice Brennan was the author of Bivens, in which he clearly distinguished the existence of a Bivens action from the presence of official immunity, 225

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In Bivens, the Court held that a federal cause of action existed, yet it remanded for consideration of whether the defendants were entitled to immunity. Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397-98 (1971).

he presumably did not mean to suggest that the absence of a Bivens action always renders federal officials absolutely immune from damages relief. Presumably, he meant instead that the failure to recognize a Bivens action in the particular context of the Stanley case would be tantamount to recognizing an absolute immunity for the particular federal officials involved. Perhaps Justice Brennan's analysis here assumed the unavailability of common law remedies in the unique context of suits by servicemembers for the reasons underlying the Court's earlier decision in Feres v. United States. 226

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See Stanley, 483 U.S. at 679; see also id. at 683-84 (citing Feres v. United States, 340 U.S. 135, 146 (1950)).

More puzzling is the Supreme Court's statement in FDIC v. Meyer that, "by definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." 227

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510 U.S. 471, 478 (1994).

On the surface, this statement appears to deny the possibility that the common law could be a "source of liability" for injuries caused by federal officials through conduct that violates the plaintiff's federal constitutional rights. As we have seen, however, common law actions such as trespass were traditionally the "source of liability" for federal officials alleged to have violated the Constitution. 228

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See supra Part II.

Because the statement, if read literally, is so clearly incorrect, an alternative reading should be preferred, if available.

The Court's statement in Meyer comes in a part of the opinion holding that the FDIC's entitlement to immunity had been waived by its organic statute. 229

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See Meyer, 510 U.S. at 475 ("By permitting the [FDIC] to sue and be sued, Congress effected a "broad' waiver of the [FDIC's] immunity from suit.").

The proposition in question was central to the Court's analysis of the relationship between the FDIC's organic statute and several provisions of the FTCA. Section 2679(a) of the FTCA provides that agencies are not suable under their organic statutes for "claims which are cognizable under section 1346(b)" of the FTCA. 230

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28 U.S.C. 2679(a) (2006).

Section 1346(b), in turn, confers jurisdiction on the federal courts over damages claims against the United States for injuries caused by federal employees within the scope of their employment "under circumstances where the United States, if a private person, would be [*554] liable to the claimant in accordance with the law of the place where the act or omission occurred." 231

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Id. 1346(b)(1).

The Court concluded that Meyer's claim was not cognizable under 1346(b), and that the waiver of immunity in its organic statute was consequently applicable, because the source of the liability in Meyer's case was federal, not state, law. 232

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Meyer, 510 U.S. at 477-78.

Hence, the United States, if a private person, would not be liable under the law of the state where the act or omission occurred.

If the Court were understood to be saying that state law "by definition" cannot provide the source of liability for claims alleging constitutional deprivations, the statement would be contradicted by the long history of state tort remedies against state and federal officials whose conduct was deemed to be unauthorized because it violated the Constitution. The Court should instead be understood to have stated that a complaint asserting a federal cause of action for violation of the Constitution "by definition" does not set forth a state law claim. In other words, the Court should be understood to have said that a claim is not cognizable under 1346(b) where the claimant has framed his claim as a federal constitutional claim. The point seems tautological, but the opinion's language indicates that the Court was only making a definitional point. On this reading, if a claimant framed his claim as one of trespass, assault, or false imprisonment, the claim would fall within 1346(b), and the agency would therefore be immune except to the extent authorized by the FTCA, even if the employee's conduct also violated the Constitution. 233

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As discussed in the next Part, the Westfall Act would immunize the officer as well from liability on a common law tort theory, but as we also explain in Part IV, it is not clear that the Act was intended to immunize the officer when the plaintiff alleges a violation of the Constitution.

The alternative would be to read this statement as reflecting the Court's view that, sometime after Bivens, state law remedies against federal officials had come to be preempted as a matter of federal common law. But such a reading is untenable for three reasons. First, the Court did not purport to be making a point about the current state of the law; rather, it purported to be making a point about the logic of constitutional claims. 234

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This conclusion follows from the Court's declaration that "by definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." Meyer, 510 U.S. at 478 (emphasis added).

Second, as noted, in Malesko and Wilkie, both decided after Meyer, the Court recognized the possibility of common law tort claims for injuries resulting from acts by federal agents or officials that violated constitutional rights. Indeed, in Westfall v. Erwin, the Court clearly upheld the availability of state tort [*555] remedies against federal officials. 235

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See 484 U.S. 292, 296 (1988) (refusing to adopt the position that federal employees are immune from damage suits under state tort law), superseded by statute, Westfall Act, Pub. L. No. 100-694, 5, 102 Stat. 4563, 4564 (1988) (amending 28 U.S.C. 2679(b)); see also Westfall Act 2(a)(4) ("Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees."); Westfall Act 2(a)(5) ("This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.").

Although the focus of the Court's discussion in Westfall was the scope of the officials' immunity, the opinion left no doubt that state law causes of action were available. The Westfall case did not involve allegations of a constitutional violation, but there is little reason or support for barring state tort remedies when the federal official has violated a state duty of care and the Federal Constitution, but not when the official has violated a state duty of care but not the Federal Constitution. If a distinction were to be drawn according to whether the Constitution was violated, one would expect the presence of allegations of a constitutional violation to have cut the other way (as indeed Congress provided when it addressed the issue in the Westfall Act 236

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See Westfall Act 5 (excepting from its grant of immunity those actions that violate the Federal Constitution) (codified at 28 U.S.C. 2679(b)(2)(A)); see also supra note 235.

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Finally, such a broad preemption of state tort remedies would have constituted a massive exercise of legislative power, something that Justices disinclined to "extend" Bivens regard as the function of Congress, not of the courts. If the Court had meant to assert that this radical change had come

about through federal common lawmaking sometime after the Bivens decision, one would have expected from the Justices in the majority in Meyer at least some analysis of this issue and a hint of criticism of such judicial activism. 237

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Another alternative would be to read the Court's statement in Meyer as reflecting the Court's interpretation of the Westfall Act as preempting all state tort claims against federal officials. This reading is equally untenable. The Court in Meyer did not even cite the Westfall Act. Moreover, as noted in the text, the Court purported to be making a point about the logic of constitutional actions, not a point about the current state of the law.

Moreover, if federal common law had somehow come to preempt the field of remedies against federal officials for constitutional violations, then an aversion to judicial lawmaking could no longer ground an unwillingness to recognize a federal cause of action: as already discussed, once the courts have held state law to be preempted as a matter of federal common law, a decision to replace state law with nothing is no less an act of judicial legislation than a decision to replace it with something. Yet the [*556] Justices in the Meyer majority continue to assert that recognition of a Bivens claim would usurp the power of Congress. 238

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See, e.g., Malesko v. Corr. Servs. Corp., 534 U.S. 61, 68-69 (2001) (noting appropriateness of deference to Congress); id. at 75 (Scalia, J., concurring) (decrying the Court's previous creation of causes of action ""implied' by the mere existence of a statutory or constitutional prohibition since an "implication' imagined in the Constitution can presumably not even be repudiated by Congress").

In summary, the Court's more recent cases determining whether to extend Bivens to new contexts do not deviate from its initial conceptualization of the Bivens question as "Bivens or (only) state law." Several decisions rely on the existence of state law remedies as a reason for declining to extend Bivens. Stray language in some opinions suggests, at most, that some Justices (and, on one occasion, the Court as a whole) have at times overlooked the fact that state tort remedies would generally remain available for federal officials' violation of the Constitution even if a Bivens action were not recognized. To read these statements as reflecting a never-explained and never-justified federal common law preemption of the field of remedies against federal officials for violation of the Constitution would be an unwarranted interpretation of ambiguous language.

Preemption of state tort remedies through congressional action would not be vulnerable to this particular criticism, and the Supreme Court in Pollard appears to have read the Westfall Act to have done just that. 239

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See Minneci v. Pollard, 132 S. Ct. 617, 623 (2012) ("Prisoners ordinarily cannot bring state-law tort actions against employees of the Federal Government.").

As we show in Part IV, however, if the Westfall Act preempts state tort remedies for federal officials' violations of constitutional rights, then it also rules out the courts of appeals' "hesitant" approach to the recognition of Bivens claims.

C. Federal Officials' Immunity from Liability for their Unconstitutional Acts

The foregoing analysis shows that, at least in theory, state law causes of action remained available at the time Congress passed the Westfall Act in 1988. But there remains the possibility that such remedies may have been effectively unavailable as a result of the operation of official immunity doctrines. Thus, before turning to the Westfall Act, we examine the scope of federal officials' immunity from common law tort claims as it stood in 1988, when the Westfall Act was passed. Although scholars have claimed that, by 1988, federal officials had come to enjoy absolute immunity from [*557] common law actions, 240

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See, e.g., Fallon et al., supra note 68, at 1006-07 ("Prior to 1988, when a state law tort action was brought against a federal officer, federal common law had established a shield of absolute immunity from damages liability .").

the cases actually confirm that such officials enjoyed, at most, a qualified immunity from common law actions seeking compensation for injuries resulting from their unconstitutional conduct.

As discussed in Part II, today most federal officials enjoy a qualified immunity from Bivens actions: they are immune if they did not violate clearly established federal law. This standard was articulated by the Court in Harlow v. Fitzgerald, decided in 1982. 241

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457 U.S. 800, 818 (1982).

Before Harlow, federal officials enjoyed immunity for conduct undertaken in good faith. 242

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See supra note 124.

Bivens itself suggests that federal law enforcement officials sued on a common law tort theory for constitutional violations enjoyed no more than a qualified immunity: In explaining his agreement with the majority's recognition of a federal right of action, Justice Harlan noted that federal law would in any event govern federal officials' defenses to liability 243

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Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring in the judgment).

- an apparent reference to those officials' immunity. Since Justice Harlan was making a point about the necessary role of federal law in suits against such officers in the event a federal right of action were not recognized, he must have meant that federal officers enjoyed such immunity from state law tort suits. He also must have understood the immunity to be a qualified one. If he and the other Justices in Bivens had believed that federal officers enjoyed an absolute immunity from state law tort suits - the only sort of suit recognized at the time - they would not have regarded the choice before them - as all of them, and the litigants, did - as "Bivens or (only) state law." 244

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See also Butz v. Economou, 438 U.S. 478, 505 (1978) ("Our opinion in Bivens put aside the immunity question; but we could not have contemplated that immunity would be absolute.").

Although the pre-Bivens cases were not uniform, most are consistent with the view that qualified immunity was the rule and absolute immunity the exception, at least for federal officials of the sort involved in Bivens. As noted, the Court has long recognized that judges and prosecutors enjoy an absolute immunity. 245

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See David E. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 43-47 (1972).

In Barr v. Matteo, the Court extended this absolute immunity to an additional (though uncertain) range of executive officials. 246

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360 U.S. 564, 574-76 (1959) (plurality opinion).

Specifically, the Barr Court held that the head of an administrative agency enjoyed an absolute privilege from suit for defamation or libel for conduct [*558] taken "within the outer perimeter of [his] line of duty," notwithstanding allegations in the complaint of malice. 247

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Id. at 575.

The Court declined to limit the privilege to cabinet officials, but it acknowledged that the immunity enjoyed by the head of an agency was "far broader than in the case of an officer with less sweeping functions." 248

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Id. at 573.

With respect to the case before it, the Court held that the official was immune from liability because his conduct "was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." 249

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Id. at 575; see also id. ("It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty.").

The lower courts had considerable difficulty applying the Barr standard. Many distinguished between "discretionary" and "ministerial" functions, but one prominent contemporaneous commentator noted that such a dichotomy is "at the least unclear, and one may suspect that it is a way of stating rather than arriving at the result." 250

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Jaffe, supra note 123, at 218. Jaffe's thesis was that the immunity cases reflected an implicit "balancing of certain important factors," namely, "the character and severity of the plaintiff's injury, the existence of alternative remedies, the capacity of a court or jury to evaluate the propriety of the officer's action, and the effect of liability whether of the officer or of the treasury on effective administration of the law." Id. at 219.

Nevertheless, and consistent with Barr's recognition that officials exercising "less sweeping functions" enjoyed a narrower privilege, most of the lower courts found Barr's absolute privilege inapplicable to police and similar rank-and-file law enforcement officers. In Bivens itself, the Court did not reach the immunity question, although Justice Harlan, the author of the plurality opinion in Barr, expressed his belief that immunity would be inapplicable "with respect, at least, to the most flagrant abuses of official power." 251

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Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment).

On remand from the Supreme Court, the Second Circuit in Bivens held that the defendants were not entitled to the broad immunity recognized in Barr, 252

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Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1345-47 (2d Cir. 1972).

and concluded instead that they were entitled to a qualified privilege protecting them from liability for actions taken in good faith. 253

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Id. at 1347-48.

In so holding, the court relied on prior decisions involving common law suits against federal officials and suits against state officials under 42 U.S.C. 1983, without suggesting that the scope of immunity varied depending on [*559] the source of the remedy being sought. 254

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See id. at 1346 ("The common law has never granted police officers an absolute and unqualified immunity ." (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967))); id. at 1347 ("[A] Federal officer sued in tort at common law, should [not] be held to enjoy an immunity denied his state or territorial brother similarly situated." (quoting Carter v. Carlson, 447 F.2d 358, 371 (D.C. Cir. 1971) (Nichols, J., concurring), rev'd on other grounds, 409 U.S. 418 (1973))); see also Bethea v. Reid, 445 F.2d 1163, 1165 (3d Cir. 1971) (emphasizing that Bivens reserved the applicable immunity for "enforcement agents"); Anderson v. Nosser, 438 F.2d 183, 194-95 (5th Cir. 1971) (reiterating the distinction between the absolute immunity of some officers and the qualified immunity of others); Kelley v. Dunne, 344 F.2d 129, 133 (1st Cir. 1965) (postal inspector not entitled to Barr immunity); Hughes v. Johnson, 305 F.2d 67, 70 (9th Cir. 1962) (holding federal game wardens not entitled to immunity from a trespass action alleging unconstitutional search, and distinguishing Barr as not involving allegations of constitutional violations); Developments in the Law, supra note 104, at 835 ("Lower ranking officers are severely restricted in the amount of judgment they are permitted to exercise without risking liability." (citing cases)). But cf. Norton v. McShane, 332 F.2d 855, 859-60 & nn.5-6 (5th Cir. 1964) (relying on pre-Barr cases for the proposition that some federal law enforcement officers are entitled to absolute immunity even under Barr's framework).

Admittedly, the case law addressing which other types of federal officials were entitled to absolute immunity and which were entitled to qualified immunity, and for which sorts of claims, was in a highly unsettled state until the Court held in Butz v. Economou that, with very limited exceptions, executive officials sued for their unconstitutional conduct enjoyed only a qualified immunity. 255

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438 U.S. 478, 507 (1978).

A few years after Butz, the Court brought additional certainty to this area of the law by holding in Harlow that qualified immunity protects federal officials only if their conduct was consistent with clearly established federal law. That is where the law of official immunity stood when Congress enacted the Westfall Act in 1988.

Nevertheless, the current edition of the Hart and Wechsler casebook, citing Barr, asserts that, "prior to 1988, when a state law tort action was brought against a federal officer, federal common law had established a shield of absolute immunity from damages liability for actions within the "outer perimeter of [the official's] line of duty.'" 256

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Fallon et al., supra note 68, at 1006-07 (quoting Barr v. Matteo, 360 U.S. 564, 575 (1959) (plurality opinion)).

If the claim is that federal officials came to enjoy an absolute immunity from common law tort claims upon the Court's decision in Barr in 1959, or soon thereafter, that position is contradicted by the authorities discussed above. 257

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See also Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 1421 (2d ed. 1973) ("Did not the Supreme Court decision in Bivens imply, notwithstanding reservation of the question, that federal officials perpetrating an unconstitutional search or seizure were not totally immune to liability for damages?").

Although a range of federal officials of uncertain scope enjoyed an absolute immunity, the immunity did not by any means apply to all - as Barr itself made clear. [*560] If the claim is instead that, sometime between the Bivens decision and the enactment of the Westfall Act, federal officials came to enjoy an absolute immunity from state tort claims, albeit not from the federal Bivens action, it is contradicted by the Supreme Court decisions discussed below.

The claim that by 1988 federal officials had come to enjoy an absolute immunity from state tort claims clearly conflicts with at least one Supreme Court decision (and a unanimous one at that) - Westfall v. Erwin, in which the Court held that officials who do not exercise discretionary functions do not enjoy any such immunity. 258

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See 484 U.S. 292, 297-98 (1988) ("Absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties and the conduct is discretionary in nature."), superseded by statute, Westfall Act, Pub. L. No. 100-694, 5, 102 Stat. 4563, 4564 (1988) (amending 28 U.S.C. 2679(b)).

But Westfall is the decision that precipitated the enactment of the Westfall Act, the purpose of which, according to Congress, was to restore the law of immunity to where it stood before the Court's decision, which Congress regarded as erroneous. 259

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See H.R. Rep. No. 100-700, at 4 (1988) ("The functional effect of H.R. 4612 is to return Federal employees to the status they held prior to the Westfall decision.").

Of course, the Court in Westfall may have correctly applied existing law, and Congress may have been mistaken about the state of the prior law. Nevertheless, given that Congress's intent was to restore what it regarded as the law that predated what it regarded as an erroneous Supreme Court decision, in interpreting the Westfall Act we must assume that the Court's holding in Westfall was mistaken.

But what was the error in Westfall that Congress intended to correct? For present purposes, the important aspect of Westfall is one it shares with Barr v. Matteo 260

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360 U.S. 564. This case contains the "outer perimeter" language quoted by Fallon et al., supra note 68, at 1006-07. See 360 U.S. at 575 (plurality opinion); see also supra note 256 and accompanying text.

: neither case involved conduct by a federal official in violation of the Constitution. We argue in Part IV that the Westfall Act is best understood to have preempted state tort actions against federal officials who

did not violate the Constitution. Here, we show that the Supreme Court had clearly held, in the years immediately preceding the Westfall Act, that only federal officials who were not alleged to have violated the Constitution enjoyed an absolute immunity from state tort suits. With the exception of prosecutors and other quasi-judicial officials, 261

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As discussed above, certain categories of officials, such as judges and prosecutors, enjoyed an absolute immunity from certain types of claims. See supra notes 111-18 and accompanying text.

federal officials enjoyed only a qualified immunity from liability for their unconstitutional conduct. Thus, to the extent that the Westfall Act was intended to restore the pre-Westfall law, it must have been intended to confirm the unavailability [*561] of state tort remedies in cases not alleging a violation of the Constitution - the sorts of cases exemplified by Westfall and Barr v. Matteo. 262

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See also 28 U.S.C. 2679(b)(2)(A) (2006) (exempting actions "brought for a violation of the Constitution" from the application of the provision otherwise rendering the FTCA the exclusive remedy (and thereby preempting state law) for the torts of federal officials); Hui v. Castaneda, 130 S. Ct. 1845, 1851 (2010) ("The Westfall Act amended the FTCA to make its remedy against the United States the exclusive remedy for most claims Notably, Congress also provided an exception for constitutional violations." (citing 28 U.S.C. 2679(b)(2)(A))).

The most thorough post-Bivens, pre-Westfall Act discussion of the scope of the immunity enjoyed by federal executive officials from liability for their constitutional violations - and the last word on the subject before the enactment of the Westfall Act (apart from the Westfall decision itself) - is found in Butz v. Economou. 263

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438 U.S. 478 (1978).

The plaintiff in Butz had sued a number of officials of the Department of Agriculture, raising Bivens claims as well as common law tort claims such as abuse of process, malicious prosecution, invasion of privacy, negligence, and trespass. 264

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Id. at 482-83, 483 n.5.

The district court had dismissed the claims, citing the "outer perimeter" language from Barr. 265

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See id. at 483-84 ("The District Court held that the individual defendants would be entitled to immunity if they could show that "their alleged unconstitutional acts were within the outer perimeter of their authority and discretionary.'" (citation omitted)).

The Supreme Court reversed, holding that the officials were entitled only to qualified immunity. 266

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Id. at 507.

Although Butz is sometimes read to have held that federal officials are entitled to qualified immunity from Bivens claims but absolute immunity from state law claims, 267

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See, e.g., Martin v. D.C. Metro. Police Dep't, 812 F.2d 1425, 1428 n.11 (D.C. Cir. 1987) (noting that there was a "distinction indicated (but not explained) in Butz between a federal official's absolute immunity from common law claims and qualified immunity from constitutional claims").

the opinion actually establishes that qualified - not absolute - immunity applies to state law claims in which the defendant is alleged to have violated the Constitution, regardless of the legal basis of the remedy being sought.

The Court in Butz began by distinguishing Barr v. Matteo, on which the district court and the defendant had principally relied. 268

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Butz, 438 U.S. at 487.

Barr, the Court noted, did not involve a claimed violation of the Constitution. Instead, the issue in Barr was whether the defendant official could be held liable for conduct "otherwise within the official's authority" if he had acted with malice. 269

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Id. at 488.

The Court in Barr rejected such liability. 270

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Id.

But, the Butz Court stressed, "quite a different question would have been presented [in Barr] [*562] had the officer ignored an express constitutional limitation on his authority." 271

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Id. at 489.

To recognize absolute immunity in the latter situation would, according to the Court, contradict Supreme Court decisions stretching back to the beginning of the Republic. 272

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See id. ("Barr did not, therefore, purport to depart from the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his power.").

Notwithstanding the immunity that federal officials otherwise enjoyed, the Court, in well-known cases such as Little v. Barreme, 273

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6 U.S. (2 Cranch) 170 (1804).

had recognized that "[a] federal official who acted outside of his federal statutory authority would be held strictly liable for his trespassory acts." 274

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Butz, 438 U.S. at 489-90.

Although Little v. Barreme involved conduct exceeding the scope of authority as set forth in statutes, the Court noted in Butz that the principle applied equally to conduct that was outside the official's authority because it violated the Constitution. 275

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Id. at 490.

"Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense." 276

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Id. at 490-91.

Barr and Spalding v. Vilas, 277

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161 U.S. 483 (1896).

upon which Barr had relied, 278

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See Barr v. Matteo, 360 U.S. 564, 570-72 (1959) (plurality opinion).

were entirely consistent with this older line of cases. Indeed, "if any inference is to be drawn from Spalding it is that the official would not be excused from liability if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of the statute." 279

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Butz, 438 U.S. at 494.

Although Barr extended the immunity somewhat beyond Spalding, the important point for the Court in Butz was that "the liability of officials who have exceeded constitutional limits was not confronted in either Barr or Spalding." 280

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Id. at 495.

Thus, neither case supports absolute immunity in such circumstances.

In distinguishing Barr and Spalding throughout the opinion, the language used by the Court in Butz encompassed not just Bivens claims, but any claim based on unconstitutional conduct. Thus, the Court wrote that "Barr did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of [*563] fairness embodied in the Constitution." 281

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Id.

The Court furthermore explained that

neither [Barr nor Spalding] purported to abolish the liability of federal officers for actions manifestly beyond their line of duty; and if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability. 282

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Id.

Each time the Court described the type of case to which absolute immunity did not extend, it referred to the type of conduct in which the defendant engaged - specifically, whether the conduct exceeded authority, including by violating the Constitution - not whether the cause of action asserted was based on federal or state law. 283

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See id. at 490-96.

In the Court's view, suits based on unconstitutional conduct were just a subset of a larger set of cases not subject to absolute immunity, namely, suits in which the officer exceeded the scope of his authority. 284

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See id. at 495.

The Court thus cannot be taken to have limited its holding to Bivens claims, as suits based on conduct that exceeded the officer's statutory authority but did not violate the Constitution cannot give rise to a Bivens claim.

Although the Court's conclusion that qualified immunity, not absolute immunity, applies to suits seeking state tort remedies for conduct in violation of the Constitution is clear enough from the foregoing parts of its analysis, the Court removed all doubt in a later footnote addressing that very question. After discussing the Court's earlier holding in Scheuer v. Rhodes that high-level state executive officials enjoy only a qualified immunity from claims under 42 U.S.C. 1983, 285

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See Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) ("[A] qualified immunity is available to officers of the executive branch of [state] government .").

Justice White wrote for the Court in Butz:

The Government argued in Bivens that the plaintiff should be relegated to his traditional remedy at state law. "In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals." Although, as this [*564] passage makes clear, traditional doctrine did not accord immunity to officials who transgressed constitutional limits, we believe that federal officials sued by such traditional means should similarly be entitled to a Scheuer immunity. 286

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438 U.S. at 507 n.34 (citation omitted).

The Court here was specifically addressing claims brought against federal officials on a common law tort theory, which, as it explained, and as we discussed in Part II, were the "traditional" means of obtaining damages against federal officials who had violated the Constitution. This footnote confirms the conclusions we reached above regarding the availability of state tort suits post-Bivens: neither Bivens itself nor any decisions after it eliminated such claims. The footnote also shows that, as late as 1978, the Court viewed the immunity issue in such "traditional" suits against federal officials who had violated the Constitution as a choice between qualified immunity and no immunity at all. In Butz, the Court opted for qualified immunity.

The only ambiguity in the above analysis is whether the views the Court expressed in Butz regarding the scope of the immunity enjoyed by federal officials in state tort suits alleging constitutional violations were dicta or holding. The Court's reasoning in deciding that the Bivens claims were only subject to a qualified immunity extends equally to state tort suits alleging unconstitutional conduct. The inapplicability of absolute immunity in Bivens claims was deduced from the broader proposition that such immunity does not apply when the officer exceeds his authority. As the Court has often said, a decision's holding encompasses the legal propositions that formed part of the Court's reasoning in reaching its judgment in the case. 287

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See, e.g., Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

On the other hand, in another footnote, the Court seemed to limit its holding to "constitutional claims." 288

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Butz, 438 U.S. at 495 n.22.

As noted above, the plaintiff in Butz brought both state tort claims as well as Bivens claims. After noting that both the District Court and the Court of Appeals in Butz had focused on the "constitutional claims," the Supreme Court wrote that "the argument before us has focused on respondent's constitutional claims, and our holding is so limited." 289

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Id.

Even if the state law claims were not technically before the Court, however, the fact remains that the Court derived its holding regarding Bivens claims from a broader principle applicable to any claims alleging conduct by federal officials exceeding their authority. Thus, [*565] in leaving open the scope of the immunity enjoyed by federal officials from state law suits alleging constitutional violations, the Court was likely leaving open whether such officials were entitled to qualified immunity or no immunity at all - the options the Court referred to in the other footnote discussed above. 290

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Id. at 507 n.34.

In any event, if the views expressed by the Court in Butz are dicta rather than holdings, they are reasoned dicta regarding the very question under discussion. Butz was the Supreme Court's last word on the scope of federal officials' immunity from state tort claims alleging constitutional violations before the Westfall decision and then the Westfall Act. The Court could hardly have stated more clearly that the immunity enjoyed by federal officials in such circumstances was, at best, a qualified one. 291

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The Butz Court noted elsewhere that, "unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss." Id. at 507-08. We do not think the Court can be taken to be saying here that nonfederal causes of action were wholly unavailable against federal officials based on their unconstitutional conduct. The latter claim is directly contradicted by the Court's statement, in a footnote coming just a few lines before, that federal officials sued by "traditional means" (meaning through common law rights of action) should enjoy qualified immunity. Id. at 507 n.34. In our view, the Court's statement about motions to dismiss was directed at a different point - i.e., why, despite the Court's rejection of absolute immunity, "insubstantial" Bivens claims "can be quickly terminated by federal courts." Id. at 507; see also Bell v. Hood, 327 U.S. 678, 682-83 (1946) (noting the rule of prior cases that a

claim may be dismissed for want of jurisdiction when it clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous").

As noted, the Butz Court did not resolve the scope of the immunity enjoyed by federal officials if no violation of federal law was alleged. That issue appears to have been settled, albeit indirectly, a few years later in Harlow v. Fitzgerald. 292

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457 U.S. 800 (1982).

The Court in Harlow self-consciously refashioned the qualified immunity enjoyed by federal executive officials, such that they are immune from liability to the extent that they do not violate clearly established federal law. 293

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See id. at 818 ("Government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

Although the Court did not discuss suits against federal officials under state tort law, it is clear after Harlow that such a suit can succeed only if the official has actually violated federal law. A tort suit of the kind involved in Barr or Spalding, where no violation of federal law was alleged, can never meet the qualified immunity standard articulated in Harlow, because there can never be a violation of "clearly established" federal law if there is no allegation that federal law was violated in the first place.

[*566] So understood, Harlow's new formulation of "qualified" immunity confirms that federal officials performing discretionary functions actually enjoy absolute immunity from state tort suits in the absence of an allegation that the official violated federal law. But, except in cases implicating specific executive functions, where the suit alleges a violation of the Constitution or other federal law, the immunity of the federal official is a qualified one, protecting the officer only if the federal law that he violated was not clearly established.

IV. The Westfall Act

The nature of the Bivens question as a choice between a federal or a state source for the right of action against federal officials for constitutional violations - and the error of the lower courts in cases like Arar in posing the question as "Bivens or nothing" 294

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See supra Introduction & Section I.A.

- would be rather clear-cut were it not for Congress's enactment of the Westfall Act in 1988. 295

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Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended in scattered sections of 28 U.S.C. (2006)).

As noted above, the prevailing understanding of the Westfall Act, now endorsed by the Supreme Court, is that it preempts all nonfederal remedies against federal employees acting within the scope of their employment, including nonfederal remedies for constitutional violations. 296

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See supra text accompanying note 23.

In our view, the Westfall Act can be read as preserving not only Bivens actions but also state law remedies against federal officials who have violated the Constitution. If so, then the choice before a court deciding whether to recognize a Bivens claim continues to be between a federal and a state remedial regime, and the national security concerns that drove the court in Arar to decline to recognize a Bivens claim should actually cut in favor of a federal remedial regime.

However, we recognize that the Westfall Act has come to be read as preempting all nonfederal remedies against federal officials acting within the scope of their employment. In our view, however, if the Westfall Act is interpreted this way, it also rules out the courts of appeals' recent "hesitant" approach to the recognition of Bivens claims. Indeed, the Act, so construed, provides substantial support for a robust approach to the recognition of Bivens claims.

Because the Westfall Act was an amendment to the FTCA, this Part opens with a brief survey of the history of that statute and describes the [*567] enactment of the Westfall Act and the statute's interaction with the rest of the FTCA. It then explains why the Westfall Act does not support the radical transformation of the Bivens question reflected in cases like Arar.

A. The FTCA, Common Law Remedies, and the Westfall Act

Others have carefully explored the background of the FTCA, 297

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Federal Tort Claims Act, Pub. L. No. 79-601, tit. IV, ch. 753, 60 Stat. 812, 842-47 (1946) (codified as amended in scattered sections of 28 U.S.C.).

as well as its legislative history and jurisprudence, 298

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See, e.g., Gregory C. Sisk, Litigation With the Federal Government: Cases and Materials 160-336 (2000) (providing relevant case law, questions, and commentary to explain the background and application of the FTCA).

and so we keep our discussion brief.

The FTCA for the first time waived the sovereign immunity of the federal government for most nonmaritime torts. 299

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In the Tucker Act of 1887, Congress expressly conferred jurisdiction upon the federal district courts for claims (not exceeding $ 10,000) against the United States arising under contract or "not sounding in tort." Act of Mar. 3, 1887, ch. 359,1-2, 24 Stat. 505, 505 (current version at 28 U.S.C. 1346(a)(2)). In 1920, Congress expanded the government's liability to encompass claims arising out of admiralty or maritime torts involving merchant vessels or tugboats owned by the federal government. See Act of Mar. 9, 1920, ch. 95,1-3, 41 Stat. 525, 525-26; see also Act of Mar. 3, 1925, ch. 428, 43 Stat. 1112, 1112 (expanding the 1920 Act to include damages caused by public vessels of the United States). It was not until the FTCA that Congress otherwise provided for governmental liability in tort.

To that end, the FTCA as enacted in 1946 authorized civil actions against the United States for monetary relief "on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," under circumstances in which "a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 300

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Federal Tort Claims Act 410(a), 60 Stat. at 842-44 (current version at 28 U.S.C. 1346(b)(1)).

As originally enacted, the FTCA expressly exempted intentional torts. 301

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Id. 421(h), 60 Stat. at 845-46 (current version at 28 U.S.C. 2680(h)). Section 421(h) exempted "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Id.

But neither the original statute, as enacted eight years after Erie, nor any of its many amendments between 1947 and 1970, purported to affect the availability of state tort remedies against individual federal officers. In 1974, after (and arguably in light of) Bivens, Congress authorized a remedy against the United States for certain intentional torts committed by federal [*568] law enforcement officers. 302

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See Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 (amending the FTCA to permit suits for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" against "investigative or law enforcement officers").

As Professors Pfander and Baltmanis have explained, the Ninety-Third Congress "deliberately retained the right of individuals to sue government officers for constitutional torts and rejected proposed legislation from the Department of Justice that would have substituted the government as a defendant on such claims." 303

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Pfander & Baltmanis, supra note 22, at 131; see also id. at 133 ("In [rejecting the DOJ's proposal], members of Congress made clear that the Bivens action was to survive the expansion of government liability for law enforcement torts. The federal courts quickly confirmed this conclusion.").

The Supreme Court confirmed this view in 1980, when it concluded in Carlson that, "when Congress amended [the] FTCA in 1974 the congressional comments accompanying that amendment made it crystal clear that Congress viewed [the] FTCA and Bivens as parallel, complementary causes of action." 304

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Carlson v. Green, 446 U.S. 14, 19-20 (1980).

What was just as true during the same time period was that state law remedies against federal officers also remained available, subject to any defenses or immunities supplied by federal law. 305

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For a discussion of official immunity and state secrets privilege, see supra text accompanying notes 82-84, 95-100 & 115-27, and Section III.C. Cf. Boyle v. United Techs. Corp., 487 U.S. 500, 504-06 (1988) (recognizing a federal common law defense for federal contractors for certain activities approved by federal officials in the exercise of discretionary functions); Saleh v. Titan Corp., 580 F.3d 1, 5-9 (D.C. Cir. 2009) (extending federal contractor defense to certain activities related to "combatant activities"); In re Katrina Canal Breaches Litig., 620 F.3d 455, 459-60 (5th Cir. 2010) (describing the three-part test given in Boyle to determine whether federal law preempts state tort law remedies).

Practically, then, had an individual in Arar's position attempted to pursue relief between 1974 and 1988 against the federal officers who had mistreated him, he could have proceeded simultaneously along three paths: (1) an FTCA claim against the United States, to the extent that he sought relief for intentional torts committed by law enforcement officers that fell outside the FTCA's discretionary function exception (including any such claim grounded in the Constitution); 306

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See, e.g., Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 254 (1st Cir. 2003) (holding that the discretionary function exception does not encompass actions by government agents that are "unconstitutional, proscribed by statute, or exceed the scope of an official's authority"); see also Sutton v. United States, 819 F.2d 1289, 1293 (5th Cir. 1987) ("We have not hesitated to conclude that [an] action does not fall within the discretionary function [exception] of 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution.").

(2) a Bivens claim against the officers, to the extent that he sought relief for a violation of his constitutional rights (and special factors did not counsel hesitation); and (3) state law tort claims [*569]

directly against the relevant officers. Different defenses may have made recovery difficult under any or all of these theories, but all three causes of action could have been pursued simultaneously.

In its 1988 decision in Westfall v. Erwin, the Supreme Court held that federal officials could be sued on a state tort theory for claims not alleging a constitutional violation. 307

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484 U.S. 292, 296-98 (1988), superseded by statute, Westfall Act, Pub. L. No. 100-694, 5, 102 Stat. 4563, 4564 (1988) (amending 28 U.S.C. 2679(b)).

The Court unanimously rejected the argument that absolute immunity shielded federal officers from all state tort liability so long as the officers were acting within the scope of their employment. 308

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Id.

As Justice Marshall concluded for a unanimous Court, immunity would be available, at most, if the officer was acting within the scope of his official duties and his conduct was "discretionary in nature." 309

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Id.

The availability of a state law cause of action was taken for granted.

Congress responded by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988 (which, for obvious reasons, became known to posterity as the Westfall Act). Among other things, section 5 of the Westfall Act expressly provided that an FTCA suit was the "exclusive" remedy for conduct covered by the statute, thereby preempting claims that might otherwise have been pursued under state law. 310

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Id. 5, 102 Stat. at 4564 (codified at 28 U.S.C. 2679(b)(1) (2006)).

Because of the limits on recovery under the FTCA, the Westfall Act had the effect of displacing state remedies in favor of no remedy against the government whatsoever in at least some cases. To take just four (of many) examples, the FTCA does not encompass (1) claims for intentional torts committed by non-law enforcement officers; 311

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28 U.S.C. 2680(h).

(2) claims arising out of a federal officer's performance of a discretionary function; 312

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Id. 2680(a).

(3) claims arising in a foreign country, 313

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Id. 2680(k).

or (4) claims arising out of, or incident to, military service. 314

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Feres v. United States, 340 U.S. 135, 146 (1950).

And even where the FTCA encompasses a particular tort claim, the statute requires administrative exhaustion; 315

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28 U.S.C. 2675.

only provides for a nonjury trial; 316

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Id. 2402.

caps attorneys' fees; 317

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Id. 2678.

and bars punitive damages 318

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Id. 2674.

and prejudgment interest. 319

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Id.

Thus, both [*570] substantively and procedurally, the effect of the Westfall Act is to narrow the universe of (and scope of recovery for) tort claims that individuals can pursue for injuries caused by federal officials.

As relevant here, though, the statute also included a critical caveat exempting from section 5's exclusivity provision any civil action against a federal officer "which is brought for a violation of the Constitution of the United States." 320

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Id. 2679(b)(2)(A).

All agree that this language preserved Bivens claims. The harder question is whether it preserved only Bivens claims.

B. Two Alternate Readings of the Westfall Act

The court in Arar assumed the unavailability of state tort remedies, perhaps because of the Westfall Act. 321

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See supra notes 38-43, 107-14 and accompanying text.

At the same time, the court applied a "remarkably low" standard in determining whether special factors counseled nonrecognition of a Bivens claim. This standard reflects the view that recognition of a Bivens claim would constitute illegitimate judicial lawmaking. In the paragraphs that follow, we show that the combination of the unavailability of state tort remedies and a reluctant approach to recognizing Bivens claims conflicts with Congress's intent in enacting the exemption provided by section 5 of the Westfall Act. Fidelity to Congress's intent as expressed in the statute's text and legislative history requires either an interpretation of the Westfall Act as preserving state tort remedies for constitutional violations by federal officials or a far more receptive approach to recognition of Bivens claims against federal officials (as distinguished from federal contractors) than is evident in cases like Arar.

1. Preserving State Constitutional Tort Remedies

Although the Supreme Court in Minneci v. Pollard appears to have endorsed a reading of the Westfall Act that would preclude state tort remedies against federal officials acting within the scope of their employment, the Court did not give the interpretive question the scrutiny that it deserves. Before Pollard, the Supreme Court's decisions were equivocal on the point. In Hui v. Castaneda the Court referred to the section 5 exception in passing as the "Bivens exception." 322

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130 S. Ct. 1845, 1853 (2010).

On the other hand, in Wilkie v. Robbins, a case decided after the enactment of the Westfall Act, the Court assumed the continued availability of common law tort remedies against federal officials [*571] alleged to have violated the Constitution. 323

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See 551 U.S. 537, 551 (2007); see also supra text accompanying notes 221-22.

Since the Court in Wilkie relied on the availability of such claims in determining that the recognition of a Bivens claim in that case was unnecessary, its views on this point cannot be dismissed as dictum. Professors Pfander and Baltmanis suggest that the Court in Wilkie was simply "mistaken[]" on this point. 324

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Pfander & Baltmanis, supra note 22, at 128.

It is, of course, possible that the Court overlooked the Westfall Act, but such a reading of a Supreme Court decision is disfavored. 325

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The Federal Tort Claims Act was brought to the Court's attention in both parties' briefs in Wilkie. See Brief for Petitioners at 9, Wilkie, 551 U.S. 537 (No. 06-219), 2007 WL 128587; Brief for Respondent at 40-41, Wilkie, 551 U.S. 537 (No. 06-219), 2007 WL 550926.

If the Court did construe the Westfall Act to preserve state law remedies in cases alleging constitutional violations by federal officials, it was on solid ground in doing so.

As noted above, the provision of the Westfall Act containing the so-called Bivens exception does not mention Bivens. Instead, it refers generally to civil actions "brought for a violation of the Constitution of the United States." 326

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28 U.S.C. 2679(b)(2)(a) (2006).

This language is broad enough to cover state law remedies for constitutional violations, thus exempting them from section 5's preemption of civil remedies against federal officials. On this view, section 5 would preempt state law remedies in cases like Westfall itself, where there were no allegations of unconstitutional conduct. In other words, on this reading, the Westfall Act preempts most state tort claims against federal officers but leaves intact constitutional tort claims against federal officers, whether the remedy is provided by federal or state law.

This reading is supported by the accompanying House Report, which makes clear that 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." 327

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H.R. Rep. No. 100-700, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5949-50.

Reading the exception to preserve the state law remedies that previously existed would be the most direct way to give effect to this intent. After all, as shown in Part II, common law actions had been the standard vehicle for obtaining damages from federal officials who violated the Constitution since early in our history, and, as shown in Part III, such remedies remained available in the period between the Bivens decision and the enactment of the Westfall Act. Removing such remedies would acutely and severely "affect" the remedial rights of victims of constitutional violations by federal officials.

In our view, the available alternative readings of this text are less plausible. On one such alternative view, a common law claim is not a claim [*572] "brought for a violation of the Constitution" even if it alleges a constitutional violation. Such claims, the argument would go, are "brought" to obtain compensation for certain interests protected by state law. The Constitution enters into such cases in order to defeat a defense of official justification, but the affirmative remedy compensates for injury to interests protected by state law, not for constitutional injuries. On this view, the overlap between common law interests and constitutional interests is fortuitous

and does not transform a suit seeking compensation for injuries to common law interests into a suit "brought for a violation of the Constitution." We might call this the "well-pleaded complaint" reading of section 5's exemption, as it relies on the fact that the Constitution comes into the case by way of replication in order to deny that such claims are "for" a constitutional violation. 328

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Cf. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908).

We believe that the well-pleaded complaint interpretation is less faithful to the statutory text than the alternative. By referring to suits "brought for a violation of the Constitution," the exemption's text appears to ask the court to identify the purpose for which the plaintiff initiated the suit. In cases where the defendant's conduct violates the Constitution as well as common law interests, the plaintiff's purpose in bringing a state law tort action will likely be to compensate for both the common law and the constitutional injuries. An approach that turns on the plaintiff's actual purpose in bringing the claim would thus usually encompass common law claims in cases where the defendant has violated the Constitution.

A proponent of the "well-pleaded complaint" approach might respond that the exemption cannot turn on the plaintiff's purpose in bringing the claim - a subjective test inappropriate in this context - but should turn instead on the legislature's purpose in creating the cause of action. On this view, a cause of action is brought "for" a violation of the Constitution if its raison d'etre is to compensate the plaintiff for constitutional violations. A common law claim for trespass would, under this theory, not be brought "for" a violation of the Constitution because it exists to compensate for injury to certain common law interests and only sometimes happens to involve constitutional violations as well.

There are several problems with such an interpretation. First, it strains the statutory language, which alludes to the purpose for which the action was "brought," not the purpose for which the cause of action was created. Second, the dichotomy between constitutional interests and common law interests that underlies this distinction will often prove to be a false one: [*573] constitutional provisions such as the Fourth Amendment were designed, at least in part, to protect interests also protected by the common law. Indeed, Solicitor General Griswold argued to the Court in Bivens that the protection of these common law interests was the Fourth Amendment's sole purpose. 329

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See 403 U.S. 388, 394 (1971) (noting "respondents' argument that the Fourth Amendment serves only as a limitation on federal defenses to a state law claim" (emphasis added)).

The Court disagreed, but it did not deny that protection of common law interests in privacy was among its purposes. 330

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See id.

To deny that a trespass action against an official who has infringed rights of privacy through conduct that violates the Constitution is a claim "for a violation of the Constitution" would bring us full circle.

Third, even under the narrowest plausible construction, the exemption would nevertheless encompass some state law actions. Recall that the "action on the statute" has long been recognized as a common law claim. 331

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See supra notes 136-43 and accompanying text.

Such an action is literally "brought for" a violation of the Constitution even if one construes that phrase to encompass only actions whose purpose is to remedy constitutional violations. For similar reasons, a converse-1983 action of the sort advocated by Professor Amar would also survive under this narrow construction of the exemption. 332

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See supra note 130. However, special state remedies for constitutional violations by federal officials may violate nondiscrimination doctrine. See supra notes 130-32 and accompanying text.

It is true that some states may not recognize one or either of these causes of action, but the possibility that some states may recognize them is sufficient to establish the lack of fit between the Arar court's analysis and its decision not to recognize a Bivens action. 333

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See supra notes 41-43 and accompanying text.

As long as some states recognize these actions, or even just reserve the possibility of recognizing them, a decision not to recognize a Bivens claim will not succeed in protecting the national security-related interests cited by the Arar court in reaching its decision. 334

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See Arar v. Ashcroft, 585 F.3d 559, 575 (2d Cir. 2009) (en banc).

We think that reading section 5's exemption to preserve state law remedies for conduct by federal officials in violation of the Constitution is more faithful to the statute's text. Even if it were not, however, the statute is susceptible to that interpretation. Because this reading of the exemption would be the most direct way to give effect to Congress's intent to preserve the remedies then available to victims of constitutional torts, it is preferable to an interpretation that would take away such remedies.

Additionally, this interpretation is preferable because it would avoid, rather than provoke, constitutional problems, which is doubly appropriate [*574] in interpreting the Westfall Act's exemption. First, avoiding such problems was evidently Congress's purpose in including an exemption for claims implicating the Constitution. Second, and independently, the constitutional

avoidance canon favors an interpretation that would avoid, rather than provoke, constitutional questions. 335

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See, e.g., Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." (citation omitted)); see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) ("An Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."); cf. Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986) ("Our disposition avoids the "serious constitutional question' that would arise if we construed [the statute in question] to deny a judicial forum for claims arising under [the act in question]."). In Bartlett v. Bowen, the D.C. Circuit explained,

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. These cases recognize and seek to accommodate the venerable line of Supreme Court cases that casts doubt on the constitutionality of congressional preclusion of judicial review of constitutional claims.

816 F.2d 695, 699-700 (D.C. Cir. 1987) (footnote omitted).

Here, the avoidance canon and Congress's intent converge in favor of interpreting the exemption to encompass state law remedies for constitutional violations by federal officials.

This is not the place to address fully the circumstances in which the Constitution requires a damages remedy for federal officials' violation of the Constitution. For present purposes, it should suffice to note that the claim that the Constitution requires such remedies in at least some circumstances is a substantial one. To this end, we recall that it was central to the argument of Richard Nixon's Solicitor General in Bivens against recognition of a federal cause of action that the state tort remedy was the one contemplated by the Framers. 336

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See supra notes 178-81. That Solicitor General was noted constitutional scholar and longtime dean of Harvard Law School, Erwin Griswold, "a lifelong Republican with a background of Midwest conservatism." Dennis Hevesi, Erwin Griswold of Harvard, Ex-Solicitor General, 90, N.Y. Times, Nov. 20, 1994, at 58.

That the Constitution requires the availability of state tort remedies (or an adequate substitute), at least in certain circumstances, has been defended by prominent scholars writing both before 337

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See, e.g., Hill, supra note 132, at 1153; Katz, supra note 136, at 52; see also Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1401 (1953) ("In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.").

and after 338

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See, e.g., Amar, Of Sovereignty and Federalism, supra note 130, at 1485-86 ("Few propositions of law are as basic today as the ancient legal maxim [that w]here there is a right, there should be a remedy."); Susan Bandes, Reinventing Bivens: The Self-Executing Constitution, 68 S. Cal. L. Rev. 289, 337 (1995) (arguing that "in the absence of effective congressional remedies, the courts are not only empowered but obligated to craft a broad range of remedies on their own"); Gene R. Nichol, Bivens, Chilicky, and Constitutional Damages Claims, 75 Va. L. Rev. 1117, 1154 (1989) ("The judiciary's obligation - whether federal or state - to decide cases arising under the Constitution embraces and demands the implementation of effective remedies."); Woolhandler, supra note 147, at 120-21. As Richard Fallon, Jr. and Daniel Meltzer explain,

Within our constitutional tradition, the Marbury dictum [that there must be a remedy for every right] reflects just one of two principles supporting remedies for constitutional violations. Another principle, whose focus is more structural, demands a system of constitutional remedies adequate to keep government generally within the bounds of law. Both principles sometimes permit accommodation of competing interests, but in different ways. The Marbury principle that calls for individually effective remediation can sometimes be outweighed; the principle requiring an overall system of remedies that is effective in maintaining a regime of lawful government is more unyielding in its own terms, but can tolerate the denial of particular remedies, and sometimes of individual redress.

Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1778-79 (1991); accord Carlos Manuel Vazquez, What Is Eleventh Amendment Immunity?, 106 Yale L.J. 1683, 1800 (1997).

[*575] Bivens. Moreover, numerous Supreme Court cases establish that the Fourteenth Amendment's Due Process Clause sometimes requires a damages remedy (or a substitute remedy against the government) against state officials who violate federal law. 339

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E.g., Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643 (1999) (holding that a due process violation sometimes occurs where the state intentionally infringes patents and fails to provide an adequate remedy); McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 36 (1990) (holding that the Due Process Clause is sometimes violated where state denies refund for unconstitutional taxes); Ward v. Love County, 253 U.S. 17, 24 (1920); see also Carlos Manuel Vazquez, Sovereign Immunity, Due Process, and the Alden

Trilogy, 109 Yale L.J. 1927, 1944 (2000) (discussing recognition in Florida Prepaid that the Due Process Clause requires a retrospective remedy in certain circumstances).

Indeed, the Due Process Clause sometimes requires a damage remedy against a government official when there has been an unlawful deprivation of liberty or property, even when the Constitution itself was not violated. See Zinermon v. Burch, 494 U.S. 113, 125-26 (1990) (holding that the Due Process Clause sometimes requires damages remedy for unlawful deprivations of liberty); Parratt v. Taylor, 451 U.S. 527, 537, 544 (1981) (holding that the Due Process Clause sometimes requires damage remedy for unlawful deprivations of property), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1998). We take no position on whether the Westfall Act's exemption of suits "brought for a violation of the Constitution" should be read to exempt cases in which the Constitution requires a damage remedy but where there was no underlying constitutional violation. The canon of avoidance would suggest so, but the statutory language extends only to cases in which the suit is brought for a violation of the Constitution. Even if the exemption does not cover such a case, however, the victim should be able to maintain a suit against the official by arguing that the Westfall Act's elimination of his state tort claim is unconstitutional. For an argument that the constitutionally required remedy for violation of the Constitution should be understood to have its basis in the Supremacy Clause rather than the Due Process Clause, see Vazquez, supra note 338, at 1777-85.

A similar analysis would appear to apply to federal officers via the Fifth Amendment's Due Process Clause. 340

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We recognize that immunity doctrines frequently prevent recovery of damages against federal and state officials who violate the Constitution. We do not contend that the Constitution requires a remedy for every violation. But we do think that there is a substantial constitutional argument that the Constitution sometimes requires a damages remedy for constitutional violations in circumstances in which the FTCA would not provide one. Since the official immunity doctrine would bar a remedy under both federal or state law, it suffices for purposes of the constitutional avoidance argument that the Constitution requires a damages remedy for some violations of clearly established constitutional law in contexts in which the FTCA does not provide a substitute remedy against the government.

[*576] Of course, to the extent that the Constitution requires the availability of a damage remedy, it is probably within Congress's power to immunize federal officials from personal liability if it substitutes a remedy against the federal government itself. But it is far from clear that the remedy provided by the FTCA suffices to meet constitutional requirements, given the exemptions and exceptions noted above. 341

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See supra text accompanying notes 311-19.

One could perhaps argue that, in light of the Westfall Act, the FTCA's exceptions should be construed with an eye toward ensuring the availability of any remedies required by the Constitution. 342

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Thus, some courts have held that the discretionary function exception does not apply to constitutional claims. See, e.g., Castro v. United States, 560 F.3d 381, 390 (5th Cir. 2009) ("While it is well-recognized that violations of constitutional mandates are not actionable under the FTCA, the occurrence of such a violation would involve the performance of a non-discretionary function for jurisdictional purposes, if the constitutional tort is also cognizable as an intentional tort under state law." (citation omitted)).

But this approach would risk distorting longstanding case law regarding the scope of these exceptions. Moreover, it would require the courts to resolve the constitutional issue in each case, whereas the approach suggested here would avoid those difficult questions. The latter approach is more faithful to Congress's intent, since the text and legislative history of the Westfall Act indicate that Congress sought to address the constitutional question by excluding claims implicating the Constitution from the scope of the Act altogether. 343

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See supra note 320 and accompanying text; supra Section IV.B.

The constitutional issues could also, of course, be channeled into the Bivens analysis. The Constitution is presumably indifferent as to whether the required damage remedy is provided by state or federal law, and for obvious reasons a federal remedy seems preferable in most contexts. One could thus interpret the Westfall Act as repealing state law remedies against federal officials and implicitly instructing the courts to ensure the availability of any constitutionally required damages remedies by means of Bivens claims. This approach too, however, would require the courts routinely [*577] to confront difficult constitutional questions. As noted, Congress appears to have intended to avoid, not provoke, such questions.

We recognize that the availability of state tort remedies may not always suffice to satisfy constitutional requirements. Still, a reading of the Westfall Act's exemption as preserving state law remedies for constitutional violations by federal officials is more compatible with Congress's intent to avoid constitutional questions than an interpretation that takes these state law remedies away.

In sum, the Westfall Act could be read to preserve not just Bivens claims but also state tort remedies in cases alleging a violation of the Constitution by federal officials. Such a reading would be more faithful to Congress's intent to preserve the remedies available to victims of constitutional violations by federal officials than is the alternative. And it would avoid rather than provoke constitutional problems, as Congress intended and as the avoidance canon requires.

2. Preserving Only Bivens Claims

As already noted, however, the Supreme Court in Pollard endorsed a broad reading of the Westfall Act's preemptive scope. This interpretation, in which the Westfall Act has the effect of preempting all civil actions against federal officials except Bivens claims, is a plausible, if not the best, reading of the statutory text. If the Westfall Act is to be read as preempting all nonfederal remedies against federal officials, however, we think that it also rules out the hesitant approach to the recognition of Bivens actions applied by the court in Arar. Indeed, we think that the statute, so construed, affirmatively supports a more receptive approach to the recognition of Bivens claims against federal officials than is evident even in the Supreme Court's most recent decisions. These conclusions follow from three interrelated arguments.

a. Congress's Intent to Preserve the Remedies Available to Victims of Constitutional Violations

As noted in the preceding section, the House Report expresses Congress's intent to leave unaffected "the ability of victims of constitutional torts to seek redress" for their injuries. 344

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H.R. Rep. No. 100-700, at 6 (1988).

Consistent with this intent, the statutory text preserves "actions" which are "brought for a violation of the [*578] Constitution." 345

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Westfall Act, Pub. L. No. 100-694, 5, 102 Stat. 4563, 4564 (1988) (amending 28 U.S.C. 2679(b)).

As discussed above, this language is best read to preserve state tort remedies for violations of the Constitution by federal officials. If the Westfall Act is to be read to preempt all such remedies, however, then giving effect to Congress's intent to preserve the ability of victims of constitutional torts to seek redress for their injuries requires that the formerly available state tort remedies now be available as federal remedies.

The most straightforward way to give effect to Congress's intent not to narrow the ability of victims of constitutional violations to seek redress for their violations would be simply to apply the tort laws of the various states, including their choice of law rules. Doing so, however, would vitiate one of the clearest advantages of a federal remedial regime over a state law remedial regime: the elimination of the need for courts and federal officials to contend with the vagaries of state tort law. We thus prefer a post-Westfall Act approach to Bivens claims under which the action would be uniform throughout the nation. However, in keeping with Congress's intent to preserve previously available remedies, the courts should presume the availability of the remedies that most states make available for analogous injuries caused by private individuals. A Bivens cause of action should thus be available at a minimum in the situations in which the common law would generally have provided a tort remedy, such as in cases involving assault, trespass, false imprisonment, and the like.

It might well be preferable to avoid the need to consult state tort law even to this extent. We think the courts would be justified in simply presuming the availability of a damages remedy for

violation of constitutional rights and channeling all possible reasons for limiting or denying such claims into the immunity, privilege, or preemption analyses. The arguments discussed below would support a post-Westfall Act approach to Bivens that recognizes the availability of a damage remedy unless Congress has provided an adequate alternative remedial scheme - subject, of course, to any defenses of immunity, privilege, or preemption. Such an approach would be consistent with, if not required by, Congress's intent to preserve the redress available to victims of constitutional torts before the Westfall Act's enactment. It would also correct the wrong turn the courts took in the wake of Erie by treating the pre-Erie "general law" of remedies for constitutional violations by federal officials as state law rather than federal common law. 346

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See supra text accompanying notes 153-65.

An approach that would deny a Bivens remedy in circumstances in which a [*579] common law remedy would previously have been available, on the other hand, would be inconsistent with congressional intent.

b. Congress's Intent to Preserve the Bivens Action As It Then Stood

A broad availability of a Bivens action is also affirmatively supported by Congress's intent in enacting the Westfall Act to preserve the Bivens action as it then stood. For the reasons discussed in the previous parts, the Arar approach to the Bivens question constitutes a drastic narrowing of the availability of the Bivens action. Before the Westfall Act, a "special factor[] counselling hesitation" was a reason to prefer a state law remedial regime or an alternative federal remedial scheme provided by Congress. 347

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Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971); see supra Part I.

Reasons to deny any remedy at all - such as the national security and state secrets concerns that motivated the decision in Arar - would have been relevant at most to defenses such as immunity, privilege, or preemption. In the latter context, the courts' concerns would have had to do much heavier lifting. A reluctance to engage in judicial lawmaking would not have justified denial of relief on such grounds. The "remarkably low" standard applied by the Arar court would have been applicable only to a decision to relegate the plaintiff to common law remedies.

Consistent with Congress's intent not to narrow Bivens, the concept of "special factors counselling hesitation" should continue to be confined to reasons to relegate victims of constitutional violations to another actually available remedial regime. Reasons for denying plaintiffs any remedy at all should continue to be considered solely in connection with defenses such as immunity, privilege, or preemption. If a "special factor[] counselling hesitation" is a reason to prefer another available remedial regime, then the Westfall Act's preemption of state tort remedies should serve to make it easier to find a Bivens remedy, as the statute takes away one of the principal alternative remedial regimes. The preemption of state tort remedies would leave

only alternative federal remedies provided for by Congress (excluding the FTCA itself, which Congress clearly made nonpreemptive of Bivens claims) as the sole alternative remedial regimes. Thus, after the Westfall Act, a special factor counseling hesitation to recognize a Bivens claim should be solely a reason to prefer a separate existing federal remedial regime.

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c. Avoidance of Constitutional Questions

As discussed above, a reading of the Westfall Act as preempting state tort remedies without creating a substitute would raise constitutional concerns. To the extent the Constitution requires a damage remedy, it is presumably indifferent as to whether the remedy is provided as a matter of state or federal law. Consequently, constitutional concerns would be avoided if the Westfall Act were construed to make the remedies previously available as state tort remedies now available as federal remedies. Thus, the canon of avoidance and Congress's obvious intent to avoid raising constitutional questions both support an interpretation of the Westfall Act as making available as federal remedies at least those remedies that were previously available under state tort law.

* * * In sum, the Westfall Act should eliminate the courts' hesitant approach to recognizing Bivens actions one way or the other. As discussed earlier, this hesitancy is based on the view that, in our constitutional system, it is the role of Congress, not the courts, to make law. Those who object to federal common lawmaking do so because, in their view, permitting the courts to make preemptive federal law circumvents the Constitution's carefully crafted procedures for displacing state law. If the Westfall Act is interpreted as removing state tort remedies against federal officials acting within the scope of their employment, then the preemption of state tort remedies will have been accomplished by Congress through the usual bicameralism and presentment process for preempting state law.

But this preemption was coupled with Congress's intent to preserve then-available remedies for constitutional violations and, in particular, its intent to preserve Bivens as it then stood. The question for the courts is thus now one of statutory interpretation rather than pure judicial common lawmaking. If Congress had decided that there should be no damage remedies against federal officials, then the courts would be required to give effect to that decision, subject to constitutional limitations. Instead, Congress left in place Bivens actions against federal officials and expressed an intent to preserve then-available remedies. Under these circumstances, courts recognizing Bivens actions for federal officials' violations of constitutional norms would not be usurping Congress's role, but merely giving effect to congressional legislation.

A Bivens skeptic might respond that the Bivens action that Congress left in place in 1988 was a severely restricted one, as the Court had already [*581] begun retrenching from the receptive approach to recognizing Bivens actions that had prevailed a decade before. As we have already shown, however, the pre-1988 decisions declining to recognize Bivens actions did so in deference to an alternative federal remedial scheme crafted by Congress. A few more recent decisions (Malesko, Pollard) have declined to recognize a Bivens action against federal contractors on the

ground that state tort remedies against such actors provided adequate deterrence and compensation. For reasons already discussed, we do not think that the Court's analysis in the latter cases would have required the same conclusion for suits against federal officials if the Westfall Act had not preempted state tort suits against such officials. To the contrary, we think the availability of state remedies should in many respects make the courts less hesitant to recognize a Bivens claim against federal officials. 348

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In addition to making national security concerns irrelevant to the Bivens question (as opposed to possible defenses), recognition that state remedies would in any event be available means that finding a Bivens action against federal officials would not increase the federal courts' caseload, given the right of such officials to remove on the basis of a federal defense. Recognition of a Bivens action against contractors would increase the federal caseload. The increased caseload for federal contractors potentially outweighs the benefits of a single uniform federal cause of action more closely tailored to the constitutional interests as stake. See supra notes 14-15 and accompanying text.

But the more important point is that, at the time of the Westfall Act's enactment, the Court's decisions declining to recognize a Bivens action did so in deference to another existing remedial scheme, or in rare cases in favor of an affirmative congressional decision to deny a remedy. 349

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See supra subsection III.B.2.

They did not reflect a judicial judgment that there should be no remedy at all, nor a judicial determination that the Constitution established a default rule of no damages remedy. To the contrary, the default rule that existed at the time of the Westfall Act's enactment was that state tort remedies were available.

Indeed, as discussed above, there is a substantial argument that damages for constitutional violations are sometimes constitutionally required. The Westfall Act's exemption of "suits brought for a violation of the Constitution" appears to reflect Congress's recognition of the constitutional dimensions of this issue. Read in this light, the decisions in Malesko and Pollard supply strong additional support for our reading of the Westfall Act. In those cases, the Court regarded the availability of state tort remedies as a reason to decline to recognize a Bivens claim against privately run prisons and their employees. In Pollard, the Court specifically distinguished suits against [*582] federal contractors from suits against federal employees on this ground. 350

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Minecci v. Pollard, 132 S. Ct. 617, 623 (2012); see also supra note 16 (noting that, if constitutional need for a damages remedy is recognized, absence of state remedies cuts in favor of finding a federal remedy).

If the availability of state tort remedies against federal contractors is a reason to decline to recognize a Bivens claim, then the Westfall Act's elimination of such remedies against federal employees, coupled

with Congress's intent to preserve remedies for constitutional violations and to avoid constitutional questions, cuts strongly in favor of recognition of a federal cause of action.

In any event, before the Westfall Act, concerns such as the ones that motivated the decision in Arar would not have grounded a decision declining to recognize a Bivens claim. Congress's decision to preserve the then-prevailing approach to Bivens supports a post-Westfall Act approach to Bivens under which such factors continue to be relevant only to the defenses of immunity, privilege, or preemption, and not to the existence vel non of a Bivens claim.

V. Conclusion

The lower courts in recent decisions have approached the Bivens question in a way that deviates sharply from how the Supreme Court itself has approached that question. Rather than seeing the choice before them as "Bivens or state law," they have posed the question as "Bivens or nothing." Moreover, they have combined this "Bivens or nothing" approach with a "remarkably low" standard for declining to recognize a Bivens claim, thereby virtually guaranteeing that Bivens itself will amount to nothing. The combination of the "Bivens or nothing" approach and the "remarkably low" standard for declining to recognize a Bivens claim has resulted in the denial of a remedy for constitutional violations producing even physical injuries of the sort which have long and uncontroversially been remedied at common law.

This Article has shown that this revised approach is supported neither by the Supreme Court's post-Bivens decisions nor by Congress's enactment of the Westfall Act. The statute exempts suits "brought for a violation of the Constitution" - an exemption designed to leave unaffected the ability of victims of constitutional torts to seek redress from the federal officials who caused their injuries. This exemption could have been read to leave in place state law remedies for injuries caused by the unconstitutional acts of federal officials. The Supreme Court in Pollard has instead read the Westfall Act to preempt all state tort remedies against federal officials acting within the [*583] scope of their employment. If the Westfall Act does preempt all such remedies, however, it also rules out the hesitant approach to recognition of Bivens claims reflected in cases like Arar. Congress's elimination of state tort remedies, combined with its intent to (a) preserve the remedies available to victims of constitutional violations, (b) leave Bivens as it found it, and (c) avoid rather than provoke constitutional problems, supports a far more receptive approach to Bivens claims than is reflected in cases like Arar, or indeed in the Supreme Court's own recent Bivens cases. Courts confronting suits implicating sensitive national security and/ or military concerns have other tools available to them if they believe that relief should be barred. But to use the appropriate tools would require far more of a principled justification for judicial intervention than the faux judicial restraint exemplified by their decisions not to recognize Bivens remedies.

Buchanan v. Barr

United States Court of Appeals for the District of Columbia Circuit

April 4, 2023, Argued; June 23, 2023, Decided

No. 22-5133 Consolidated with 22-5139

Reporter
71 F.4th 1003 *; 461 U.S. App. D.C. 278 **; 2023 U.S. App. LEXIS 15739 ***

RADIYA BUCHANAN, ET AL., APPELLANTS v. WILLIAM P. BARR, IN HIS INDIVIDUAL CAPACITY AS FORMER U.S. ATTORNEY GENERAL, ET AL., APPELLEES

Prior History:

[***1] Appeals from the United States District Court for the District of Columbia. (No. 1:20-cv-01542), (No. 1:20-cv-01469).

Counsel: Scott Michelman and Lee R. Crain argued the causes for appellants. With them on the briefs were Anne Champion, Arthur B. Spitzer, Dennis Corkery, Jonathan M. Smith, Jon Greenbaum, Arthur Ago, David Brody, John A. Freeman, and David E. Kouba.

Scott F. Regan and Victoria Clark were on the brief for amici curiae Institute for Justice and Foundation for Individual Rights and Expression in support of appellants.

Gabriel K. Gillett, Ishan K. Bhabha, and Lauren J. Hartz were on the brief for amici curiae Bipartisan Former Members of Congress in support of appellants.

Sarah Helene Duggin, Donald Crane, Kwaku A. Akowuah, Tobias S. Loss-Eaton, and Lakeisha F. Mays were on the brief for amici curiae Clergy and Religious Institutions in support of appellants.

Brian J. Springer, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Brian M. Boynton, Principal Deputy Assistant Attorney General, and Mark B. Stern, Attorney.

Christopher A. Zampogna was on the brief for appellee Sean Kellenberger.

Judges: Before: WILKINS and WALKER, Circuit Judges, and SENTELLE, [***2] Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge SENTELLE. Concurring opinion filed by Circuit Judge WILKINS. Concurring opinion filed by Circuit Judge WALKER.

Opinion by: SENTELLE

Opinion

[**280] [*1005] Sentelle, Senior Circuit Judge: Appellants, individual protestors and Black Lives Matter D.C., brought these consolidated actions against federal law enforcement officers, alleging that officers' actions in clearing protestors from Lafayette Park in June 2020 violated their First, Fourth, and Fifth Amendment rights and seeking damages under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Appellees, former Attorney General Barr and various named U.S. Park Police officers, moved to dismiss the claims, arguing that a Bivens [*1006] [**281] remedy is unavailable in this context. The district court granted the motions, and this appeal followed. Applying Supreme Court precedent, we hold that Appellants' claims arise in a new context and that special factors counsel hesitation against extending the availability of Bivens claims to that context. Accordingly, we affirm.

I. Background

We review the district court's dismissal of Appellants' claims de novo and accept as true all well-pleaded factual allegations. Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113, 342 U.S. App. D.C. 268 (D.C. Cir. 2000). Following the killings of George Floyd and Breonna Taylor, protestors, including [***3] Appellants, gathered in Lafayette Square across from the White House in Washington, D.C., to protest racism and police brutality. On the evening of June 1, 2020, at the order of Attorney General Barr, federal law enforcement officers began clearing protestors from the park using physical force, chemical irritants, and munitions. Officers fired tear gas, rubber bullets, flash grenades, and pepper spray into the crowd, hitting and injuring many. Appellants were struck with batons and rubber bullets, experienced adverse reactions to the chemical irritants, and suffered emotional and psychological harm.

While officers cleared protestors from the park, President Trump was on the opposite side of the White House giving a speech in the Rose Garden. Minutes later, after protestors were out of the area, President Trump, Attorney General Barr, and other senior officials walked through Lafayette Park to St. John's Church and took a photograph.

Senior administration officials gave conflicting statements on the rationale for clearing the park, including that it was done to enforce the city's curfew, which was not until twenty-five minutes after officers began clearing the park; to expand the security [***4] perimeter surrounding the White House; to protect St. John's Church, which had suffered fire damage the day before but was not encompassed by the expanded perimeter; and to curtail ongoing violence. Appellants have alleged that the dispersal was done to facilitate the President's photo opportunity at St. John's Church.

Appellants sued, bringing, inter alia, Bivens claims to recover damages for the Government's alleged violations of their First, Fourth, and Fifth Amendment rights. The district court granted the Government's motions to dismiss the claims after holding that the claims arose in a new context and that three special factorsnational security, Congress's involvement in the intersection between presidential security and protestors' rights, and the availability of alternative remediescounselled hesitation against extending Bivens to that context. This appeal followed.

II. Analysis

Starting with Bivens in 1971 and over the course of the following nine years, the Supreme Court has three times recognized that "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." Carlson v. Green, 446 U.S. 14, 18, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980); see Bivens, 403 U.S. at 397; Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) [***5] . Those three cases permitted claims for damages under the Fourth Amendment for an alleged violation of the prohibition against unreasonable searches and seizures, see Bivens, 403 U.S. at 389, under the Fifth Amendment for alleged sex discrimination by a Congressman, see Davis, 442 U.S. at 231, 248, [*1007] [**282] and under the Eighth Amendment for an alleged violation of the prohibition against cruel and unusual punishment, see Carlson, 446 U.S. at 17-18. Such "authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in our general jurisdiction to decide all cases 'arising under the Constitution, laws, or treaties of the United States.'" Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) (quoting 28 U.S.C. 1331). In the forty years following those three decisions, however, the Supreme Court has not recognized a new Bivens claim. See Egbert v. Boule, 596 U.S. 482, 142 S. Ct. 1793, 1799, 213 L. Ed. 2d 54 (2022). While Bivens and its progeny have not been overruled and claims for damages arising under the Constitution remain available in some circumstances, the Supreme Court has recognized that creating implied causes of action under Bivens is "a disfavored judicial activity." Id. at 1803 (quoting Ziglar v. Abbasi, 582 U.S. 120, 135, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017)).

The Supreme Court has set out a two-part test to determine whether to permit a Bivens claim. First, courts must ask if the claim arises in a "new context" from the three previous Bivens claims recognized by the Supreme Court. Id. at 1803. If the context is not new, the claim can go forward. But if the context is new, courts move to the second step and ask whether, absent any "affirmative action by Congress," there are any "special factors counselling hesitation" against extending Bivens to that context. Ziglar, 582 U.S. at 136 (quoting Carlson, 446 U.S. at 18). "If there is even a single 'reason to pause before applying Bivens in a new context,' a court may not recognize a Bivens remedy." Egbert, 142 S. Ct. at 1803 (quoting Hernandez v. Mesa, 140 S. Ct. 735, 743, 206 L. Ed. 2d 29 (2020)). The guiding principle behind the inquiry is respect for the separation of powers and deference to Congress's preeminent role as the legislative body. See Egbert, 142 S. Ct. at 1803; see also Ziglar, 582 U.S. at 135-36.

Appellants' primary argument focuses on Congress's enactment of the Westfall Act of 1988, which requires that the United States be substituted as the defendant in all tort claims against employees of the federal government acting in their official capacities. See 28 U.S.C. 2679(b)(1); see also id. 1346(b)(1). Notably, however, [***6] the Act carves out an exception for, and thus preserves the availability of, "civil action[s] against an employee of the Government . . . which [are] brought for a violation of the Constitution of the United States." Id. 2679(b)(2)(A). In other words, the Westfall Act "left Bivens where it found it." Hernandez, 140 S. Ct. at 748 n.9.

Appellants invoke the prior construction canon, arguing that the Westfall Act "left Bivens" as it had been interpreted by the Supreme Court and in notable Courts of Appeals decisions prior to 1988. Specifically, Appellants rely on this Court's 1977 decision in Dellums v. Powell, 566 F.2d 167, 184 U.S. App. D.C. 275 (D.C. Cir. 1977), in which we affirmed the availability of a Bivens remedy for alleged First Amendment violations and upheld defendants' liability under Bivens after individuals protesting the Vietnam War had been arrested on the steps of the Capitol, id. at 173-74, 194-96. Appellants argue that because Congress was presumably aware of that decision, by passing the Westfall Act and "le[aving] Bivens where it found it," Hernandez, 140 S. Ct. at 748 n.9, Congress affirmatively endorsed Dellums and the availability of Bivens remedies in analogous circumstances. And because, definitionally, there can be no "special factors counselling hesitation in the absence of affirmative action by [*1008] [**283] Congress," Ziglar, 582 U.S. at 136 (quoting Carlson, 446 U.S. at 18), where Congress has affirmatively acted, Appellants further [***7] argue that their own analogous Bivens claimsalso based on alleged First and Fourth Amendment violations, in addition to an alleged Fifth Amendment violation, arising from a protest outside the seat of a branch of governmentmust be allowed to proceed.

Appellants may be hoist with their own petard; if Congress is aware of and incorporates prior court decisions, then Congress also should have been aware of the Supreme Court's admonition against expanding the range of the Bivens remedy, as recognized by Supreme Court precedent at the time. Cf. Bush v. Lucas, 462 U.S. 367, 390, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983) (declining to extend Bivens beyond circumstances recognized in prior Supreme Court cases); Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983) (same); United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987) (same). As Supreme Court precedent makes clear, any new Bivens claim must still "satisf[y] the 'analytic framework' prescribed by the last four decades of intervening case law." Egbert, 142 S. Ct. at 1809 (quoting Ziglar, 582 U.S. at 139); cf. Hernandez, 140 S. Ct. at 748 n.9 ("[The Westfall Act's exception for Bivens claims] is not a license to create a new Bivens remedy in a context [the Supreme Court] ha[s] never before addressed." (citation omitted)); Meshal v. Higgenbotham, 804 F.3d 417, 428, 420 U.S. App. D.C. 1 (D.C. Cir. 2015) ("[U]ncertain interpretations of what Congress did in . . . 1988 cannot overcome the weight of authority against expanding Bivens.").

Turning then to that framework, we hold that Appellants' claims arise in a new context [***8] and that national security is a special factor counselling hesitation against extending Bivens to that context. First, neither party contends that these claims do not arise in a new context, and for good reason. What constitutes a "new context" is exceedingly broad. "If the case is different in a

meaningful way from previous Bivens cases decided by [the Supreme] Court, then the context is new." Ziglar, 582 U.S. at 139. Examples of meaningful differences include "the rank of the officers involved[,] the constitutional right at issue," and "the risk of disruptive intrusion by the Judiciary into the functioning of other branches." Id. at 139- 40. Appellants' First, Fourth, and Fifth Amendment claims satisfy this test. The Supreme Court has never recognized the availability of Bivens claims for First Amendment violations. See Egbert, 142 S. Ct. at 1807 ("[W]e have never held that Bivens extends to First Amendment claims." (citation omitted)); Bush, 462 U.S. at 390. Appellants' Fourth and Fifth Amendment claims likewise arise in a new context because the clearing of protestors from a public park by federal law enforcement officers is notably different from an unlawful search and arrest by federal narcotics officers, see Bivens, 403 U.S. at 389-90, and from sex discrimination by a Congressman, see Davis, 442 U.S. at 231.

Claims that arise in a new context are not necessarily precluded, however, [***9] so long as there are no "special factors counselling hesitation" against extending Bivens to that context. Ziglar, 582 U.S. at 136 (quoting Carlson, 446 U.S. at 18). As with the "new context" test, what constitutes a "special factor" is interpreted broadly. See Egbert, 142 S. Ct. at 1805 ("A court inevitably will 'impair' governmental interests, and thereby frustrate Congress' policymaking role, if it applies the '"special factors" analysis' at such a narrow 'level of [*1009] [**284] generality.'" (alterations omitted) (quoting Stanley, 483 U.S. at 681)). Where there is even the "potential" that "'judicial intrusion' into a given field might be 'harmful' or 'inappropriate,'" courts cannot permit Bivens claims to proceed. Id. at 1805 (emphasis omitted) (quoting Stanley, 483 U.S. at 681).

As the Supreme Court has made clear in recent years, "a Bivens cause of action may not lie where . . . national security is at issue." Egbert, 142 S. Ct. at 1805; see Hernandez, 140 S. Ct. at 746-47. Appellees argue that national security concerns regarding the safety of the President and the area surrounding the White House justify finding a special factor in this case. Appellants rely on their well-pleaded allegation that "the law-abiding, peaceful protestors posed no threat to the President." Appellants' Opening Br. at 44. But Appellants misunderstand the applicable standard. Officers need not have [***10] been responding to an ongoing or imminent threat to national security to invoke national security as a special factor. See Hernandez, 140 S. Ct. at 746 ("The question is not whether national security requires such conduct . . . ." (emphasis added)). Instead, courts ask whether they "should alter the framework established by the political branches" for handling cases with possible national security implications. Id. Because "[n]ational-security policy is the prerogative of the Congress and President," the answer most often will be no. Ziglar, 582 U.S. at 142.

Under any of the proffered explanations given for clearing protestors from Lafayette Park, Appellees' actions implicate national security under the Supreme Court's broad understanding of that special factor. While we recognize that Lafayette Square is a "unique situs" for First Amendment activity, "it cannot be denied that a public gathering presents some measure of hazard to the security of the President and the White House." Quaker Action Grp. v. Morton, 516 F.2d 717, 725, 731, 170 U.S. App. D.C. 124 (D.C. Cir. 1975). Given the nation's

"overwhelming . . . interest in protecting the safety of its Chief Executive," Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), officers in the area surrounding the White House and the President must be able to act without hesitation. But faced with "[t]he risk of personal damages liability," officers [***11] are more likely "to second-guess difficult but necessary decisions concerning national-security policy," Ziglar, 582 U.S. at 142, including decisions regarding presidential and White House security. Because "regulating the conduct of [law enforcement officers near the White House] unquestionably has national security implications, the risk of undermining [presidential and White House] security provides reason to hesitate before extending Bivens into this field." Hernandez, 140 S. Ct. at 747.

Appellants caution that such a ruling creates a "Constitution-free zone" by precluding Bivens claims for any constitutional violation occurring in Lafayette Square due to its sensitive location, Appellants' Opening Br. at 45, and treats national security as a "talisman used to ward off inconvenient claims," Ziglar, 582 U.S. at 143. Without purporting to decide the availability of any Bivens claim arising from events in Lafayette Park under other circumstances, we note that to the extent Appellants' fears come to fruition, it is a result of heeding the Supreme Court's admonition to "ask 'more broadly' if there is any reason to think that 'judicial intrusion' into a given field might be 'harmful' or 'inappropriate.'" Egbert, 142 S. Ct. at 1805 (alteration omitted) (quoting Stanley, 483 U.S. at 681) (emphasis added). Finally, [***12] it bears mention that First Amendment activity in Lafayette Park remains constitutionally protected. [*1010] [**285] We decide only the availability of damages, not the existence of a constitutional violation. To the extent damages under a federal cause of action are necessary for full enjoyment of that constitutional right, such endorsement must come from the Supreme Court or from Congress.

Because the presence of one special factor is sufficient to preclude the availability of a Bivens remedy, we do not reach Appellees' other special factors arguments regarding the availability of alternative remedies, congressional involvement in the intersection between presidential security and protestors' rights, the political branches' activity in investigating the events underlying Appellants' claims, and the risk that discovery might expose "sensitive Executive Branch communications between high-ranking officials." Gov't Appellees' Br. at 24-25; see Egbert, 142 S. Ct. at 1803 ("'Even a single sound reason to defer to Congress' is enough to require a court to refrain from creating such a remedy." (alteration omitted) (quoting Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1937, 210 L. Ed. 2d 207 (2021))).

III. Conclusion

Mindful of our obligation to faithfully apply Supreme Court precedent and avoid arrogating legislative power, [***13] we affirm.

Concur by: WILKINS; WALKER

Concur

Wilkins, Circuit Judge, concurring: I join the majority opinion in full. Supreme Court precedent requires us to affirm the District Court's dismissal of Appellants' Bivens claims. As our opinion explains, those claims arise in a "new context," and the "special factor" of national security precludes us from extending Bivens to that new context. I write separately because in my view, applying that precedent here would seem to undermine the very separation-of-powers concerns that underlie modern Bivens doctrine in the first place.

The Supreme Court has long "presume[d] that Congress[,]" when it legislates, is "thoroughly familiar with . . . unusually important precedents" from not only the Supreme Court but also the Courts of Appeals. Cannon v. Univ. of Chi., 441 U.S. 677, 698-99, 99 S. Ct. 1946, 60 L. Ed. 2d 560 & n. 23 (1979). Examples abound across a wide range of statutory contexts. For instance, in construing the Copyright Act's safe-harbor provision, the Court recently found "no indication that Congress intended to alter" a similar rule established by prior lower court decisions. Unicolors, Inc. v. H&M Hennes & Mauritz, LP, 595 U.S. 178, 142 S. Ct. 941, 947-48, 211 L. Ed. 2d 586 (2022) ("When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that [***14] concept by the courts." (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 813, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989)). Similarly, in interpreting the scope of a judicial review provision of the Immigration and Nationality Act, the Court "assume[d] that Congress" was "aware" of "lower court precedent" regarding the scope of habeas review and intended its enactment to conform with that view. Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1072, 206 L. Ed. 2d 271 (2020). When Congress amended a provision of the Bankruptcy Code, the Court subsequently reasoned that Congress was "presumptively . . . aware" of prior lower court opinions interpreting the same phrase and that Congress therefore "intended it to retain its established meaning." Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1762, 201 L. Ed. 2d 102 & n.3 (2018). The Court has made the same presumption in interpreting Title VII, see Albemarle Paper [*1011] [**286] Co. v. Moody, 422 U.S. 405, 414, 95 S. Ct. 2362, 45 L. Ed. 2d 280 & n.8 (1975), Title IX, see Cannon, 441 U.S. at 698 n.23, the Americans with Disabilities Act, see Lorillard v. Pons, 434 U.S. 575, 580-81, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978), and the National Labor Relations Act, see NLRB v. Gullett Gin Co., 340 U.S. 361, 365-66, 71 S. Ct. 337, 95 L. Ed. 337 (1951). This presumption holds for not only civil but also criminal statutes, see Abuelhawa v. United States, 556 U.S. 816, 129 S. Ct. 2102, 173 L. Ed. 2d 982 (2009), and equally when Congress does not act, i.e., when it "retain[s] . . . statutory text" that has been construed by the Courts of Appeals. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 576 U.S. 519, 535-37, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015).

Applying that rule here, Congress was presumably aware of our decision in Dellums v. Powell, 566 F.2d 167, 184 U.S. App. D.C. 275 (D.C. Cir. 1977), when it enacted the Westfall Act in 1988,

which preserved a damages remedy against individual federal officers for constitutional violations. Pub. L. No. 100-694, 5, 102 Stat. 4563 (1988) (codified at 28 U.S.C. 2679(b)(2)(A)). By any measure, Dellums was an "unusually important precedent[.]" [***15] Cannon, 441 U.S. at 699. The events giving rise to Dellums had garnered nationwide media attention, and we held for the first time that a Bivens remedy was available for certain First Amendment violations. Not only that, the "presumption is particularly appropriate here" because of the unique nexus between the facts and parties of that case and Congress itself. Lorillard, 434 U.S. at 581. The lead plaintiff in Dellums was a member of Congress, the case arose from mass arrests during a nationally prominent protest on the steps of the Capitol, and members of both the House and Senate made floor remarks regarding the events of that day. See Bipartisan Former Members of Cong. Amicus Br. 21-23 & n.15 (collecting statements of members of Congress).

If we are also to presume, in the words of the Supreme Court, that the Westfall Act "left Bivens where it found it" in 1988, Hernandez v. Mesa, 140 S. Ct. 735, 748 n.9, 206 L. Ed. 2d 29 (2020), then Congress must have intended to leave Dellums v. Powell where it found itthat is, as good law. There is no compelling reason to conclude otherwise. The Supreme Court denied certiorari in Dellums, see438 U.S. 916, 98 S. Ct. 3147, 57 L. Ed. 2d 1161 (1978), and no decision prior to 1988, either of that Court or our court, cast doubt on Dellums's validity.1

1

In 1983, the Supreme Court declined to find available a Bivens remedy for a First Amendment retaliation claim brought by a federal civil service employee. Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983). In reaching that conclusion, the Court observed that Congress had already created "an elaborate remedial system . . . with careful attention to conflicting policy considerations," to address such claims. Id. at 388. It saw no need to supplement that "comprehensive" scheme of existing statutory remedies with a judge-made one. Id. at 388-90. In contrast, no such remedial system existed that would have offered the Dellums plaintiffs alternative relief. Thus, Bush v. Lucas did not call into question Dellums.

To be sure, and as the majority opinion acknowledges, by 1988 the Court had declined several [***16] times to expand the range of the Bivens remedy "beyond circumstances recognized in prior Supreme Court cases." Maj. Op. 7. But that does not undermine the key point. Declining to discuss important lower court precedent is not the same as calling that precedent into question or sub silentio overruling it. More importantly, it is even more unclear that Congress would have understood any of the Court's pre-1988 cases to have that effect, that is, to render wholly irrelevant all existing lower [*1012] court [**287] Bivens precedent. In other words, a few cases in which the Court exercised caution before extending Bivens to new contexts cannot overcome the strong and well-settled presumption that Congress was aware of a case like Dellums.

Thus, deferring to Congressas the Supreme Court has repeatedly urged courts to do in deciding the viability of Bivens claimswould counsel strongly in favor of recognizing such claims in cases analogous to Dellums. See Egbert v. Boule, 596 U.S. 482, 142 S. Ct. 1793, 1802-04, 213 L. Ed. 2d 54 (2022) ("[T]he most important question is who should decide whether to provide for a

damages remedy, Congress or the courts? . . . If there is a rational reason to think that the answer is 'Congress'as it will be in most every [***17] case, . . . no Bivens action may lie." (internal quotations and citations omitted)); Hernandez, 140 S. Ct. at 750; Ziglar v. Abbasi, 582 U.S. 120, 135-36, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017). As Appellants and the former members of Congress amici argue, it is hard to imagine a case more analogous to Dellums than this one. The following describes equally both cases: Plaintiffs allege that federal officers used violence to clear a peaceful protest in a quintessential public forum for political speech in our nation's capital, for viewpoint-discriminatory reasons.

The problem for Appellants with this line of reasoning is that the Supreme Court's "new context" test renders irrelevant all pre-1988 lower court decisions recognizing Bivens claims, including Dellums. The "new context" inquiry considers only prior Supreme Courtnot lower courtprecedent. Egbert, 142 S. Ct. at 1803; Loumiet v. United States, 948 F.3d 376, 382, 445 U.S. App. D.C. 124 (D.C. Cir. 2020) ("[T]he new-context analysis may consider only Supreme Court decisions . . ."). In turn, courts may not "justify a Bivens extension based on parallel circumstances" with pre-1988 cases. Egbert, 142 S. Ct. at 1809 (internal quotations omitted). We must follow that precedent. I simply observe that here, that precedent "is in tension with the Court's insistence that 'prescribing a cause of action is a job for Congress, not the courts.'" See Egbert, 142 S. Ct. at 1823 (Sotomayor, J., concurring [***18] in the judgment in part and dissenting in part) (quoting majority opinion).

Walker, Circuit Judge, concurring:

Protesters say federal officers violated their constitutional rights by forcibly dispersing a demonstration outside the White House. So they sued for damages, claiming that the Constitution gives them permission to bring their suit. See Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

But as the Court's opinion explains, the protesters' claims do not fit any recognized cause of action under the Constitution. And gone are the days when federal courts could invent new remedies to redress the protesters' injuries. See Egbert v. Boule, 596 U.S. 482, 142 S. Ct. 1793, 1803, 213 L. Ed. 2d 54 (2022).

Yet that does not mean the protesters have no way to recover. For most of our history, those injured by federal officers' unconstitutional conduct could sue for damages in state court. The Framers saw state common-law suits as an important check on federal misconduct.

Some have assumed that those suits are now precluded by the Westfall Act. It bars many "civil action[s] . . . for money damages" filed to redress "injury or loss . . . resulting from" federal officers' conduct. 28 U.S.C. 2679(b)(1). But it also has an exception. It does not bar "a civil action . . . brought for a violation of the Constitution of the United States." Id. 2679(b)(2)(A).

That exception[***19] might preserve state tort suits "brought" to remedy constitutional [*1013] [**288] injuries. Reading the Act that way accords with Founding-era principles of officer accountability and closes the remedial gap left by today's narrow approach to remedies under the Constitution ensuring relief for those unconstitutionally injured by federal officers.

I. Tort Suits Against Federal Officers Today

Tort suits against federal officers are channeled through the Federal Tort Claims Act. 28 U.S.C. 2679. That's because another statute the Westfall Act makes the FTCA "the exclusive remedy for most claims against [federal] employees arising out of their official conduct." Hui v. Castaneda, 559 U.S. 799, 806-07, 130 S. Ct. 1845, 176 L. Ed. 2d 703 (2010) (citing 28 U.S.C. 2679(b)(1)). So tort victims generally cannot sue federal officers personally under state law. Id.

But the FTCA's remedies are limited. It puts procedural and substantive limits on claims that would otherwise be available under state law. See, e.g., id. 2675(a) (claims must first be "denied by [an] agency in writing" before a plaintiff can sue under the FTCA), 2680 (listing substantive exceptions). That leaves some victims of officers' unconstitutional conduct without compensation.

To illustrate how restrictive the FTCA can be, consider an example. A federal prosecutor maliciously [***20] prosecutes a plaintiff, forcing him to defend against made-up charges. See Thompson v. Clark, 596 U.S. 36, 142 S. Ct. 1332, 212 L. Ed. 2d 382 (2022) (Fourth Amendment protects against malicious prosecution). Can the plaintiff sue for damages under the FTCA? Probably not. He can't bring a claim directly for the constitutional violation "because constitutional claims are not cognizable under the FTCA." Harper v. Williford, 96 F.3d 1526, 1528, 321 U.S. App. D.C. 78 (D.C. Cir. 1996). And even if he repackages his claim as a state-law suit, that avenue isn't available either. See 28 U.S.C. 2680(h) (barring claims for most intentional torts, including "malicious prosecution"); Moore v. United States, 213 F.3d 705, 710, 341 U.S. App. D.C. 348 (D.C. Cir. 2000).1

1

True, the FTCA allows some intentional-tort claims to proceed against "investigative or law enforcement officers." 28 U.S.C. 2680(h). But that exception is narrow. Only claims for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" are allowed. Id. And even then, the suit must be against an "investigative or law enforcement officer," excluding many federal tortfeasors. See, e.g., Moore, 213 F.3d at 710 (prosecutors not covered); Wilson v. United States, 959 F.2d 12, 15 (2d Cir. 1992) (parole officers not covered); Solomon v. United States, 559 F.2d 309, 310 (5th Cir. 1977) (some security employees not covered); see also Pellegrino v. TSA, 937 F.3d 164, 170-81 (3d Cir. 2019) (allowing claim against TSA employees to proceed, but articulating a convoluted test).

The upshot is that the FTCA leaves some plaintiffs with no remedy even plaintiffs who have been intentionally and unconstitutionally harmed by federal officers. See Byrd v. Lamb, 990 F.3d 879, 883 n.8 (5th Cir. 2021) (Willett, J., concurring) ("For victims" of excessive force, the FTCA "offers no protection at all.").

That gap was temporarily filled, in part, by Bivens suits damages actions implied under the Constitution. But the modern Supreme Court has all-but removed that option. Since 1980, the Court has refused to expand Bivens beyond three narrow contexts. See Egbert v. Boule, 596 U.S. 482, 142 S. Ct. 1793, 1802, 213 L. Ed. 2d 54 (2022) (describing those contexts); Maj. Op. 4-5 (same). Over and over again, the Court has said judges should not extend Bivens when "there is any reason to think [***21] that Congress might be better equipped to create a damages remedy." Id. at 1803 (emphasis added).

[*1014] [**289] That may mean that we should never extend Bivens. "[C]reating a cause of action is a legislative endeavor" that requires "evaluat[ing] a range of policy considerations." Id. at 1802 (cleaned up). So "in most every case," Congress is "far more competent" to decide whether to create a new cause of action. Id. at 1803 (cleaned up); see also id. at 1810 (Gorsuch, J., concurring).

Does that leave today's Plaintiffs with no remedy for federal officers' allegedly unconstitutional conduct? They say it does. I'm not so sure. For most of our history, state tort suits were the primary mechanism for holding federal officers accountable. And an overlooked exception to the Westfall Act may allow some of those suits to proceed today.

II. Remedies Against Federal Officers at the Founding

At the Founding, constitutional claims against federal officials were litigated in state tort suits. Hernandez v. Mesa, 140 S. Ct. 735, 751, 206 L. Ed. 2d 29 (2020) (Thomas, J., concurring). In those suits, "[t]he ultimate issue before the court concerned the federal Constitution," but the cause of action was supplied by state law. Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1506 (1987).

Those suits would proceed in three steps:

Imagine a federal [***22] officer unlawfully searches a house. To get damages, the owner would file a state-law trespass suit against the officer.

As a defense, the officer would argue that his actions were authorized by a federal statute, a warrant, or a command from a superior officer.

To defeat that defense, the owner would argue that any purported federal authorization was unconstitutional.2

2

See Mitchell v. Harmony, 54 U.S. (13 How.) 115, 14 L. Ed. 75 (1851); Wise v. Withers, 7 U.S. (3 Cranch) 331, 2 L. Ed. 457 (1806); Wheeldin v. Wheeler, 373 U.S. 647, 652, 83 S. Ct. 1441, 10 L. Ed. 2d 605 (1963) ("When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. Federal law, however, supplies the defense"); Alfred Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1128-29 n.89 (1969) (collecting cases).

Little v. Barreme is a good example. 6 U.S. (2 Cranch) 170, 2 L. Ed. 243 (1804). Following instructions from President Adams to seize ships going to or coming from French ports, a U.S. Navy captain captured a Danish ship. Id. at 176-78. The owner sued in trespass. The Supreme Court held that the captain was liable because the President's instructions were not authorized by statute. Id. at 179. Because the instructions were invalid, they could not "legalize an act" that was otherwise "a plain trespass." Id.; see also Slocum v. Mayberry, 15 U.S. (2 Wheat) 1, 10, 4 L. Ed. 169 (1817) ("if the seizure be finally adjudged wrongful, and without reasonable cause, [the victim] may proceed, at his election, by a suit at common law . . . for damages for the illegal act").

The ratification debates suggest that the Framers thought state tort suits would be an important check against federal misconduct. In North Carolina, Archibald [***23] Maclaine said a citizen "would have redress in the ordinary courts of common law" after a federal "deput[y]" followed the President's unlawful instructions and "distressed" the citizen. 4 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 47 (2d ed. 1836). And Richard Dobbs Spaight agreed that "it was very certain and clear that, if any man [i]s injured by an officer of the United States, he could get redress by a suit at law." Id. at 36-37. Relying on [*1015] [**290] state causes of action to hold federal officers accountable put an important structural check on federal power. State courts would have a strong incentive to zealously enforce state law, guarding against federal overreach.

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." Jennifer Mascott, The Ratifiers' Theory of Officer Accountability, 29 (forthcoming), https://perma.cc/AS4U-56WA. So when Congress passed the First Judiciary Act, it required federal marshals to assume personal liability for the misdeeds of their deputies by [***24] posing "sureties . . . in the sum of twenty thousand dollars," while leaving deputies' liability to state law. Judiciary Act of 1789, 27, 1 Stat. 73, 87.

Using tort suits to hold executive officers accountable was a model borrowed from England. In two famous unlawful-search cases, the English courts held Crown officials liable for trespass, awarding the plaintiffs damages. Wilkes v. Wood (1763) 98 Eng. Rep. 489; Entick v. Carrington (1765) 95 Eng. Rep. 807. Those cases are important today because they "profoundly influenced" the drafting of the Fourth Amendment. City of West Covina v. Perkins, 525 U.S. 234, 247, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999) (Thomas, J., concurring).

That background may explain why the Bill of Rights did not contain an express cause of action. The Framers likely expected our newly guaranteed rights to be secured by old common-law actions. Federal officers would not be above the law because they would be subject to the same

common law as private citizens. Amar, supra at 1507 (the Bill of Rights presupposed "a general backdrop of private law" causes of action to vindicate "primary rights of personal property and bodily liberty").3

3

It's not surprising that the Constitution silently assumed the availability of state common-law actions. The Framers also assumed the continued existence of other long-standing features of the legal landscape. Take sovereign immunity. Until the Eleventh Amendment, the Constitution didn't say a word about it. But state immunity from suit was part of the "plan of the Convention" that is, implicit in "the structure of the original Constitution itself." PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2258, 210 L. Ed. 2d 624 (2021) (cleaned up). The same is probably true of state tort actions against federal officers.

III. The Westfall Act's Constitutional-Tort Exception

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. For that reason, some judges and scholars have said prohibiting all damages actions against federal [***25] officers might be a constitutional problem today.4

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See, e.g., Byrd v. Lamb, 990 F.3d 879, 883-84 (5th Cir. 2021) (Willett, J., concurring) (it would raise "serious constitutional concerns" to "slam[ ] shut" the "courthouse doors" on "victims of unconstitutional conduct"); Brief of Professor Jennifer L. Mascott as Amicus Curiae in Support of Petitioner at 28-29, Egbert v. Boule, 596 U.S. 482, 142 S. Ct. 1793, 213 L. Ed. 2d 54 (2022) (noting but not endorsing the view that "some remedy" might be "constitutionally necessary to address government official actions taken without any lawful scope of authority"); William Baude, Bivens Liability and Its Alternatives, Summary, Judgment (Feb. 27, 2020) ("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."), https://perma.cc/BL77-3JSU. I take no position on whether those scholars and judges are correct that removing all damages remedies against federal officers would violate the Constitution.

But those concerns may be premature. It's possible [*1016] [**291] that a careful reading of the Westfall Act avoids any constitutional problem by preserving state tort suits against federal officers for constitutional violations.

Recall that the Westfall Act generally prohibits tort victims from bringing state tort suits against federal officers, forcing victims instead to pursue the limited remedies in the FTCA. 28 U.S.C. 2679(b)(1). But the Westfall Act does not preclude "a civil action . . . brought for a violation of the Constitution of the United States." Id. at (b)(2)(A). Though overlooked, that exception may allow state tort suits "brought for" constitutional violations to proceed.

On a broad reading of the exception, a suit might count as "brought for a violation of the Constitution" if its purpose is to remedy a constitutional violation. For instance, a state trespass suit could proceed if its goal was to remedy an unconstitutional search. That interpretation arguably tracks the ordinary meaning of the phrase "brought for." Courts have long used it to describe the goal of a suit, not the cause of action. See, e.g., Escanaba & Lake Michigan Transportation Co. v. City of Chicago, 107 U.S. 678, 684, 2 S. Ct. 185, 27 L. Ed. 442 (1883) (describing a suit as "brought [***26] for damages"); see also Carlos M. Vǎuez & Stephen I. Vladeck, State Law, the Westfall Act, and the Nature of the Bivens Question, 161 U. Pa. L. Rev. 509, 570-77 (2013) (proposing a similar interpretation).

Even if that reading is too broad, the exception may still allow some suits to proceed. On a narrower reading, a suit might count as "brought for a violation of the Constitution" if a constitutional violation is part of the plaintiff's cause of action. Though that reading would preclude most state tort suits a constitutional violation is not part of a trespass action, for example some suits might still fit the bill. In many states plaintiffs can file an "action on the statute," alleging a "cause of action in tort resulting from activity in violation of a legislatively created duty or standard." Vǎuez & Vladeck, supra at 538-39 (cleaned up). A plaintiff might use that cause of action to allege that a federal officer violated the Constitution. And if current state laws do not meet the exception, nothing would stop a state from creating a new cause of action allowing plaintiffs to directly allege federal constitutional violations. See Akhil Reed Amar, Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983 [***27] , 64 U. Colo. L. Rev. 159, 160 (1993); see also Thomas Koenig & Christopher D. Moore, Of State Remedies and Federal Rights, 36 (forthcoming), https:// perma.cc/ 6LH6-6TM2 ("the text of the Westfall Act counsels in favor of reading" the constitutional-tort exception "to extend to state civil actions brought for federal constitutional violations").

True, until now, the Westfall Act's constitutional-tort exception has been read more narrowly than that. The Supreme Court has said the exception "simply left Bivens where it found it," ensuring that Bivens actions weren't precluded by the Westfall Act. Hernandez v. Mesa, 140 S. Ct. 735, 748 n.9, 206 L. Ed. 2d 29 (2020). But that does not foreclose the possibility that the Act could also let some state tort suits proceed.5

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Minneci v. Pollard might be read to go further. 565 U.S. 118, 126, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012). It explained that there was a need for a Bivens remedy against federal prison guards, but no need for one against private guards operating a federal prison. That's because state tort actions are generally available "against employees of a private firm," but are generally barred by the FTCA "against employees of the Federal Government." Id.

Some have read that statement to foreclose interpreting the Westfall Act to allow state tort suits. James E. Pfander & David P. Baltmanis, W(h)ither Bivens?, 161 U. Pa. L. Rev. Online 231, 243 (2013). But that may read Pollard for more than it's worth. For one thing, the Court's fleeting

remark about the Westfall Act gave little attention to its text. For another, in at least one post Westfall-Act case, the Court reached a different conclusion. In Wilkie v. Robbins, the Court suggested that a tort victim didn't need a Bivens remedy because under state law he "had a civil remedy in damages for trespass" against offending federal officials. 551 U.S. 537, 551, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007). For that statement to be correct, the Westfall Act must not preclude state tort suits brought for constitutional violations.

[*1017] [**292] Plus, reading the exception as a good-for-Bivens-only rule is in tension with the statutory text and context. From the Founding until the 1970s, state suits were the primary regime for holding federal officers accountable for constitutional violations.6

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For proof that state tort suits were used to remedy constitutional violations until the 1970s, look no further than the Solicitor General's Brief in Bivens. There, the government assured the Court that there was no need to create a new federal remedy for Fourth Amendment violations, because "a body of state law" already provided "substantial recovery." Brief for the United States at 38, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

So we might expect exceptionally clear language if Congress had wanted to abrogate that regime. Instead, we find statutory text tailored to preserve it: The Act does not cover suits "brought for a violation of the Constitution." 28 U.S.C. 2679(b)(2)(A); see also Meshal v. Higgenbotham, 804 F.3d 417, 428, 420 U.S. App. D.C. 1 (D.C. Cir. 2015) (noting [***28] that Congress tried to ensure the Westfall Act would not leave victims of constitutional torts remediless). If Congress had meant to limit that exception to Bivens suits, it might have said "suits arising under the Constitution," not suits "brought for" constitutional violations. See Davis v. Passman, 442 U.S. 228, 229-30, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) (describing Bivens suits as "aris[ing] under the Constitution").

Finally, the Westfall Act's historical context provides no clear evidence that Congress wished to upset the long tradition of using state tort actions to police constitutional violations. The Act abrogated Westfall v. Erwin, 484 U.S. 292, 297-98, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988). There, the Supreme Court refused to grant federal employees' absolute immunity from state tort suits. Because that decision "eroded the common law tort immunity previously available to Federal employees," Congress passed the Westfall Act to funnel future tort claims through the FTCA. Westfall Act, Pub. L. No. 100-694, 2(a)(4), 102 Stat. 4563 (1988). But Westfall did not concern a suit brought for a constitutional violation. And Congress enacted an express exception to carve out such suits.

* * *

I'm not certain whether the Westfall Act is best read to allow state tort suits for constitutional injuries. But that reading finds support in the text of the statute, accords with Founding-era principles of officer accountability, and closes a remedial [***29] gap ensuring relief for those

injured by federal officers' unconstitutional conduct. For those reasons, I hope the Act gets close attention in an appropriate case.

If the Westfall Act does not preclude state tort suits against federal officers for constitutional violations, the protesters in this case may yet seek a remedy. They allege that federal officers violated the Fourth Amendment by using "excessive force" against them. JA 173. DC law provides a cause of action for tortious assault and battery. See District of Columbia v. Chinn, 839 A.2d 701, 705 (D.C. 2003). The protesters could thus file a tort action, [*1018] [**293] claiming assault and battery, to recover damages for the alleged Fourth Amendment violation.

But the protesters did not file those claims in this case. And I agree with the Court that their Bivens claims fail.

Escanaba Co. v. Chi.

Supreme Court of the United States

March 5, 1883, Decided; OCTOBER, 1882, Term

No Number in Original

Reporter
107 U.S. 678; 2 S. Ct. 185 **; 27 L. Ed. 442 ***; 1882 U.S. LEXIS 1266 ****; 17 Otto 678

ESCANABA COMPANY v. CHICAGO.

Prior History:

[****1] APPEAL from the Circuit Court of the United States for the Northern District of Illinois. The case is fully stated in the opinion of the court.

Syllabus

1. The Chicago River and its branches, although lying within the limits of the State of Illinois, are navigable waters of the United States over which Congress, in the exercise of its power under the commerce clause of the Constitution, may exercise control to the extent necessary to protect, preserve, and improve their free navigation; but until that body acts, the State has plenary authority over bridges across them, and may vest in Chicago jurisdiction over the construction, repair, and use of those bridges within the city. 2. There is nothing in the ordinance of July 13, 1787, or in the subsequent legislation of Congress, that precludes the State from exercising that authority.

Counsel: Mr. Alexander T. Britton, Mr. Jehiel H. McGowan, and Mr. Homer Cook for the appellant.

Mr. Frederick S. Winston, Jr., for the appellee.

Opinion by: FIELD

Opinion

[*679] [**185] [***443] MR. JUSTICE FIELD delivered the opinion of the court.

The Escanaba and Lake Michigan Transportation Company, a corporation created under the laws of Michigan, [****2] is the owner of three steam-vessels engaged in the carrying trade between ports and places in different states on Lake Michigan and the navigable waters connecting with it. The vessels are enrolled and licensed for the coasting trade, and are principally employed in carrying iron ore from the port of Escanaba, in Michigan, to the docks of the Union Iron and Steel Company on the south fork of the south branch of the Chicago River in the city of Chicago. In their course up the river and its south branch and fork to the docks they are required to pass through draws of several bridges constructed over the stream by the city of Chicago; and it is of obstructions caused by the closing of the draws, under an ordinance of the city, for a designated hour of the morning and evening during week-day, and by a limitation of the time to ten minutes, during which a draw may be left open for the passage of a vessel, and by some of the piers in the south branch and fork, and the bridges resting on them, that the corporation complains; and to enjoin the city from closing the draws for the morning and evening hours designated, and enforcing the ten minutes' limitation, [**186] and to compel the [****3] removal of the objectionable piers and bridges, the present bill is filed.

The river and its branches are entirely within the State of Illinois, and all of it, and nearly all of both branches that is navigable, are within the limits of the city of Chicago. The river, from the junction of its two branches to the lake, is about three-fourths of a mile in length. The branches flow in opposite directions and meet at its head, nearly at right angles with it. Originally the width of the river and its branches seldom exceeded one hundred and fifty feet; of the branches and fork it was often less than one hundred feet; but it has been greatly [***444] enlarged by the city for the convenience of its commerce.

[*680] The city fronts on Lake Michigan, and the mouth of the Chicago River is near its center. The river and its branches divide the city into three sections; one lying north of the main river and east of its north branch, which may be called its northern division; one lying between the north and south branches, which may be called its western division; and one lying south of the main river and east of the south branch, which may be called its southern division. Along [****4] the river and its branches the city has grown up into magnificent proportions, having a population of six hundred thousand souls. Running back from them on both sides are avenues and streets lined with blocks of edifices, public and private, with stores and warehouses, and the immense variety of buildings suited for the residence and the business of this vast population. These avenues and streets are connected by a great number of bridges, over which there is a constant passage of foot-passengers and of vehicles of all kinds. A slight impediment to the movement causes the stoppage of a crowd of passengers and a long line of vehicles.

The main business of the city, where the principal stores, warehouses, offices, and public buildings are situated, is in the southern division of the city; and a large number of the persons who do business there reside in the northern or the west ern division, or in the suburbs.

While this is the condition of business in the city on the land, the river and its branches are crowded with vessels of all kinds, sailing craft and steamers, boats, barges, and tugs, moving backwards and forwards, and loading and unloading. Along the banks there are docks, [****5] warehouses, elevators, and all the appliances for shipping and reshipping goods. To these vessels the unrestricted navigation of the river and its branches is of the utmost importance; while to those who are compelled to cross the river and its branches the bridges are [**187] a necessity. The object of wise legislation is to give facilities to both, with the least obstruction to either. This the city of Chicago has endeavored to do.

The State of Illinois, within which, as already mentioned, the river and its branches lie, has vested in the authorities of the city jurisdiction over bridges within its limits, their construction, [*681] repair, and use, and empowered them to deepen, widen, and change the channel of the stream, and to make regulations in regard to the times at which the bridges shall be kept open for the passage of vessels.

Acting upon the power thus conferred, the authorities have endeavored to meet the wants of commerce with other States, and the necessities of the population of the city residing or doing business in different sections. For this purpose they have prescribed as follows: that "Between the hours of six and seven o'clock in the morning, [****6] and half-past five and half-past six o'clock in the evening, Sundays excepted, it shall be unlawful to open any bridge within the city of Chicago;" and that "During the hours between seven o'clock in the morning and half-past five o'clock in the evening, it shall be unlawful to keep open any bridge within the city of Chicago for the purpose of permitting vessels or other crafts to pass through the same, for a longer period at any one time than ten minutes, at the expiration of which period it shall be the duty of the bridge-tender or other person in charge of the bridge to display the proper signal, and immediately close the same, and keep it closed for fully ten minutes for such persons, teams, or vehicles as may be waiting to pass over, if so much time shall be required; when the said bridge shall again be opened (if necessary for vessels to pass) for a like period, and so on alternately (if necessary) during the hours last aforesaid; and in every instance where any such bridge shall, be open for the passage of any vessel, vessels. or other craft, and closed before the expiration of ten minutes from the time of opening, said bridge shall then, in every such case, remain closed for [****7] fully ten minutes, if necessary, in order to allow all persons, teams, and vehicles in waiting to pass over said bridge."

The first of these requirements was called for to accommodate clerks, apprentices, and laboring men seeking to cross the bridges, at the hours named, in going to and returning from their places of labor. Any unusual delay in the morning would derange their business for the day, and subject them to a corresponding loss of wages. At the hours specified there is three times -- so the record shows -- the [**188] usual number of pedestrians going and returning that there is during other hours.

[*682] The limitation of ten minutes for the passage of the draws by vessels seems to have been eminently wise and proper for the protection of the interests of all parties. Ten minutes is ample

time for any vessel to pass the draw of the bridge, and the allowance of more time would subject foot-passengers, teams, and other vehicles to great inconvenience and delays.

The complainant principally objects to this ten minutes' limitation, and to the assignment of the morning and evening hour to pedestrians and vehicles. It insists that the navigation of the river and [****8] its branches should not be thus belayed; and that the rights of commerce by vessels are paramount to the rights of commerce by any other way.

But in this view the complainant is in error. The rights of each class are to be enjoyed without invasion of the equal rights of others. Some concession must be made on every side for the convenience and the harmonious pursuit of different occupations. Independently of any constitutional restrictions, nothing would seem more just and reasonable, or better designed to meet the wants of the population of an immense city, consistently with the interests of commerce, than the ten minutes' rule, and the assignment of the morning and evening hours which the city ordinance has prescribed.

The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the States or with foreign countries. The Daniel Ball, 10 Wall. 557. Such is the case with the Chicago River and its branches. [****9] the common-law test of the navigability of waters, that they are subject to the ebb and flow of the tide, grew out of the fact that in England there are [***445] no waters navigable in fact, or to any great extent, which are not also affected by the tide. That test has long since been discarded in this country. Vessels larger than any which existed in England, when that test was established, now navigate rivers and inland lakes for more than a thousand miles beyond the reach of any tide. That test only becomes important when considering the rights of riparian owners to [*683] the bed of the stream, as in some States it governs in that matter.

The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its [**189] commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation.

But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, [****10] and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or

the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation [****11] in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are Willson v. The Black Bird Creek Marsh Co., 2 Pet. 245, decided in 1829, and Gilman v. Philadelphia, 3 Wall. 713, decided in 1865. In the first of these cases, an act of Delaware incorporated the company, [*684] and authorized it to construct over one of the small navigable rivers of the State a dam which obstructed the navigation of the stream. A sloop, licensed and enrolled according to the navigation laws of the United States, broke and injured the dam, and thereupon an action was brought for damages by the company. The owners of the sloop set up that the river was a public and common navigable creek "in the nature of a highway," in which the tides had always flowed and reflowed, and in which there was, and of right ought to be, a common and public way for all the citizens of the State of Delaware and of the United States, with sloops [**190] and other vessels to navigate at all times [****12] of the year at their free will and pleasure; that the company had wrongfully erected the dam across the navigable creek and thereby obstructed the same; and that they had broken the dam in order to pass along the creek with their sloop. To this plea the company demurred, and the demurrer was sustained by the Court of Appeals of Delaware and by this court. The decision here was based entirely upon the absence of any legislation of Congress upon the subject. Said Chief Justice Marshall, speaking for the court: "The measure authorized by this act (of Delaware) stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.' If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object [****13] of which was to control State legislation over those small navigable creeks, into which the tide flows, and which abound throughout the lower country of the middle and southern States, we should feel not much difficulty in saying that a State law, coming in conflict with such act, would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power of Congress to regulate commerce with foreign nations and among the several [*685] States, a power which has not been so exercised as to affect the question."

The second case mentioned, that of Gilman v. Philadelphia, is equally emphatic and decisive. The complaint there was by a citizen of New Hampshire, who owned valuable coal wharves on the Schuylkill River at Philadelphia, just above Chestnut Street in that city. In 1857 the legislature of the State authorized the city of Philadelphia to erect a permanent bridge over the river at that

street. The city being about to begin the structure, which was to be without a draw, Gilman filed a bill to prevent its erection, alleging that it would be an unlawful obstruction of the navigation of [****14] the river, and an illegal interference with his rights, and a public nuisance, producing to him special damage, and that it was not competent for the legislature of Pennsylvania to sanction such a structure; and he claimed that he was entitled to be protected by an injunction to stay the progress of the work, and to a decree of abatement, if it should be proceeded with to completion. It appeared that the river was tide-water, and navigable to his wharves for vessels drawing from eighteen to twenty feet of water, and that for many years [**191] commerce to them had been carried on in all kinds of vessels. The bridge, which was to be constructed below them, was to be only thirty feet high; hence would not permit the passage of vessels with masts. The city justified its proposed action by the act of the legislature, alleging that the bridge was a necessity for public convenience, a large population residing on [***446] both sides of the river. The Circuit Court dismissed the bill, and this court affirmed the decree, holding that as the river was wholly within her limits, the State had not exceeded the bounds of her authority, and that until the dormant power of the Constitution [****15] was awakened and made effective by appropriate legislation, the reserved power of the State was plenary, and its exercise in good faith could not be made the subject of review by the court. In its opinion, after observing "that it must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation as well as navigable waters, and that the commerce which passed over a bridge may be much greater than would ever be transported on the water [*686] obstructed," the court said, speaking by Mr. Justice Swayne: "It is for the municipal power to weigh the considerations which belong to the subject and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government, they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the State shall be exerted within the sphere of the commercial power which belongs to the nation."

These decisions have been cited, approved, and followed in many cases, notably [****16] in that of Pound v. Turck, decided in 1877. 95 U.S. 459. There, a statute of Wisconsin authorized the erection of one or more dams across the Chippewa River, which was a small navigable stream lying wholly within the limits of the State, but emptying its waters into the Mississippi; and also the building and maintaining of booms on the river with sufficient piers to stop and hold floating logs. The dams and booms were to be so built as not to obstruct the running of lumber-rafts on the river. Certain parties were damaged by delay in a lumber-raft and from its breaking, caused by the obstructions in the river; and their assignees in bankruptcy brought an action against those who had placed the obstructions there, and recovered. The case being brought here, this court was of opinion that the somewhat confused instructions of the Circuit Court must have led the jury to understand, that if the structures of the defendant were [**192] a material obstruction to the general navigation of the river, the statute of the State afforded no defence, although the structures were built in strict conformity with its provisions. The Circuit Court evidently acted upon the theory that the State [****17] possessed no power to pass the statute because of its supposed conflict with the commercial power of Congress. This court thus construing the

instructions of that court, held that they were erroneous, that the case was within the decisions of the Black Bird Creek Marsh case, and Gilman v. Philadelphia, and that it was competent for the legislature of the State to impose such regulations and limitations upon the erection of obstructions like dams and booms in navigable streams wholly [*687] within its limits, as might best accommodate the interests of all concerned, until Congress should interfere and by appropriate legislation control the matter.

The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exercised are national in their character, and admit and require uniformity of regulation affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its non-action is therefore a declaration that they shall remain free from all regulation. Welton [****18] v. State of Missouri, 91 U.S. 275; Henderson v. Mayor of New York, 92 id. 259; County of Mobile v. Kimball, 102 id. 691.

On the other hand, where the subjects on which the power may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management until Congress interferes and supersedes it. As said in the case last cited: "The uniformity of commercial regulations which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where, from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations, adapted to the immediate locality, could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is supereded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that [****19] nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act they may by regulated by State authority."

[**193] Bridges over navigable streams, which are entirely within the limits of a State, are of the latter class. The local authority can better appreciate their necessity, and can better direct the manner in which they shall be used and regulated than a government [*688] at a distance. It is, therefore, a matter of good sense and practical wisdom to leave their control and management with the States, Congress having the power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce.

It is, however, contended here that Congress has interfered, and by its legislation expressed its opinion as to the navigation of Chicago River an its branches; that it has done so by acts recognizing the ordinance of 1787, and by appropriations for the improvement of the harbor of Chicago.

The ordinance of 1787 for the government of the territory of the United States northwest of the Ohio River, contained in its fourth article a clause declaring that, [****20] "The navigable waters

leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other States that may be admitted into the confederacy, [***447] without any tax, impost, or duty therefor."

The ordinance was passed July 13, 1787, one year and nearly eight months before the Constitution took effect; and although it appears to have been treated afterwards as in force in the territory, except as modified by Congress, and by the act of May 7, 1800, c. 41, creating the Territory of Indiana, and by the act of Feb. 3, 1809, c. 13, creating the Territory of Illinois, the rights and privileges granted by the ordinance are expressly secured to the inhabitants of those Territories; and although the act of April 18, 1818, c. 67, enabling the people of Illinois Territory to form a constitution and State government, and the resolution of Congress of Dec. 3, 1818, declaring the admission of the State into the Union, refer to the principles of the ordinance according to which the constitution was to be formed, its provisions [****21] could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordnance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and [*689] possessed of all the rights of dominion and sovereignty which belonged to the original States. She was [**194] admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is "on an equal footing with the original States in all respects whatever." 3 Stat. 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River. Pollard's Lessee v. Hagan, 3 How. 212; Permoli v. First Municipality, id. 589; Strader v. Graham, 10 id. 82.

But aside from these considerations, [****22] we do not see that the clause of the ordinance upon which reliance is placed materially affects the question before us. That clause contains two provisions: one, that the navigable waters leading into the Mississippi and the St. Lawrence shall be common highways to the inhabitants; and the other, that they shall be forever free to them without any tax, impost, or duty therefor. The navigation of the Illinois River is free, so far as we are informed, from any tax, impost, or duty, and its character as a common highway is not affected by the fact that it is crossed by bridges. All highways, whether by land or water, are subject to such crossings as the public necessities and convenience may require, and their character as such is not changed, if the crossings are allowed under reasonable conditions, and not so as to needlessly obstruct the use of the highways. In the sense in which the terms are used by publicists and statesmen, free navigation is consistent with ferries and bridges across a river for the transit of persons and merchandise as the necessities and convenience of the community may require. In Palmer v. Commissioners of Cuyahoga County we have a case in point. There [****23] application was made to the Circuit Court of the United States in Ohio for an injunction to restrain the erection of a drawbridge over a river in that State on the ground that it would

obstruct the navigation of the stream and injure the property of the plaintiff. The applica was founded on the provision of the fourth article of the ordinance mentioned. The court, which was presided over by Mr. Justice McLean, [*690] then having a seat on this bench, refused the injunction, observing that "This provision does not prevent a State from improving the navigableness of these waters, by removing obstructions, or by dams and locks, so increasing the depth of the water as to extend the line of navigation. Nor does the ordinance prohibit the construction of any work on the river which the State [**195] may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the ordinance." And again: "A drawbridge across a navigable water is not an obstruction. [****24] As this would not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw: and as such a work may be very important in a general intercourse of a community, no doubt is entertained as to the power of the State to make the bridge." 3 McLean, 226. The same observations may be made of the subsequent legislation of Congress declaring that navigable rivers within the Territories of the United States shall be deemed public highways. Sect. 9 of the act of May 18, 1796, c. 29; sect. 6 of the act of March 26, 1804, c. 35.

As to the appropriations by Congress, no money has been expended on the improvement of the Chicago River above the first bridge from the lake, known as Rush Street Bridge. No bridge, therefore, interferes with the navigation of any portion of the river which has been thus improved. But, if it were otherwise, it is not perceived how the improvement of the navigability of the stream can affect the ordinary means of crossing it by ferries and bridges. The free navigation of a stream does not require an abandonment of those means. To render [****25] the action of the State invalid in constructing or authorizing the construction of bridges over one of its navigable streams, the general government must directly interfere so as to supersede its authority and annul what it has done in the matter.

It appears from the testimony in the record that the money appropriated by Congress has been expended almost exclusively [*691] upon what is known as the outer harbor of Chicago, a part of the lake surrounded by breakwaters. The fact that formerly a light-house was erected where now Rush Street bridge stands in no respect affects the question. A ferry was then used there; and before the construction of the bridge the site as a light-house was abandoned. The existing light-house is below all the bridges. The improvements on the river above the first bridge do not represent any expenditure of the government.

From any view of this case, we see no error in [***448] the action of the court below, and its decree must accordingly be

Affirmed.

Byrd v. Lamb

United States Court of Appeals for the Fifth Circuit

March 9, 2021, Filed

No. 20-20217

Reporter
990 F.3d 879 *; 2021 U.S. App. LEXIS 6844 **; 2021 WL 871199

KEVIN BYRD, Plaintiff-Appellee, versus RAY LAMB, Agent, Defendant-Appellant.

Subsequent History: US Supreme Court certiorari denied by, Motion granted by Byrd, Kevin v. Lamb, Ray, 2022 U.S. LEXIS 3024 (U.S., June 21, 2022)

Prior History:

[**1] Appeal from the United States District Court for the Southern District of Texas. USDC No. 4:19-CV-3014.

Counsel: For Kevin Byrd, Plaintiff - Appellee: Solomon M. Radner, Johnson Law, P.L.C., Detroit, MI; Brandon Grable, Grable Grimshaw Mora, P.L.L.C., San Antonio, TX.

For Ray Lamb, Agent, Defendant - Appellant: Andrew Joseph Willey, Houston, TX.

Judges: Before KING, ELROD, and WILLETT, Circuit Judges. DON R. WILLETT, Circuit Judge, specially concurring.

Opinion

[*880] Per Curiam:

Kevin Byrd alleges that Ray Lamb, an Agent for the Department of Homeland Security, verbally and physically threatened him with a gun to facilitate an unlawful seizure. Byrd filed a Bivens action against Agent Lamb alleging use of excessive force to effectuate an unlawful seizure. Agent Lamb filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court denied Agent Lamb's motion to dismiss. Agent Lamb now appeals. We conclude that Byrd's lawsuit is precluded by our binding case law in Oliva v. Nivar, 973 F.3d 438 (5th Cir.

2020), petition for cert. filed, 89 U.S.L.W. 28 (U.S. Jan. 29, 2021) (No. 20-1060). We therefore REVERSE and REMAND with instructions to dismiss the claims against Agent Ray Lamb.

I.

In the early morning hours of February 2, 2019, Kevin Byrd went to visit his ex-girlfriend, Darcy Wade, at the hospital after [**2] she called to tell him that she had been in a car accident. Byrd learned that Wade had been in the car with Eric Lamb (Darcy's then-boyfriend) when they collided with a Greyhound bus. Byrd also became aware that Wade and Eric Lamb had been kicked out of a bar before the car accident occurred. Byrd went to that bar to learn more details about this occurrence. After attempting to investigate, Byrd tried to leave the parking lot of the bar, but he was prevented by Eric's father, Agent Ray Lamb.

Byrd alleges that Agent Lamb physically threatened him with a gun, and verbally threatened to "put a bullet through his fking skull" and that "he would blow his head off." Byrd further alleges that Agent Lamb attempted to smash the window of his car and left marks and scratches on his window.

Shortly after the incident began, Byrd called for police assistance. Two local officers arrived at the scene. Byrd contends that upon the officers' arrival, Agent Lamb identified himself as a federal agent for the Department of Homeland Security, and one of the officers immediately handcuffed and detained Byrd for nearly four hours.

After reviewing surveillance footage, the officers released Byrd. Shortly thereafter, [**3] [*881] Agent Lamb was arrested and taken into custody for aggravated assault with a deadly weapon and misdemeanor criminal mischief.

Byrd filed a Bivens action against Agent Lamb alleging use of excessive force to effectuate an unlawful seizure and filed a 42 U.S.C. 1983 action against the two local officers for unlawfully detaining him. Agent Lamb and the local officers filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) raising the defense of qualified immunity. Agent Lamb also argued that he had reasonable suspicion of Byrd's criminal activity, including harassment and stalking of Lamb's son. The district court granted the officers' motions to dismiss but denied Agent Lamb's motion to dismiss.

Agent Lamb timely appealed.

II.

"We review the district court's denial of the qualified immunity defense de novo, accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff." Brown v. Miller, 519 F.3d 231, 236 (5th Cir. 2008). "Our jurisdiction over qualified immunity appeals

extends to 'elements of the asserted cause of action' that are 'directly implicated by the defense of qualified immunity[,]' including whether to recognize new Bivens claims." De La Paz v. Coy, 786 F.3d 367, 371 (5th Cir. 2015) (quoting Wilkie v. Robbins, 551 U.S. 537, 549 n.4, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)).

The Supreme Court has stated that "the Bivens question" is "antecedent" to [**4] the question of qualified immunity. Hernandez v. Mesa (Hernandez I), 137 S. Ct. 2003, 2006, 198 L. Ed. 2d 625 (2017). In Bivens, the Supreme Court recognized an implied right of action for damages against federal officers alleged to have violated a citizen's constitutional rights. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

The Supreme Court has cautioned against extending Bivens to new contexts. See Hernandez v. Mesa (Hernandez II), 140 S. Ct. 735, 744, 206 L. Ed. 2d 29 (2020) (holding that the plaintiff's Bivens claim arose in a new context, and factors, including the potential effect on foreign relations, counseled hesitation with respect to extending Bivens); Ziglar v. Abbasi, 137 S. Ct. 1843, 1861, 198 L. Ed. 2d 290 (2017) (holding that plaintiff's detention-policy claims arose in a new Bivens context, and factors, such as interfering with sensitive Executive-Branch functions and inquiring into national-security issues, counseled against extending Bivens). In fact, the Supreme Court has gone so far as to say that extending Bivens to new contexts is a "'disfavored' judicial activity." Abbasi, 137 S. Ct. at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

The Supreme Court has provided a two-part test to determine when extension would be appropriate. First, courts should consider whether the case before it presents a "new context." Hernandez II, 140 S. Ct. at 743. Only where a claim arises in a new context should courts then proceed to the second step of the inquiry, and contemplate whether there are "any special factors that counsel [**5] hesitation about granting the extension." Id. (cleaned up). Some recognized special factors to consider include: whether there is a "risk of interfering with the authority of the other branches," whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," and "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." Id. [*882] "When a party seeks to assert an implied cause of action under the Constitution," as in this case, "separation-of-powers principles . . . should be central to the analysis." Abbasi, 137 S. Ct. at 1857.

We recently addressed the extension of Bivens in Oliva v. Nivar, 973 F.3d 438. In that case, an altercation arose between police officers in a Veterans Affairs (VA) hospital and Oliva over hospital ID policy. Id. at 440. The VA officer wrestled Oliva to the ground in a chokehold and arrested him. Id. We concluded that Oliva's Fourth Amendment claim for use of excessive force arose in a new context. Id. at 443.

In ruling in this case, the conscientious district court judge did not have the benefit of our decision in Oliva and Agent Lamb's attorney did not even raise the Bivens issue in the district

court. Nevertheless, [**6] we must address it here. In Oliva, we held that Bivens claims are limited to three situations. First, "manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment." Id. at 442 (citing Bivens, 403 U.S. at 389-90). Second, "discrimination on the basis of sex by a congressman against a staff person in violation of the Fifth Amendment." Id. (citing Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)). Third, "failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the Eighth Amendment." Id. (citing Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)). "Virtually everything else is a 'new context.'" Id. (quoting Abbasi, 137 S. Ct. at 1865).

To determine whether Byrd's case presents a new context, we must determine whether his case falls squarely into one of the established Bivens categories, or if it is "different in a meaningful way from previous Bivens cases decided by [the Supreme] Court." Id. at 442 (quoting Abbasi, 137 S. Ct. at 1859).

Here, although Byrd alleges violations of the Fourth Amendment, as did the plaintiff in Bivens, Byrd's lawsuit differs from Bivens in several meaningful ways. This case arose in a parking lot, not a private home as was the case in Bivens. 403 U.S. at 389. Agent Lamb prevented Byrd from leaving the parking lot; he was not making a warrantless search for narcotics in Byrd's home, as was the case in Bivens. Id. The incident between the two [**7] parties involved Agent Lamb's suspicion of Byrd harassing and stalking his son, not a narcotics investigation as was the case in Bivens. Id. Agent Lamb did not manacle Byrd in front of his family, nor strip-search him, as was the case in Bivens. Id. Nor did Lamb discriminate based on sex like in Davis, 442 U.S. at 230. Nor did he fail to provide medical attention like in Carlson, 446 U.S. at 23-24. As explained in Oliva, Byrd's case presents a new context.

We must also determine whether any special factors counsel against extending Bivens.Here, as in Oliva, separation of powers counsels against extending Bivens. Oliva, 973 F.3d at 444. Congress did not make individual officers statutorily liable for excessive-force or unlawful-detention claims, and the "silence of Congress is relevant." Abbasi, 137 S. Ct. at 1862. This special factor gives us "reason to pause" before extending Bivens. Hernandez II, 140 S. Ct. at 743.

For these reasons, we reject Byrd's request to extend Bivens. Because we do not extend Bivens to Byrd's lawsuit, we need not address whether Agent Lamb is entitled to qualified immunity.

III.

We REVERSE and REMAND with instructions to dismiss the claims against federal Agent Ray Lamb.

Concur by: DON R. WILLETT

Concur

[*883] Don R. Willett, Circuit Judge, specially concurring:

The majority opinion correctly denies Bivens relief.

Middle-management [**8] circuit judges must salute smartly and follow precedent. And today's result is precedentially inescapable: Private citizens who are brutalizedeven killedby rogue federal officers can find little solace in Bivens.

Between 1971 and 1980, the Supreme Court recognized a Bivens claim in three different cases, involving three different constitutional violations under the Fourth, Fifth, and Eighth Amendments.1

1

See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389-90, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (strip search in violation of the Fourth Amendment); Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) (discrimination on the basis of sex in violation of the Fifth Amendment); Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) (failure to provide medical attention to a prisoner in violation of the Eighth Amendment).

Those nine years represent the entire lifespan of Bivens. For four decades now, the Supreme Court, while stopping short of overruling Bivens, has "cabined the doctrine's scope, undermined its foundation, and limited its precedential value."2

2

Hernandez v. Mesa, 140 S. Ct. 735, 751, 206 L. Ed. 2d 29 (2020) (Thomas, J., concurring).

Since 1980, the Supreme Court has "consistently rebuffed" pleas to extend Bivens, even going so far as to suggest that the Court's Bivens trilogy was wrongly decided.3

3

Id. at 743.

The Bivens doctrine, if not overruled, has certainly been overtaken.

Our recent decision in Oliva v. Nivar erases any doubt.4

4

973 F.3d 438 (5th Cir. 2020).

Jos頑liva was a 70-year-old Vietnam veteran who was choked and assaulted by federal police in an unprovoked attack at a VA hospital. The Oliva panel isolated the precise facts of the three Supreme Court cases that recognized Bivens liability,5

5

Id. at 442.

quoted the Court's recent admonition that [**9] extending Bivens was "disfavored judicial activity,"6

6

Id. (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017)).

and concluded that Oliva had no constitutional remedy. "Virtually everything" beyond the specific facts of the Bivens trilogy "is a 'new context,'" the panel held.7

7

973 F.3d at 442.

And new context = no Bivens claim.

My big-picture concern as a federal judgeindeed, as an everyday citizenis this: 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,8

8

28 U.S.C. 2679(b). The Federal Tort Claims Act does waive the United States' sovereign immunity for certain intentional tortsbut not for excessive-force claims against individual federal officers. For victims like Jos頑liva, Congress offers no protection at all; indeed, it has removed protection. Hernandez, 140 S. Ct. at 752 (Thomas, J., concurring). Beyond providing no federal-officer corollary to 1983, Congress "has pre-empted the state tort suits that traditionally served as the mechanism by which damages were recovered from federal officers." Id. (citing the Westfall Act, 28 U.S.C. 2679(b)). For Oliva, as for many victims of unconstitutional conduct at the hands of federal officers, it's Bivens or nothing.

do victims of unconstitutional conduct have any judicial forum [*884] whatsoever? Are all courthouse doorsboth state and federalslammed 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?

Chief Justice John Marshall warned in 1803 that when the law no longer furnishes a "remedy for the violation of a vested legal right," the United States "cease[s] to deserve th[e] high appellation" of being called "a government of laws, and not of men."9

9

Marbury v. Madison, 5 U.S. 137, 163, 2 L. Ed. 60 (1803).

Fast forward two centuries, and [**10] redress for a federal officer's unconstitutional acts is either extremely limited or wholly nonexistent, allowing federal officials to operate in something resembling a Constitution-free zone. Bivens today is essentially a relic, technically on the books but practically a dead letter, meaning this: If you wear a federal badge, you can inflict excessive force on someone with little fear of liability.

At bottom, Bivens poses the age-old structural question of American government: who decidesthe judiciary, by creating implied damages actions for constitutional torts, or Congress, by reclaiming its lawmaking prerogative to codify a Bivens-type remedy (or by nixing the preemption of state-law tort suits against federal officers)? Justices Thomas and Gorsuch have called for Bivens to be overruled, contending it lacks any historical basis.10

10

Hernandez, 140 S. Ct. at 750-53 (Thomas, J., concurring, joined by Gorsuch, J.).

Some constitutional scholars counter that judge-made tort remedies against lawless federal officers date back to the Founding.11

11

See James E. Pfander & David Baltmanis, Rethinking Bivens: Legitimacy and Constitutional Adjudication, 98 Georgetown L. J. 117, 134 (2009); see also Carlos M. Vazquez & Steven I. Vladeck, State Law, the Westfall Act, and the Nature of the Bivens Question, 161 U. Pa. L. Rev. 509, 532 (2013); 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. 132,144 (2012); Peter Margulies, Curbing Remedies for Official Wrongs: The Need for Bivens Suits in National Security Cases, 68 Case W. Res. L. Rev. 1153, 1156-64 (2018); Steven I. Vladeck, Supreme Court Review, Cato Institute, https:/ / www.cato.org/ sites/ cato.org/ files/ 2020-09/ 2020-supreme-court-review-10_vladeck.pdf; James E. Pfander, Alexander A. Reinert, Joanna C. Schwartz, The Myth of Personal Liability: Who Pays When Bivens Claims Succeed, 72 Stan. L. Rev. 561, 569 (2020); Brief Amicus Curiae of Douglas Laycock, James E. Pfander, Alexander A. Reinert and Joanna C. Schwartz, Hernandez v. Mesa, 140 S. Ct. 735, 206 L. Ed. 2d 29 (2020).

Putting that debate aside, Congress certainly knows how to provide a damages action for unconstitutional conduct. Wrongs inflicted by state officers are covered by 1983. But wrongs inflicted by federal officers are not similarly righted, [**11] leaving constitutional interests violated but not vindicated. And it certainly smacks of self-dealing when Congress subjects state and local officials to money damages for violating the Constitution but gives a pass to rogue federal officials who do the same. Such imbalancedenying federal remedies while preempting nonfederal remediesseems innately unjust.

I am certainly not the first to express unease that individuals whose constitutional rights are violated at the hands of federal officers are essentially remedy-less.12

12

See Marbury5 U.S. at 163 (noting the "general and indisputable rule, that where there is a legal right, there is also a legal remedy") (quoting 3 William Blackstone, Commentaries, 23); see also Joan Steinman, Backing [**12] Off Bivens and the Ramifications of This Retreat for the Vindication of First Amendment Rights, 83 Mich. L. Rev. 269 (1984); Betsy J. Grey, Preemption of Bivens Claims: How Clearly Must Congress Speak?, 70 Wash. U. L.Q. 1087, 1127 (1992); Joanna C. Schwartz, Alexander A. Reinert, and James E. Pfander, Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based Bivens Claims, Notre Dame L. Rev., Forthcoming 2021, https:/ / ssrn.com/ abstract=3778230; William Baude, Bivens Liability and its Alternatives, https:/ / www.summarycommajudgment.com/ blog/ a-few-thoughts-about-bivens-liability.

A [*885] 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.

David v. Weinstein Co. LLC

United States District Court for the Southern District of New York

December 19, 2019, Decided; December 19, 2019, Filed

18-cv-5414 (RA)

Reporter
431 F. Supp. 3d 290 *; 2019 U.S. Dist. LEXIS 220125 **; 2019 WL 6954363

WEDIL DAVID, Plaintiff, v. THE WEINSTEIN COMPANY LLC, THE WEINSTEIN COMPANY HOLDINGS LLC, HARVEY WEINSTEIN, and ROBERT WEINSTEIN, Defendants.

Prior History: David v. Weinstein Co. LLC, 2019 U.S. Dist. LEXIS 69917 (S.D.N.Y., Apr. 24, 2019)

Counsel: [**1] For Wedil David, Plaintiff: Kevin Todd Mintzer, LEAD ATTORNEY, Kevin Mintzer, P.C., New York, NY; Bryan Louis Arbeit, Douglas Holden Wigdor, Wigdor LLP, New York, NY.

For The Weinstein Company L.L.C., The Weinstein Company Holdings LLC, Defendants: Kristen M Peters, Laura Wilson Shelby, LEAD ATTORNEYS, Jennifer Rose Nunez, Seyfarth Shaw LLP, Los Angeles, CA; Gerald Leonard Maatman, Jr, Seyfarth Shaw LLP, Chicago, IL; Karen Yasmine Bitar, Seyfarth Shaw LLP (NYC), New York, NY.

For Harvey Weinstein, Defendant: John L Barber, Kelsey Elizabeth Scherr, LEAD ATTORNEYS, Lewis Brisbois Bisgaard and Smith LLP, Los Angeles, CA; Anne Pete, Simi Bhutani, Lewis Brisbois Bisgaard & Smith LLP, New York, NY.

For Robert Weinstein, Defendant: Brian Theodore Kohn, LEAD ATTORNEY, Schulte, Roth & Zabel LLP, New York, NY; Carly Jeanine Halpin, Gary Stein, LEAD ATTORNEYS, Schulte Roth & Zabel LLP (NY), New York, NY.

For Lance Maerov, Jeff Sackman, Defendants: Israel David, LEAD ATTORNEY, Fried, Frank, Harris, Shriver & Jacobson LLP, New York, NY.

For Richard Koenigsberg, Defendant: John Christian Scalzo, LEAD ATTORNEY, Jonathan Peter Gordon, Reed Smith LLP (NYC), New York, NY.

For Dirk Ziff, Defendant: Lawrence [**2] Steve Spiegel, LEAD ATTORNEY, Abigail Elizabeth Davis, Skadden, Arps, Slate, Meagher & Flom LLP (NYC), New York, NY.

For Tim Sarnoff, Defendant: Laura R. Washington, LEAD ATTORNEY, Joshua Garrett Hamilton, Latham & Watkins LLP (LA 10250), Los Angeles, CA; Marvin S. Putnam, LEAD ATTORNEY, Latham & Watkins LLP (LA), Los Angeles, CA.

For Paul Tudor Jones, Defendant: Alejandro Hari Cruz, James Vincent Masella, III, Patterson, Belknap, Webb & Tyler LLP, New York, NY; Melissa Rae Ginsberg, Patterson Belknap Webb & Tyler, New York, NY.

For James Dolan, Defendant: John Jacob Rosenberg, LEAD ATTORNEY, Matthew H. Giger, Rosenberg, Giger & Perala P.C., New York, NY.

Judges: Ronnie Abrams, United States District Judge.

Opinion by: Ronnie Abrams

Opinion

[*294] OPINION & ORDER

RONNIE ABRAMS, United States District Judge:

Plaintiff Wedil David filed this action against Defendants Harvey Weinstein, Robert Weinstein, The Weinstein Company LLC, and The Weinstein Company Holdings LLC,1

1

The Weinstein Company LLC and The Weinstein Company Holdings LLC are collectively referred to as the "Companies."

asserting claims related to two alleged incidents of sexual assault by Harvey Weinstein. Defendant Harvey Weinstein moved to dismiss the Fifth Cause of Action (Sex Trafficking) for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Defendant Robert Weinstein moved to dismiss the [**3] Sixth [*295] Cause of Action (Negligence)the only claim asserted against him in Plaintiff's Third Amended Complaintfor failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, Harvey Weinstein's motion is denied, but Robert Weinstein's motion is granted. Plaintiff may proceed with the following causes of action: sexual battery, battery, assault, and sex trafficking against both Harvey Weinstein and the Companies; gender violence against Harvey Weinstein; and negligence and negligent retention or supervision against the Companies.

BACKGROUND

The facts of this case have been detailed in the Court's prior opinion granting the motions to dismiss the claims against nine former directors of the Companies (the "Director Defendants"). See David v. The Weinstein Company LLC, No. 18-cv-5414 (RA), 2019 U.S. Dist. LEXIS 69917,

2019 WL 1864073 (S.D.N.Y. Apr. 24, 2019). The Court therefore includes only those facts necessary to resolve the instant motions. These facts are drawn from Plaintiff's Third Amended Complaint, filed on June 6, 2019, and are assumed to be true for the purpose of the pending motions to dismiss. See Stadnick v. Vivint Solar, Inc., 861 F.3d 31, 35 (2d Cir. 2017).

I. The Alleged Sexual Assaults

Plaintiff alleges that she first met Harvey Weinstein ("HW") at a party hosted by the Companies in late 2011. TAC [**4] 24. Upon learning that she was an actress, Weinstein allegedly offered to help Plaintiff with her acting career. Id. 25. Plaintiff states that, over the next few years, HW invited her to attend award show parties hosted by the Companies, and that the two communicated every few months. Id. 26.

Plaintiff alleges that, in late 2015, she met HW at the Montage Hotel in Beverly Hills, California to discuss a possible role on a television show called "Marco Polo," on which both HW and his brother, Robert Weinstein ("RW"), served as executive producers. Id. 28-29. HW allegedly told Plaintiff that he "had another movie role that he would cast her in," and that he also wanted her to do some "voiceover work" for him because her voice was "soft and sexy." Id. 30. According to Plaintiff, at some point during this meeting in his hotel room, HW suddenly asked if he could masturbate in front of her. Id. 31. Although Plaintiff refused his request, HW allegedly grabbed her wrist with one hand, and masturbated "in front of her until completion" with the other. Id. 32.

In early spring 2016, HW allegedly contacted Plaintiff to meet her once again at the Montage Hotel, in order to celebrate what [**5] he claimed would be her upcoming role in Marco Polo, "giving her the impression that she had been chosen for the part." Id. 33. Since Plaintiff had already been in contact with the Companies' employees about a role on Marco Polo, including speaking with a producer for Marco Polo, she agreed and met Weinstein in his hotel room. Id. 34. Plaintiff alleges that, at some point during this meeting, HW excused himself and returned wearing a bathrobe. Id. 36. According to Plaintiff, HW then "grabbed her" and "pulled her into the bedroom." Id. Although Plaintiff told HW that she "did not want to do anything sexual with him," he allegedly threw her on the bed, pulled down her jeans, and started to perform oral sex on her. Id. 37. Plaintiff alleges that HW then "used his massive weight and strength" to hold her down and force "his penis inside of her vagina without a condom." Id. After HW withdrew, he allegedly grabbed Plaintiff's wrist with one hand, and, as before, masturbated with the other. [*296] Id. Plaintiff states that she was eventually able to break free from his grasp and flee the suite. Id.

According to Plaintiff' HW subsequently contacted her, acted "as if nothing had happened" between [**6] them, and told her that he was coming to Los Angeles. Id. 38. In response, Plaintiff asserts that she "swore at him and hung up the phone." Id.

Plaintiff states that she neither received a job offer for "Marco Polo" nor for any of the other potential acting roles that HW had discussed with her. Id. 39.

Plaintiff also alleges that, for decades, HW had engaged in a "pattern and practice of sexually harassing" female employees, applicants, and "actresses seeking professional opportunities from him." Id. 88. According to Plaintiff' the Companies were also aware that HW engaged in a pattern of "using his power and the promise of procuring jobs to coerce and force actresses to engage in sexual acts with him." Id. 94.

II. Additional Allegations About Robert Weinstein

Plaintiff alleges that, during their time together at Miramax, RW knew that HW "engaged in a pattern of sexual misconduct and he helped HW cover it up." Id. 43. Specifically, Plaintiff alleges that while at Miramax, a young woman left the company abruptly after an "encounter with HW," and that the woman later received a settlement. Id. 45. Plaintiff asserts that "RW personally knew the circumstances that caused this young [**7] woman's abrupt departure because his assistant handed him a letter from the woman's lawyer, which stated Your brother is a pig. Id. 46.

Plaintiff next alleges that, in 1998, RW personally paid 250,000 to settle claims that asserted HW had "sexually assaulted and attempted to rape a female employee," Id. 47. According to Plaintiff, that settlement agreement also listed RW as one of the released parties, and stated that only RW or HW could consent to the release of confidential information covered by the agreement. Id. 48. Plaintiff asserts that RW had both "personal and financial motives to help conceal HW's sexual misconduct." Id. 50.

Plaintiff asserts that, although RW knew about HW's sexual misconduct and helped to conceal it, RW nonetheless made public statements about HW's "'good' behavior." Id. 57. According to Plaintiff, RW's statements "maintained the public perception that HW was a 'kind' and 'gentle' person." Id. 59.

Despite knowing about HW's sexual misconduct, Plaintiff alleges, RW nonetheless decided to leave Miramax with HW in 2005 to start the Companies. Id. 60. Plaintiff further states that, notwithstanding his purported knowledge that HW still engaged in [**8] "similar sexualized and abusive conduct," RW effectively gave HW "free reign to run his portion of the business." Id. 62. Plaintiff further alleges that RW knew HW "posed a risk to the female employees and actresses" that HW encountered in connection with the business. Id. 64. RW, however, allegedly "did nothing to warn or otherwise protect" those female employees and actresses. Id. 67. Rather, Plaintiff claims, RW permitted HW to "misuse the Companies' funds and resources to engage in his sexual misconduct." Id. 68.

According to Plaintiff, RW also knew that his brother was "doing nothing" to address his "sexualized and abusive behavior." Id. 71. Plaintiff asserts that HW's behavior "got so bad that RW and HW stopped interacting. Id. 73. RW allegedly moved to Los Angeles to run the

Companies' office there, and so that he could "further distance himself from HW and not [WC97] be forced to take action to stop his sexual misconduct." Id. 75. Plaintiff again alleges that, throughout this time, RW "did nothing to stop HW or warn other female employees and actresses about the consequences of being around HW." Id. 1 73. Plaintiff states that although RW "distanced and protected himself from [**9] HW," he still did not warn or protect anyone else. Id. 76.

Plaintiff asserts that, rather than taking any action, RW "continued to back HW" professionally, including by re-signing his employment agreement in 2015. Id. 78-79. According to Plaintiff, RW had a financial incentive "not to warn" the Companies' Board of Directors about HW's sexual misconduct or about RW's own "prior acts" to conceal the misconduct. Id. 84.

PROCEDURAL HISTORY

The Court assumes the parties' familiarity with the procedural history of this case. Events between November 14, 2017, when Plaintiff filed her initial complaint in California state court, and April 24, 2019, when this Court dismissed Plaintiff's claims against the Director Defendants, were summarized in the Court's prior opinion. See David, 2019 U.S. Dist. LEXIS 69917, 2019 WL 1864073, at *3-4. The Court now details the procedural history subsequent to its April 24, 2019 opinion.

On May 17, 2019, Plaintiff filed a Third Amended Complaint. See Dkt. 147. Plaintiff's Third Amended Complaint pleaded an additional cause of action against HW and the CompaniesSex Trafficking under the Trafficking Victims Protection Act (the "TVPA"), 18 U.S.C. 159las well as additional allegations purporting to demonstrate RW's negligence. See [**10] Dkt. 148.

On June 6, 2019, Plaintiff re-filed her Third Amended Complaint ("TAC"), naming as Defendants only The Weinstein Company LLC, The Weinstein Company Holdings LLC, HW, and RW. See Dkt. 161.

On June 21, 2019, HW moved to dismiss Plaintiff's Fifth Cause of Action (Sex Trafficking under the TVPA). See Dkt. 164.2

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HW has not moved to dismiss any of Plaintiff's other claims against him: sexual battery in violation of Cal. Civ. Code 1708.5 (First Cause of Action); gender violence in violation of Cal. Civ. Code 52.4 (Second Cause of Action); battery (Third Cause of Action); and assault (Fourth Cause of Action).

On that same day, RW separately moved to dismiss Plaintiff's Sixth Cause of Action (Negligence), the only cause of action still asserted against him, See Dkt. 167. Plaintiff filed oppositions to both motions on July 22, 2019. See Dkts. 169 and 170. HW and RW filed replies on August 19, 2019. See Dkts. 175 and 176, respectively.3

On August 12, 2019, the Companies filed their Answer to the TAC. See Dkt. 174, The Companies have not moved to dismiss any of Plaintiff's claims.

On September 16, 2019, the Court stayed discovery as to RW pending the resolution of his motion to dismiss, and, as to HW and the Companies, referred the case to Magistrate Judge Lehrburger for general pretrial purposes (after which it was reassigned to Magistrate Judge Fox). See Dkt. 182.

On November 6, 2019, the Court held argument on both HW's and RW's motions to dismiss. See Dkt. 196. For the reasons discussed below, the Court now denies HW's motion, but grants RW's motion.

STANDARD OF REVIEW

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must [**11] plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl Corp. v. [*298] Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557). On a Rule 12(b)(6) motion, the question is "not whether [the plaintiff] will ultimately prevail," but "whether [her] complaint [is] sufficient to cross the federal court's threshold." Skinner v. Switzer, 562 U.S. 521, 529-30, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011) (citation omitted). In answering this question, the Court must "accept[] all factual allegations as true, but 'giv[e] no effect to legal conclusions couched as factual allegations.'" Stadnick, 861 F.3d at 35 (quoting Starr v. Sony BUG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010)).

DISCUSSION

I. Defendant Harvey Weinstein's Motion to Dismiss the Fifth Cause of Action

HW argues that Plaintiff fails to state a claim for sex trafficking under the Trafficking Victims Protection Act (the "TVPA"), 18 U.S.C. 1591, because she fails to plausibly allege a "commercial sex act," a required element of the claim. HW contends that because the TAC does not allege that Plaintiff [**12] received "anything of value, such as money, property, or any specific career advancement" in connection with the two alleged sexual assaults, see HW Mot., Dkt. 165, at 3, Plaintiff's sex trafficking claim must fail. The Court disagrees.

Section 1591 provides that "Whoever knowingly . . . in or affecting interstate or foreign commerce, . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person . . knowing, or . . . in reckless disregard of the fact, that means of force, threats of force, fraud, . . . or any combination of such means will be used to cause the person to engage in a commercial sex act, ... shall be punished as provided in subsection (b)." 18 U.S.C. 1591(a). The term "commercial sex act" is defined as "any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. 1591(e)(3).

Thus, to state a claim under Section 1591, "as applied here, Plaintiff must adequately plead that [HW] knowingly and in interstate or foreign commerce: (1) recruited, enticed, harbored, transported, provided, obtained, or maintained by any means a person; (2) 'knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud . . or any combination [**13] of such means will be used'; (3) 'to cause the person to engage in a commercial sex act.'" Noble v. Weinstein, 335 F. Supp. 3d 504, 515 (S.D.N.Y. 2018) (quoting 18 U.S.C. 1591)).

Numerous judges in this district have denied motions to dismiss similar TVPA claims brought against HW. See Geiss v. The Weinstein Co. Holdings LLC, 383 F. Supp. 3d 156, 163, 168 (S.D.N.Y. 2019) (denying HW's motion to dismiss the sex trafficking claim under the TVPA where HW's behavior "followed a consistent pattern," in which HW "set up meetings with women under the guise of assisting them with their careers, isolated them after they had arrived for the meetings, and assaulted, battered, or attempted to assault them"); Canosa v. Ziff, No. 18 Civ, 4115 [*299] (PAE), 2019 U.S. Dist. LEXIS 13263, 2019 WL 498865, at *22 (S.D.N.Y. Jan. 28, 2019) (rejecting the argument that "the TVPA was not intended to apply in contexts such as those pled by Canosa," and holding that the allegations in plaintiff's amended complaint stated a claim for sex trafficking under the TVPA as against HW); Noble, 335 F. Supp. 3d at 521 (denying HW's motion to dismiss the sex trafficking claim and holding that plaintiff sufficiently alleged participation in a "commercial sex act" because "[f]or an aspiring actress, meeting a world-renowned film producer carries value, in and of itself"). This Court finds persuasive the reasoning employed and the conclusions rendered in these cases. See also Ardolf v. Weber, No. 18 Civ. 12112 (GBD), 332 F.R.D. 467, 2019 WL 3759374, at *2-3, *7 (S.D.N.Y. July 25, 2019) (denying photographer's motion to dismiss sex trafficking [**14] claim brought under the TVPA by former male models where plaintiffs alleged sexual assault in connection with photographer's "offer[] [of] valuable career advancement, including future modeling jobs").

A. HW's Conduct Falls Within the Plain Language of the TVPA

In a case alleging a statutory violation, a court "begin[s] with the text of the statute to determine whether the language at issue has a plain and unambiguous meaning." Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 108 (2d Cir. 2012) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)). If a statute's language does in fact have a plain and unambiguous meaning, the inquiry ends there. See BedRoc Ltd., LLC v. United States, 541

U.S. 176, 183, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (citations omitted). The TVPA's language, while broad, is plain and unambiguous. The statute provides that any person who "knowingly" "entices," among other things, another person "by any means," knowing that "force, threats of force, fraud, . . . or any combination" thereof "will be used to cause" that person "to engage in a commercial sex act," is liable for sex trafficking under the TVPA. See 18 U.S.C. 1591(a). As discussed below, the phrase "commercial sex act" is expressly defined in the statute, and there is nothing ambiguous about the remaining language of the [**15] provision.

Numerous courts have thus found that the TVPA covers allegations of coercive sexual assault where the defendant uses force and/ or fraud to entice the plaintiff to engage in a "commercial sex act," even if the defendant has not "trafficked" the plaintiff within the ordinary or traditional meaning of that word. See Ardolf, 332 F.R.D. 467, 2019 WL 3759374, at *3 ("Even though this law has been traditionally used to prosecute the types of sex trafficking that Defendant describes, [i.e., 'the illicit sex trade and human trafficking for commercial gain,'] that does not mean that it only applies in those circumstances."); Geiss, 383 F. Supp. 3d at 168 ("[T]he TVPA extends to enticement of victims by means of fraudulent promises of career advancement, for the purpose of engaging them in consensual or, as alleged here, non-consensual sexual activity."); Canosa, 2019 U.S. Dist. LEXIS 13263, 2019 WL 498865, at *23 ("[Defendants'] attempt to cabin the TVPA to reach only caricatures of child slavery, and to exclude corporate-supported conduct, is wholly unpersuasive. The text of the TVPA does not provide any charter for this self-serving distinction."); Noble, 335 F. Supp. 3d at 516 (rejecting the argument that "the application of Section 1591 should be limited to 'the type of criminality for which the Government has historically prosecuted under Section 1591, such as [**16] child prostitution, torture, and child pornography,' and noting that "other courts have applied Section 1591 to [*300] defendants who have lured women, under false pretenses and with lucrative promises, for sexual purposes") (citations omitted); see also Huett v. The Weinstein Co. LLC, No. 18-cv-06012-SVW-MRW, 2018 U.S. Dist. LEXIS 223736, 2018 WL 6314159, at *1 (C.D. Cal. Nov. 5, 2018) ("[N]otwithstanding Defendant's argument regarding legislative intent, there are reasons to believe that Sections 1591 and 1595 should be interpreted broadly.").

The Court disagrees with HW's contention that applying the TVPA to Plaintiff's sex trafficking claim would be "an utter perversion of the legislative intent behind the statute," HW Mot. at 5, because, as HW claims, the TVPA was not intended to cover allegations of sexual assault "related to an interview or meeting with a superior," HW Reply, Dkt. 175, at 7. As an initial matter, the Court need not look to the legislative history where the statute's language is plain and unambiguous, as here. See BedRoc Ltd., 541 U.S. at 183; Lawrence + Memorial Hosp. v. Burwell, 812 F.3d 257, 266 (2d Cir. 2016). Moreover, HW's argument that the TVPA is only appropriate in cases of "slavery, involuntary servitude, or human trafficking," such as those that involve "the sale of women and minors, drugging and kidnapping, smuggling women and minors, and forced prostitution," [**17] appears to be based on one piece of legislative historya House of Representatives Committee Report on the original version of the TVPA. See HW Mot. at 5.

HW's narrow interpretation of Section 1591 ignores both basic canons of statutory interpretation and the prevailing case law. The Court's conclusion, moreover, is reinforced by the fact that "Section 1595 is a remedial provision that permits civil actions for damages under Section 1591," and the Supreme Court "has recognized a 'canon of construction' that remedial statutes should be liberally construed." Huett, 2018 WL 6314159, at *1 (quoting Peyton v. Rowe, 391 U.S. 54, 65, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968)).

In short, while this case might not be an "archetypal sex trafficking action," see Noble, 335 F. Supp. 3d at 515, the Court nonetheless finds the TVPA' s language broad, the other judges' analyses in similar cases against HW compelling, and HW's arguments unavailing. The Court therefore concludes that the TVPA can be appropriately applied to this case.4

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The Court is also not convinced that application of the TVPA here would cause a "dangerous domino effect" in which "this Circuit will be faced with a tidal wave of cases involving trafficking claims arising from any job interview or meeting in which there is a disparate level of power or fame." HW Mot. at 4, 8-11. HW offers no support for his dramatic assertion, other than to say that Noble and the subsequent cases were decided in error, see id at 8-10, and/ or were "[e]mboldened by the torrent of negative media coverage [of HW] over the past year and a half," see id. at 11. However, a sex trafficking claim will not arise from "any job interview or meeting in which there is a disparate level of power or fame," as HW suggests. Importantly, the other elements of Section 1591 serve as a natural limiting principle, asin HW's hypotheticalthe superior must have first enticed the victim, using some combination of fraud and/ or force, and the superior must then have caused the victim to engage in a sex act.

B. The TAC Adequately Pleads that HW "Enticed" Plaintiff

It appears undisputed that Plaintiff has adequately alleged that HW "enticed" her. For the purposes of a Section 1591 claim, courts have interpreted the word "entice" based on its ordinary meaning, which is "'to attract artfully or adroitly or by arousing hope or desire,' and [**18] [to] attract or tempt by offering pleasure or advantage." Noble, 335 F. Supp. 3d at 517 (citations omitted). The TAC alleges that Plaintiff met with HW in late [*301] 2015 "to discuss a prospective acting job" on Marco Polo, and that during that meeting, HW also told Plaintiff that he "wanted her to do some voiceover work for him because her voice was 'soft and sexy,'" and that he "had another movie role that he would cast her in." TAC 28, 30. In early spring 2016, HW allegedly organized a second meeting with Plaintiff "to celebrate her upcoming role in Marco Polo, giving her the impression that she had been chosen for the part." Id. 33. HW's "empty promises of a film role" in both situations were "more than enough to arouse 'hope and desire' in [Plaintiff], an aspiring actress," thereby sufficiently "enticing" her. See Noble, 335 F. Supp. 3d at 517; see also Ardolf, 332 F.R.D. 467, 2019 WL 3759374, at *3 ("[T]he use of the term 'entice' in

the TVPA means that the perpetrator attracts the victim by offering something that arouses hope or desire.").

C. The TAC Adequately Pleads that HW Knew "Means of Force [and] Fraud" Would Be Used

Plaintiff has also sufficiently alleged that HW knew he would use fraud and force. For the purposes of a Section 1591 claim, courts have found that the requirement of "knowledge" [**19] is satisfied if the complaint plausibly alleges "a modus operandi, such that [the defendant] knew that he had a pattern of using fraud or force to cause commercial sex acts with victims." Ardolf, 332 F.R.D. 467, 2019 WL 3759374, at *4; see also Noble, 335 F. Supp. 3d at 517-18 ("The plain language of Section 1591(a) requires Plaintiff to plausibly allege knowledge, or a modus operandi, associated with [the] 'enticement,' that Defendant enticed Plaintiff with knowledge that means of force or fraud would be used to cause a commercial sex act to take place.") (citing United States v. Todd, 627 F.3d 329, 333-34 (9th Cir. 2010)). In other words, Plaintiff must allege that HW had an awareness or understanding that "if things go as he has planned, force, fraud or coercion will be employed to cause his victim to engage in a commercial sex transaction." Todd, 627 F.3d at 334; see also Noble, 335 F. Supp. 3d at 518 (explaining that plaintiff is required to allege that defendant had "awareness, at the initial recruitment or enticement stage, that certain prohibited means will be employed to achieve a perverse end goal: a commercial sex act").

The TAC contains a "pattern of behavior," or modus operandi, that "plausibly alleges a knowledge and understanding that . . . [HW] would use fraudulent means to entice [Plaintiff] to engage in a sex act with him." Noble, 335 F. Supp. 3d at 518; see TAC 23-39. In particular, Plaintiff [**20] alleges that, "[f]or decades," HW had a "pattern and practice of sexually harassing female employees and applicants as well as actresses seeking professional opportunities from him." TAC 88. According to Plaintiff, HW "us[ed] his power and the promise of procuring jobs to coerce and force actresses to engage in sexual acts with him." 94. Plaintiff's allegations that HW "lure[d]" her to a hotel with "the promise of a role" in one of his productions, id. 1, must be viewed in combination with the allegations that HW had engaged in a pattern of doing the same with other women over decades. This leads to the plausible inference that HW knew that force and fraud would be used to cause Plaintiff to engage in a commercial sex act.

Though Plaintiff need not allege both "fraud" and "force," here, the TAC adequately pleads that HW knew both means would be used. Plaintiff alleges that HW used fraud since, according to the TAC, he made "fraudulent promises and offers of career success" in order to lure Plaintiff to his hotel room on two occasions. See Ardolf, 332 F.R.D. 467, 2019 WL 3759374, at *4. Specifically, Plaintiff [*302] alleges that the first meeting was set up "to discuss a prospective acting job on a television show called 'Marco [**21] Polo,' and that during the meeting, HW also made statements indicating that he wanted to hire her for "some voiceover work" and "another movie role." TAC 28, 30. As to the second meeting, Plaintiff asserts that HW asked to meet with her "to celebrate her upcoming role in Marco Polo." Id. 33. As Plaintiff "never received a job offer for the

Marco Polo project," nor for any "other projects that HW had discussed with her," id. 39, the allegations in the TAC "go beyond mere non-performance," and "evidence conscious behavior and fraudulent intent." Noble, 335 F. Supp. 3d at 518. Indeed, HW's failure to perform on these alleged promises suggests that he knew "his promises had no factual basis" when he enticed Plaintiff to meet with him. Id.

The TAC also contains multiple allegations that HW used force. See TAC 32 ("HW proceeded to grip her wrist with one hand while using the other to masturbate in front of her until completion."); id. 36 ("HW grabbed her and pulled her into the bedroom."); id. 37 ("HW then used his massive weight and strength to force himself on her, pushing his penis inside of her vagina without a condom."). As Section 1591 "refers to the noun 'force,' not to the verb 'to force,'" see Ardolf, 332 F.R.D. 467, 2019 WL 3759374, at *5, these allegations [**22] are sufficient to show that HW used force to cause Plaintiff to engage in the alleged sexual assaults.

D. The TAC Adequately Pleads a "Commercial Sex Act"

Lastly, Plaintiff has sufficiently alleged that HW's use of fraud and force caused her to engage in a commercial sex act. As an initial matter, Plaintiff has adequately pleaded a "sex act." See, e.g., TAC 32, 37. The issue before the Court is thus whether Plaintiff has adequately pleaded a "commercial sex act" under the TVPA.

"'Commercial sex act' is defined in Section 1591(e)(3) as 'any sex act, on account of which anything of value is given to or received by any person." Noble, 335 F. Supp. 3d at 520 (quoting 18 U.S.C. 1591(e)(3)) (emphasis in Noble). "Congress's use of expansive language in defining commercial sex actusing such terms as 'any sex act,' anything of value,' given to or received by any person'requires a liberal reading." Id. at 521; see also id. at 516 ("Where, as here, a broad statute has a plain and unambiguous meaning, it ought to be interpreted broadly.") (citing BedRoc Ltd, 541 U.S. at 183). In fact, the sex act itself need not occur to state a cause of action under the TVPA. See United States v. Alvarez, 601 F. App'x 16, 18 (2d Cir. 2015) ("The [TVPA] criminalizes certain means when they are 'used to cause' an act, and thus is concerned with the means and not with the result."). [**23] A plaintiff's sex trafficking claim thus survives if she pleads that the defendant enticed her while knowing that he would cause her to engage in a commercial sex act, regardless of whether that act ultimately occurs. See United States v. Corley, 679 F. App'x 1, 7 (2d Cir. 2017) ("[T]he plain meaning of the statute . . . requires only that the defendant 'know' that the victim 'will be caused' to engage in a commercial sex act; the statute does not require that an actual commercial sex act have occurred."); see also United States v. Bazar, 747 F. App'x 454, 456 (9th Cir. 2018) ("[A] trafficker can be convicted under section 1591 even if his victim did not perform a single commercial sex act.") (citation omitted); United States v. Williams, 666 F. App'x 186, 197 n.6 (3d Cir. 2016) ("[Section] 1591 does not require that there be a direct temporal nexus between the threats, force, fraud, or coercion [*303] and the

commercial sex act although the closer the coercive conduct is to the [sex acts], the more likely the causation element of the offense will be satisfied.").

When accepting all factual allegations as true and construing reasonable inferences in Plaintiff's favor, the Court finds that the TAC plausibly alleges that Plaintiff received a thing "of value" in exchange for the sex acts that took place. Plaintiff, an aspiring actress, received meetingsprivate meetingswith one of the most influential [**24] producers in her industry, as well as opportunities for potential movie and television roles based on her contact with him. See TAC 23-39. The Court agrees with the other judges who have considered this issue that these meetings, as well as the promises of professional opportunities and success attendant to these meetings, are things of value for the purposes of a TVPA claim. See Noble, 335 F. Supp. 3d at 521 ("For an aspiring actress, meeting a world-renowned film producer carries value, in and of itself. The opportunity, moreover, for the actress to sit down with that producer in a private meeting to . . . discuss a promised film role carries value that is career-making and life-changing."); see also Ardolf, 332 F.R.D. 467, 2019 WL 3759374, at *7 (holding that "Defendant's alleged fondling of Plaintiffs' genitals was commercial in nature because he offered them valuable career advancement, including future modeling jobs, to allow it to happen") (citations omitted); Geiss, 383 F. Supp. 3d at 168 (holding that "the TVPA extends to enticement of victims by means of fraudulent promises of career advancement, for the purpose of engaging them in consensual or . . . non-consensual sexual activity"); Canosa, 2019 U.S. Dist. LEXIS 13263, 2019 WL 498865, at *22 n.26 (holding that plaintiff adequately pleaded a "commercial sex act" based on her "reasonable [**25] expectation of receiving [something of value] in the future, based on [HW's] repeated representations that she would") (citation omitted).

Plaintiff alleges that she first met with HW in late 2015 "to discuss a prospective acting job" on Marco Polo and other potential roles. TAC 28, 30. Following that meetingat which HW forcibly held Plaintiff's wrist while masturbating in front of hershe had "several phone calls and emails with the Companies' employees about a role on Marco Polo," and even spoke to a producer for Marco Polo. Id. 34. At some point also following that first meeting, HW allegedly contacted Plaintiff again to meet with him to "celebrate her upcoming role in Marco Polo, giving her the impression that she had been chosen for the part." Id. 33. Thus, with respect to the first meeting and the attendant sex act, at the very least, Plaintiff has alleged that she received "phone calls and emails" about Marco Polo, if not an actual role on Marco Poloall of which constitute "things of value" for the purposes of her sex trafficking claim.

When Plaintiff then returned to HW's hotel room a second time in early spring 2016, she did so because 11W had contacted her purportedly [**26] "to celebrate her upcoming role in Marco Polo." Id. Although she had previously discussed this role with employees at the Companies, she had not yet been officially cast in the role. Id. 34. HW's suggestion that he wanted to celebrate her upcoming role in Marco Polo led her to believe that she had gotten the part. Id. 33. It is reasonable to assume that Plaintiff expected to receive something of valueat a minimum, the role in Marco Poloin return for meeting with HW a second time. At that second meeting, HW "force[d] himself on her, pushing his penis inside of her vagina." Id. 37. Plaintiff ultimately broke free

and left the hotel room, subsequently swearing at HW and hanging up on him when he "contacted [*304] [her] thereafter and acted as if nothing had happened." Id. 38. Although she never received the role on Marco Polo, Plaintiff nonetheless received a "thing of value" from this meeting and sexual encounter for purposes of the TVPAnot only the meeting, but also the promise of and opportunity for career advancement.

In evaluating a Section 1591 claim, it is also important to view the conduct through the perspective of the alleged perpetrator. The Court must determine whether HW "intended, [**27] or was aware, 'that the fraud and force would cause a [commercial] sex act to take place." Ardolf, 332 F.R.D. 467, 2019 WL 3759374, at *5 (quoting Noble, 335 F. Supp. 3d at 519). As to the fraud, "the question is whether [HW] made material misstatements that he knew a reasonable plaintiff would rely on." Id. at *6 (citation omitted). The allegations in the TAC support a finding that HW made material misrepresentations to Plaintiff, by suggesting that he had certain film and television roles in mind for her and by specifically representing that she had received the role in Marco Polo. See TAC 28, 30, 33. Moreover, HW knew that an "aspiring actress" in Plaintiffs position would reasonably rely on such statements. See Ardolf, 332 F.R.D. 467, 2019 WL 3759374, at *6 ("Defendant's promises of career advancement were undoubtedly material because he was very powerful and influential in the fashion industry, so it was perfectly reasonable for aspiring male models to rely on them.") (citation omitted); Noble, 335 F. Supp. 3d at 519 (finding that, "[m]ade to an aspiring actress by a film producer and co-founder of a top film studio, the statements are clearly material, and induced reasonable reliance," particularly since "[t]he statements caused [the aspiring actress] to first go to [HW's] hotel room, and then to partially 'compl[y]' in the performance [**28] of a sex act").

The TAC also adequately pleads that HW knew he would use force to cause Plaintiff to engage in a sex act. Plaintiffs allegations that HW used physical force during both incidents, see TAC 32,36-37, as well as her allegations that HW engaged in a "pattern of using his power and the promise of procuring jobs to . . . force actresses to engage in sexual acts with him," id. 94, inevitably leads to this conclusion.

Finally, contrary to HW's assertion that a "commercial sex act" must be "economic in nature," HW Mot. at 7, the TVPA contains no such requirement. Indeed, courts have routinely rejected this argument. See, e.g., Noble, 335 F. Supp. 3d at 515-16 (rejecting HW's argument that "the 'commercial sex act' element [was] absent because nothing of value was exchanged"); United States v. Raniere, 384 F. Supp. 3d 282, 318 (E.D.N.Y. 2010) ("Courts have consistently held that 'anything of value' encompasses more than simply monetary exchanges.").5

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The one case that HW cites as "particularly instructive" on this point is not so. See HW Mot. at 8. HW cites Kolbeck v. Twenty First Century Holiness Tabernacle Church, Inc., No. 10-CV-4124, 2013 U.S. Dist. LEXIS 180463, 2013 WL 6816174 (W.D. Ark. Dec. 24, 2013) for the proposition that the TVPA should not apply "in the absence of a clear exchange of value." HW Reply at 6; see also HW Mot. at 8. But in Kolbeck, whether plaintiffs alleged "a thing of value"

was not at issue. Rather, the court rejected the sex trafficking claim because it found that there was no causal connection between the "thing of value" (the payment of living expenses) and the sex act. See Kolbeck, 2013 U.S. Dist. LEXIS 180463, 2013 WL 6816174, at *16 ("Plaintiffs offer no evidence of a causal relationship between the sex acts and the payment of expenses" since they "have not offered any evidence showing that [their] living expenses were paid as some sort of quid pro quo for the sex acts that occurred with [Defendant]."). Here, the TAC alleges a connection between the meetings and potential for career advancement, on the one hand, and the sexual assaults, on the other, because Plaintiff expected to receive something of value in exchange on both occasions. In other words, the TAC plausibly alleges that Plaintiff received the "thing of value"both the meetings and the promises of certain movie and television rolesas a quid pro quo for meeting with HW and being caused to engage in the sex acts. The other cases cited by HW are inapposite. In United States v. Campbell, 111 F. Supp. 3d 340 (W.D.N.Y. 2015), the court addressed whether Section 1591 was a valid exercise of Congress's Commerce Clause power, but did not define or limit "anything of value" to include only those transactions involving money. In United States v. Reed, No. 15-188 (APM), 2017 U.S. Dist. LEXIS 118020, 2017 WL 3208458 (D.D.C. July 27, 2017), the court analyzed the constitutionality of a different statute, 18 U.S.C. 2423(c), and again did not limit "commercial sex act" as defined in Section 1591 in any way.

Moreover, the fact that HW [*305] did not ultimately deliver on his promises to cast Plaintiff in Marco Polo, or any other television or movie roles, does not mean that Plaintiff was not given anything of value. To the contrary, "[e]ven if the prospect[s] of a film role . . were not 'things of value' sufficient to satisfy [the] commercial [**29] aspect of the sex act definition, [Plaintiff's] reasonable expectation of receiving those things in the future, based on [HW's] repeated representations that she would, is sufficient." Noble, 335 F. Supp. 3d at 521; see also Huett, 2018 WL 6314159, at *3 ("Even if Plaintiff did not in fact receive a role in exchange for the sex act, but rather only received a promise of a role, such a promise would still have held value to Plaintiff at the time."). The TAC alleges such promises were made. See, e.g., TAC 130 (HW told Plaintiff that he wanted her "to do some voiceover work for him" and that he "had another movie role that he would cast her in"). Further, even the mere "hope for a beneficial financial relationship," as HW concedes is alleged in the TAC, see HW Mot. at 8, would suffice.

Because the TAC adequately pleads that Plaintiff received something of value in exchange for the sex acts, and that HW knew he would use fraud and/ or force to cause Plaintiff to engage in those sex acts, Plaintiff adequately pleads a commercial sex act, and thus a sex trafficking claim under the TVPA. HW's motion to dismiss the Fifth Cause of Action is therefore denied.

II. Defendant Robert Weinstein's [**30] Motion to Dismiss the Sixth Cause of Action

RW argues that Plaintiff fails to state a claim for negligence because the TAC fails to establish any legally cognizable duty of care that RW owed to Plaintiff. The Court agrees. Under either New York law or California law, Plaintiff fails to state a claim for negligence as to RW because the allegations in the TAC do not establish the threshold element of duty.6

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Both parties agree that the Court need not address the choice of law issue at this time. In any event, as the parties also agree, there is no material difference between the substantive negligence laws of New York and California for the purposes of RW's motion to dismiss. See RW Mot., Mt. 168, at 7; Pl. Opp'n, Dkt. 170, at 8-9, 8 n.4. Plaintiff's negligence claim against RW fails regardless of which state's law governs.

A. Standard of Negligence

"To establish a prima facie case of negligence under New York law, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom.'" Lerner v. Fleet Bank, N.A., 459 F.3d 273, 286 (2d Cir. 2006) (quoting Solomon ex rel. Solomon v. City of New York, 66 N.Y.2d 1026, 1027, 489 N.E.2d 1294, 499 N.Y.S.2d 392 (1985)). As the Court explained when granting the Director Defendants' motions to dismiss, "absent a special relationship, 'a defendant [*306] generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter [the] defendant can exercise such control.'" David, 2019 U.S. Dist. LEXIS 69917, 2019 WL 1864073, at *6 (quoting Rabin v. Dow Jones & Co., Inc., No. 14-cv-4498 (JSR), 2014 WL 5017841, at *21 (S.D.N.Y. Sept. 23, 2014)). Furthermore, "[a]bsent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." Id. [**31] (quoting 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280, 289, 750 N.E.2d 1097, 727 N.Y.S.2d 49 (2001)).

Similarly, in order to state a claim for negligence under California law, "a plaintiff must establish four required elements: (1) duty; (2) breach; (3) causation; and (4) damages." Fabian v. LeMahieu, No. 19-CV-00054-YGR, 2019 U.S. Dist. LEXIS 172906, 2019 WL 4918431, at *11 (N.D. Cal. Oct. 4, 2019) (quoting Illeto v. Glock Inc., 349 F.3d 1191, 1203 (9th Cir. 2003)). "Generally, under California law, there is 'no duty to act to protect others from the conduct of third parties.'" McConnell v. Lassen Ciy., No. Civ. S-05-0909 FCD DAD, 2007 U.S. Dist. LEXIS 35056, 2007 WL 1412300, at *4 (E.D. Cal. May 14, 2007) (quoting Margaret W v. Kelley R., 139 Cal. App. 4th 141, 150, 42 Cal. Rptr. 3d 519 (Ct. App. 2006)); see also Toomer v. United States, 615 F.3d 1233, 1236 (9th Cir. 2010) ("The first element of any negligence claim is the existence of a duty. . . . Generally there is no obligation to protect others from the harmful conduct of third parties.") (citations omitted). "However, a defendant may owe an affirmative duty to protect another from the conduct of third parties if he or she has a 'special relationship' with the other person." McConnell, 2007 WL 1412300, at *4 (quoting Delgado v. Trax Bar & Grill, 36 Cal. 4th 224, 235, 30 Cal. Rptr. 3d 145, 113 P.3d 1159 (2005)); see also Regents of the Univ. of Cal. v. Superior Court, 4 Cal. 5th 607, 619, 230 Cal. Rptr. 3d 415, 413 P.3d 656 (2018) ("A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act.") (quoting Williams v. California, 34 Cal. 3d 18, 23, 192 Cal. Rptr. 233, 664 P.2d 137 (1983)). Nonetheless, "[i]f there is no duty, there can be no liability, no matter how

easily one may have been able [**32] to prevent injury to another." Margaret W, 139 Cal. App. 4th at 150.

B. The TAC Does Not Adequately Plead that RW Owed Plaintiff a Duty

Plaintiff concedes that RW did not owe her a duty of care based on any "special relationship."7

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Plaintiff seems to have abandoned her previous theory of negligencethat RW had a duty to prevent HW from committing tortious acts by virtue of a "special relationship." The Court nonetheless notes that the additional allegations in the TAC do not support a finding of any "special relationship" sufficient to give rise to a duty. Moreover, Plaintiff's attempt to repackage her claim by arguing that she has sued RW in his "personal capacity," as HW's "brother and long-time business partner," as opposed to in his official capacity, as a director and officer of the Companies, see Pl. Opp'n, Dkt. 170, at 6, makes no difference. Plaintiff points to no authority that would support a claim of third-party negligence based on such a familial or long-time business relationship, and the Court is aware of none.

See, e.g., Pl. Opp'n, Dkt. 170, at 10. Instead, Plaintiff now argues that RW owed her a duty of care "not based on a special relationship, but because [RW], through his own actions, is responsible for enabling [HW] to engage in sexual misconduct with female actresses, [*307] and as a result placed [Plaintiff] in a position of foreseeable harm." Id. Plaintiff contends that the "nearly fifty additional allegations" about RW in the TAC "demonstrate that he did more than fail to act," id. at 9, i.e., that he engaged in certain "affirmative conduct that created or exacerbated a risk of danger to which she otherwise would not have been exposed," id. at 2. While it is true that Plaintiff added almost fifty allegations to the TAC, purportedly detailing RW's liability, see TAC 41-87, these allegations are insufficient to show that RW engaged in any affirmative act that could give rise to a duty of care.

Plaintiff asserts specifically that RW engaged in three categories of affirmative acts that "created" or "exacerbated" [**33] her risk of harm: (1) covering up of HW's sexual misconduct, including by paying and otherwise being involved in settlements, see, e.g., id. 43-49, 64, 102; (2) making public statements regarding HW, portraying him as a "kind" and "gentle" person, see, e.g., id. 57-59; and (3) providing HW with the resources and opportunities with which to engage in sexual misconduct, see, e.g., id. 62, 68, 78-79. See also PL Opp'n, Dkt. 170, at 1 ("For years, [RW] actively worked to conceal [HW's] sexual misconduct, to present a false impression to the world that [HW] was safe to work with, and he continued to empower [HW] with resources, status and opportunities to find more victims."). Notwithstanding these additional allegations, Plaintiff's negligence claim against RW still boils down to the same claim that she previouslyand unsuccessfullyasserted against RW and the other Director Defendants: that RW failed to act to prevent harm caused by HW. Indeed, the entire premise of Plaintiff's negligence claim is that, despite RW's purported knowledge, acquiescence, and concealing of HW's sexual misconduct, RW failed to act. See, e.g., TAC 2 (RW "covered for HW's sexual misconduct and created [**34]

an environment where [Plaintiff] and scores of other female employee actresses were harmed by a sexual predator, yet RW did nothing to warn these women about HW's propensity to engage in sexual misconduct, or prevent HW from using the Companies' resources to lure these women to him."); see, also, e.g., id. 62, 64, 67-68, 71-73, 76.

The TAC simply does not plead any active rolei.e., affirmative misfeasanceon the part of RW sufficient to give rise to a duty of care. See David, 2019 U.S. Dist. LEXIS 69917, 2019 WL 1864073, at *1-3, *6-7 (rejecting similar arguments that RW owed a duty of care based on his purported "facilitation" and "enabl[ing]" of HW's alleged misconduct, and stating that, while "such actions on the Director Defendants' part were not without moral culpability," Plaintiff "failed to allege how this constituted negligence as a legal matter"); see also Melton v. Boustred, 183 Cal. App. 4th 521, 531, 107 Cal. Rptr. 3d 481 (Ct. App. 2010) ("Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention."). At most, the TAC alleges that RW concealed HW's acts of sexual misconduct, while making public statements that portrayed HW in a [**35] manner that belied his violent and predatory nature.8

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As to the third category of purported affirmative actsthat RW "continued to empower [HW] with resources, status and opportunities to find more victims"the TAC is insufficient for the reasons addressed in the Court's prior opinion. See David, 2019 U.S. Dist. LEXIS 69917, 2019 WL 1864073, at *6-7.

Even accepting the allegations as true, however, neither the alleged [*308] concealment nor the public statements give rise to a duty owed by RW to Plaintiff. See In re Sept. 11 Litig., 280 F. Supp. 2d 279, 290 (S.D.N.Y. 2003) ("The injured party must show that a defendant owed not merely a general duty to society but a specific duty to the particular claimant, for 'without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.'") (quoting Lauer v. City of New York, 95 N.Y.2d 95, 100, 733 N.E.2d 184, 711 N.Y.S.2d 112 (2000)); see also Fernandez v. New England Motor Freight, Inc., No. 12-CV-6536 (VEC), 2015 WL 4002233, at *2 (S.D.N.Y. July 1, 2015) ("To establish the existence of a duty under New York law, '[t]he injured party must show that a defendant owed not merely a general duty to society but a specific duty to the particular claimant.'") (quoting Perkins Eastman Architects, P.C. v. Thor Eng'rs, P.A., 769 F. Supp. 2d 322, 328 (S.D.N.Y. 2011)). The Court is not persuaded by the suggestion that RW's purported concealment of misconductseemingly unrelated to Plaintiff and primarily from the 1990screated a risk to Plaintiff. Nor can be it said that RW's public statements, which Plaintiff does not allege to have read or relied on prior to meeting with HW, created a risk. Indeed, the TAC does not allege that RW ever met or interacted with Plaintiff, or that he even knew who she was. Even accepting [**36] all of its allegations as true, the TAC thus fails to plead that RW's conduct "created a peril" that would give rise to a duty of care owed to Plaintiff.

The Court also notes that the other judges in this district to expressly consider RW's liabilityalbeit under different causes of actionhave consistently found the allegations insufficient

to withstand motions to dismiss. See, e.g., Geiss, 383 F. Supp. 3d at 166, 176 (dismissing claims based on allegations that RW was "aware of his brother's sexual misconduct, authorized Miramax and TWC to settle claims relating to that misconduct, and personally paid one victim and the colleague who reported the assault"); Canosa, 2019 U.S. Dist. LEXIS 13263, 2019 WL 498865, at *3, *27 (dismissing claims based on allegations that RW "knew of his brother's sexual assaults of various women while he and his brother jointly held positions at Miramax and TWC, ... and that he did not investigate or take corrective action," and further that RW "used settlements with other women, which contained strict non-disclosure agreements binding victims and witnesses, to prevent other TWC employees, the public, and law enforcement from learning of his brother's misconduct"); Noble, 335 F. Supp. 3d at 513, 526 (dismissing claims based on allegations that RW "knew about, and benefitted from, [**37] [HW's] international business dealings," knew about HW's "pattern and practice" of enticing "young female actors with the promise of roles," and '"willfully caused' [HW's] sex acts with [plaintiff] by 'supporting [HW's] pursuit of their joint business interests'").

Moreover, contrary to Plaintiff's assertion, Pamela L. v. Farmer, 112 Cal. App. 3d 206, 169 Cal. Rptr. 282 (Ct. App. 1980), does not support the conclusion that RW is liable; rather, it supports the conclusion that RW cannot be held liable for HW's misconduct absent any purported "affirmative acts." In Pamela L, a wife was found negligent based on her husband's sexual abuse of two children. There, however, the wife's liability stemmed not only from her knowledge that her husband was a sex offender, but also from her own affirmative acts of encouraging and inviting the children over to play, preparing refreshments to "entice" the children to her house, and telling the children's parents that it would be "perfectly safe" for them to come over while she was not home because her husband [*309] would be there. Pamela L., 112 Cal. App. 3d at 210. The court thus found that there was "a fairly close connection" between the wife's "invitation" and the "ultimate harm" to the children. Id. at 211. No such "close connection" is alleged in the TAC.9

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See also Melton, 183 Cal. App. 4th at 533 ("[D]efendant's conduct in issuing that invitation [to a party at his home] did not create the peril that harmed plaintiffs.").

Even if accepted [**38] as true, the allegations in the TAC fail to support a finding of any affirmative acts or misfeasance on the part of RW.

As the allegations also do not support a finding of any special relationship, the Court concludes that RW did not owe Plaintiff a duty of care. Without a duty running from RW to Plaintiff, her negligence claim must fail. See In re Sept. 11 Litig., 280 F. Supp. 2d at 290 ("[W]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.") (quoting Lauer, 95 N.Y.2d at 100); see also McCarthy v. Olin Corp., 119 F.3d 148, 156 (2d Cir. 1997) ("[I]t may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.") (citation omitted); Fernandez, 2015 WL 4002233, at *2 ("In the absence of duty, there is no breach and without a breach there is

no liability,") (quoting Pulka v. Edelman, 40 N.Y.2d 781, 782, 358 N.E.2d 1019, 390 N.Y.S.2d 393 (1976)); Margaret W., 139 Cal. App. 4th at 150 ("If there is no duty, there can be no liability, no matter how easily one may have been able to prevent injury to another.") (citing Delgado, 36 Cal. 4th at 235).

Finally, because the Court has found that RW did not owe Plaintiff a duty of carearising from either his affirmative conduct or any "special relationship"the Court need not address the parties' arguments as to foreseeability. Foreseeability [**39] is relevant in determining the scope of the duty of care, only after a legally cognizable duty is established. See McCarthy, 119 F.3d at 156 ("In tort cases, foreseeability is often confused with duty. Foreseeability 'is applicable to determine the scope of dutyonly after it has been determined that there is a duty.'") (quoting Pulka, 40 N. Y.2d at 785); see also id. ("The mere fact that a consequence might foreseeably result from an action or condition does not serve to establish a duty owing from a defendant to a plaintiff.") (quoting Gonzalez v. Pius, 138 A.D.2d 453, 525 N.Y.S.2d 868, 869 (App. Div. 1988)); Regents, 4 Cal. 5th at 630 ("Such case-specific foreseeability questions are relevant in determining the applicable standard of care or breach in a particular case. They do not, however, inform our threshold determination that a duty exists."); Melton, 183 Cal. App. 4th at 532 ("Where there is a legal basis for imposing a dutyas in cases of misfeasance or when a special relationship existsthe court considers the foreseeability of risk from the third party conduct.").10

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Although it is true that some California courts have suggested that the foreseeability inquiry may be properly considered as part of the Court's threshold determination of whether a duty exists, see, e.g., Margaret W., 139 Cal. App. 4th at 150-51, 160-61, the Court is not persuaded that such an analysis is necessary here. At oral argument, Plaintiff's counsel explained that, while certain California cases have considered foreseeability at this stage, Plaintiff is "not necessarily relying on that analysis" because Plaintiff instead asserts that RW is "liable based on his own affirmative conduct." See Nov. 6, 2019 Tr., Dkt. 196, at 18.

[*310] Because Plaintiff has failed to adequately plead a legally cognizable duty, RW's motion to dismiss is granted.

CONCLUSION

For the foregoing reasons, Defendant Harvey Weinstein's motion to dismiss is denied, and Defendant Robert Weinstein's motion to dismiss is granted. Plaintiff's [**40] claims for sexual battery, gender violence, battery, assault, sex trafficking, negligence, and negligent retention or supervision will proceed against Harvey Weinstein, The Weinstein Company LLC, and The Weinstein Company Holdings LLC.

The Clerk of Court is respectfully directed to terminate the motions pending at Dkts. 164 and 167.

SO ORDERED.

Dated: December 19, 2019

New York, New York

/ s/ Ronnie Abrams

Ronnie Abrams

United States District Judge

Owino v. Corecivic, Inc.

United States Court of Appeals for the Ninth Circuit

February 18, 2022, Argued and Submitted, San Francisco, California; December 20, 2022, Amended

No. 21-55221

Reporter
60 F.4th 437 *; 2022 U.S. App. LEXIS 35216 **

SYLVESTER OWINO; JONATHAN GOMEZ, on behalf of themselves, and all others similarly situated, Plaintiffs-Appellees, v. CORECIVIC, INC., a Maryland corporation, Defendant-Appellant.

Subsequent History: US Supreme Court certiorari denied by CoreCivic, Inc. v. Owino, 143 S. Ct. 2612, 216 L. Ed. 2d 1210, 2023 U.S. LEXIS 2514, 2023 WL 3937627 (U.S., June 12, 2023)

Prior History:

[**1] Appeal from the United States District Court for the Southern District of California. D.C. No. 3:17-cv-01112-JLS-NLS. Janis L. Sammartino, District Judge, Presiding.

Owino v. Corecivic, Inc., 36 F.4th 839, 2022 U.S. App. LEXIS 15342, 2022 WL 1815825 (9th Cir. Cal., June 3, 2022)

Disposition:

AFFIRMED.

Summary:

SUMMARY**

**

This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Class Certification / Victims of Trafficking and Violence Protection Act

The panel filed (1) an order denying a petition for panel rehearing and, on behalf of the court, a petition for rehearing en banc; and (2) an opinion (a) amending and superceding the panel's

original opinion and (b) affirming the district court's order certifying three classes in an action brought under the Victims of Trafficking and Violence Protection Act of 2000 by individuals who were incarcerated in private immigration detention facilities owned and operated by CoreCivic, Inc., a for-profit corporation.

U.S. Immigration and Customs Enforcement contracts with CoreCivic to incarcerate detained immigrants in 24 facilities across 11 states. Plaintiffs, detained solely due to their immigration status and neither charged with, nor convicted of, any crime, alleged that the overseers of their private detention facilities forced them to perform labor against their will and without adequate compensation in violation of the Victims of Trafficking and Violence Protection Act of 2000, the California Trafficking Victims Protection Act ("California TVPA"), various [**2] provisions of the California Labor Code, and other state laws.

The panel held that the district court properly exercised its discretion in certifying a California Labor Law Class, a California Forced Labor Class, and a National Forced Labor Class.

The panel held that, as to the California Forced Labor Class, plaintiffs submitted sufficient proof of a classwide policy of forced labor to establish commonality. Plaintiffs established predominance because the claims of the class members all depended on common questions of law and fact. The panel agreed with the district court that narrowing the California Forced Labor Class based on the California TVPA's statute of limitations was not required at the class certification stage.

For the same reasons as above, the panel held that, as to the National Forced Labor Class, the district court did not abuse its discretion in concluding that plaintiffs presented significant proof of a classwide policy of forced labor and that common questions predominated over individual ones. The panel held that under Moser v. Benefytt, Inc., 8 F.4th 872 (9th Cir. 2021), CoreCivic's personal jurisdiction challenge with respect to the claim of non-California-facility class members was an issue for the district court [**3] to resolve. The panel declined to vacate the certification of the National Forced Labor Class, but it held that CoreCivic retained its personal jurisdiction defense, and the panel remanded the personal jurisdiction question to the district court for consideration at the appropriate time.

As to the California Labor Law Class, the panel held that plaintiffs established that damages were capable of measurement on a classwide basis, and they did not need to present a fully formed damages model when discovery was not yet complete. The panel agreed with the district court that the named plaintiffs were typical of the class they sought to represent and their allegations, if true, fit within California's Unfair Competition Law and the state labor law provisions they invoked. Narrowing the class based on statute of limitations was not required at the certification stage. The panel held that the district court did not abuse its discretion in certifying a failure-to-pay and waiting-time claim, which was affirmatively interwoven in plaintiffs' pleadings.

Judge VanDyke, joined by Judges Callahan, Bennett, R. Nelson, and Bumatay, and by Judge Ikuta except as to Part II-A, dissented from the denial [**4] of rehearing en banc. In Part II-A, Judge

VanDyke wrote that the panel created inter-and intra-circuit conflicts by eliminating the actual causation requirement for "forced labor" claims under the TVPA. In Part II-B, Judge VanDyke wrote that rehearing en banc also was warranted because the panel transgressed the holding of Wal-Mart Stores v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), disregarding Fed. R. Civ. P. 23's commonality requirement by concluding that a handful of declarations from detainees at only one of the defendant's 24 facilities was significant proof of the defendant's nationwide policies and practices.

Counsel: Nicholas D. Acedo (argued), Daniel P. Struck, Rachel Love, Ashlee B. Hesman, and Jacob B. Lee, Struck Love Bojanowski & Acedo PLC, Chandler, Arizona, for Defendant-Appellant.

Eileen R. Ridley (argued) and Alan R. Ouellette, Foley & Lardner LLP, San Francisco, California; Robert L. Teel, Law Office of Robert L. Teel, Seattle, Washington; for Plaintiffs-Appellees.

Judges: Before: M. Margaret McKeown and William A. Fletcher, Circuit Judges, and Richard D. Bennett,*

*

The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

District Judge. Opinion by Judge McKeown; Dissent by Judge VanDyke.

Opinion by: M. Margaret McKeown

Opinion

[*441] AMENDED OPINION

McKEOWN, Circuit Judge:

This appeal arises from a class action filed by individuals who were incarcerated [**5] in private immigration detention facilities owned and operated by a for-profit corporation, CoreCivic, Inc. These individualsdetained solely due to their immigration status and neither charged with, nor convicted of, any crimeallege that the overseers of their private detention facilities forced them to perform labor against their will and without adequate compensation. Our inquiry on appeal concerns only whether the district court properly certified three classes of detainees. Considering the significant deference we owe to the district court when reviewing a class certification, as well

as the district court's extensive and reasoned findings, we affirm the certification of all three classes.

BACKGROUND

In 2017, Sylvester Owino ("Owino") and Jonathan Gomez ("Gomez") (collectively "Owino") brought a class action suit against CoreCivic. Both men were previously held in a civil immigration detention facility operated by CoreCivicOwino from 2005 to 2015, and Gomez from 2012 to 2013. They filed suit "on behalf of all civil immigration detainees who were incarcerated and forced to work by CoreCivic," seeking declaratory and injunctive relief and damages, among other remedies, for "forcing/ coercing [**6] detainees to clean, maintain, and operate CoreCivic's detention facilities in violation of both federal and state human trafficking and labor laws." Specifically, Owino alleged violations of the Victims of Trafficking and Violence Protection Act of 2000, 18 U.S.C. 1589 et seq. ("TVPA"), California Trafficking Victims Protection Act, Cal. Civ. Code 52.5 ("CTVPA"), various provisions of the California Labor Code, and other state laws.

Pursuant to 8 U.S.C. 1231(g), U.S. Immigration and Customs Enforcement ("ICE") contracts with CoreCivic to incarcerate detained immigrants in 24 facilities across 11 states. According to Owino, those incarcerated in these facilities "are detained based solely on their immigration status and have not been charged with a crime." Because of this, ICE states these detainees "shall not be required to work, except to do personal housekeeping." These housekeeping duties are delineated in ICE's Performance-Based National Detention Standards ("Standards"): "1. making their bunk beds daily; 2. stacking loose papers; 3. keeping the floor free of debris and dividers free of clutter; and 4. refraining from hanging/ draping clothing, pictures, keepsakes, or other objects from beds, overhead lighting fixtures or other furniture." Performance-Based National Detention Standards 2011, at 406 (revised Dec. 2016), https:/ / www.ice.gov/ doclib/ detention-standards/ 2011/ pbnds [**7] 2011r2016.pdf. The Standards also require facilities to provide detainees with the "opportunity to participate in a voluntary work program" ("Work Program") for which they [*442] must be compensated at least $1 per day. Id. at 406, 407.

Despite these guidelines, Owino contends that, "as a matter of policy," CoreCivic compelled him and detainees across its facilities to work "as a virtually free labor force to complete 'essential' work duties at their facilities," including such "foundational tasks" as kitchen and laundry services. CoreCivic's written policies require "all" detainees to "maintain[] the common living area [i.e., not the bunk bed area] in a clean and sanitary manner." The policies further require "[d]etainee/ inmate workers" to carry out a "daily cleaning routine," to remove trash, sweep, mop, clean toilets, clean sinks, clean showers, and clean furniture, and to undertake "[a]ny other tasks assigned by staff in order to maintain good sanitary conditions." Yet, according to Owino, CoreCivic generally paid ICE detainees either $1 per day or nothing at all. Owino further contends that CoreCivic paid ICE detainees between $.75 and $1.50 per day for work that it

"misclassified" as [**8] "volunteer," thus failing to pay wages that approximated the minimum hourly wage required by California law.

On April 15, 2019, Owino filed a motion for class certification, seeking to certify five classes:

1. California Labor Law Class: All ICE detainees who (i) were detained at a CoreCivic facility located in California between May 31, 2013, and the present, and (ii) worked through CoreCivic's Voluntary Work Program during their period of detention in California.

2. California Forced Labor Class: All ICE detainees who (i) were detained at a CoreCivic facility located in California between January 1, 2006, and the present, (ii) cleaned areas of the facilities above and beyond the personal housekeeping tasks enumerated in the Standards, and (iii) performed such work under threat of discipline irrespective of whether the work was paid or unpaid.

3. National Forced Labor Class: All ICE detainees who (i) were detained at a CoreCivic facility between December 23, 2008, and the present, (ii) cleaned areas of the facilities above and beyond the personal housekeeping tasks enumerated in the Standards, and (iii) performed such work under threat of discipline irrespective of whether the work was [**9] paid or unpaid.

4. California Basic Necessities Class: All ICE detainees who (i) were detained at a CoreCivic facility located in California between January 1, 2006, and the present, (ii) worked through CoreCivic's Work Program, and (iii) purchased basic living necessities through CoreCivic's commissary during their period of detention in California.

5. National Basic Necessities Class: All ICE detainees who (i) were detained at a CoreCivic facility between December 23, 2008, and the present, (ii) worked through CoreCivic's Work Program, and (iii) purchased basic living necessities through CoreCivic's commissary during their period of detention.

A year laterfollowing numerous filings, oral argument, and supplemental briefingthe district court certified three of the proposed five classes: (1) the California Labor Law Class, (2) the California Forced Labor Class, and (3) the National Forced Labor Class. In an extensive and thoughtful order, the district court found the following:

1. California Labor Law Class: Owino and Gomez "adequately have established that they were never paid a minimum wage through the [Work Program]," that they "never received wage statements," and that CoreCivic [**10] "failed to pay compensation upon termination" and [*443] "imposed unlawful terms and conditions of employment." There were sufficient "common, predominating questions" to certify the class.

2. California Forced Labor Class: Owino and Gomez "sufficiently have demonstrated" that CoreCivic facilities in California "implemented common sanitation and disciplinary policies that together may have coerced detainees to clean areas of [CoreCivic's California] facilities beyond the personal housekeeping tasks enumerated in the ICE [Standards]."

3. National Forced Labor Class: Owino and Gomez "sufficiently demonstrated" the same regarding CoreCivic facilities nationwide.

Due to the vulnerability of the class members and the "risks, small recovery, and relatively high costs of litigation," the district court concluded that "class-wide litigation is superior" because "no viable alternative method of adjudication exists."

ANALYSIS

We review the district court's class certification for "abuse of discretion." B.K. ex rel.Tinsley v. Snyder, 922 F.3d 957, 965 (9th Cir. 2019). As we set out at length in Snyder,

An error of law is a per se abuse of discretion. Accordingly, we first review a class certification determination for legal error under a de novo standard, and if [**11] no legal error occurred, we will proceed to review the decision for abuse of discretion. A district court applying the correct legal standard abuses its discretion only if it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors. Additionally, we review the district court's findings of fact under the clearly erroneous standard, meaning we will reverse them only if they are (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the record.

Id. at 965-66 (quoting Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1002 (9th Cir. 2018)). Notably, in "reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification." Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1171 (9th Cir. 2010).

In assessing whether to certify a class, the district court determines whether the requirements of Rule 23 are met. Rule 23 provides:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable ["numerosity"]; (2) there are questions of law or fact common to the class ["commonality"]; (3) the claims or defenses of the representative parties [**12] are typical of the claims or defenses of the class ["typicality"]; and (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy"].

Fed. R. Civ. P. 23(a). Additionally, a proposed class must satisfy one of the subdivisions of Rule 23(b). Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). Owino seeks to proceed under Rule 23(b)(3), which requires "the court find[] that the [common questions] predominate over any questions affecting only individual members ['predominance'], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy ['superiority']." Fed R. Civ. P. 23(b)(3). The district court made both findings.

CoreCivic brings three challenges to each of the three certified classes. We review each of these challenges in turn.

[*444] I. California Forced Labor Class

A. Class-wide Policy of Forced Labor

We first consider CoreCivic's assertion that Owino failed to present "[s]ignificant proof" of a class-wide policy of forced labor, thus defeating commonality. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 353, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). To support the California Forced Labor class, Owino provided the declarations of four detainees, all from one facility, but this was not the extent or the focus of Owino's "significant proof," nor was it the focus of the district court's decision. [**13] Rather, Owino centered his argument, and the district court centered its holding, on the text of CoreCivic's corporate policies. The sanitation policy requires detainees to remove trash, wash windows, sweep and mop, "thoroughly" scrub toilet bowls, sinks, and showers, and undertake sundry other cleaning responsibilities across the facility. On their face, these policies appear to go beyond those minimal tidying responsibilities laid out in the ICE Standards. The discipline policy further makes clear that detainees are subject to a range of punishments, including disciplinary segregation, for refusal to "clean assigned living area" or "obey a staff member/ officer's order."

The persuasive weight of the text of these policies is augmented by the statements of ICE detainees themselves, who declared that they were in fact required to clean common areaswithout payment and under threat of punishmentin line with the policies. Further, one of CoreCivic's own senior managers testified that CoreCivic facilities do not have the ability to opt out of these company-wide, "standard policies."

Commonality is necessarily established where there is a class-wide policy to which all class members are [**14] subjected. Parsons v. Ryan, 754 F.3d 657, 678 (9th Cir. 2014). And while "the mere existence of a facially defective written policywithout any evidence that it was implemented in an unlawful mannerdoes not constitute '[s]ignificant proof' that a class of employees were [sic] subject to an unlawful practice," Davidson v. O'Reilly Auto Enters., LLC, 968 F.3d 955, 968 (9th Cir. 2020) (internal citation omitted), Owino relied on the written policies as well as the testimony of former ICE detainees and CoreCivic's own manager. Although the company "may wish to distance itself from [its employee's] statements," here the "admissions were material and [are] properly before us." Abdullah v. U.S. Sec. Assocs., 731 F.3d 952, 966 (9th Cir. 2013).

In view of the highly deferential abuse of discretion standard and the full scope of evidence in the record, we reject CoreCivic's claim that Owino failed to provide "significant proof" of the class-wide policy necessary to satisfy the commonality requirement.

B. Predominance of Common Questions

We next consider CoreCivic's claim that Owino failed to establish that common questions predominate over individual ones, thus defeating predominance. The predominance inquiry tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016) (quoting Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). Here, they are.

As the district court noted, the California [**15] Forced Labor class members "share a large number of common attributes, including that they are immigrants [*445] who are or were involuntarily detained in [CoreCivic's] facilities and subjected to common sanitation and disciplinary policies." The claims of these class members all depend on common questions of law and factwhether CoreCivic utilized threats of discipline to compel detainees to clean its California facilities in violation of state and federal human trafficking statutes. This is a quintessential "common question" as defined by the Supreme Court: "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." Tyson Foods, 577 U.S. at 453 (citation omitted).

In other words, the question is appropriate for class-wide resolution because either CoreCivic's company-wide policies and practices violated the law and the rights of the class members, or they didn't. See Parsons, 754 F.3d at 678 (holding that the "policies and practices to which all members of the class are subjected . . . are the 'glue' that holds together the putative class . . . either each of the policies and practices is unlawful as to every inmate or it is not"); see also Gonzalez v. U.S. Immigr. & Customs Enf't, 975 F.3d 788, 808 (9th Cir. 2020).

CoreCivic argues [**16] against predominance largely by attempting to reframe the inquiry, asserting that the district court should have asked whether each class member actually has a viable California TVPA claim. However, this is not the applicable test. In Tyson Foods, the Supreme Court instructs that

[t]he predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

577 U.S. at 453 (internal citations and quotation marks omitted); see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, 31 F.4th 651, 681-82 (9th Cir. 2022) (en banc).

C. Statute of Limitations

Finally, we consider CoreCivic's argument that the district court should have narrowed the proposed California Forced Labor class based on the statute of limitations. While Owino seeks to

include all ICE detainees held at a CoreCivic facility in California between January 1, 2006, and the present, CoreCivic argues that because the California [**17] TVPA has a seven-year statute of limitations, no detainee who was released before May 31, 2010, can bring a claim. See Cal. Civ. Code 52.5(c). The district court ruled that such a finding was premature at the class certification stage: "If discovery indicates that the class period should be limited, the Court will entertain a motion to that effect; however, at this stage in the litigation and on the record before it, the Court is not inclined to narrow the class period."

We agree with the district court that narrowing the class based on statute of limitations is not required at the certification stage. Along with our sister circuits, we have held this in the context of the predominance inquiry. See, e.g., Williams v. Sinclair, 529 F.2d 1383, 1388 (9th Cir. 1975) ("The existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones."); see also In re Monumental Life Ins. Co., 365 F.3d 408, 420-21 (5th Cir. 2004); [*446] Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000). We now clarify that this principle is applicable to certification more broadly. After all, "[e]ven after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). CoreCivic cites no case law to the contrary. We therefore hold that the district court did not abuse its discretion in declining [**18] to narrow the California Forced Labor class.

II. National Forced Labor Class

We can dispense with CoreCivic's first two challenges to the National Forced Labor class easily, as these challenges are virtually identical to those directed at the California Forced Labor class. For the same reasons discussed above, the district court did not abuse its discretion in concluding that Owino presented significant proof of a class-wide policy of forced labor. Likewise, the district court did not abuse its discretion in concluding that common questions predominate over individual ones. CoreCivic's argument that the TVPA necessitates a subjective, individualized inquiry fails due to contrary language in the statute, see, e.g., 18 U.S.C. 1589(c)(2) (defining "serious harm" as that which would compel a "reasonable person" to perform or continue performing labor to avoid incurring such harm), as well as the broader predominance test prescribed by precedent. Tyson Foods, 577 U.S. at 453.

The statute's causal elementprohibiting the obtainment of labor "by means of" one of the statutorily enumerated harms, see 18 U.S.C. 1589(a)may similarly be inferred by class-wide evidence. See Menocal v. GEO Grp., Inc., 882 F.3d 905, 918-20 (10th Cir. 2018); Rosas v. Sarbanand Farms, LLC, 329 F.R.D. 671, 689 (W.D. Wash. 2018) ("An allegation that the defendant engaged in a common scheme or practice to coerce [**19] labor from putative class members may be sufficient to establish that the class's claim is susceptible to class-wide resolution."). While class-wide causation depends on the context, see Poulos v. Caesars World,

Inc., 379 F.3d 654, 665-66 (9th Cir. 2004) (requiring individualized showing of causation in a "narrow and case-specific" RICO-claim case because "gambling is not a context in which we can assume that potential class members are always similarly situated"), in Walker v. Life Insurance Co. of the Southwest, we recognized that reliance can be inferred on a class-wide basis. 953 F.3d 624, 630-31 (9th Cir. 2020). Here, Owino offered as evidence a written discipline policy stating that detainees will be punished if they fail to clean or obey staff orders. The district court did not abuse its discretion in concluding that a factfinder could reasonably draw a class-wide causation inference from this uniform policy.

However, CoreCivic's appeal with respect to personal jurisdiction is not resolved by what we wrote, above, with respect to the National Forced Labor class. See Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 582 U.S. 255, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017). The district court ruled that CoreCivic had waived its personal jurisdiction challenge with respect to the claim of the non-California-facility class members, because it did not raise such a defense in its first [**20] responsive pleadings (which CoreCivic filed after the Supreme Court decided Bristol-Myers Squibb). After the district court's ruling and after CoreCivic filed its opening brief in this appeal, the Ninth Circuit squarely addressed this issue: prior to class certification, a defendant does "not have 'available' a Rule 12(b)(2) personal jurisdiction [*447] defense to the claims of unnamed putative class members who were not yet parties to the case." Moser v. Benefytt, Inc., 8 F.4th 872, 877 (9th Cir. 2021).

Although Owino maintains that Moser was wrongly decided, we have no authority to ignore circuit precedent. See Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Owino's challenge to the merit of CoreCivic's personal jurisdiction defense is an issue for the district court to resolve. See Moser, 8 F.4th at 879.

We decline to vacate the certification of the National Forced Labor class, but we hold that CoreCivic retains its personal jurisdiction defense and remand the personal jurisdiction question to the district court for consideration at the appropriate time.

III. California Labor Law Class

A. Damages Capable of Class-wide Measurement

We first consider CoreCivic's arguments that the members of the California Labor Law class have not presented "a fully formed damages model" and thus cannot be certified. Owino claims that CoreCivic misclassified [**21] the detainees participating in the Work Program as "volunteers" rather than "employees" and thus failed to pay them the minimum wage required in California for "employees," in violation of California wage and hour law. The district court certified the class, holding that Owino had met the "evidentiary" burden of "present[ing] proof that damages are capable of being measured on a class-wide basis."

We agree with the district court that Owino did not need to present a fully formed damages model "when discovery was not yet complete and pertinent records may have been still within Defendant's control." Rather, "plaintiffs must show that 'damages are capable of measurement on a classwide basis,' in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory." Just Film, Inc. v. Buono, 847 F.3d 1108, 1120 (9th Cir. 2017) (quoting Comcast, 569 U.S. at 34). In other words, "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." Vaquero v. Ashley Furniture Indus., Inc., 824 F.3d 1150, 1154 (9th Cir. 2016) (citation omitted).

There is a clear line of causation between the alleged misclassification of detainee employees as "volunteers" and the deprivation of earnings they may have suffered as a consequence of [**22] the violation of California wage and hour laws. See id. at 1155 (holding that, "[i]n a wage and hour case . . . the employer-defendant's actions necessarily caused the class members' injury"). According to evidence from a CoreCivic manager, spreadsheets of wages paid, and CoreCivic's corporate policy itself, ICE detainees participated in the Work Program across CoreCivic's facilities, for which they were almost never paid more than $1.50 per day. If CoreCivic did indeed misclassify these participants as "volunteers" (e.g., because the detainees should have been considered "employees"), CoreCivic would necessarily have failed to pay the minimum hourly wage required by California law. Thus, any damages that the class members are owed necessarily "stemmed from [CoreCivic's] actions." Id.

Owino presented sufficient evidence to show that damages are capable of measurement on a class-wide basis. This evidence includes documentation of "typical" shift lengths, the days worked by ICE detainees, the wages paid, and the job assignments. Additional testimony and CoreCivic records can establish details about [*448] which detainees participated in the Work Program, see Ridgeway v. Walmart Inc., 946 F.3d 1066, 1087 (9th Cir. 2020), and as the Supreme Court emphasized in Tyson Foods, sufficiently [**23] reliable representative or statistical evidence can be used to establish the hours that a class of employees had worked. 577 U.S. at 459.

B. Narrowing the Class

In seeking certification of the California Labor Law class, Owino alleged that detainees' participation in the Program violated a variety of state labor law provisions, as well as California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code 17200, et seq. CoreCivic notes, correctly: "Other than the California UCL claim [which has a four-year statute of limitations, id. 17208], all other state law claims have a one-, two-, or three-year statute of limitations." CoreCivic thus argues that Owino is barred from representing this class at all, because his last day in the Work Program was May 22, 2013, which is more than four years before he filed the May 31, 2017, complaint. (Owino disputes this date, claiming he worked until his release on March 9,

2015.) CoreCivic further argues that Gomez is time-barred from pursuing non-UCL claims, because his last day in the Work Program was September 7, 2013.

The district court held that, for the purposes of the certification motion, even if the plaintiffs' claims under the California Labor Code are time-barred, they could still recover for the majority of the alleged violations under [**24] the UCL because the UCL prohibits unfair competition, defined as "any unlawful, unfair or fraudulent business act or practice," Cal. Bus. & Prof. Code 17200, and naturally this includes such violations of California's wage and hour law. Under this characterization, the class period for all claims seeking remedies under the UCL begins May 31, 2013; the period for waiting-time and failure-to-pay claims begins May 31, 2014; and the period for claims as to the alleged failure to provide wage statements begins May 31, 2016 (for remedies pursuant to Cal. Code Civ. Proc. 340), or May 31, 2014 (for remedies pursuant to Cal. Code Civ. Proc. 338).

As to the named plaintiffs, the district court ruled that neither Owino nor Gomez is typical of the members of the California Labor Law class seeking penalties under California Labor Code 226 (which requires employers to provide wage statements to employees), and that Gomez is not typical of members of the California Labor Law Class seeking waiting-time penalties under California Labor Code 203. Nonetheless, the court found that Owino is part of the California Labor Law class for the wage claims, for failure to pay compensation upon termination, and for waiting time penalties and actual damages for the failure to provide wage statements, while Gomez is part of the California [**25] Labor Law class for the wage claims. Due to CoreCivic's "belated assertion of . . . factual disputes concerning whether Mr. Owino worked during the Class Period for the California Labor Law Class," the district court stated it was "disinclined to resolve this issue at the class certification stage . . . particularly given that Mr. Gomez remains a viable class representative for the majority of the claims of the California Labor Law Class."

Because plaintiffs can recover for almost all of the alleged violations under the UCL, the district court properly rejected CoreCivic's argument against certification as predicated on "a distinction without a difference." The district court appropriately exercised its discretion by declining to resolve a factual matter that CoreCivic [*449] raised for the first time in its post-hearing supplemental brief, and which the district court concluded was not dispositive of certification.

We agree with the district court that Owino and Gomez are typical of the class they are seeking to represent and their allegations, if true, fit within the statutes they invoke. Although they may run into statute of limitations issuessome disputed and unprovennarrowing the class [**26] based on statute of limitations is not required at the certification stage. Cf. Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1270 (4th Cir. 1981) ("Courts passing upon motions for class certification have generally refused to consider the impact of such affirmative defenses as the statute of limitations on the potential representative's case.").

C. Failure-to-pay and Waiting-time Claim

Finally, CoreCivic argues that because Owino and Gomez "did not reference their failure to pay/ waiting-time claim ([Cal. Labor Code] 201-203)" in their motion for class certification, the district court should not have certified that claim as one common to the California Labor Law class. Because the claims are affirmatively interwoven in Owino's pleadings, the district court did not abuse its discretion in certifying this claim.

To begin, the complaint included California Labor Code 201-03 among the causes of action for the California Labor Law class:

Plaintiffs and Class Members incorporate the above allegations by reference.

California Labor Code 201 and 202 require CoreCivic to pay all compensation due and owing to Plaintiffs and Class Members immediately upon discharge or within seventy-two hours of their termination of employment. Cal. Labor Code 203 provides that if an employer willfully fails to pay compensation promptly upon discharge or resignation, as required [**27] by 201 and 202, then the employer is liable for such "waiting time" penalties in the form of continued compensation up to thirty workdays.

CoreCivic willfully failed to pay Plaintiffs and Class Members who are no longer employed by CoreCivic compensation due upon termination as required by Cal. Labor Code 201 and 202. As a result, CoreCivic is liable to Plaintiffs and former employee Class Members waiting time penalties provided under Cal. Labor Code 203, plus reasonable attorneys' fees and costs of suit.

Owino asserted that CoreCivic violated a dozen provisions of the California Labor Code with respect to the members of the California Labor Law class. The motion for class certification then stated, "Plaintiffs' claims on behalf of the CA Labor Law Class for violations of the California Labor Code . . . all turn on a common legal question: whether ICE detainees that worked through the [Work Program] at CoreCivic's facilities in California are employees of CoreCivic under California law . . . ." Owino then discussed this question in depth.

CoreCivic has cited no precedent to suggest that Owino must specifically list the citation of each of the dozen provisions of the California Labor Code in the motion for class certification. Such [**28] an approach would exalt form over substance and ignore the fair notice Owino provided to CoreCivic throughout the certification proceeding. Rather, because Owino outlined these provisions substantively in the complaint, stated that "all" of the alleged violations of the Labor Code turn on a common question, and discussed the common question [*450] at length, Owino sufficiently referenced this matter before the district court.

Conclusion

We affirm the district court's certification of all three classes. We hold that CoreCivic retains its personal jurisdiction defense and remand the personal jurisdiction question to the district court for consideration at the appropriate juncture.

AFFIRMED.

Dissent by: VANDYKE

Dissent

VANDYKE, Circuit Judge, with whom Judges CALLAHAN, BENNETT, R. NELSON, and BUMATAY join, and with whom Judge IKUTA joins except as to Part II-A, dissenting from denial of rehearing en banc:

In affirming certification of the nationwide class in this case, the panel committed two errors that merited en banc review. First, the panel created inter-and intra-circuit conflicts by eliminating the actual causation requirement for "forced labor" claims under the Victims of Trafficking and Violence Protection Act of 2000 (TVPA). Second, the panel transgressed the holding of Wal-Mart Stores v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) [**29] , disregarding Rule 23's commonality requirement by concluding that a handful of declarations from detainees at only one of the defendant's 24 facilities was "significant proof" of the defendant's nationwide "policies and practices." In Dukes, the Supreme Court instructed that expert testimony, statistical evidence, and testimony from more than 100 individuals spread across the country were insufficient proof of the nationwide policy asserted in that case. Here, the plaintiffs did not present half as much evidence as was provided in Dukes, yet the panel improperly found "significant proof" of a nationwide policy.

We should have taken the opportunity to correct this decision. Uncorrected, it will have sweeping implications for all civil TVPA lawsuits, class actions or otherwise, sowing confusion over whether actual causation is a required showing. It will also doubtless become the new rallying point for class counsel seeking to avoid the minimum commonality required by binding Supreme Court precedent. I respectfully dissent from the denial of en banc rehearing.

I.

The U.S. government contracts with the defendant in this case, CoreCivic, Inc., to hold immigration detainees in 24 facilities across 11 states. Government regulations require immigration detainees to perform personal housekeeping tasks, but prohibit CoreCivic from requiring them to clean areas beyond "their immediate living areas." Performance-Based National Detention Standards 2011 5.8(II), (V)(C). This case is a class challenge by two former detainees claiming that they and other detainees across all 24 facilities were forced to perform cleaning

tasks beyond the personal housekeeping tasks allowed by those standards. See Owino v. CoreCivic, Inc., 36 F.4th 839, 842 (9th Cir. 2022).

The named plaintiffs moved to certify a nationwide class consisting [**30] of all CoreCivic detainees detained after December 23, 2008, who were required under threat of discipline to clean areas of CoreCivic facilities beyond their cells. See id. at 843. To succeed on their motion, they needed to prove that "questions of law or fact common to the class" existed and that such common questions "predominate[d] over any questions affecting only individual members." Fed. R. Civ. P. 23(a)(2), (b)(3); see also Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 275, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014) (requiring the plaintiffs to prove, "not simply plead," that "their proposed class satisfies each requirement of Rule 23"). The named [*451] plaintiffs argued that a common question stemmed from CoreCivic's policy requiring all its detainees to clean areas beyond their cells under threat of discipline and that this question predominated over any individualized questions. Because they sought to prove a common question through a nationwide policy, the named plaintiffs needed to provide "significant proof" that this policy existed. Dukes, 564 U.S. at 353 (citation omitted). As evidence of CoreCivic's purported nationwide policy requiring all detainees to clean areas beyond their cells, the named plaintiffs proffered CoreCivic's written "Sanitation" and "Disciplinary" policies, plus the declarations of four detainees at one of CoreCivic's [**31] 24 detention facilities.

The district court considered whether the written policies unambiguously supported CoreCivic's interpretation and then rejected it because it "is not clear from the face of the policies" that the policies "do[] not require detainees to clean the common area," (emphasis added). The court likewise found the policies ambiguous because "[t]here is no indication from the face of the policies that" only the detainees who participated in the voluntary work program ("VWP") were required to clean. The district court's only discussion about who was required to clean under CoreCivic's written policies emphasized their ambiguity. But because the named plaintiffs also offered the four detainee declarations, the court concluded that there was "significant proof" that CoreCivic had "implemented common sanitation and discipline policies," (emphasis added), across its 24 facilities. And the court concluded that because the Disciplinary Policy "could reasonably be understood to have subjected detainees to discipline for failure to comply with the uniform sanitation policy," CoreCivic "may have coerced detainees" into cleaning.

The district court also concluded that common questions [**32] about CoreCivic's class-wide "policy and practice" predominated over individualized questions. On this point, CoreCivic argued that questions about whether CoreCivic's conduct caused the class members individually to choose to labor for CoreCivic would predominate over any common question. The district court disagreed, concluding that liability under the TVPA attaches even if CoreCivic's actions did not cause the detainees to perform the labor. The court ruled instead that the TVPA requires plaintiffs to show only an "objectively, sufficiently serious threat of harm." Alternatively, the district court reasoned that, even assuming the TVPA requires a showing of causation, whether each individual class member felt coerced by CoreCivic's policies could be decided on a class basis by inferring whether a reasonable person would have felt coerced.

On appeal, our court affirmed certification. See Owino, 36 F.4th at 850. In doing so, the panel rejected CoreCivic's argument that questions about individual causation precluded predominance, never addressing either of our court's precedents holding that a showing of causation is required under the TVPA. Compare id. at 847, with Martz-Rodrez v. Giles, 31 F.4th 1139, 1150 (9th Cir. 2022), and Headley v. Church of Scientology Int'l, 687 F.3d 1173, 1179 (9th Cir. 2012). Rather, the panel held that no "subjective, [**33] individualized inquiry" into why each class member labored was necessary because the ostensibly "contrary language" in the TVPA requires only that a defendant's threats be objectively serious. See id. (citing 18 U.S.C. 1589(c)(2) (requiring an objectively "serious harm")). Although cursory in its analysis, the necessary import of the panel rejecting CoreCivic's argumentby exclusively citing the TVPA's objectively serious harm requirementis that the [*452] plaintiffs did not need to show that CoreCivic's actions caused them to labor.

The panel also concluded that the named plaintiffs proved the existence of a common question, locating that common question in "CoreCivic's company-wide policies and practices." Owino, 36 F.4th at 846. The panel relied on three things evincing the supposed nationwide common "policies and practices": (1) CoreCivic's written policies; (2) CoreCivic's employees' declarations interpreting those written policies; and (3) declarations by four former detainees that described practices they experienced and observed at a single facility. See id. at 845.

As to the first two types of evidenceCoreCivic's written policies and its interpretations thereofthe panel provided little analysis, briefly addressing them in two short [**34] paragraphs. See id. The panel was nonetheless clear that it relied decisively on its conclusion that CoreCivic's nationwide written policy "requires detainees" to perform a long list of cleaning duties. Id. The panel nowhere acknowledged, however, that its list was taken from CoreCivic's policy applicable only to "detainee[] workers," (emphasis added), which CoreCivic employees consistently explained meant not all detainees, but rather a subset of detainees who had affirmatively volunteered to participate in its paid VWP. Ignoring the district court's conclusion that the written policies are ambiguous, the panel held that the written policies required all detainees to clean and that, when combined with the four detainee declarations, they constituted "significant proof" of a nationwide policy consistent with the plaintiffs' allegations. See id.

Accordingly, the panel affirmed certification of the nationwide class. Following CoreCivic's petition for rehearing, the panel amended its opinion in an attempt to clarify its rationale on the TVPA's causation requirement. Unfortunately, as discussed below, the amendment does not fix the panel's errors.

II.

This case deserved en banc review for [**35] two independent reasons: (1) it creates inter-and intra-circuit conflict by eliminating the TVPA's actual causation requirement for civil forced labor claims; and (2) it holds that much less evidence of a nationwide policy than was present in

Dukesis nonetheless "significant proof" of a nationwide policy, and therefore sufficient to certify a class.

A.

The TVPA prohibits a person from obtaining labor from a victim by improper means. See 18 U.S.C. 1589(a). A defendant who obtains forced labor may be held civilly liable. See id.; 18 U.S.C. 1595(a).1

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A defendant who obtains or attempts to obtain forced labor may also be criminally punished. See 18 U.S.C. 1589(a), 1594(a).

But according to the panel decision in this case, the TVPA, in permitting "victim[s]" of "forced labor" to "recover damages," id., is indifferent as to whether anyone actually forced someone else to labor. See Owino, 36 F.4th at 847. Instead, a plaintiff may satisfy the TVPA's causation requirement by showing that an abstract reasonable person would have labored because of the defendant's conduct. Only by deeming actual causation unnecessary was the panel able to conclude that individualized causation inquiries would not predominate over common questions in the named plaintiffs' class action. See id.

[*453] The panel's causation conclusion is doubly wrong. First, it is wrong because it creates inter-and [**36] intra-circuit conflict by disregarding both our binding circuit precedent, see, e.g., Martz-Rodrez, 31 F.4th at 1156 (requiring that the plaintiffs provide evidence that the defendant's conduct "proximately caused" the plaintiffs to labor), and the wisdom of our sister circuits' decisions that likewise require a showing of actual causation to prevail in a TVPA forced labor claim, see, e.g., United States v. Zhong, 26 F.4th 536, 560 (2d Cir. 2022) (recognizing that unless the prosecution proves a defendant's actions "did, in fact, compel the ... workers to remain working for [the defendant's company] when they otherwise would have left," the defendant "could not have 'provide[d] or obtain[ed]' their labor th[r]ough these actions or threats" (quoting 1589(a))); Menocal v. GEO Group, Inc., 882 F.3d 905, 918 (10th Cir. 2018) ("[P]laintiffs must prove that an unlawful means of coercion caused them to render labor.").2

2

Similar to the panel's amended opinion, the Tenth Circuit in Menocal permitted causation to be inferred class-wide. See882 F.3d at 918. But the Tenth Circuit still required actual causation by allowing the defendant to introduce evidence that individual class members were not coerced by the defendant's class-wide conduct. See id. at 921. Here, the panel acknowledged no room for a defendant to introduce evidence that individual class members did not labor because of its class-wide conduct, implying that the panel established a conclusive presumption that causation is satisfied for a TVPA claim through evidence of class-wide conduct that would cause a reasonable person to labor. No circuit has departed so far from the TVPA's actual causation requirement.

Second, even aside from the panel ignoring binding precedent, this case merited en banc review because the text of the TVPA clearly requires causation for a forced labor claimwhich is why, until this case, our circuit and other circuits have required it. See 18 U.S.C. 1589(a)(2), (4). The panel confused and conflated the TVPA's requirement that harms or threatened harms be objectively serious with the TVPA's separate requirement that [**37] such harms actually cause a victim to labor or provide services. Actual causation requires proof that the specific victim would not have labored but for the threats or harms. The TVPA requires both objectively serious harms and actual causation. The panel's error in eliminating the TVPA's causation requirement led the panel to wrongly affirm class certification. Because each class member here must individually prove causation, the panel erred in concluding that common questions predominated. See Poulos v. Caesars World, Inc., 379 F.3d 654, 668 (9th Cir. 2004).

* * *

The panel's elimination of the TVPA's causation requirement runs face-first into at least two of our precedents, as well as the decisions of our sister circuits that have addressed this issue. In our court's 2012 Headley decision, for example, lack of individualized causation is precisely what drove our court to affirm summary judgment in favor of the defendant. 687 F.3d at 1173. The plaintiffs in Headley argued that they were coerced into laboring by the defendant organization inflicting harm upon them, but our court affirmed summary judgment against the plaintiffs because the "record does not suggest that the defendant[] obtained the [plaintiffs'] labor 'by means of' those[harms]." Id. at 1180. The court instead concluded [**38] that "the record shows that the adverse consequences cited by the [plaintiffs] are overwhelmingly not of the type that caused them to continue their work and to remain with the [organization]." Id. (emphasis added). And only months before the panel issued its decision in this case, our court [*454] again affirmed that a plaintiff can succeed in a forced labor claim only if he shows that the defendant's unlawful conduct "caused the [p]laintiff to provide the labor that [the defendant] obtained." Martz-Rodrez, 31 F.4th at 1150 (emphasis in original).

In holding that the named plaintiffs need not show that the defendant's conduct caused them to labor before stating a forced labor claim, the panel advanced a novel interpretation of the TVPA's prohibition on forced labor that no federal circuit had previously adopted: holding that a defendant may be civilly liable for forced labor when its conduct did not cause the plaintiff to labor. Three other circuitsfive, if we count unpublished decisionshave either explained that a defendant's conduct must actually cause the victim to labor or relied on such causation to uphold a criminal conviction. See, e.g., Zhong, 26 F.4th at 560 (2d Cir. 2022); United States v. Toure, 965 F.3d 393, 401-02 (5th Cir. 2020) (affirming a forced labor conviction as supported by sufficient evidence, [**39] in part, because the defendants' "conduct caused [the victim] to remain with the defendants because [the victim] faced threats of serious harm, or reasonably believed she would face serious harm, if she did not provide them with her labor and services"); Menocal, 882 F.3d at 918 (10th Cir. 2018); see also United States v. Afolabi, 508 F. App'x 111, 119 (3d Cir. 2013) (unpublished) (explaining that even if the "victims were not actually intimidated" by certain abuses, the victims' testimony that they labored because of the

defendant's other illegal and improper conduct "was enough for a jury to find that the Government had satisfied its burden"); Roman v. Tyco Simplex Grinnell, 731 Fed. Appx. 813, 817 (11th Cir. 2018) (per curiam) (affirming in an unpublished opinion the district court's dismissal of a complaint because the plaintiff failed to "explain how [the defendant's] threats led to his forced labor" (citing Headley, 687 F.3d at 1179)).3

3

Although some of these decisions arose in a criminal context, the convictions were for forced labor and the courts' reasoning would apply equally to a civil claim for forced labor.

There is a good reason that all the circuits to address the question (we and five others) have uniformly concluded that the TVPA requires actual causation for forced labor claims: the plain text of the TVPA permits civil liability for "forced labor" only when a person obtains that labor "by means of" certain improper conduct, such as "by means of serious harm or threats of serious harm to that person or another person ... [or] by means of any [**40] scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint." 18 U.S.C. 1589(a)(2), (4) (emphasis added).

The "by means of" phrase that the TVPA invokes is well-recognized as requiring a causal relationship. See, e.g., Martz-Rodrez, 31 F.4th at 1155 ("[T]he phrase 'by means of' refers to familiar principles of causation and requires a proximate causal link ...."); Sanders v. John Nuveen & Co., Inc., 619 F.2d 1222, 1225 (7th Cir. 1980) ("[T]he 'by means of' language in the statute requires some causal connection ...."); Jackson v. Oppenheim, 533 F.2d 826, 830 (2d Cir. 1976) (explaining that a decision is "effected 'by means of'" an action if that action had "some causal relationship"even if not a "decisive effect""to that decision").

In rejecting "CoreCivic's argument that the TVPA necessitates a subjective, individualized inquiry" into causation, the panel ignored the TVPA's "by means of" language and instead cited the TVPA's [*455] provision defining "serious harm" as an objectively serious harm. Owino, 36 F.4th at 847 (citing 18 U.S.C. 1589(c)(2)). The panel was right that the particular provision it cited does not itself require actual causation. But the existence of the TVPA's requirement that harms and threatened harms be objectively serious does not somehow [**41] nullify the TVPA's separate requirement that a defendant obtain labor by means of such serious harm or threatened harmthe TVPA's causation requirement. In sum, a plaintiff who labored because a defendant threatened harm that would not cause a reasonable person to labor has no forced labor claim because he cannot show an objectively serious threat of harm. And likewise, a plaintiff who labored for a reason wholly unrelated to the defendant's harms or threatened harms has no claimeven if those harms or threatened harms were objectively seriousbecause he cannot show the defendant obtained the plaintiff's labor by means of those threats. The panel was wrong to conclude that plaintiffs in this latter categoryplaintiffs who didn't labor because of the defendant's conductcan succeed in bringing a forced labor claim.

The panel's belated attempt to address this problem by amending its opinion does not, unfortunately, fix it. The amended opinion does just as much damage to the TVPA's causation requirement for forced labor claims as its original opinion, just with different language. In its original opinion, the panel eliminated the TVPA's requirement that a plaintiff show individualized [**42] causationthat the defendant caused the specific plaintiff to labor. In its amended opinion, the panel acknowledges that the TVPA's "by means of" language requires some form of causation. But then the panel immediately makes clear that it is really removing the TVPA's actual causation requirement by concluding that causation may be inferred class-wide through a generally applicable policy. To make this leap, the panel must assume both that (1) every person in the class is reasonable and (2) the policy actually causes every reasonable person to labor. But it is easily foreseeable that, even assuming plaintiffs' allegations of class-wide threats are true, some portion of the class would clean merely because they liked to live in a clean space. It is reasonable to believe that many normal human beings would voluntarily sweep or wipe down furniture in common areas simply because they enjoy living in a clean environment. The panel's new description of "causation" isn't actual causation, it is probable causation applied to an abstract reasonable person, and therefore isn't real causation at all. Which brings us right back to the original opinion's conflation of the TVPA's objective standard [**43] with its requirement for individualized causation. The panel cannot have it both ways: either the TVPA requires actual causation or it does not. The opinion as now amended forswears it has eliminated causation, but if anything, it is now even clearer that the TVPA's requirement of actual causation no longer exists (or at least that panels of our court have taken inconsistent positions).

In any event, the panel's amendment leaves in place the original opinion's statement that the TVPA's objective standard means that the TVPA does not "necessitate[] a subjective, individualized inquiry." Id. That incorrect statement of law remains on the books, and, despite the amended opinion's attempt to have it both ways, will continueat odds with our own prior precedentto communicate that actual causation is not required by the TVPA.

By ignoring in-and out-of-circuit precedent and the text of the TVPA, the panel created both intra-and inter-circuit conflict [*456] on whether a plaintiff must show actual causation for a forced labor claim under the TVPA. The panel's removal of the TVPA's causation requirement will plague our cases going forward. The court should have granted rehearing en banc to eliminate [**44] a conflict in our precedent and restore the correct interpretation of the TVPA.

B.

Even if the panel had not created confusion through its incorrect conclusion that the TVPA requires no proof of actual causation, the panel still erred in certifying this class. Rule 23 requires that the movant prove the class shares a common question of law or fact. See Halliburton Co., 573 U.S. at 275. The panel concluded that the nationwide class here shared a common question based on the declarations of four detainees, all from the same facility, together with corporate

policies that are at best ambiguous as to the misconduct claimed in those declarations. See Owino, 36 F.4th at 845. The panel thus created a new rule of commonality that authorizes class certification so long as a movant can offer anecdotal evidence of misconduct limited to a small fraction of a class, coupled with written policies that at most are unclear about the complained-of conduct. That rule is inconsistent with Rule 23 and Dukes, and charts an attractive and sure-to-be-followed path for those seeking an easy class action certification.

Under Dukes, to prove commonality through a policy, a plaintiff must offer "significant proof" that the complained-of practice exists class-wide. 564 U.S. at 353. Although the [**45] Supreme Court declined to offer a bright line rule for what counts as "significant proof," we see clearly in Dukes what does not suffice: the combination of (1) an official policy of discretion that can be used for unlawful activity, (2) expert testimony that the permissive policy is used for unlawful activity, (3) statistical evidence merely suggesting unlawful activity, and (4) testimony of the unlawful activity from more than one-hundred potential class members spread across multiple locations. See id. at 353-58.

Since the plaintiffs in Dukes failed to clear the commonality threshold, a fortiori the named plaintiffs in this case failed. Here, the second and third categories above were completely missing. And the first category of evidence was no better here than it was in Dukes because, as the district court acknowledged, the policies relied on by the named plaintiffs were at most "not clear" as to the misconduct alleged. And this case is worse than Dukes as to the fourth category because the plaintiffs' testimony here is limited to one out of dozens of locations.

The written policies in this case merit more discussion because, while the panel's analysis of those policies is frustratingly brief, [**46] it is nonetheless clear that the panel put decisive weight on those policies. The named plaintiffs attempted to prove that CoreCivic has a policy requiring all detainees to "clean" the common living areas and to threaten those who refuse with discipline. They presented two written policies that the plaintiffs contend require "all detainees" to clean the common living areas or suffer disciplinary action. But the policies the named plaintiffs cited do not say that; rather, only "detainee[] workers" must clean the common living areas and detainees risk disciplinary action only if they refuse to clean their "assigned living area[s]," (emphasis added). At best, these policies are ambiguous about the very thing the named plaintiffs needed to prove: the duties of "[a]ll detainees." Ambiguity is not "significant proof." Id. at 353.

[*457] The first policy the named plaintiffs cited was the Sanitation Policy. That policy distinguishes the duties of "[a]ll detainees" from the duties of "detainee[] workers." "All detainees ... are responsible for maintaining the common living area in a clean and sanitary manner." But only "detainee[] workers" clean those areas. CoreCivic officials uniformly testified that the [**47] "workers" referenced in the Sanitation Policy are the participants in its voluntary work program. Moreover, because only workers "clean[]," the policy cannot plausibly mean that "all detainees[]" must clean the common living areas. To conclude otherwise renders superfluous the policy's distinction between "all detainees" and "detainee workers." See DaVita Inc. v. Amy's

Kitchen, Inc, 981 F.3d 664, 674 (9th Cir. 2020) (presuming that a difference in language carries a difference in meaning); Rainsong Co. v. FERC, 151 F.3d 1231, 1234 (9th Cir. 1998) (explaining that interpretations rendering language in a statute or regulation superfluous "are to be avoided" (citation omitted)).

The district court found the Sanitation Policy ambiguous. Because the panel's task was to review for abuse of discretion, it was obligated to defer to this finding unless it was clearly erroneous. See B.K. by next friend Tinsley v. Snyder, 922 F.3d 957, 966 (9th Cir. 2019). That finding was not clearly erroneous, and the panel was thus presented with an ambiguous written policy. An ambiguous policy, however, is not materially different than the policy that was insufficient in Dukes: both policies might allow the complained-of misconduct, but neither require it.

The second written policy the named plaintiffs cited was the Disciplinary Policy, which prohibits detainees from "[r]efus[ing] to clean assigned living [**48] area[s]." The Sanitation Policy clarifies that the "assigned living areas" are the detainees' personal cells and contrasts those cells with the "common living area." But if the "assigned living area" that the Disciplinary Policy punishes detainees for not cleaning is the detainees' personal cells, then this policy does not require any cleaning that the named plaintiffs claim was improper. After all, the named plaintiffs had not attempted to certify a class of detainees forced to clean their own cell and have never contended that such a requirement is problematic. This policy is thus, like the Sanitation Policy, unhelpful to proving that all CoreCivic detainees were required by any class-wide written policy to clean the common living area.

In Dukes, the plaintiffs at least offered evidence of an official policy of discretion that permitted the unlawful activity. Here, it is a stretch to read CoreCivic's written policies as even permitting the conduct complained of by the named plaintiffs. The facilities could require "[a]ll detainees" to clean common living areas only by reading "all detainees" to mean the same thing as "detainee workers" and thus intentionally obfuscating the language [**49] of the Sanitation Policy. The most that can be said about CoreCivic's written policies is that, at best, they might permit the complained-of practice. This is what the district court concluded. But that is clearly not enough under Dukes to suffice as "significant proof" of a class-wide policy requiring all detainees to clean.

Beyond the written policies, the named plaintiffs' only other evidence to satisfy their burden of "significant proof" of a common policy was their four declarations from detaineesall housed at the same, single facility. That is of no help to the named plaintiffs, because the named plaintiffs' declarations merely provide anecdotal support indicating that CoreCivic may have had an unwritten policy requiring all detainees to clean the common living area [*458] at that one facility. Four declarations from one of 24 facilities cannot provide "significant proof" of an unwritten policy that was applied to thousands, and potentially "hundreds of thousands," of detainees across all CoreCivic facilities. Because these four declarations were "concentrated in only" one facility, the other 23 facilities were left with no "anecdotes about [CoreCivic's] operations at all." Dukes, 564 U.S. at 358. The panel [**50] could not properly assume that one

facility's unwritten practice was adopted and applied in every one of CoreCivic's other facilities. And the named plaintiffs offered no evidence whatsoever that it was, falling woefully short of their burden of "significant proof" of a class-wide policy.

The panel's opinion ignored these serious problems. It did not engage with the different sections of the Sanitation Policy or consider the testimony from CoreCivic's employees. Instead, the panel referenced portions of the Sanitation Policy that apply only to "detainee workers"without even acknowledging that the policy distinguishes between "detainee workers" and "all detainees"and concluded that the Sanitation Policy, when supplemented with the four detainee declarations, evinced a class-wide policy requiring all detainees to labor. See Owino, 36 F.4th at 845. The panel also read the Sanitation Policy to require detainees to "undertake sundry other cleaning responsibilities across the facility," a requirement not appearing in the policy. Id. In its short two-paragraph analysis, the panel applied a new rule that flips the script on the Dukes commonality rule: a movant for class certification must simply provide some class-wide [**51] official policyhowever ambiguous as to the claimed misconductand a few declarations indicating that the defendant engaged in misconduct somewhere, sometime.

Ultimately, the panel's new rule takes us down a familiar road where the seasoned traveler can easily predict the destination. In 2004, a court in the Northern District of California certified a class of "at least 1.5 million women" who were or had been employed by Wal-Mart. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 142, 188 (N.D. Cal. 2004). These plaintiffs sought monetary damages and equitable relief for discrimination in pay and promotions. See id. at 141. After first affirming in a panel opinion, we went en banc and affirmed again, holding that the plaintiffs proved that the nearly 1.5 million-member nationwide class shared a common question. In Dukes we had more proof of class-wide conduct than the panel had here: we relied on a company-wide policy giving managers discretion in employment decisions, expert testimony suggesting that Wal-Mart's culture prejudiced women, statistical disparities between promotions of men and women, and testimony from 120 employees located in different stores nationwide saying they had experienced discrimination. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 600-13 (9th Cir. 2010) (en banc). That was enough for us.

It was not enough for [**52] the Supreme Court. The Court unanimously reversed us, with the majority holding that we erred in concluding that there was even a single common question. The Court reminded us that "there is a wide gap between" an individual's alleged injury, inflicted through a "company ... policy," and "the existence of a class of persons who have suffered the same injury [such] that" the individual and class claims share "common questions." Dukes, 564 U.S. at 352-53 (quotation omitted). And the Court reminded us that a common question can arise from a corporate policy only through "significant proof." Id. at 353. Because our opinion affirming the class certification relied solely on an [*459] irrelevant policy, immaterial expert testimony, and anecdotal testimony, the Court reversed. See id. at 354-60.

I would say that the panel here repeated our error in Dukes, but it did worse. At least in Dukes, we had anecdotal evidence from multiple locations nationwide. We also had statistical evidence

and expert testimony that we do not have here. And like Duke, we could rely on an official policy that at least implicitly permitted the unlawful conduct. The panel affirmed in this case by relying solely on anecdotal evidence from one of dozens of locations, and [**53] corporate policies that are at best ambiguous on whether CoreCivic had a "policy" that required detainees to labor. See Owino, 36 F.4th at 845-46. Our court should have granted rehearing en banc.

Ruelas v. Cty. of Alameda

United States District Court for the Northern District of California

February 9, 2021, Decided; February 9, 2021, Filed

Case No. 19-cv-07637-JST

Reporter
519 F. Supp. 3d 636 *; 2021 U.S. Dist. LEXIS 26846 **

ARMIDA RUELAS, et al., Plaintiffs, v. COUNTY OF ALAMEDA, et al., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Dismissed by, in part Ruelas v. Cnty. of Alameda, 2021 U.S. Dist. LEXIS 269780, 2021 WL 12144269 (N.D. Cal., June 24, 2021) Motion granted by, Question certified by Ruelas v. Cnty. of Alameda, 2021 U.S. Dist. LEXIS 269781 (N.D. Cal., June 24, 2021)
Magistrate's recommendation at Ruelas v. Alameda Cnty., 2022 U.S. Dist. LEXIS 246820, 2022 WL 21769762 (N.D. Cal., Nov. 1, 2022)

Counsel: [**1] For Armida Ruelas, DE'ANDRE EUGENE COX, BERT DAVIS, KATRISH JONES, JOSEPH MEBRAHTU, DAHRYL REYNOLDS, MONICA MASON, LUIS NUNEZ-ROMERO, Plaintiffs: Anne Butterfield Weills, Siegel & Yee, Oakland, CA; EmilyRose Naomi Johns, Daniel Mark Siegel, Siegel, Yee, Brunner & Mehta, Oakland, CA.

For Scott Abbey, Plaintiff: EmilyRose Naomi Johns, Siegel, Yee, Brunner & Mehta, Oakland, CA.

For COUNTY OF ALAMEDA, Defendant: Joel Perry Glaser, LEAD ATTORNEY, Skane Wilcox LLP, Los Angeles, CA.

For SHERIFF Gregory J. Ahern, Defendant: Joel Perry Glaser, Skane Wilcox LLP, Los Angeles, CA.

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Judges: JON S. TIGAR, United States District Judge.

Opinion by: JON S. TIGAR

Opinion

[*642] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS

Re: ECF Nos. 51, 52

Before the Court are motions to dismiss the first amended complaint filed by Defendants Alameda County and Sheriff Gregory J. Ahern ("County Defendants"), ECF No. 51, and Defendant Aramark Correctional Services, [**2] LLC ("Aramark"), ECF No. 52. The Court will deny the motions in part and grant them in part.

I. BACKGROUND

A. Factual History1

1

For purposes of these motions, the Court accepts as true the factual allegations of Plaintiffs' first amended complaint. Smith v. City of Oakland, No. 19-cv-05398-JST, F. Supp. 3d , 2020 U.S. Dist. LEXIS 86030, 2020 WL 2517857, at *2 (N.D. Cal. Apr. 2, 2020).

Plaintiffs Armida Ruelas, De'Andre Eugene Cox, Bert Davis, Katrish Jones, Joseph Mebrahtu, Dahryl Reynolds, Monica Mason, Luis Nunez-Romero, and Scott Abbey are or were "pre-trial detainees, detainees facing deportation, [and] federal detainees" confined in Alameda County's Santa Rita Jail. First Amended Complaint ("FAC"), ECF No. 48 1. Plaintiffs are or were performing "industrial food preparation services and cleaning" for Aramark pursuant to a contract between Aramark and Alameda County. Id. "Aramark is a private, for-profit company that sells food prepared by prisoners to third parties" outside of Alameda County. Id. This contract was made possible by California Proposition 139, which allows private companies to hire county jail inmates. Id. 18. Alameda County contracted with Aramark "as early as July 1, 2015." Id. 22.

Plaintiffs allege that Aramark's contract with Alameda County allows Aramark "to employ persons imprisoned in Santa Rita Jail without compensating them." Id. Under the contract, "[p]risoners prepare and package food" [**3] in Santa Rita's kitchen "and clean and sanitize the kitchen" after preparation has finished. Id. 23. Plaintiffs allege that "Aramark employees manage the kitchen operation and observe the Sheriff's deputies' supervision of the prisoner-employees." Id. Employees of Aramark "supervise the quality and amount of work that prisoners accomplish" and "supervise prisoner-employee conduct and report misconduct to the deputies for discipline." Id. 24. Further, Aramark "establishes quotas for prisoners that dictate how much work prisoners must complete before their shift ends" and "determines from its quotas how many prisoner-employees are required to work and how many shifts are required." Id. 25.

Plaintiffs allege that County Defendants may "remove [prisoner-employees'] eligibility to work in the jail and subject them to disciplinary action" if Sheriff's deputies are "displeased with the quality or quantity of the work performed or the conduct of a prisoner-employee." Id. 26. Plaintiffs allege that "if Aramark is displeased with a prisoner-employee, it can tell the County that the prisoner-employee may not return to work for Aramark." Id. County Defendants and Aramark "arranged to divide [**4] the work day so that male prisoners are [*643] assigned to longer, daytime shifts, and female prisoners are assigned to shorter, nighttime shifts." Id. 27. Plaintiffs allege County Defendants "determine which prisoners are eligible to work and place them in worker housing units," and Aramark "assigns prisoner-employees to their specific tasks." Id. 28. Plaintiffs allege that "Sheriff's deputies threaten plaintiffs and other prisoner-employees of Aramark that if they refuse to work, they will receive lengthier jail sentences or be sent to solitary confinement, where they would be confined to a small cell for 22 to 24 hours a day." Id. 31. The deputies "also threaten to terminate prisoners' employment if they need to take a sick day or are injured." Id. Plaintiffs allege that such threats are sometimes made "in the presence of Aramark employees," id. 32, and that Aramark employees threaten "to report [prisoner-employees] to the Sheriff's deputies for punishment if they attempt to leave work early due to illness or injury," id. 33.

In late October 2019, male prisoner workers, including those working for Aramark, staged a worker strike at Santa Rita "to advocate for improved conditions [**5] at the jail[.]" Id. 37. Plaintiffs allege that in response, Sheriff's deputies forced female prisoners, including Plaintiffs Ruelas and Mason, to cover the men's shifts "so that Aramark could meet their quotas[.]" Id. Deputies allegedly threatened these women by telling them they would "not be provided meals unless they worked." Id.

B. Procedural History

Plaintiffs filed the original complaint on November 20, 2019 on behalf of themselves, a class of individuals incarcerated in Santa Rita Jail who perform or performed services for Aramark, ECF No. 1, Complaint 41, and three subclasses: (1) a "Pretrial Detainee Subclass," represented by Ruelas, Davis, and Mason and comprising pretrial detainees who perform or performed services for Aramark while incarcerated at Santa Rita jail, id. 43; (2) the "Women Prisoner Subclass," represented by Ruelas, Jones, and Mason and comprising women who perform or performed services for Aramark while incarcerated at Santa Rita Jail, id. 44; and (3) the "Immigration Detainee Subclass," represented by Nunez-Romero and comprising all detainees awaiting immigration proceedings who perform or performed services for Aramark while incarcerated at Santa Rita [**6] Jail, id. 45. Plaintiffs brought ten claims, including claims under the Thirteenth Amendment, the Trafficking Victims Protection Act ("TVPA"), the Fourteenth Amendment, the California Labor Code, California's Unfair Competition Law ("UCL"), and California's Bane Act. Id. 67-108.

County Defendants moved to dismiss Plaintiffs' complaint on December 13, 2019. ECF No. 13. This Court took County Defendants' motion under submission without a hearing. ECF No. 36. Aramark moved to dismiss the complaint on January 17, 2020. ECF No. 23. The Court held a hearing on March 4, 2020. ECF No. 37.

On June 26, 2020, this Court granted in part and denied in part County Defendants and Aramark's motions to dismiss. ECF No. 46. The Court dismissed Plaintiffs' (1) TVPA claim against Aramark; (2) Labor Code claim for failure to pay wages, but only as it pertained to convicted plaintiffs; (3) Labor Code claims against County Defendants for failure to pay minimum wage and overtime, but only as they pertained to convicted Plaintiffs; (4) Labor Code claims against Aramark for failure to pay minimum wage and overtime; (5) Equal Pay Act claim; (6) Bane Act claim, but only against Aramark; and (7) Plaintiffs Mebrahtu, Mason, and Nunez-Romero's Labor [**7] [*644] Code and Bane Act claims against County Defendants. Id. at 25. All dismissals were with leave to amend except for the Labor Code claim for failure to pay convicted Plaintiffs wages as well as Mebrahtu, Mason, and Nunez-Romero's claims. Id.

On July 10, 2020, Plaintiffs filed the FAC. ECF No. 48. Plaintiffs add a new plaintiff, Scott Abbey, id. 1, and reassert nine of the ten claims from the original complaint, see id. 74-110. Plaintiffs add Jones, Reynolds, Cox, Mebrahtu, and Abbey as representatives of the pretrial detainee subclass. Id. 51. Plaintiffs no longer bring claims under California's Equal Pay Act., cf. id., or seek to represent convicted jail inmates, see id. 50.

On August 14, 2020, County Defendants and Aramark filed the instant motions to dismiss. ECF Nos. 51, 52. Plaintiffs opposed both motions and County Defendants and Aramark replied. ECF Nos. 53, 54, 56, 57. The Court held a hearing on October 21, 2020.

II. JURISDICTION

As Plaintiffs make claims under 42 U.S.C. 1983 and 18 U.S.C. 1589, this Court has subject matter jurisdiction pursuant to 28 U.S.C. 1331. The Court has supplemental jurisdiction over Plaintiffs' state law claims under 28 U.S.C. 1367.

III. LEGAL STANDARD

A complaint must contain "a short and plain statement of the [**8] claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). The Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).

IV. DISCUSSION

County Defendants argue that Plaintiffs fail to state any claims under the California Labor Code, the TVPA, or 42 U.S.C. 1983. They additionally argue that Plaintiffs Mebrahtu, Mason, and Nunez-Romero's claims are barred because this Court previously dismissed their claims without leave to amend, and that Plaintiff Abbey fails to state any [**9] claims against County Defendants. Aramark argues that Plaintiffs fail to state a claim under the TVPA, the California Labor Code, the UCL, or the Bane Act.

A. TVPA Claims

The pretrial and immigration detainee subclasses bring a claim under the TVPA against both County Defendants and Aramark. FAC 77-79. Plaintiffs allege that they "were and continue to be coerced to work without compensation under threat of physical punishment and restraint." Id. 78.

[*645] Subsection (a) of the TVPA imposes liability on primary offenders, or "[w]hoever knowingly provides or obtains the labor or services of a person" by one or a combination of the following for means:

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

(3) by means of the abuse or threatened abuse of law or legal process; or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint[.]

18 U.S.C. 1589(a)(1)-(4). Subsection (b) imposes liability on venture offenders, or any [**10] entity that "knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in" conduct prohibited by Subsection (a) where that entity knew or acted with "reckless

disregard of the fact that the venture has engaged in" the prohibited conduct. Id. 1589(b). Section 1595(a) authorizes civil remedies for violations of Section 1589. Id. 1595(a).

Plaintiffs argue that County Defendants are primary offenders of the TVPA, ECF No. 53 at 13, and that Aramark is liable as both a primary and a venture offender, ECF No. 54 at 10-14. County Defendants move to dismiss the claim on the ground that the TVPA does not apply to public entities. ECF No. 51 at 21. Aramark moves to dismiss Plaintiffs' TVPA claim on the grounds that Plaintiffs do not have standing to sue Aramark, ECF No. 52 at 15, and that Plaintiffs failed to state a claim for either primary or venture liability under the TVPA, id. at 16.

1. Standing to Sue Aramark

Aramark argues that Plaintiffs lack standing to pursue a TVPA claim against Aramark because "not one Plaintiff alleges that he or she was personally threatened by or in the presence of any Aramark employee." ECF No. 52 at 14. Aramark relies on O'Shea v. Littleton, 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974), for support. There, the Supreme Court held that [**11] general allegations were insufficient to support standing because "[n]one of the named plaintiffs is identified as himself having suffered any injury in the manner specified." O'Shea, 414 U.S. at 495. Aramark asserts that no named Plaintiff personally claims to have been "threatened by or in the presence of an Aramark employee, much less that he or she involuntarily worked in the kitchen because of such threats." ECF No. 52 at 15. Accordingly, Aramark concludes, "Plaintiffs have failed to allege actual, particularized injury against Aramark." Id.

Plaintiffs argue that they have standing to bring their TVPA claim because, contrary to Aramark's assertions, each plaintiff need not "allege that he or she was personally threatened by or in the presence of an Aramark employee." ECF No. 54 at 9. Plaintiffs contend that their injury - "being trafficked through forced labor is direct and particularized." Id. at 10.

Article III standing requires that a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered [**12] an invasion of a legally protected interest that is concrete and particularized [*646] and actual or imminent, not conjectural or hypothetical." Id. at 1548 (internal quotation marks and citations omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Accordingly, "each element must be supported . . . with the manner and degree of evidence required at the successive stages of litigation." Id.

Plaintiffs have standing to sue Aramark. Contrary to Aramark's argument, Plaintiffs need not plead that each of them "was personally threatened by or in the presence of an Aramark employee" to plead a particularized injury traceable to Aramark. See ECF No. 52 at 14 (emphasis

in original). Rather, Plaintiffs need only show that they have "suffered an injury in fact," "traceable to the challenged conduct" and "likely to be redressed by a favorable judicial decision." Spokeo, 136 S. Ct. at 1547. Unlike O'Shea, where the Supreme Court found that "the claim against petitioners allege[d] injury only in the most general terms," 414 U.S. at 495, Plaintiffs allege that Aramark and County Defendants forced them to work without compensation, even when they were sick or injured, through threats of discipline that included [**13] solitary confinement. ECF No. 54 at 10; see FAC 31-33. Plaintiffs' injury is traceable to Aramark because Plaintiffs allege that Aramark coerced them into forced labor by threatening to report Plaintiffs to Sheriff's deputies who could place them in solitary confinement, FAC 31. Plaintiffs' injury is redressable by a favorable judicial decision if Aramark can be held liable as offenders under the TVPA. See Lujan, 504 U.S. at 560-61. The Court finds this sufficient to hold that Plaintiffs have standing. See id.; see also Spokeo, 136 S. Ct. at 1547.

2. Primary Offender Liability

a. County Defendants

County Defendants assert that they cannot be held liable as primary offenders because governmental entities cannot be held liable under the TVPA. ECF No. 51 at 21. County Defendants rely on Nu□Tanedo v. E. Baton Rouge Parish Sch. Bd., 2011 U.S. Dist. LEXIS 164138, 2011 WL 13153190 (C.D. Cal. May 12, 2011), to support their argument. Nu□Tanedo held that "neither the term 'perpetrator' nor the term 'whoever' extend to governmental entities under the TVPA." 2011 U.S. Dist. LEXIS 164138, 2011 WL 13153190 at *12. Aramark also argues that County Defendants are not liable as primary offenders, and cites an Eleventh Circuit opinion, Barrientos v. CoreCivic, Inc., 951 F.3d 1269 (11th Cir. 2020), for additional support. In Barrientos, the Eleventh Circuit read the TVPA by reference to the Dictionary Act, which defines "whoever" to "include corporations, companies, associations, [**14] firms, partnerships, societies, and joint stock companies, as well as individuals." 951 F.3d at 1277. Aramark contends that because both Nu□Tanedo and Barrientos interpreted the TVPA by reference to the Dictionary Act, this Court must also do so. ECF No. 57 at 11.

Plaintiffs respond that, as Nu□Tanedo acknowledged, there is no "hard and fast rule" excluding a sovereign from the definition of "person," and that Nu□Tanedo's reading of the TVPA as excluding governmental entities runs counter to Supreme Court precedent. ECF No. 53 at 13. For support, Plaintiffs first cite Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 83, 111 S. Ct. 1700, 114 L. Ed. 2d 134 (1991), in which the Supreme Court wrote, "[O]ur conventional reading of person may . . . be disregarded if the purpose, the subject matter, the context, the legislative history, or the executive interpretation of the statute indicate [*647] an intent, by the use of the term, to bring state or nation within the scope of the law." 500 U.S. at 83 (internal quotation marks, alterations, and citation omitted). Plaintiffs also cite Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), in which

the Supreme Court held that a municipal corporation falls under the "usual meaning of the word person," 436 U.S. at 688 (internal quotation marks omitted). ECF No. 53 at 13. Plaintiffs contend further that following Nu Tanedo would [**15] "render the Supreme Court's instruction in Int'l Primate Prot. League meaningless" because it "would foreclose courts' future inquiry into whether the definition of person included the sovereign." Id. at 14.

Plaintiffs also point out that the TVPA was enacted to "implement the Thirteenth Amendment against slavery or involuntary servitude." Id.As such, given that counties may decidedly be liable for violations of the Thirteenth Amendment, they must also be liable under the statute that carries out its protections. Id. Finally, Plaintiffs argue that the TVPA's legislative history "demonstrates the legislature's wide-ranging contempt for trafficking," and "indicates that the legislature intended the TVPA to be enforceable against anyone including municipalities that violate its provisions." Id.

The Court is persuaded by Plaintiffs' argument that finding municipalities immune from liability under the TVPA would contradict Supreme Court precedent. The Supreme Court instructed in Int'l Primate Prot. League to disregard the usual reading of "person" if "the purpose, the subject matter, the context, the legislative history, or the executive interpretation of the statute indicate an intent to bring state or nation within the scope of the [**16] law." 500 U.S. at 83 (internal quotation marks, alterations, and citation omitted). County Defendants' argument that municipalities do not fall within the TVPA's definition of "person" or "whoever" does not comport with this instruction given the purpose and context of the TVPA.

The Court first notes that the TVPA was enacted to implement the Thirteenth Amendment. See United States v. Toviave, 761 F.3d 623, 629 (6th Cir. 2014). The legislative history of the TVPA demonstrates Congress's contempt for human trafficking, and intent to bring all traffickers within the TVPA's ambit. ECF No. 53 at 14; H.R. Conf. Rep. 106-939, at 5-6 (2000) (deeming trafficking "an evil requiring concerted and vigorous action" and "involving grave violations of human rights"). Furthermore, Congress did not explicitly exclude municipalities from liability under the TVPA. See Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. at 688 (holding that a municipal corporation falls under the "usual meaning of the word person" (internal quotation marks omitted)). Defendants offer the Court no reason why Congress would have excluded the sovereign from liability, without doing so explicitly, in the context of a law that was intended to give "the highest priority to investigation and prosecution of trafficking offenses." H.R. Rep. 106-487(I), at 27 (1999).2

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Barrientos v. CoreCivic, Inc. does not change the Court's analysis. In Barrientos, the Eleventh Circuit held that a for-profit government contractor could be held liable under the TVPA. See Barrientos, 951 F.3d at 1279-80. It did not address whether liability could lie against a governmental entity. See id.

And, as Plaintiffs rightly [**17] point out, it would be incongruous that a county could be liable for violations under the Thirteenth Amendment, Christie v. Iopa, 176 F.3d 1231, 1234 [*648] (9th Cir. 1999), yet be excluded from liability under the statute that implements that amendment's protections. Accordingly, the Court concludes that the context of the TVPA indicates an intent by Congress to bring the sovereign within the scope of the law. For these reasons, the Court finds that Plaintiffs may sue County Defendants as primary offenders under the TVPA, and denies County Defendants' motion to dismiss Plaintiffs' TVPA claim.

b. Aramark

Aramark argues that it cannot be liable as a primary offender because it "does not operate the Santa Rita Jail and therefore lacks the power to coerce inmates into the kitchen." ECF No. 52 at 8. Aramark asserts that because it does not have the authority to punish Plaintiffs, Plaintiffs cannot maintain a "claim of primary liability under Section 1589(a)." Id. at 16. Aramark notes that "Plaintiffs' sole new allegation for primary offender liability is that unspecified Aramark employees 'coerce' unspecified inmates 'by threatening to report them to Sheriff's deputies for punishment'" for attempting to leave work early. Id. at 15 (citing FAC 33). [**18] Aramark contends that this allegation is conclusory and insufficient given that Aramark does not have the authority to punish Plaintiffs.

Plaintiffs respond that Aramark "perpetrates trafficking in violation of the TVPRA by forcing plaintiffs' labor under the threat that Aramark will report plaintiffs to Sheriff's deputies for punishment." ECF No. 54 at 10. For support, Plaintiffs cite Owino v. CoreCivic, Inc., 2018 U.S. Dist. LEXIS 81091, 2018 WL 2194644, at *24 (S.D. Cal. May 14, 2018), which held that plaintiffs alleging they were threatened with solitary confinement had stated a claim against defendants. Plaintiffs further contend that "[i]t is not necessary that the perpetrator have the means to impose the discipline," but rather, "[t]he threat to turn plaintiffs over to an authority for discipline that is an abuse of the law is sufficient." ECF No. 54 at 11. Plaintiffs rely on Copeland v. C.A.A.I.R., 2019 U.S. Dist. LEXIS 154619, 2019 WL 4307125, at *8 (N.D. Okla. Sept. 11, 2019), for this proposition.

The FAC alleges that "Aramark employees . . . coerce plaintiffs and other prisoner-employees to work by threatening to report them to the Sheriff's deputies for punishment if they attempt to leave work early due to illness or injury." FAC 33. The Court previously noted that unlike the defendants in Owino, Aramark does not operate the Santa Rita Jail, and thus, Aramark does not have [**19] the authority to punish or coerce Plaintiffs directly. ECF No. 46 at 7. However, Plaintiffs' new allegation that Aramark employees threaten to report Plaintiffs to Sheriff's deputies for punishment for attempting to leave work early when they are sick or injured, ECF No. 54 at 10, is sufficient to show that Aramark could be a primary offender under the TVPA. Even though Aramark does not technically have the authority to place prisoner-employees in solitary confinement, Plaintiffs sufficiently allege that Aramark obtains Plaintiffs' labor by threats of physical restraint. That the physical restraint would be imposed by the County rather than

Aramark does not change the analysis. Aramark employees' threats to report Plaintiffs to coerce them to work carry the same effect as if Sheriff's deputies made the threats; no matter who makes the threats, they lead to Plaintiffs providing labor for fear that they will be placed in solitary confinement. 18 U.S.C. 1589(a)(1), (a)(4); see Owino, 2018 U.S. Dist. LEXIS 81091, 2018 WL 2194644 at *24; see also Lesnik v. Eisenmann SE, 374 F. Supp. 3d 923, 952 (N.D. Cal. 2019) (threatened harm under the TVPA must be "serious enough to compel a reasonable person to perform labor to avoid the harm") (citation omitted).

[*649] Plaintiffs also rely on Copeland, which held that plaintiffs had alleged a TVPA claim [**20] because defendants' threats of incarceration "constitute[d] threatened abuse of law or legal process." 2019 U.S. Dist. LEXIS 154619, 2019 WL 4307125 at *8. Here, Plaintiffs' allegation is similar in that Aramark threatens to report prisoner-employees to Sheriff's deputies who have the power to put them in solitary confinement or impose lengthier sentences for punishment if they refuse to work. FAC 31. Plaintiffs sufficiently allege that Aramark abused the legal process. The purpose of longer jail sentences and solitary confinement is not to force pretrial detainees to provide labor. Yet, Aramark threatened inmates that they could face punishments which Plaintiffs understood to include solitary confinement and lengthier sentences if they refused to work. 18 U.S.C. 1589(a)(3); see Copeland, 2019 U.S. Dist. LEXIS 154619, 2019 WL 4307125 at *8 ("Abuse or threatened abuse of law or legal process is defined as the use or threatened use of the law or legal process in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action." (citing 22 U.S.C. 7102(1)) (internal quotation marks omitted)). Accordingly, the Court finds that Plaintiffs have alleged primary offender liability under the TVPA against Aramark. [**21]

3. Venture Offender Liability

In addition to Aramark's primary offender liability, the Court finds that Plaintiffs have also sufficiently alleged that Aramark is a venture offender under the TVPA. See Bistline v. Parker, 918 F.3d 849, 871 (10th Cir. 2019).

Aramark argues that Plaintiffs cannot state a claim for venture liability under the TVPA because Section 1589(b) requires a primary offender and Plaintiffs have not stated a cognizable claim that County Defendants are primary offenders. ECF No. 52 at 16. Aramark further argues that Plaintiffs fail to allege the knowledge or reckless disregard required to state a venture liability claim under the TVPA. Id. Relying on Noble v. Weinstein, 335 F. Supp. 3d 504, 523-24 (S.D.N.Y. 2018), Aramark contends that liability under the TVPA "cannot be established by association alone," and that "specific conduct that furthered the forced labor venture" must be alleged. Id. at 16-17 (alterations omitted). Aramark notes that although the FAC alleges that Aramark employees "made or observed threats made by deputies, Plaintiffs do not identify a single Aramark employee by name or function who allegedly made or observed such threats, nor

the substance of any such threats." Id. at 17. Without more, Aramark argues, such assertions "are entitled to no weight." Id. (citing Iqbal, 556 U.S. at 678).

Plaintiffs assert that Aramark [**22] is liable even absent an "overt act in furtherance of the venture." ECF No. 54 at 12. Plaintiffs cite a recent decision holding that a plaintiff seeking a civil remedy under Section 1595(a) "is not required to allege an overt act in furtherance of a . . . trafficking venture in order to sufficiently plead her section 1595 civil liability claim." J.C. v. Choice Hotels Int'l, Inc., No. 20-cv-00155-WHO, 2020 U.S. Dist. LEXIS 99252, 2020 WL 3035794, at *1, n.1 (N.D. Cal. Jun. 5, 2020). Plaintiffs assert that they "may bring their claim against Aramark without bringing their claim against the venture partner." ECF No. 54 at 12.

As explained above, the Court holds that County Defendants are liable as primary offenders under the TVPA. See supra IV.A.2.a. Thus, the only question left to resolve at this stage is whether Plaintiffs have pleaded sufficient facts to state that Aramark is liable as a venture offender. The Court finds that they have. Under the [*650] TVPA, "[w]hoever knowingly benefits, financially . . . from participation in a venture which has engaged in the providing or obtaining of labor or services by any means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished . . [**23] . ." 18 U.S.C. 1589(b). Plaintiffs allege that Aramark receives a financial benefit in the form of an "economic windfall as a result of the uncompensated labor of prisoners confined in Santa Rita Jail." Id. 38. And Aramark is involved with scheduling work days for prisoner employees and assigning them to their specific tasks. See FAC 27-28. Plaintiffs also allege that Aramark employees "observe the Sheriff's deputies' supervision of the prisoner-employees, including threats of force," and that Aramark employees themselves threaten to report employees to Sheriff's deputies for punishment. Id. 23, 32, 33. These facts are sufficient to plead that Aramark knowingly benefited financially from its participation in the venture with County Defendants. Aramark's observation of the threats demonstrates that it knew or should have known of County Defendants' threats of force, yet continued to participate in the venture and receive a financial benefit notwithstanding. See Lesnik, 374 F. Supp. 3d at 953 ("[G]iven [defendant's] direct involvement in every aspect of the events at issue, the Court finds that [defendant] knew or should have known of [primary offender's] treatment of its employees."). Accordingly, Aramark's motion to dismiss [**24] Plaintiffs' TVPA claim is denied.

B. Labor Code Claims

Plaintiffs make three California Labor Code claims: (1) failure to pay wages, Cal. Lab. Code 201, 202, 218; (2) failure to pay minimum wage, id. 1194; and (3) failure to pay overtime premium wages, id. FAC 91-101. Plaintiffs argue that they are entitled to wages under California Proposition 139, which Plaintiffs state, "mandated that counties 'operate and implement the program . . . by rules and regulations prescribed by . . . local ordinance.'" ECF No. 53 at 7

(quoting Cal. Const. art. XIV, 5). Plaintiffs further assert that the Labor Code, rather than the Penal Code, controls Plaintiffs' claims. ECF No. 53 at 9; ECF No. 54 at 17-18. The Court concludes that although Proposition 139 does not support Plaintiffs' claim for wages, Plaintiffs have pleaded sufficient facts to state claims against County Defendants and Aramark under Labor Code Section 1194.

1. Proposition 139

Proposition 139 allowed for-profit entities to contract with state prisons and county jails for the purpose of using inmate labor. Proposition 139 authorized joint employment ventures with for-profit entities by amending the California Constitution to create prison work programs, which county jail programs implement through [**25] local ordinances. ECF No. 24-2 at 2; Cal. Const. art. 14, 5.

County Defendants assert that Proposition 139 left individual municipalities to determine how to compensate inmates held and performing work in county jails, if at all. ECF No. 51 at 14. Thus, County Defendants conclude, Proposition 139 does not entitle Plaintiffs to wages because Alameda County has not adopted an ordinance or provision in its administrative code requiring wages be paid to county jail inmates performing work pursuant to contracts with private companies. Id. at 15. Aramark similarly argues that Proposition 139 "forecloses the wage claims of non-convicted jail inmates" because, as Aramark reads the proposition, "Plaintiffs' [*651] prayer is properly directed to the Alameda County Board of Supervisors not to the federal court." ECF No. 52 at 20.

Plaintiffs assert that Proposition 139 mandated County Defendants to enact a local ordinance regarding the compensation of prisoner-employees before contracting with Aramark to provide inmate labor. Id. at 7-8. Consequently, Plaintiffs argue that County Defendants "eschewed the directive of the California Constitution" when it entered into a contract with Aramark "without a local ordinance." ECF No. 53 at 8.

Plaintiffs [**26] argue further that "in the absence of a local ordinance regulating the program," County Defendants and Aramark are bound by their contract to pay inmate workers wages. ECF No. 53 at 8; see ECF No. 55-3.3

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Plaintiffs filed an unopposed request for judicial notice of the contract between Aramark and County Defendants, ECF No. 55-3 at 2, which the Court grants because the contract is a matter of public record. See Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006).

The contract provides in pertinent part that

[p]ursuant to Labor Code Sections 1770 et seq., [Aramark] shall pay to person performing labor in and about Work provided for in Contract not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the Work is performed, and not less than the general prevailing rate of per diem wages for legal holiday and overtime work in said locality . . . .

ECF No. 55-3 at 10-11. Because County Defendants and Aramark's contract contains a clause binding Aramark to pay for work performed, Plaintiffs argue that the Court should construe this contract as a "local ordinance" pursuant to Article 14.

The Court does not find the contract between Aramark and County Defendants to be a "local ordinance" under Article 14. Nowhere in Proposition 139 or the California Constitution does it state that a contract can function as an ordinance in the absence of a local ordinance governing county jail programs, and Plaintiffs cite no [**27] authority to support the position that it can.4

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Unlike Vasquez v. State of California, 105 Cal. App. 4th 849, 129 Cal. Rptr. 2d 701 (2003), on which Plaintiffs rely, Plaintiffs do not bring claims to compel County Defendants or Aramark to pay prevailing wages under their contract. The Court therefore does not consider whether Defendants have fulfilled their prevailing wage obligations under the contract.

In addition, County Defendants were not mandated by Proposition 139 to enact a local ordinance before entering a joint employment venture with Aramark. Plaintiffs cite no authority to support their theory that such an ordinance is required, and the Court declines to read such a mandate into Proposition 139. The Court therefore concludes that Proposition 139 does not provide Plaintiffs with a right to compensation.

2. California Penal Code

County Defendants advance three arguments for why Plaintiffs' claims for unpaid wages lie in the Penal Code as opposed to the Labor Code. ECF No. 51 at 15-18. First, County Defendants contend that the Labor Code does not apply in light of the "comprehensive statutory scheme" governing inmate conditions, as laid out in the California Penal Code. ECF No. 51 at 15. County Defendants argue that "[n]either the California Constitution nor Title 4 of the Penal Code provides any rights for inmates of county jails to receive wages for the work performed while incarcerated." Id. at 16. For support, County [*652] Defendants direct the Court to the legislative context of the Penal Code. See id. Specifically, County Defendants argue [**28] that the California legislature has "addressed the availability of compensation [for] county jail inmates involved in work programs through the use of credits and reductions in sentences . . . for satisfactorily performing labor as required by the Sheriff" in Section 4019(b) of the Penal Code. Id. Section 4019(b) states, in pertinent part, that

"for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from the prisoner's period of confinement unless it

appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp."

Cal. Penal Code 4019(b). County Defendants assert that by enacting the Penal Code, the legislature has addressed the issue of compensation for all inmates and has decided not to provide wages. ECF No. 51 at 24.

Second, County Defendants assert that the Labor Code addresses inmates solely in the context of workers' compensation, ECF No. 51 at 17 (citing Cal. Lab. Code 3370, et seq.), and that the Labor Code "otherwise conflicts with . . . the Penal Code." Id. at 17-18. For example, County Defendants point out that the Penal Code allows state prison inmates to be paid [**29] below the minimum wage and classifies paid inmate work as a privilege, not a right. Id. County Defendants read this to mean that "the Labor Code applies exclusively to non-incarcerated persons, and the Penal Code applies exclusively to incarcerated persons, except in the sole context of workers' compensation laws." Id. at 18. County Defendants argue further that the same scheme applies to detainees awaiting immigration proceedings because Section 4005(a) of the Penal Code states that "[t]he sheriff shall receive, and keep in the county jail, any prisoner committed thereto by process or order issued under the authority of the United States . . . ." Cal. Penal Code 4005(a). Id.

Aramark similarly contends that the "Penal Code does not authorize non-convicted county jail inmates to recover under the Labor Code." ECF No. 52 at 21. Aramark argues that the Court's prior observation that relevant portions of the Penal Code are inconsistent with the Labor Code applies "not only to convicted inmates but to all Santa Rita Jail inmates, including the non-convicted inmates . . . ." Id. Because the legislature made no distinction between convicted and non-convicted inmates when enacting the Penal Code's provisions pertaining to county jails, [**30] Aramark argues, the Penal Code necessarily applies to all inmates, convicted or not. Id. at 22.

Finally, County Defendants, as well as Aramark, assert that prisoners are not considered employees under federal law. County Defendants primarily cite Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993), in support of this argument, id. at 19-20, which held that there was no employer employee relationship between state prisoners and the state under the economic realities test of the Federal Labor Standards Act ("FLSA"). 993 F.2d at 1395. Aramark similarly argues that this case is analogous to cases decided under the FLSA insofar as "[Plaintiffs'] liberty is lawfully constrained during their incarceration and they are not able to participate freely in the labor market, but their standard of living is provided for"; thus, pretrial detainees cannot be considered employees under the Labor Code. Id. at 22-23.

[*653] Plaintiffs respond that the Penal Code does not control and is not adverse to their Labor Code claims and that Plaintiffs may not be held under conditions that violate the Constitution. ECF No. 53 at 9 (citing ECF No. 46 at 20); ECF No. 54 at 17. Plaintiffs assert that pretrial detainees cannot be forced to perform uncompensated work under threat, and therefore, "any labor referenced in [**31] the Penal Code as it applies to pretrial detainees cannot mean forced

uncompensated labor for a private company." ECF No. 53 at 9. Plaintiffs further argue that nothing precludes them from the protections of the Labor Code and that requiring they be paid for work performed for a private contractor "does not offend any provision of the Penal Code or Labor Code." ECF No. 53 at 10.

In opposing Aramark, Plaintiffs argue that "[i]f for no other reason than their contract demands it, Aramark must pay pretrial detainees." ECF No. 54 at 17. Plaintiffs also ask the Court to disregard cases that construe the FLSA to exclude pretrial detainees because this case is not governed by federal labor law, but California labor law. Id. (citing Owino v. CoreCivic, Inc., 2018 U.S. Dist. LEXIS 81091, 2018 WL 2194644, at *24 (S.D. Cal. May 14, 2018)). In reply, Aramark argues that Owino is inapposite because the plaintiffs were civil immigration detainees "subject not to the California Penal Code, but to ICE regulations stating that detainees could only perform basic housekeeping tasks." ECF No. 57 at 16. Aramark argues that a better comparison is to Villarreal v. Woodham, 113 F.3d 202 (11th Cir. 1997). In Villarreal, the court held that pretrial detainees were not entitled to wages under the FLSA because correctional facilities provide pretrial detainees with [**32] "everyday needs such as food, shelter, and clothing." 113 F.3d at 206-07. Aramark does not ask the Court to apply the FLSA's economic realities test, but rather, to apply the same reasoning as Villarreal in finding that Plaintiffs are not employees. ECF No. 57 at 16.

Defendants advance unpersuasive arguments for why the Penal Code and the Labor Code are mutually exclusive. Contrary to County Defendants' argument, nothing in the statutory scheme governing the conditions of inmates indicates that the Labor Code excludes Plaintiffs, nor that the Penal Code governs Plaintiffs. For example, insofar as the Labor Code addresses inmates, it only discusses state prison inmates, without reference to county jail inmates. See, e.g., Cal. Lab. Code 3370, 6304.2. As this Court noted in its previous order, the Penal Code presumes that the Labor Code does not apply to convicted state prison inmates unless specifically indicated. ECF No. 46 at 19; see Cal. Penal Code 2811 ("[I]n no event shall [state prisoner compensation] exceed one-half the minimum wage provided in Section 1182 of the Labor Code, except as otherwise provided in this code.") (emphasis added). To that end, while the Penal Code explicitly addresses employment and wages of state prisoners, see, e.g., Cal. Penal Code 2811, 2700, it [**33] does not explicitly address such matters for pretrial detainees confined in county jails. The Court reads this omission to imply that the California legislature did not intend to exclude pretrial detainees from the Labor Code's protections.

Cases involving claims under the FLSA do not determine the outcome here because, as Plaintiffs note, this case is governed by California labor law rather than federal labor law. See Owino, 2018 U.S. Dist. LEXIS 81091, 2018 WL 2194644, at *24 ("The defect in Defendant's argument is that California's employment definition is explicitly different from FLSA's economic reality test. The California Supreme Court cannot be much clearer when it said '[i]n no sense is the IWC's definition of the term 'employ' [*654] based on federal law.'") (citations omitted). Furthermore, though this case involves a "custodial relationship" similar to the relationship described in Villarreal, 113 F.3d at 206, there are important distinctions. In Villarreal, the court noted that the

FLSA did not apply because "the labor produce[d] goods and services utilized by the prison." 113 F.3d at 207 (citation omitted). Here, Aramark, a private party, sells the goods that inmates produce to third parties outside of Alameda County. FAC 1. Thus, it cannot be said that the workers have been [**34] "taken out of the national economy" as they were in Villarreal.5

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The other cases that County Defendants and Aramark cite are similar to Villarreal insofar as plaintiffs there were taken out of the national economy. In Tourscher v. McCullough, 184 F.3d 236, 243 (3d Cir. 1999), the economic reality was such that plaintiff's labor "did not compete with private employers." In Hale, where the labor was pursuant to mandated state prison work programs, the court held that the plaintiff's labor "belonged to the institution." 993 F.2d at 1395.

See 113 F.3d at 207 (quoting Danneskjold v. Hausrath, 82 F.3d 37, 42-43 (2d Cir. 1996)). The Court therefore declines to hold that this case is analogous to FLSA cases, and the Court concludes that the Penal Code does not foreclose Plaintiffs' Labor Code claims.

3. Failure to Pay Wages (Labor Code Sections 201 and 202)6

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In its prior order, the Court denied the Defendants' motions to dismiss Plaintiffs' claim for failure to pay wages as made by non-convicted Plaintiffs because "Defendants ma[d]e no arguments as to why, despite [the Thirteenth Amendment prohibition on involuntary servitude], pretrial detainees are not entitled to wages or Labor Code protections." ECF No. 46. County Defendants now argue that pretrial detainees are not entitled to wages under either the Labor Code or the Thirteenth Amendment. ECF No. 51 at 25. Aramark also argues that the Thirteenth Amendment does not establish a right to wages, and that the Labor Code was not enacted to implement the Thirteenth Amendment. ECF No. 52 at 21. The Court recognizes that Plaintiffs allege both forced labor claims (under the TVPA and the Thirteenth Amendment) and uncompensated labor claims (under the Labor Code), and that Plaintiffs argue that unpaid wages is an appropriate remedy under the Thirteenth Amendment. The Court addresses Parties' arguments regarding Plaintiffs' Thirteenth Amendment claim below, see infra IV.C.1, but need not address the Thirteenth Amendment in the context of Plaintiffs' Labor Code claims. The Court also need not reach Plaintiffs' prayer for relief which is a remedy, not a claim at this stage. Fed. R. Civ. P. 12(b)(6); seeMecum v. Wells Fargo Bank, N.A., No. C15-1302JLR, 2016 U.S. Dist. LEXIS 31219, 2016 WL 1047435, at *5 (W.D. Wash. Mar. 9, 2016) ("Because a prayer for relief is a remedy and not a claim, a Rule 12(b)(6) motion to dismiss for failure to state a claim is not a proper vehicle to challenge the requested relief."); Monaco v. Liberty Life Assur. Co., No. C06-07021 MJJ, 2007 U.S. Dist. LEXIS 11741, 2007 WL 420139, at *6 (N.D. Cal. Feb. 6, 2007) (holding that "a complaint is not subject to a motion to dismiss for failure to state a claim under Rule 12(b)(6) because the prayer seeks relief that is not recoverable as a matter of law" (emphasis omitted)).

The Court now considers whether Plaintiffs allege claims under Sections 201 and 202 of the Labor Code. The Court will deny Plaintiffs' Section 201 and 202 claims for failure to state a claim.

Aramark argues that Plaintiffs do not allege facts sufficient to demonstrate that they are entitled to wages under Sections 201 and 202 because those sections are "facially inapplicable." ECF No. 52 at 26. Aramark asserts that "Sections 201 and 202 require that employers pay employees within a certain amount of time upon separation of employment," id., and since Plaintiffs do not allege that they resigned or were terminated from the kitchen, the claims should be dismissed. Id. Aramark and Plaintiffs both rely on Ambriz v. Coca Cola Co., No. 13-cv-03539-JST, 2013 U.S. Dist. LEXIS 158513, 2013 WL 5947010, at *7 (N.D. Cal. [*655] Nov. 5, 2013), which denied a defendant's motion to dismiss plaintiffs' failure to pay final wages claim. Aramark asks the Court to follow [**35] Ambriz insofar as some form of termination or resignation must have occurred for Plaintiffs to have valid Section 201 and 202 claims. ECF No. 52 at 26 (citing Ambriz, 2013 U.S. Dist. LEXIS 158513, 2013 WL 5947010, at *7). Plaintiffs, on the other hand, read Ambriz to support the proposition that whether Plaintiffs were terminated or resigned is "immaterial" because "the time to pay plaintiffs unpaid earned wages has passed under any . . . circumstance." ECF No. 54 at 23.

The Court concludes that Plaintiffs have not pleaded sufficient facts to state a claim under either Section 201 or Section 202. Plaintiffs do not allege that they resigned or were terminated, or when. The approximate dates of employment listed in the FAC, see FAC 45, 47, 48, without more, are insufficient to show resignation or termination under Sections 201 and 202. Plaintiffs have not alleged any facts regarding how or why their employment ended, and the Court cannot conclude whether a plaintiff resigned or was terminated merely from a date. The Court also observes that the notion that an inmate could "resign" is incompatible with Plaintiffs' allegations that inmates were forced to work. The Court therefore dismisses Plaintiff's Section 201 and 202 failure to pay wages claim with leave to amend. Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995) ("a district court should grant leave [**36] to amend . . . unless it determines that the pleading could not possibly be cured by the allegation of other facts") (citation omitted).

4. Failure to Pay Minimum and Overtime Wages (Section 1194 Claims)

Aramark contends that even if Plaintiffs can avail themselves of the Labor Code, Plaintiffs have failed to state any Labor Code claims against Aramark because Plaintiffs fail to allege an employment relationship with Aramark, ECF No. 52 at 24. In Martinez, the California Supreme Court held that the Industrial Welfare Commission's ("IWC") wage orders define an "employer" as a person who "directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." 49 Cal. 4th at 52, 71 (quoting Wage Order No. 14) (emphasis omitted). Pursuant to the IWC, "employ" is defined to mean "to engage, suffer, or permit to work." Id. at 57 (quoting Wage Order No. 14). "To

employ, then, under the IWC's definition, has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship." Id. at 64. "Any of the three is sufficient [**37] to create an employment relationship." Ochoa v. McDonald's Corp., 133 F. Supp. 3d 1228, 1233 (N.D. Cal. 2015). "While [the] plaintiff is not required to conclusively establish that defendants [a]re her joint employers at the pleading stage, [the] plaintiff must at least allege some facts in support of this legal conclusion." Johnson v. Serenity Transp., Inc., 141 F. Supp. 3d 974, 988 (N.D. Cal. 2015) (quoting Hibbs-Rines v. Seagate Techs., LLC, No. 08-cv-05430-SI, 2009 U.S. Dist. LEXIS 19283, 2009 WL 513496, at *5 (N.D. Cal. Mar. 2, 2009)).

The Court finds that Plaintiffs have alleged an employment relationship with Aramark under the first Martinez prong. Under that prong, "control over 'any one of the three aspects wages, hours, or working conditions is sufficient to impute employer liability under California [*656] wage and hour law.'" Haralson v. United Airlines, Inc., 224 F. Supp. 3d 928, 939 (N.D. Cal. 2016) (quoting Torries v. Air to Ground Servs., Inc., 300 F.R.D. 386, 395 (C.D. Cal. 2014)). "Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as one of the 'working conditions' mentioned in the wage order." Martinez, 49 Cal. 4th at 76. However, a "single conclusory allegation . . . that [the plaintiff] was supervised and/or managed by [defendant] employers" is not sufficient to support an inference of control. Haralson, 224 F. Supp. 3d at 939-40.

Plaintiffs allege the following: "Aramark employees and County of Alameda Sheriff's deputies both supervise prisoner-employees to make sure they do not violate safety rules. Aramark employees supervise [**38] the quality and amount of work that prisoners accomplish. Aramark employees also supervise prisoner-employee conduct and report misconduct to the deputies for discipline." FAC 24. Plaintiffs further allege that "Aramark establishes quotas for prisoners that dictate how much work prisoners must complete before their shift ends." Id. 25. Plaintiffs also allege that "if Aramark is displeased with a prisoner-employee, it can tell the County that the prisoner-employee may not return to work for Aramark." Id. 26. In its previous order, the Court found that Plaintiffs' threadbare allegation that Aramark supervised Plaintiffs was insufficient to allege any control by Aramark over their work conditions. ECF No. 46 at 21. However, Plaintiffs' new allegations demonstrate that Aramark dictates the length of prisoner-employees' shifts, and that Aramark can effectively terminate them if Aramark is dissatisfied with them. Plaintiffs thus allege sufficient facts to show that Aramark exercises some control over Plaintiffs' working conditions. SeeJohnson v. Serenity Transportation, Inc., No. 15-cv-02004-JSC, 2016 U.S. Dist. LEXIS 8404, 2016 WL 270952, at *16 (N.D. Cal. Jan. 22, 2016) (holding that defendant's removal of truck drivers from their work route effectively removed [**39] the drivers from employment, sufficient to show that defendant exercised control over the drivers' working conditions). Therefore, the allegations support a finding of an employment relationship under the first prong of Martinez. Accordingly, the Court denies Aramark's motion to dismiss Plaintiffs' Section 1194 claims for failure to pay minimum wage and overtime.

The Court need not consider whether Plaintiffs have asserted an employment relationship with County Defendants under the first prong of Martinez because, as the Court held in its previous order, Plaintiffs' allegations support a finding of an employment relationship under Martinez's second prong. See ECF No. 46 at 23. Under Martinez's second prong to suffer or permit to work - "the basis of liability is defendant's knowledge of and failure to prevent the work from occurring." 49 Cal. 4th at 70 (emphasis in original). In Martinez, defendants did not have the power to prevent the plaintiffs from working because a third party "had the exclusive power to hire and fire [the] workers, to set their wages and hours, and to tell them when and where to report to work." Id. As this Court explained in its prior order, every aspect of Plaintiffs' lives was or is [**40] controlled by the County, the Sheriff, and their agents. ECF No. 46 at 23. Plaintiffs allege that Sheriff's deputies force them to work and "threaten to terminate prisoners' employment if they need to take a sick day or are injured." FAC 31. This is sufficient to demonstrate that the County Defendants suffer or permit the Plaintiffs to work. Thus, Plaintiffs have sufficiently alleged that they were employed by [*657] County Defendants for the purposes of Section 1194.

Finally, County Defendants assert that the Section 1194 claim for unpaid overtime fails because state law regulations "exempt employees of the State or any political subdivision thereof, including any city, county, or special district from the overtime requirements of the Labor Code." ECF No. 51 at 18 (citing 8 Cal. Code of Regulations 11010). Plaintiffs make no argument to the contrary. Because County Defendants are exempt from the state overtime laws, 8 Cal. Code of Regulations 11010, their motion to dismiss Plaintiffs' Section 1194 claim for failure to pay overtime wages is granted. Dismissal is without leave to amend because amendment would be futile. See Salameh v. Tarsadia Hotel, 726 F.3d 1124, 1133 (9th Cir. 2013).

For the foregoing reasons, Plaintiffs have alleged an employment relationship with all Defendants. Therefore, the Court denies Aramark's motion to dismiss Plaintiffs' [**41] Section 1194 claims for failure to pay minimum wage and overtime wages. The Court denies County Defendants' motion to dismiss Plaintiffs' Section 1194 claim for failure to pay minimum wage, but grants County Defendants' motion to dismiss Plaintiffs' Section 1194 claim for failure to pay overtime wages because state entities are exempt from state overtime laws.

C. Claims Under 42 U.S.C. 1983

County Defendants submit that Plaintiffs' claims under Section 1983 fail because they are premised on the fact that Plaintiffs are entitled to compensation for work performed in Santa Rita Jail, which, County Defendants argue, they are not. ECF No. 51 at 23.

42 U.S.C. 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

To state a claim under Section 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated; and (2) that the violation [**42] was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). Liability under Section 1983 "arises only upon a showing of personal participation by the defendant." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (citations omitted). Respondeat superior liability does not lie in Section 1983; a supervisor is only liable under Section 1983 "if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." Id.

1. Thirteenth Amendment Claim

The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, 1. Plaintiffs who have not been convicted of crimes are protected by the Thirteenth Amendment's prohibition against involuntary servitude. See McGarry v. Pallito, 687 F.3d 505, 511 (2d Cir. 2012).

County Defendants contend that Plaintiffs' Thirteenth Amendment claim fails because they have no right to compensation [*658] for work performed in Santa Rita Jail. ECF No. 51 at 23-24. County Defendants argue that all Plaintiffs pretrial detainees and immigration detainees included - "are governed by Title 4 of the California Penal Code . . . ." Id. at 24. County Defendants conclude that because Plaintiffs cannot be compensated for their labor, they are, "like convicted criminals," not entitled [**43] to the Thirteenth Amendment's protection from involuntary servitude. Id. at 25.

Plaintiffs respond that Section 1983 authorizes damages against County Defendants for violating Plaintiffs' Thirteenth Amendment rights. ECF No. 53 at 15. Plaintiffs argue that they may seek compensatory, nominal, and punitive damages in the form of wages under the Thirteenth Amendment because "[w]ages are suitable compensatory damages for forced labor," and "[d]efendants cite no contrary case law." Id.

As the Court noted above, the issue of remedies for any violation of the Thirteenth Amendment is not before the Court at this stage of the proceedings. See supra IV.B.3 n.6. At this stage, the Court need only resolve whether Plaintiffs have sufficiently pleaded a Thirteenth Amendment claim against County Defendants under Section 1983.

Plaintiffs allege that County Defendants force them to work before they have been convicted or while awaiting immigration proceedings. FAC 51, 53, 75, 76. Rather than refute this allegation, County Defendants argue that Plaintiffs have not stated a Thirteenth Amendment claim because they are not entitled to payment for their labor and the Thirteenth Amendment therefore does

not apply. ECF No. 51 at 24. As the Court noted, claims of unpaid labor are distinct from claims of forced labor. See supra IV.B.3 n.6. In support of their forced labor claims, [**44] Plaintiffs allege that County Defendants forced them to work under the threat of punishment, including lengthier sentences and solitary confinement. This allegation is sufficient to plead that County Defendants have violated Plaintiffs' Thirteenth Amendment rights, and Plaintiffs therefore satisfy the first element of a Section 1983 claim. See Atkins, 487 U.S. at 48. Plaintiffs have also sufficiently pleaded that the persons who violated their rights were acting under color of state law, as County Defendants are governmental entities who were acting under state law as the administrators of Santa Rita Jail. Id. As such, County Defendants' motion to dismiss Plaintiffs' Thirteenth Amendment claim is denied.7

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Plaintiffs have not brought a Thirteenth Amendment claim against Aramark. Nonetheless, Plaintiffs argue that Aramark violated the Thirteenth Amendment and that "the gravamen of [Plaintiffs'] complaint puts Aramark on notice that they . . . have violated plaintiffs' right to be free from forced labor." ECF No. 54 at 17. Plaintiffs request leave by the Court to add a Section 1983 claim against Aramark for violating the Thirteenth Amendment. Id. The Court grants Plaintiffs' request. See Topadzhikyan v. Glendale Police Dep't, 2010 U.S. Dist. LEXIS 78717, 2010 WL 2740163, at *3 n.1 (C.D. Cal. May 21, 2010) (plaintiff was permitted to add new claims where the court granted leave to amend without limitation in its dismissal order).

2. Fourteenth Amendment Claims

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, 1.

a. Equal Protection Claim

The women prisoner subclass alleges a violation of the Fourteenth Amendment's equal protection clause against [*659] County Defendants. FAC 80-84. County Defendants move to dismiss on the ground that the FAC does not allege that the denial of out of cell time caused any plaintiff any injury.8

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County Defendants also argue that the women prisoner subclass was treated "exactly the same as the male inmates," ECF No. 51 at 25, insofar as all of them received no compensation. This point is irrelevant to Plaintiffs' equal protection claim, which is based on the difference in out of cell time.

ECF No. 51 at 25. According to County Defendants, "the generic statement that out of cell time is [**45] crucial for the physical and mental health of prisoners is wholly insufficient to state a claim for injury" under Section 1983. Id. County Defendants further argue that Plaintiffs have alleged no facts suggesting that "the Sheriff personally deprived any Plaintiff of any out of cell time." Id. at 26.

To prevail on an equal protection claim, plaintiffs "must allege facts plausibly showing that the defendants acted with an intent or purpose to discriminate against them based upon membership in a protected class." Hartmann v. Cal. Dep't of Corr. & Rehab., 707 F.3d 1114, 1123 (9th Cir. 2013). Supervisory liability exists under Section 1983 where the supervisor is either personally involved in the constitutional deprivation or there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. Rodriguez v. Cnty. of Los Angeles, 891 F.3d 776, 798 (9th Cir. 2018).

County Defendants misunderstand the question, which is not whether the denial of out-of-cell time caused the Women Subclass injury but whether the denial itself was the injury. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . [t]he "injury in fact" in an equal protection case . . . is the denial of equal treatment resulting from the [**46] imposition of the barrier[.]" Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586, (1993). Similarly here, the injury for equal protection purposes is not the effect of the loss of out-of-cell time, but rather the fact that such time has been taken away in the first place on the basis of gender. See Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 704 (9th Cir. 1997), as amended on denial of reh'g and reh'g en banc (Aug. 21, 1997), as amended (Aug. 26, 1997) ("Where a state denies someone a job, an education, or a seat on the bus because of her race or gender, the injury to that individual is clear.")9

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In any event, it cannot seriously be argued that out-of-cell time is not valuable to prisoners. See, e.g., Ashker v. Newsom, 968 F.3d 939, 942 (9th Cir. 2020) (class member prisoners alleging violation of agreement to provide out-of-cell time); Salvador Venegas v. Stan Sniff, No. 5:18-cv-02293-JLS(SHK), 2020 U.S. Dist. LEXIS 225357, 2020 WL 6723353, at *8 (C.D. Cal. Sept. 8, 2020) (ordering defendant county to provide jail inmate with a specific amount of out-of-cell time per week).

The Court finds that Plaintiffs have stated an injury insofar as the County Defendants' practices deprive women prisoners of equal time outside their cells on the basis of gender, and out of cell time positively affects their physical and mental health. See FAC 82.

Plaintiffs have also alleged sufficient facts to show that the Sheriff personally participated in the arrangement that treats women unequally. See FAC 27, 37, 52, 81, 84. For example, Plaintiffs specifically allege that Sheriff Ahern, along with other Defendants, "divide the work day so that male prisoners are assigned to longer, daytime shifts, and female prisoners are assigned to shorter, nighttime shifts." [**47] FAC 27. The Court finds that this allegation is [*660] sufficient to plead that Sheriff Ahern personally participated in the constitutional violation. See Rodriguez,

891 F.3d at 798. Accordingly, County Defendants' motion to dismiss the women prisoner sub class's equal protection claim is denied.

b. Procedural Due Process Claim

"[S]ome kind of hearing is required" under the Fourteenth Amendment before the state may deprive a person of his or her property. Parratt v. Taylor, 451 U.S. 527, 540, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327, 330-31, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

Plaintiffs allege that County Defendants failed to provide them due process by denying them wages without a meaningful opportunity to be heard beforehand. FAC 36, 85-90. County Defendants move to dismiss on the ground that Plaintiffs have no protected property interest in wages for work performed in the Santa Rita jail kitchen. ECF No. 51 at 27. County Defendants rely on Voris v. Lampert, 7 Cal. 5th 1141, 250 Cal. Rptr. 3d 779, 446 P.3d 284 (2019) to support their argument.

Plaintiffs contend that inmates "working for private companies whose wages are governed by statute, in this case the California Labor Code, are entitled to due process before being denied wages for work that they have performed." ECF No. 53 at 16. Plaintiffs cite Piatt v. MacDougall, 773 F.2d 1032 (9th Cir. 1985) for support and argue that Voris is inapplicable. Id. at 17.

The Court holds that Piatt v. MacDougall [**48] controls. Piatt held that a state prisoner could not be denied compensation without being afforded due process where an Arizona statute authorized compensation for work done in prisons and "his work was done as part of a contract with a private entity." Piatt, 773 F.2d at 1036. The Court has found that Plaintiffs have sufficiently alleged that County Defendants denied them wages in violation of the Labor Code. See supra IV.B.4 (denying motion to dismiss failure to pay minimum wage claim). Like Piatt, Plaintiffs have alleged a right to compensation, and that right to compensation cannot be denied without due process of law. 773 F.2d at 1036. But Plaintiffs contend that County Defendants provided them with no hearing before denying them wages. FAC 36. Therefore, Plaintiffs sufficiently allege that County Defendants denied Plaintiffs due process of law by denying them pay without providing an opportunity to be heard.

Voris is inapposite. In Voris, a terminated employee brought a common law conversion action against his former employer to recover unpaid wages. 7 Cal. 5th at 1149. The California Supreme Court rejected the employee's attempt to use the common law tort of conversion to recover unpaid wages "[i]n light of the extensive remedies [**49] that already exist to combat wage nonpayment in California." Id. at 1162. County Defendants read Voris to stand for the proposition that there is no valid property interest in unpaid wages. ECF No. 51 at 27. However, that was not Voris's holding. It held only that the tort of conversion cannot be used to recover unpaid wages. Cf. 7 Cal. 5th at 1149.

The motion to dismiss Plaintiffs' Section 1983 claim for failing to provide Plaintiffs due process is denied.

D. Individual Plaintiffs' Claims

County Defendants contend that the FAC fails to state any claim for relief for Plaintiffs Mebrahtu, Mason, or Nunez-Romero because the Court previously dismissed [*661] their claims without leave to amend. ECF No. 51 at 28. Plaintiffs submit that Mebrahtu, Mason, and Nunez-Romero amended their claims against County Defendants "such that they state federal claims only . . . ." ECF No. 53 at 17. In its previous order, the Court dismissed Mebrahtu's state law claims against County Defendants because he did not sufficiently allege that he suffered an injury within one year of filing the class claim, ECF No. 46 at 13, and Mason and Nunez-Romero's state law claims for failure to comply with the Government Claims Act, id. at 14. This has no effect on Mebrahtu, Mason, [**50] and Nunez-Romero's federal claims. Additionally, the Court has held that Plaintiffs have alleged sufficient facts to state TVPA and Section 1983 claims against County Defendants. See supra IV.A.2.a, IV.C. The Court will not dismiss Plaintiffs Mebrahtu, Mason, and Nunez-Romero's federal claims.

County Defendants also argue that Plaintiff Abbey fails to state any claims against County Defendants because the FAC does not contain specific facts pertaining to Abbey nor any claim for relief that he asserts. ECF No. 51 at 28-29. Plaintiffs plead that Abbey worked in the Santa Rita Jail kitchen and include dates on which he worked. FAC 13, 48. Plaintiffs contend that, "[l]ike all plaintiffs and the putative class, [Abbey] was forced to work without compensation and under threat of solitary confinement." ECF No. 53 at 17. Plaintiffs included Abbey as one of the representative plaintiffs for the pretrial detainee subclass. FAC 51. Finally, Plaintiffs use the term "Plaintiffs" to refer to all named plaintiffs, including Abbey, in allegations against County Defendants. See, e.g., id. 31. From these facts, the Court concludes that Abbey's claims against County Defendants are properly pleaded. The Court [**51] likewise declines to dismiss Abbey's claims.

E. UCL Claim

Aramark moves to dismiss Plaintiffs' UCL claim on the ground that Plaintiffs have not stated any claim under other laws or statutes that could tether a UCL claim. ECF No. 52 at 26-27; see Willner v. Manpower, Inc., 35 F. Supp. 3d 1116, 1132 (N.D. Cal. 2014) ("An act is unlawful under the UCL if it violates another law."). As discussed above, Plaintiffs have sufficiently alleged a TVPA claim and Labor Code claims against Aramark. Because "virtually any state, federal or local law can serve as the predicate for an action under [the UCL]," Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1168 (9th Cir. 2012), the Court concludes that Plaintiffs have stated a UCL claim and denies Aramark's motion to dismiss this claim.

F. Bane Act Claim10

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County Defendants do not move to dismiss Plaintiffs' Bane Act claim. The Court analyzes solely whether Plaintiffs state a claim under the Bane Act against Aramark.

Lastly, Aramark moves to dismiss Plaintiffs' Bane Act claim for failure to state a claim. ECF No. 52 at 27. Aramark contends that Plaintiffs have not alleged either of the required elements for a Bane Act claim. Id.The necessary elements for a Bane Act claim are "(1) intentional interference or attempted interference with a state or federal constitutional or legal right, and (2) the interference or attempted interference was by threats, intimidation or coercion." Lawrence v. City and Cnty. of San Francisco, 258 F. Supp. 3d 977, 994-95 (N.D. Cal. 2017) (citing Allen v. City of Sacramento, 234 Cal. App. 4th 41, 67, 183 Cal. Rptr. 3d 654 (2015)); see also Cal. Civ. Code 52.1(b)-(c). The right at issue must be constitutional or statutory. [**52] Venegas v. Cnty. of Los Angeles, 32 Cal. 4th 820, 843, [*662] 11 Cal. Rptr. 3d 692, 87 P.3d 1 (2004).

Plaintiffs have met the first element by alleging that Aramark intentionally interfered with Plaintiffs' right to minimum and overtime wages under California Labor Code Section 1194.

The test under the second element is "whether a reasonable person, standing in the shoes of the plaintiff, would have been intimidated by the actions of the defendants and have perceived a threat of violence." Richardson v. City of Antioch, 722 F. Supp. 2d 1133, 1147 (N.D. Cal. 2010). Aramark argues that Plaintiffs fail to meet the second element because "speech alone is insufficient to support a Bane Act claim, 'except upon a showing that the speech itself threatens violence against a specific person or a group [of] persons.'" ECF No. 52 at 27 (citing Cal. Civ. Code 52.1(k)). Plaintiffs respond that Aramark's threats to turn Plaintiffs over to the Sheriff's deputies for discipline are sufficient to meet the second element. ECF No. 54 at 24.

Under the Richardson test, the second element of the Bane Act is satisfied if a reasonable person "would have been intimidated by the actions of the defendants and have perceived a threat of violence." 722 F. Supp. 2d at 1147. While threats of solitary confinement would meet this test, see Owino, 2018 U.S. Dist. LEXIS 81091, 2018 WL 2193644, at *11, Plaintiffs do not allege that Aramark employees make these threats. Cf. FAC 31. Instead, Plaintiffs allege that Aramark employees [**53] threaten to turn Plaintiffs over to be disciplined by Sheriff's deputies for misconduct, id. 24, or attempting to leave work early due to injury or illness, id. 33. Nonetheless, the Court finds that Plaintiffs have sufficiently alleged that Aramark coerces Plaintiffs into working without compensation, interfering with their right to minimum and overtime wages. It matters not whether Aramark has the actual authority to place prisoners in solitary confinement, only whether a reasonable person, "standing in the shoes of the plaintiff," would have perceived a threat. Richardson, 722 F. Supp. 2d at 1147. The Court finds that a reasonable person standing in Plaintiffs' place would have been intimidated by Aramark's threats to report Plaintiffs for

discipline by Sheriff's deputies, who Plaintiffs believed would place them in solitary confinement if they refused to work. Accordingly, Aramark's motion to dismiss the Bane Act claim is denied.11

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Because the Court finds that Plaintiffs have met the second element on the Bane Act under Richardson, the Court will not address Plaintiffs' theory that Aramark aided and abetted County Defendants. See ECF No. 54 at 24.

CONCLUSION

For the foregoing reasons, County Defendants and Aramark's motions to dismiss are granted in part and denied in part. The Court dismisses Plaintiffs' (1) Labor Code Section 201 and 202 claims for failure to pay wages with leave to amend and (2) Labor Code Section 1194 claim against County [**54] Defendants for failure to pay overtime without leave to amend. The motions are denied in all other respects.

IT IS SO ORDERED.

Dated: February 9, 2021

/ s/ Jon S. Tigar

JON S. TIGAR

United States District Judge

Hornof v. Waller

United States District Court for the District of Maine

October 20, 2020, Decided; October 20, 2020, Filed

2:19-cv-00198-JDL

Reporter
2020 U.S. Dist. LEXIS 198578 *; 2020 AMC 342

JAROSLAV HORNOF, et al., Plaintiffs, v. SHANE WALLER, et al., Defendants.

Subsequent History: Motion denied by Hornof v. United States, 2021 U.S. Dist. LEXIS 12278 (D. Me., Jan. 22, 2021)
Motion denied by Hornof v. United States, 2021 U.S. Dist. LEXIS 79853, 2021 WL 1651193 (D. Me., Apr. 27, 2021)
Motion denied by Hornof v. United States, 2022 U.S. Dist. LEXIS 3761, 2022 WL 79823 (D. Me., Jan. 7, 2022)
Objection overruled by, Affirmed by Hornof v. United States, 2022 U.S. Dist. LEXIS 61792, 2022 WL 986162 (D. Me., Apr. 1, 2022)
Summary judgment granted by Hornof v. United States, 2023 U.S. Dist. LEXIS 153898, 2023 WL 5627631 (D. Me., Aug. 31, 2023)

Prior History: United States v. MST Mineralien Schiffarht Spedition Und Transp. GmbH, 2017 U.S. Dist. LEXIS 191259, 2017 WL 5585718 (D. Me., Nov. 19, 2017)

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For SHANE WALLER, a former employee of the U.S. Department of Justice, RICHARD UDEL, an employer of the U.S. Department of Justice, MICHAEL A FAZIO, Commander, First Coast Guard District of the United States Coast Guard, MICHAEL BARODY, Captain and Commanding Officer, United States Coast Guard, Sector Northern New England, JON D LAVALLEE, Lieutenant, First Coast Guard District Legal Office, MARK ROOT, Special Agent, United States Coast Guard Investigative Service, CHRISTY DOYLE, a Citizen of Maine employed by the United States Customs and Border Protection, SHANNON TRUE, a Citizen of Maine employed by the United States Customs and Border Protection, Defendant: DAVID W. INKELES, LEAD ATTORNEY, DEPARTMENT OF JUSTICE CIVIL DIVISION CONSTITUTIONAL AND SPECIALIZED TORT LITIGATION TORTS BRANCH, WASHINGTON, DC; JAMES G. BARTOLOTTO, US DEPARTMENT OF JUSTICE-CIVIL DIVISION, WASHINGTON, DC.

For UNITED STATES DEPARTMENT OF JUSTICE,[*2] UNITED STATES COAST GUARD, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES OF AMERICA, Defendant: MICHAEL A. DILAURO, LEAD ATTORNEY, US DEPARTMENT OF JUSTICE, WASHINGTON, DC.

Judges: JON D. LEVY, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: JON D. LEVY

Opinion

ORDER ON MOTIONS TO DISMISS

Jaroslav Hornof, Damir Kordic, and Lucas Zak (collectively, the "Plaintiffs"), all former crew members of a foreign vessel known as the M/ V Marguerita, bring this action against the United States, the United States Department of Justice, the United States Coast Guard, and the United States Department of Homeland Security (collectively, the "Government"), as well as nine federal officers (the "Individual Defendants").1

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The Individual Defendants include three federal prosecutors, Attorneys Shane Waller, John Cashman, and Richard Udell; four United States Coast Guard officials, Commander Michael Fazio, Captain Michael Baroody, Lieutenant Jon Lavallee, and Special Agent Mark Root; and two United States Customs and Border Protection officials, Shannon True and Christy Doyle. The Plaintiffs name them in their individual capacities only.

The Government moves to dismiss the Plaintiffs' First Amended Complaint under Fed. R. Civ. P. 12(b)(1) and (6) (ECF No. 23).2

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Originally, the Government's motion was characterized as a "motion to dismiss or, alternatively, for summary judgment." ECF No. 23. However, at oral argument, the Government agreed that the motion should be construed as a motion to dismiss. See ECF No. 60 at 8. Accordingly, I do not consider the Government's statement of material facts (ECF No. 24) in deciding this motion, and I deny the Government's motion for leave to file a supplemental statement of material fact (ECF No. 45) as moot.

Separately, the Individual Defendants move to dismiss the First Amended Complaint under Rule 12(b)(6) (ECF No. 21). A hearing was held on the pending motions on February 13, 2020. For the reasons that follow, the Government's motion to dismiss is granted in part and denied in part, and the Individual Defendants' motion to dismiss is granted.*

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This opinion is SEALED until 5:00 p.m. on October 23, 2020, to give the parties an opportunity to notify the Court, by sealed filings, whether any portions of the opinion need to be redacted because of confidentiality restrictions.

I. FACTUAL BACKGROUND

In short, the Plaintiffs allege that the Defendants [*3] unlawfully initiated an investigation into the owner and operator of the M/ V Marguerita for violating international pollution laws when the vessel arrived in Portland in July of 2017, and that they unlawfully detained the Plaintiffs as "human collateral" to secure potential fines against the vessel, in exchange for the vessel's release. ECF No. 3 1(d)-(h). The Plaintiffs also allege that the Government then sought fraudulent and pretextual material witness warrants against them to conceal the unlawful nature of and basis for their detention. As demonstrated by the narrative set forth below, the underlying facts of this case are complex.

I treat the facts alleged in the First Amended Complaint as true for purposes of ruling on the motions to dismiss. See Gordo-Gonzաz v. United States, 873 F.3d 32, 35 (1st Cir. 2017); Rodrez-Reyes v. Molina-Rodrez, 711 F.3d 49, 52-53 (1st Cir. 2013). Additionally, because certain of the Plaintiffs' allegations relate to and arise out of prior judicial proceedings, I take judicial notice of the records from those proceedings in deciding the motions to dismiss.3

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In ruling on a motion to dismiss, a court may rely on documents other than the complaint if they are "official public records," such as court records, or "documents sufficiently referred to in the complaint." Squeri v. Mount Ida Coll., 954 F.3d 56, 66 (1st Cir. 2020) (quoting Freeman v. Town of Hudson, 714 F.3d 29, 36 (1st Cir. 2013)); see also Freeman, 714 F.3d 29, 36 (describing the scope of extrinsic documents that may be considered on a motion to dismiss). Because I take judicial notice of the court records in the prior related judicial proceedings, including the transcripts of hearings in those proceedings, there is no need for those records to be filed on the docket of this case. Accordingly, the Government's motion for leave to file transcripts (ECF No. 51) is denied as moot.

A. Hornof's Whistleblowing Activity

The First Amended Complaint alleges the following facts. In May 2017, Hornof, an engineer aboard the M/ V Marguerita, discovered that the vessel's chief engineer had discharged [*4] oily bilge water into the ocean in violation of the International Convention for the Prevention of Pollution from Ships ("MARPOL"), an international treaty regarding pollution on the high seas.

Hornof reported the discharges to the then captain of the vessel as well as to the vessel's operator, MST Mineralien Schiffarht Spedition und Transport GmbH ("MST"). A new captain was assigned to the vessel, and a corrective entry was executed in the vessel's oil record book, indicating that prior entries may have been inaccurate and that the matter was under investigation. Hornof then prepared a written report about the discharges, which was relayed to MST representatives. MST provided the report to officials in Liberia, the vessel's flag state, and arranged for the vessel to undergo an independent MARPOL audit.

At the time, MST was on probation in the United States for a previous, unrelated pollution event. Pursuant to its probation conditions, MST notified several United States officialsincluding lawyers who worked with Attorneys Udell, Waller, and Cashmanof Hornof's report. Liberian officials notified the same U.S. officials that they had opened an investigation into the incident. Additionally, [*5] once the MARPOL audit was completed, attorneys for MST communicated the audit results to Michael Baroody, the Captain and Commanding Officer for the Coast Guard's Northern New England Sector, and Michael Fazio, the Commander for the First Coast Guard District. None of the Defendants responded to any of these communications, nor did any other United States official.

B. The Plaintiffs' Arrival in the United States

When the Marguerita arrived in Portland on July 7, 2017, Customs and Border Protection ("CBP") officials came onboard and granted the crew members, including the Plaintiffs, entry into the United States.4

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None of the Plaintiffs are citizens or residents of the United States. Hornof is a citizen and resident of the Czech Republic, Kordic is a citizen and resident of Croatia, and Zak is a citizen and resident of the Slovak Republic.

For the crew members who remained under contract to serve on the vessel, including Hornof and Kordic, CBP officials granted D-1 visas, which are also known as "shore passes." For those crew members whose contracts had expired, including Zak, CBP officials granted D-2 visas, giving them permission to travel home on scheduled flights.

Later that day, at least thirteen Coast Guard officials, including Special Agent Root, came onboard and questioned the crew members at length about the alleged unlawful discharges of oily bilge water that Hornof had reported. The next day, CBP officials, [*6] including True, again boarded the Marguerita and revoked all of the crew members' visas, at which point the vessel and its crew were formally detained. The Plaintiffs remained detained onboard, subject to twice-daily attendance checks and unaware of the reason for their detention, until July 16.

C. The Security Agreement

On July 13, the United States asserted in writing its belief that the Marguerita and its owner and operator5

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MST was the Marguerita's operator; its owner, at all relevant times, was Reederei MS "Marguerita" GmbH & Co. Geschlossene Investment KG, an entity that appears to be somehow linked to MST. Nothing about the two entities' relationship is relevant to the motion to dismiss, so for simplicity's sake, I refer to them collectively as "the vessel's owner and operator."

were liable for monetary penalties because the vessel had violated MARPOL and the federal law implementing it, the Act to Prevent Pollution from Ships, 33 U.S.C.A. 1901-1915 ("APPS"). Pursuant to 33 U.S.C.A. 1908 and 46 U.S.C.A. 60105 (West 2020), the Department of Homeland Security withheld the vessel's departure clearance until the vessel provided security for the potential monetary penalties. In order to secure the vessel's release, the vessel's owner and operator entered into a Security Agreement with the United States, acting through Commander Fazio. See 33 U.S.C.A. 1908(e).

Among other things, the Security Agreement provided that the vessel would be permitted to depart from Portland only if it left the Plaintiffs and certain other crew members behind. The Plaintiffs were not parties to the Security Agreement, and the First [*7] Amended Complaint alleges that they did not consent to it. The Security Agreement stated that it was not "binding on non-parties" and recognized that the vessel owner and operator could not exercise "complete control" over its crew members. In re Material Witness Jaroslav Hornof, No. 2:17-mj-00174-JHR, ECF No. 5-4 5, 7 (D. Me. Aug. 7, 2017). But it also purported to require the Plaintiffs and other crew members to remain in the District of Maine after the vessel's departure. To facilitate compliance with this provision, the vessel owner and operator agreed to continue paying the Plaintiffs and other crew members' wages indefinitely, even if their employment contracts had already expired, until the United States "advise[d] that their presence" in the District of Maine was "no longer necessary." Id. 3(c). The First Amended Complaint alleges that the Security Agreement thus effectively assigned the Plaintiffs' contracts to the United States as security for any monetary penalties that would ultimately be levied against the vessel for its alleged violations of federal law and thereby treated the Plaintiffs as "human collateral." ECF No. 3 1(h).

Additionally, the Security Agreement [*8] required the vessel owner and operator to provide hotel lodging, a daily meal allowance, health care, and reasonable transportation to the Plaintiffs and other crew members while they remained in the United States. The Security Agreement further provided that the vessel owner and operator would request the Plaintiffs and other crew members' passports and advise the United States if any crew member either refused to surrender his passport or requested that his passport be returned to him. The First Amended Complaint does not state whether the vessel's owner or operator ever made such a request.

D. The Plaintiffs' Parole into the United States

The First Amended Complaint alleges that on July 16, 2017, after the Security Agreement was executed, Special Agent Root took the Plaintiffs and other crew members to the office of Customs and Border Protection, where the Plaintiffs were paroled into the United States without their consent.6

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Parole is a temporary status that can be granted to non-citizen applicants for admission to the United States on a discretionary, case-by-case basis for "urgent humanitarian reasons" or to promote a "significant public benefit." 8 U.S.C.A. 1182(d)(5)(A) (West 2020). Certain immigration officials may parole certain "arriving aliens" into the United States "under such terms and conditions . . . as [they] may deem appropriate." 8 C.F.R. 212.5(c) (West 2020).

The First Amended Complaint further alleges that Special Agent Root and Defendant Doyle conspired to deprive the Plaintiffs of assistance of counsel during this process and refused to either explain the Plaintiffs' rights to them or notify the Plaintiffs' respective [*9] consulates of their parole status in the United States. The First Amended Complaint alleges that, at some point during or after this process, Special Agent Root confiscated the Plaintiffs' passports.

E. Judicial Proceedings Relating to the Plaintiffs' Alleged Detention

1. The Plaintiffs' Requests for Release and Subsequent Arrests

Each of the Plaintiffs sought permission from the Court to return home: Zak filed a petition for a writ of habeas corpus, Hornof moved for discharge from constructive detention, and Kordic and Hornof jointly moved for return of their visas and passports so that they could leave the United States and return home. The Government responded to each of these requests for relief by seeking and securing warrants to arrest each of the Plaintiffs as material witnesses in an ongoing grand jury proceeding targeting the vessel owner and operator.

Each of the Plaintiffs was subsequently arrested and released on a $10,000 unsecured bond. As conditions of release, the Plaintiffs were ordered to submit to supervision by United States Probation and Pretrial Services, to surrender their passports to the United States Coast Guard, to remain in the District of [*10] Maine, and to comply with temporary parole conditions set by Immigration and Customs Enforcement. After their bond hearings, the Plaintiffs returned to the hotel where they had been residing pursuant to the Security Agreement.

2. The Plaintiffs' Motions Challenging the Arrest Warrants

The Plaintiffs challenged the material witness warrants and argued that their arrests had been unlawful under the material witness statute, 18 U.S.C.A. 3144 (West 2020), because (1) the Government's investigation into MST was beyond its jurisdiction, rendering all arrests made in furtherance of that investigation unlawful, and (2) the Government had misrepresented that arrests were necessary to secure the Plaintiffs' testimony when in fact the Plaintiffs had promised to cooperate with the Government and testify against MST and the vessel's owner. The Plaintiffs further asserted that their initial questioning and detention, the revocation of their visas, the confiscation of their passports, and the Security Agreement violated several provisions of the United States Constitution, tainting the arrest warrants and justifying their dismissal.

In the alternative, the Plaintiffs moved to be deposed immediately so that they could [*11] satisfy the purpose of the material witness warrants and return to their home countries. The Plaintiffs' motions were consolidated for a hearing held before United States Magistrate Judge John H. Rich III on August 24, 2017.

3. The August 24, 2017 Hearing and Subsequent Memorandum Decision

By the date of the August 24th hearing before the Magistrate Judge, each of the Plaintiffs had already testified before the grand jury, and the grand jury had returned an indictment against the vessel owner and operator for several offenses related to the alleged discharges of oily bilge water on the high seas. However, the Government asserted that the Plaintiffs remained subject to the material witness warrants because their testimony was material to the trial of the vessel owner and operator.

At the hearing, the Plaintiffs, through their attorney, indicated that they were "reserving their rights to be immediately released and dissolve the warrants," but that "as a practical matter," their immediate goal was to "get an order for a prompt deposition" of each of them so that they could all return home as quickly as possible. In re Material Witness Jaroslav Hornof, No. 2:17-mj-00174-JHR-1, ECF No. 31 [*12] at 52 (D. Me. Jan. 17, 2020). The Plaintiffs agreed to the Magistrate Judge's characterization of their requests for depositions as "alternative" claims for relief that could be resolved without reaching their claims implicating the lawfulness of the warrants or other events leading up to the hearing. Id. at 51; see also id. at 36-37.

The Magistrate Judge found that the Plaintiffs were detained within the meaning of the material witness statute, 18 U.S.C.A. 3144, and therefore that they had standing to move for depositions pursuant to Fed. R. Crim. P. 15(a)(2). Without opining on the lawfulness of that detention, the Magistrate Judge ordered that the Plaintiffs be deposed within thirty days, following which they would be permitted to depart the United States. Because the Plaintiffs had sought depositions as an "alternative" ground for relief, the Magistrate Judge deemed the Plaintiffs' claims about unlawful conduct by the Government to be moot.

Pursuant to the Magistrate Judge's order, the Plaintiffs were deposed on September 11 and 12, 2017, in connection with the vessel owner and operator's trial. On September 14, 2017, the Magistrate Judge ordered that the Plaintiffs be released and that their passports be returned to them. On the same day, [*13] as they were preparing to depart, the Plaintiffs were served with trial subpoenas. The Plaintiffs moved to quash the subpoenas as unnecessary and unlawful. The Magistrate Judge denied the motion without prejudice because of uncertainty regarding the eventual trial date. The First Amended Complaint alleges that the subpoenas required the Plaintiffs to return to the United States for the trial of the vessel owner and operator and thereby rendered the Plaintiffs unable to sign future employment contracts to return to sea.7

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The Plaintiffs left the United States on September 14, 2017.

F. Criminal Proceedings Against the Vessel's Owner and Operator

The indictment against the vessel owner and operator charged them with nine counts of violating federal law. The first eight counts alleged that the vessel owner and operator violated the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C.A. 1901-1915, and the ninth count charged the vessel owner and operator with obstruction of justice. After the Plaintiffs' depositions were taken, the owner and operator moved to dismiss the APPS charges, asserting that the United States lacked jurisdiction to prosecute the conduct alleged in the indictment because no violation of the laws of the United States had occurred, an argument the [*14] Plaintiffs had made in their motions challenging the material witness warrants. In an order dated January 22, 2018, United States District Judge Nancy Torresen rejected this argument, holding that the first eight counts of the indictment sufficiently alleged violations of United States law, regardless of whether the alleged discharge of oily bilge water and the initial concealment of it in the vessel's oil record book had occurred on the high seas. Accordingly, the motion to dismiss was denied.

On November 2, 2018, the vessel operator pleaded guilty to one count of violating the APPS and one count of obstruction of justice. All other counts of the indictment were dismissed. The vessel operator was sentenced to a term of probation of four years and ordered to pay a fine in the amount of $3,200,000: $500,000 for the APPS violation and $2,700,000 for the obstruction of justice charge. The Plaintiffs then moved for an award of fees under 33 U.S.C.A. 1908(a), which provides that up to half of any fine imposed for an APPS violation may be paid to persons who gave the Government information leading to the conviction. Judge Torresen granted the Plaintiffs' motion and awarded $225,000 to Hornof and $12,500 each [*15] to Zak and Kordic.

II. PROCEDURAL HISTORY AND LEGAL FRAMEWORK

On May 6, 2019, the Plaintiffs filed this civil action against the Government and the Individual Defendants, asserting a variety of claims for which they seek damages as well as injunctive and declaratory relief. The gist of the complaint is that the Defendants initiated proceedings against the Marguerita under the APPS, despite knowing that no probable cause supported the prosecution, because they believed that a conviction under the APPS would generate large fines for the Government and "personal glory" for the Individual Defendants. The Plaintiffs further allege that they were detained as "human collateral" for the prospective fines under the security agreement, and that the Defendants sought fraudulent and pretextual material witness warrants against them to justify their unlawful detention and to conceal the real basis for both their detention and the underlying prosecution: the Defendants' desire to extort large sums of money from the vessel owners.

[*16] The First Amended Complaint contains six Counts. Four of those six Counts are against all the Defendants: those Counts make claims under the Federal Tort Claims Act, 28 U.S.C.A. 1346 (West 2020) (Count Two); the Act to Prevent Pollution from Ships, 33 U.S.C.A. 1901-1915 (West 2020) (Count Three); and the federal criminal statutes against peonage, involuntary servitude, and human trafficking, see 18 U.S.C.A. 1581, 1584, 1592, and 1595 (West 2020) (Count Five), as well as a claim for declaratory and injunctive relief related to all Counts (Count Four). Counts One and Six involve claims against only the Individual Defendants: Count One for constitutional violations under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and Count Six for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.A. 1961-1968 (West 2020).

The Government has moved to dismiss all of the Counts against it (Counts Two, Three, Four, and Five) pursuant to Fed. R. Civ. P. 12(b)(1), arguing that it retains sovereign immunity for all the claims against it and, therefore, this Court lacks subject matter jurisdiction. See Valentin v. Hospital Bella Vista, 254 F.3d 358, 362-63 (1st Cir. 2001). The Government also moves to dismiss the Counts against it pursuant to Rule 12(b)(6). The Individual Defendants, for their part, move to dismiss all counts against them on 12(b)(6) grounds.

To navigate this thicket, I proceed in the following manner: First, I address the substantive Counts against all the Defendants (that is, Counts Two, Three, and Five) before turning to the Counts against the Individual Defendants [*17] only (Counts One and Six) and then, finally, addressing the Plaintiffs' request for declaratory and injunctive relief (Count Four). Before delving into the particulars of each Count, I set forth the legal standards governing my analysis; I also take the opportunity to sketch the law governing the Individual Defendants' defense of qualified immunity, which they assert with regard to multiple Counts.

A. Legal Standard

To survive a motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the plaintiff must "make clear the grounds on which the court may exercise

jurisdiction." Johansen v. United States, 506 F.3d 65, 68 (1st Cir. 2007). If the plaintiff "fails to demonstrate a basis for jurisdiction," the motion to dismiss for lack of subject-matter jurisdiction must be granted. Id. Where, as here, a motion to dismiss under Rule 12(b)(1) is based solely on the complaint, courts accept as true all well-pleaded allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. Gordo-Gonzalez, 873 F.3d at 35. In other words, "[t]he pleading standard for satisfying the factual predicates for proving jurisdiction is the same as applies under Rule 12(b)(6)." Id. (quoting Labor Relations Div. of Constr. Indus. of Mass., Inc. v. Healey, 844 F.3d 318, 326-27 (1st Cir. 2016)).

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the complaint "must contain sufficient factual matter to state a [*18] claim to relief that is plausible on its face." Rodrez-Reyes, 711 F.3d at 53 (quoting Grajales v. P.R. Ports Auth., 682 F.3d 40, 44 (1st Cir. 2012)). Courts apply a two-pronged approach in resolving a motion to dismiss under Rule 12(b)(6). Ocasio-Hernandez v. Fortuño-Burset, 640 F.3d 1, 12 (1st Cir. 2011). First, courts must identify and disregard statements in the complaint that merely offer legal conclusions couched as factual allegations. Id. (citing Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). Second, courts "must determine whether the remaining factual content allows a reasonable inference that the defendant is liable for the misconduct alleged." A.G. ex rel. Maddox v. Elsevier, Inc., 732 F.3d 77, 80 (1st Cir. 2013) (quotation marks and citation omitted). Determining the plausibility of a claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 53 (quoting Iqbal, 556 U.S. at 679).

B. Qualified Immunity as to the Individual Defendants

The Individual Defendants contend that they are entitled to qualified immunity on all Counts against them. "The qualified immunity doctrine protects federal . . . officials from civil liability in the performance of 'discretionary functions insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Martinez-Rodriguez v. Guevara, 597 F.3d 414, 419 (1st Cir. 2010) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)) (alteration omitted). The qualified immunity inquiry involves [*19] a "two-part test: '(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation.'" Penate v. Hanchett, 944 F.3d 358, 366 (1st Cir. 2019) (quoting Rocket Learning, Inc. v. Rivera-Sánchez, 715 F.3d 1, 8 (1st Cir. 2013)).

"Courts need not engage in the first inquiry and may choose, in their discretion, to go directly to the second." Id. (citing Eves v. LePage, 927 F.3d 575, 584 (1st Cir. 2019)).

"The 'clearly established' inquiry itself has two elements." Id. (quoting MacDonald v. Town of Eastham, 745 F.3d 8, 12 (1st Cir. 2014)). "First, the plaintiff must identify either 'controlling

authority' or a 'consensus of cases of persuasive authority' sufficient to signal to a reasonable officer that particular conduct would violate a constitutional right." Morse v. Cloutier, 869 F.3d 16, 23 (1st Cir. 2017) (quoting Wilson v. Layne, 526 U.S. 603, 617, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)). "This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" Id. (quoting Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam)). Second, the court must determine "whether a reasonable officer in the defendant's position would have known that his conduct violated the established rule." Id. (citing Wilson v. City of Boston, 421 F.3d 45, 57-58 (1st Cir. 2005)).

III. DISCUSSION

Having outlined the legal framework, I turn to an analysis of each Count, beginning with the Counts involving claims against all Defendants, as discussed above.

A. Count Two: The Federal [*20] Tort Claims Act

Count Two asserts claims for false arrest, false imprisonment, abuse of process, and intentional infliction of emotional distress ("IIED") against all Defendants under the Federal Tort Claims Act ("FTCA"), 28 U.S.C.A. 1346.8

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The First Amended Complaint also contains one allegation that the Defendants "defamed" the Plaintiffs. ECF No. 3 127. To the extent that the Plaintiffs intend to assert a defamation claim under Count Two, this Court lacks jurisdiction to decide it. The FTCA does not waive sovereign immunity for claims of libel or slander, which include defamation claims. See 28 U.S.C.A. 2680(h) (West 2020); Aversa v. United States, 99 F.3d 1200, 1207, 1213 (1st Cir. 1996) (noting that "claims arising from libel and slander" are not within the FTCA's jurisdictional exception); accord Vincent v. United States [*21] , No. 2:14-CV-00238-JAW, 2015 U.S. Dist. LEXIS 87575, 2015 WL 4092842, at *3-4 (D. Me. July 7, 2015).

The FTCA provides that federal courts:

shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. 1346(b)(1). As counsel for the Plaintiffs conceded at oral argument, claims under the FTCA may only be brought against the United States. See ITT Fed. Servs. Corp. v. Montano, 474 F.3d 32, 34 (1st Cir. 2007) (citing 28 U.S.C.A. 1346(b), 2674, 2679); ECF No. 60 at 27. Accordingly, Count Two is dismissed as to all Defendants other than the United States. The Government contends that Count Two

should also be dismissed as to the United States for lack of jurisdiction and failure to state a claim. I address each of the Plaintiffs' claims under the FTCA in turn.

1. False Arrest and False Imprisonment

Count Two asserts claims of false arrest and false imprisonment based on the Plaintiffs' alleged detention onboard the ship, the restrictions allegedly placed on their liberty after they were paroled into the United States, and their arrests as material witnesses. The Government contends that the Plaintiffs' claims of false arrest and false imprisonment should be dismissed for lack of subject-matter jurisdiction because sovereign immunity shields the United States from those claims. In the alternative, the Government asserts that the Plaintiffs' claims of false imprisonment and false arrest are barred by issue preclusion. Failing that, the Government argues that the claims for false arrest and false imprisonment should be dismissed for failure to state a claim. I consider the Government's jurisdictional arguments first.

a. Sovereign Immunity

Federal courts lack subject-matter jurisdiction over claims asserted against the United States unless the United States has waived sovereign immunity with respect to those claims. See Villanueva v. United States, 662 F.3d 124, 126 (1st Cir. 2011) (citing FDIC v. Meyer, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)). The FTCA "waives the sovereign immunity of the United States with respect to certain torts committed by federal employees [*22] acting within the scope of their employment." Gordo-Gonzalez, 873 F.3d at 35 (citing Bolduc v. United States, 402 F.3d 50, 55 (1st Cir. 2005)). But "the FTCA's waiver of sovereign immunity is narrowed by exceptions." Evans v. United States, 876 F.3d 375, 380 (1st Cir. 2017). "One such exception, commonly called the discretionary function exception, bars liability for claims 'based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.'" Id. (quoting 28 U.S.C. 2680(a)). Thus, if a plaintiff's FTCA claims are based on conduct involving "the exercise of discretion in furtherance of public policy goals," those claims "are foreclosed by the discretionary function exception." Id. at 380-81 (quoting United States v. Gaubert, 499 U.S. 315, 334, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991)).

The Government argues that the Plaintiffs' false arrest and false imprisonment claims are barred by the discretionary function exception because they primarily challenge government officials' discretionary conduct during a law enforcement investigation. The Plaintiffs respond that, notwithstanding the discretionary function exception, their claims for false arrest and imprisonment are expressly permitted by the FTCA's law enforcement proviso, which waives sovereign immunity as to "any claim arising . [*23] . . out of assault, battery, false imprisonment,

false arrest, abuse of process, or malicious prosecution" based on acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C.A. 2680(h).

The relationship between the discretionary function exception and the law enforcement proviso is not clear, and the Circuit Courts are divided on the question of whether the discretionary function exception can bar liability for the enumerated torts arising from the conduct of law enforcement officers, for which the FTCA would otherwise waive immunity pursuant to the law enforcement proviso. The Second, Fourth, Fifth, Seventh, Ninth, and D.C. Circuits have held that the law enforcement proviso "does not negate the discretionary function exception" and, thus, that the United States retains sovereign immunity for torts arising from at least some discretionary functions exercised by law enforcement officers, although those Circuits apply different standards to synthesize the two provisions. Joiner v. United States, 955 F.3d 399, 406 (5th Cir. 2020). Compare, e.g., Campos v. United States, 888 F.3d 724, 731 (5th Cir. 2018) ("Neither the discretionary function exception nor the law enforcement proviso 'exist[s] independently of the other nor does one predominate over the other.'" (quoting [*24] Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987))) with Linder v. United States, 937 F.3d 1087, 1089 (7th Cir. 2019) ("[D]iscretionary acts by law-enforcement personnel remain outside the FTCA by virtue of 2680(a), even though the proviso allows other . . . suits."). By contrast, the Eleventh Circuit has held that "sovereign immunity does not bar a claim that falls within the [law enforcement proviso], regardless of whether the acts giving rise to it involve a discretionary function." Nguyen v. United States, 556 F.3d 1244, 1256-57 (11th Cir. 2009). The First Circuit has not considered the issue. It is unclear whether, in the First Circuit, the FTCA's discretionary function exception applies to tort claims arising out of the conduct of law enforcement officers. Even if the discretionary function exception applies, however, "[i]t is elementary that the discretionary function exception does not . . . shield conduct that transgresses the Constitution." Limone v. United States, 579 F.3d 79, 101 (1st Cir. 2009). Because the Plaintiffs' FTCA claims are predicated on allegations that the Defendants' conduct violated, among other things, the Fourth Amendmentallegations that, as I describe in greater detail below, pass 12(b)(6) musterI conclude that the discretionary function exception does not bar the Plaintiffs' claims of false arrest and false imprisonment under the FTCA. Accordingly, I turn to the Government's second argument, that the [*25] judicial proceedings involving the Plaintiffs before the Magistrate Judge preclude the Plaintiffs from relitigating the validity of their detention.

b. Issue Preclusion

The Government points out, correctly, that the Plaintiffs now reassert many of the same allegations and arguments they originally raised in support of their motions challenging the material witness warrants. In particular, the First Amended Complaint contends that the Plaintiffs' detention and the circumstances surrounding the same violated their rights under the Fourth, Fifth, Sixth, and Thirteenth Amendments. Because all of these contentions were raised

before the Magistrate Judge, the Government asserts that the Plaintiffs are precluded from raising them again in this action under the doctrine of issue preclusion, which is also known as collateral estoppel. A party invoking issue preclusion based upon a previous federal court judgment must show, among other things, that "the prior court decided that issue in a final judgment." Vargas-Col□. Fundaci□amas, Inc., 864 F.3d 14, 26 (1st Cir. 2017) (quoting Robb Evans & Assocs., LLC v. United States, 850 F.3d 24, 32 (1st Cir. 2017)).

The Government cannot meet this burden. In the material witness proceedings, the Plaintiffs argued for two alternative forms of relief. First, they sought immediate release on the grounds that their detention was unlawful. [*26] Alternatively, they requested that their depositions be taken pursuant to the material witness statute, 18 U.S.C.A. 3144, and Fed. R. Crim. P. 15, so that they could promptly satisfy the purpose of the material witness warrants and return home. The Plaintiffs indicated that they would not press their arguments about the lawfulness of their detention if the Magistrate Judge granted them alternative relief in the form of an order requiring prompt depositions. The Magistrate Judge did just that. He found that the Plaintiffs were "detained" within the meaning of the material witness statute and ordered that the Government take the Plaintiffs' depositions and release them from detention within 30 days. The Magistrate Judge did not address the lawfulness of the Plaintiffs' detention. Ultimately, the Plaintiffs' claims for immediate release were denied as moot. Because the Magistrate Judge's order did not decide the issues presented by the FTCA claims, issue preclusion does not prevent the Plaintiffs from raising them now.

Having determined that the Plaintiffs' false arrest and false imprisonment claims are not barred by issue preclusion, I now address the Government's argument these claims should be dismissed for failure to [*27] state a claim under Fed. R. Civ. P. 12(b)(6).

c. Failure to State a Claim

In order to establish a tort claim of false arrest and false imprisonment under Maine law, "the authority upon which [the plaintiff] is confined must be unlawful." Santoni v. Potter, 369 F.3d 594, 603 (1st Cir. 2004) (quoting Nadeau v. State, 395 A.2d 107, 116 (Me. 1978)). Thus, a plaintiff can establish a false arrest by showing that the arrest was unauthorized by statute or that the arrest violated the Fourth Amendment. See, e.g., id. (finding no basis for liability for false arrest or false imprisonment where plaintiff was arrested and confined upon valid state law authority). The Plaintiffs assert claims of false arrest and false imprisonment based on their alleged detention both before and after the material witness warrants were issued.

i. The Alleged Pre-Warrant Detention

The Plaintiffs first contend that they were unlawfully detained before the material witness warrants were issued. This contention is based on the alleged fact that the Plaintiffs were

detained without probable cause on the ship from July 7 until July 16, 2017, and that they were involuntarily paroled into the United States and required to remain in the United States against their will under the Security Agreement.

The Government does not meaningfully address whether the Plaintiffs' [*28] allegations of pre-warrant detention plausibly state a claim for false arrest and false imprisonment. For example, the Government and the Individual Defendants both argue that the Plaintiffs were not seized until the material witness warrants were issued, but they do not explain this argument further or provide any authority supporting it. The Government simply stated at oral argument that the Plaintiffs were in the United States "voluntarily" before they were formally arrested. ECF No. 60 at 6. However, the Amended Complaint specifically alleges that the Plaintiffs were present in the United States involuntarily, and I must treat this allegation as true on a motion to dismiss.

The Government further contends that even if the Plaintiffs were detained before the warrants were issued, their detention was lawful because it was authorized by three separate statutes. The Government first points to the material witness statute, which provides, in relevant part:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer [*29] may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title.

18 U.S.C.A. 3144. But the text of the material witness statute does not provide for the warrantless arrest of material witnesses. Rather, the material witness statute permits arrests upon an "order" by a "judicial officer" if "it appears from an affidavit filed by a party that the testimony of a person is material" and "that it may become impracticable to secure the presence of the person by subpoena." Id. Thus, the plain text of the statute suggests that warrants are necessary to justify the detention of material witnesses. Although the Government argues that "warrants were not immediately necessary," ECF No. 43 at 8, it again does not develop this argument or provide supporting authority. Instead, the Government rests on its contention that the Magistrate Judge decided this issue during the material witness proceedings. However, as I have already explained, the Magistrate Judge did not decide issues relating to the lawfulness of the Plaintiffs' detention. Therefore, I am not persuaded that the Plaintiffs' alleged pre-warrant detention was lawful under the material witness statute.

The Government [*30] next points to 19 U.S.C.A. 1581(a), which provides that Customs and Border Protection officials may "stop," "board," and "search" vessels and may "use all necessary force to compel compliance." The Plaintiffs respond that 19 U.S.C.A. 1581(a) could not have authorized their alleged detention onboard the ship from July 7 to July 16, 2017, because there was no ongoing "search" of the vessel that would have necessitated a use of "force" against the crew members for that entire time period. The Amended Complaint does not specifically detail the movements and activities of CBP officials during the Plaintiffs' alleged detention onboard the ship, but it is reasonable to infer that the officials' search of the vessel did not span nine continuous days. Because I must draw all reasonable inferences in the Plaintiffs' favor on a

motion to dismiss, I am not persuaded by the Government's argument that the full length of the Plaintiffs' alleged detention onboard the ship was authorized by 19 U.S.C.A. 1581.9

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The Amended Complaint also asserts that the Plaintiffs' pre-warrant detention, both on and off the ship, was achieved through unlawful means, namely, the revocation of their visas without due process. The parties' memoranda do not address whether the Plaintiffs' alleged pre-warrant detention in fact resulted from the revocation of their visas. Nor do they address the lawfulness of the alleged visa revocation or of the Plaintiffs' alleged pre-warrant detention under the relevant immigration laws, including the parole statute, 8 U.S.C.A. 1182(d)(5), and the statute governing conditional visas for foreign crew members, 8 U.S.C.A. 1282 (West 2020). Accordingly, I do not decide this issue.

The Government also relies on 14 U.S.C.A. 522, which permits the Coast Guard to "make inquiries, examinations, . . . seizures, and arrests . . . for the prevention, detection, and suppression of violations" of federal law and to make arrests when "it appears [*31] that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person." But statutes authorizing Coast Guard officers to make arrests do not exempt those officers from the Fourth Amendment's prohibition on unreasonable seizures. See United States v. Cardona-Sandoval, 6 F.3d 15, 23 (1st Cir. 1993); cf. Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 259 (1st Cir. 2003) (refusing to adopt an interpretation of the Coast Guard's statutory authority that would run afoul of the Fourth Amendment). Thus, even if 14 U.S.C.A. 522 or some other statute authorized the Plaintiffs' alleged pre-warrant detention, the question remains whether such detention violated the Fourth Amendment's prohibition on unreasonable seizures.

The Government does not cite any Fourth Amendment caselaw or otherwise address the reasonableness of the Plaintiffs' alleged pre-warrant detention under the Fourth Amendment. To the extent that the Government intends to argue that the statutory authority it relies on is coextensive with the Fourth Amendment, it does not provide any authority supporting this argument. The Government, as the moving party, "bears the burden of demonstrating that the complaint fails to state a claim." Franchini v. Bangor Publ'g Co., 383 F. Supp. 3d 50, 55 (D. Me. 2019) (citing Lamprey v. Wells Fargo Home Mortg., No. 2:16-cv-00570-JDL, 2017 U.S. Dist. LEXIS 127653, 2017 WL 3470570, at *2 (D. Me. Aug. 11, 2017)). Because the Government has not provided "any authority at all" supporting its position that the Plaintiffs' alleged [*32] pre-warrant detention was reasonable under the Fourth Amendment, it has not satisfied this burden. Filler v. Hancock Cnty., No. 1:15-cv-00048-JAW, 2016 U.S. Dist. LEXIS 10777, 2016 WL 335858, at *26 (D. Me. Jan. 27, 2016). Accordingly, the Government's motion to dismiss is denied with respect to the Plaintiffs' claims that they were falsely arrested and falsely imprisoned before the material witness warrants were issued.

ii. The Material Witness Warrants

The Plaintiffs also challenge the lawfulness of their detention pursuant to the material witness warrants because, they assert, those warrants were invalid. See Santoni, 369 F.3d at 603. The Government contends that the Plaintiffs were lawfully arrested under the material witness statute. As explained above, the material witness statute permits the detention of a witness only upon a showing that (1) the witness's testimony is material, and (2) it may become impracticable to secure the presence of the witness by subpoena. See 18 U.S.C.A. 3144. These requirements are sometimes referred to as the "materiality prong" and the "impracticability prong." See, e.g., United States v. Awadallah, 349 F.3d 42, 76 (2d Cir. 2003) (Straub, J., concurring).

The warrant affidavits signed by Special Agent Root indicated that each of the Plaintiffs were eyewitnesses to or participants in the vessel's alleged violations of federal law and stated [*33] that they would be "able to corroborate and provide other relevant and probative information" relating to the ongoing grand jury investigation targeting the vessel owner and operator. Thus, the warrant affidavits facially established that the Plaintiffs' testimony was material in the criminal proceedings against the vessel owner and operator.

The warrant affidavits further stated that the Plaintiffs were foreign citizens who would "not be subject to compulsory process" if they were allowed to return to their home countries. Ordinarily, foreign citizenship and residence are sufficient to establish the impracticability prong of the material witness statute because "the government's subpoena power [is] basically ineffectual" in foreign countries. United States v. Matus-Zayas, 655 F.3d 1092, 1099-1100 (9th Cir. 2011) (quotation marks omitted). Thus, the warrant affidavits facially established that it may have become impracticable to secure the Plaintiffs' presence by subpoena. Because the affidavits satisfied both the materiality and impracticability prongs, the material witness warrants were facially valid.

Nevertheless, the Plaintiffs argue that their arrests pursuant to the material witness warrants violated the Fourth Amendment, and were therefore unlawful for false arrest [*34] purposes, see Santoni, 369 F.3d at 603, because the material witness warrant applications and supporting affidavits intentionally misrepresented and omitted material facts. The Fourth Amendment is violated if an application for an arrest warrant or the supporting affidavit intentionally or recklessly misrepresents or omits material facts. See Burke v. Town of Walpole, 405 F.3d 66, 81 (1st Cir. 2005) (citing Forest v. Pawtucket Police Dep't, 377 F.3d 52, 58 (1st Cir. 2004)). Misrepresentations or omissions violate the Fourth Amendment only if they are material to the magistrate judge's probable cause determination. Id. at 82 (citing Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)). In order to determine the materiality of the misstatements and omissions, a court must "excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the corrected warrant affidavit would

establish probable cause." (internal quotation marks omitted) (quoting Wilson v. Russo, 212 F.3d 781, 789 (3d Cir. 2000)).

The Plaintiffs identify several categories of alleged misrepresentations and omissions in the warrant applications. First, the Plaintiffs allege that the warrant applications and affidavits intentionally misrepresented that the Marguerita had violated federal law by discharging pollutants in or within twelve nautical miles of the United States and by failing to maintain an accurate oil record book, when in fact the vessel had not violated [*35] any federal law. Because the Plaintiffs assert that the criminal proceedings against the vessel were unlawful, they argue that the material witness warrants were invalid. However, Judge Torresen rejected the vessel owner and operator's arguments that the vessel had not violated any federal law during the criminal proceedings, and the vessel operator was ultimately convicted of two federal crimes.10

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Of course, as the Government argues, the lawfulness of the predicate criminal proceeding is not an element of the material witness statute, and an unlawful criminal proceeding may not necessarily invalidate an otherwise lawful material witness warrant. Here, however, the Plaintiffs were allegedly subjected to lengthy detention and questioning prior to the issuance of the material witness warrants, and the lawfulness of that alleged pre-warrant detention and questioning may well depend on the lawfulness of the investigation into the vessel. Thus, if the underlying investigation were unlawful and the material witness warrant applications relied on information learned from the Plaintiffs during the alleged pre-warrant detention and questioning, the validity of the warrants themselves could be called into question under the fruit of the poisonous tree doctrine: At least one Court of Appeals has stated that information unlawfully obtained from a person should be excised from a warrant application and affidavit when determining the validity of a warrant for that person's arrest as a material witness. Awadallah, 349 F.3d at 68-69. However, I need not address this issue because the investigation and prosecution of the vessel owner and operator were lawful, as noted above. Even if this were not so, the Plaintiffs admit that all relevant information was already known or at least readily available to the Government through an independent, lawful sourcethe vessel's voluntary disclosures, which were made prior to the Plaintiffs' alleged pre-warrant detention and questioning. This admission offsets any potential concerns about the actual source of the information in the warrant applications and affidavit.

Furthermore, I do not address the Government's argument that collateral estoppel precludes the Plaintiffs from relitigating the lawfulness of the criminal prosecution against the Marguerita's owner and operator. Cf. Heck v. Humphrey, 512 U.S. 477, 487, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). Rather, I simply am not persuaded that there are any grounds to reconsider Judge Torresen's well-reasoned decision in that case.

Thus, the alleged misrepresentations regarding the vessel owner and operator's conduct and the applicable federal laws do not invalidate the Plaintiffs' material witness warrants.11

To the extent that the Plaintiffs argue that the warrants were unlawful because they were pretextual, the "alleged pretextual use" of a material witness warrant does not state a claim for a Fourth Amendment violation. Ashcroft v. al-Kidd, 563 U.S. 731, 740, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

Second, the Amended Complaint alleges that the material witness warrant applications and supporting affidavits intentionally omitted details about the amount of evidence the Government possessed against the vessel owner and operator. Specifically, the Amended Complaint alleges that the vessel owner and operator had voluntarily disclosed the nature and extent of the vessel's unlawful discharges and "had pledged full and complete cooperation" with the Government's investigation. ECF No. 3 93(k). The Amended Complaint further alleges that the Plaintiffs had fully cooperated with the Government's [*36] requests for information. The Plaintiffs assert that the amount of evidence in the Government's possession "cast[s] doubt on the 'need' to arrest [them] as material witnesses." ECF No. 31 at 8. Thus, the Plaintiffs suggest that the Magistrate Judge would not have found their testimony material in the criminal proceedings against the vessel owner and operator if the warrant applications had specifically described the other evidence in the Government's possession.

However, even if these alleged omissions had been included, the Plaintiffs' testimony would have been material to the criminal proceeding because it corroborated the Government's documentary evidence against the vessel owner and operator. In the criminal proceeding against the vessel operator, Judge Torresen found that Hornof's cooperation was "key" to obtaining the vessel operator's conviction and that Kordic and Zak's testimony "provided important corroboration" of Hornof's account. United States v. MST Mineralien Schiffarht Spedition und Transport GMBH, No. 2:17-cr-00117-NT, ECF No. 192 (D. Me. Feb. 19, 2019). Indeed, the Plaintiffs themselves have asserted that their testimony was "vital" to the prosecution and conviction [*37] of the vessel operator. In re United States v. MST Mineralien Schiffarht Spedition und Transport GMBH, No. 2:18-mc-00127-NT, ECF No. 1 11, 19 (D. Me. May 4, 2018). Thus, the alleged omissions regarding the nature and extent of evidence already in the Government's possession do not invalidate the material witness warrants.

Finally, the Amended Complaint alleges that the material witness warrant applications and supporting affidavits intentionally omitted the details of the Security Agreement and the confiscation of the Plaintiffs' passports when they were paroled into the United States. The Plaintiffs assert that these details, if included, would have established that they were already detained in the United States and therefore that it would not have been impracticable to secure their presence by subpoena.

The Government responds that these alleged omissions were not material to the Magistrate Judge's determination of impracticability because each of the Plaintiffs had expressed an intent to leave the United States, establishing that their presence would likely become impracticable to secure by subpoena. Notably, this information was also omitted from the warrant applications.

Even[*38] if it had been included, the Amended Complaint alleges that the Plaintiffs were unable to act freely on their intent to leave the United States because Special Agent Root had confiscated their passports. Indeed, the Plaintiffs only expressed their intent to leave the United States by filing a habeas petition and several motions with the Court, arguing that they were unlawfully detained in the United States and seeking to be released so that they could return to their home countries. Taking the allegations in the First Amended Complaint as true, I conclude that the Plaintiffs were unable to evade subpoenas by leaving the United States when the Government sought material witness warrants against them, which would have undermined the impracticability determination had that information been included in the warrant applications.

The Government suggests that the mere filing of the habeas petition and the other motions seeking release satisfies the impracticability prong of the material witness statute. But if the Plaintiffs' alleged pre-warrant detention was lawful, as the Government contends, then the Plaintiffs would not have prevailed on their motions seeking release, and they would have [*39] remained in the United States without their passports and subject to subpoena. Thus, the Government's assertions of impracticability depend on the lawfulness of the Plaintiffs' alleged pre-warrant detention. Because the Government's motion to dismiss is denied with respect to the Plaintiffs' claims that they were falsely arrested and falsely imprisoned before the material witness warrants were issued, the Government's motion to dismiss is also denied with respect to the Plaintiffs' claims that they were falsely arrested and falsely imprisoned pursuant to the material witness warrants.12

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Although the Plaintiffs also argue that the warrant applications misrepresented the impracticability of securing the Plaintiffs' presence by subpoena by failing to indicate that the Plaintiffs had promised to appear in person before the grand jury and to return to the United States as needed to testify at trial, this argument is unpersuasive. As noted above, foreign residency and citizenship ordinarily satisfy the impracticability prong because a subpoena by the United States is "basically ineffectual" in foreign countries. Matus-Zayas, 655 F.3d at 1099-1100. The Plaintiffs' alleged promises to appear do not bear on the legal effect of subpoenas served in foreign countries and therefore do not negate the Magistrate Judge's finding of impracticability.

2. Abuse of Process

In addition to the false arrest and false imprisonment claims discussed above, Count Two also asserts a claim for abuse of process. Although the factual underpinnings of this claim are not specifically outlined in the First Amended Complaint, it appears to be based on the Plaintiffs' allegations that Attorneys Waller and Cashman filed fraudulent warrant applications and that Special Agent Root signed fraudulent affidavits in support of the same. The Government argues that the Plaintiffs' claim for abuse of process should be dismissed for lack of subject-matter jurisdiction on sovereign [*40] immunity grounds.

Abuse of process claims asserted against the United States are generally barred because they do not fall within the scope of the FTCA's limited waiver of sovereign immunity. See 28 U.S.C.A. 2680(h). However, pursuant to the law enforcement proviso discussed above, abuse of process claims are permitted if they arise out of the conduct of "investigative or law enforcement officers of the United States Government." Id. The Plaintiffs' abuse of process claim appears to arise out of the conduct of Attorneys Waller and Cashman, who are both federal prosecutors, as well as the conduct of Special Agent Root, who is an officer of the Coast Guard's criminal division. Prosecutors are not "investigative or law enforcement officers" under 2680(h). See Yacubian v. United States, 750 F.3d 100, 108 (1st Cir. 2014) (citing Limone, 579 F.3d at 88-89, and Bernard v. United States, 25 F.3d 98, 104 (2d Cir. 1994)). Thus, sovereign immunity bars the Plaintiffs' abuse of process claim to the extent it is based on the conduct of Attorneys Waller, Cashman, and Udell, or any other federal prosecutor.

Special Agent Root, by contrast, is plainly an "investigative or law enforcement officer" under 2680(h). Thus, the law enforcement proviso contained in 2680(h) expressly allows the Plaintiffs' abuse of process claim to the extent that it is based on Special Agent Root's conduct. [*41] 13

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Because the Government did not assert that the Amended Complaint fails to state a claim for abuse of process in its motion to dismiss, I do not address the merits of the Plaintiffs' abuse of process claim.

3. Intentional Infliction of Emotional Distress

Finally, Count Two asserts a claim for IIED under the FTCA. Although the basis for the IIED claim is not spelled out in the First Amended Complaint, the Plaintiffs clarify that the IIED claim arises out of their prolonged detention. The Government contends that this claim, too, should be dismissed for lack of jurisdiction on sovereign immunity grounds.

As explained above, the FTCA's law enforcement proviso waives sovereign immunity with respect to claims "arising . . . out of" certain intentional torts, including false arrest, false imprisonment, and abuse of process, if they are committed by "investigative or law enforcement officers of the United States Government." 28 U.S.C.A. 2680(h). The First Circuit has held that 2680(h) is broad enough to encompass some IIED claims.14

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Although the First Circuit's decision in Limone interpreted the language of a previous version of 2680(h) that was in effect before the law enforcement proviso was enacted, its logic applies equally to the law enforcement proviso because the language of the proviso is identical to the statutory language at issue in Limone in all relevant respects.

Limone, 579 F.3d at 92. However, IIED claims only fall within the scope of 2680(h) if they "rest[] on proof of" a false arrest, false imprisonment, abuse of process, or another "specifically enumerated tort." Id. If a plaintiff fails to establish an element of the enumerated tort, then his IIED claim does not "arise[] out of" that tort for purposes of 2680(h), even if it is based on the same conduct that gave rise to the enumerated [*42] tort claim. Id. at 92-93. Thus, whether an IIED claim arises out of a false imprisonment or false arrest for purposes of 2680(h) is a "fact-sensitive, case-specific inquiry." Id. at 92.

Applying this First Circuit precedent, I conclude that if the Plaintiffs can establish either that they were falsely arrested and imprisoned or that Special Agent Root committed an abuse of process, the Court has jurisdiction to decide their IIED claim under the law enforcement proviso contained in 2680(h), to the extent that their IIED claim arises out of the same conduct as their false arrest, false imprisonment, or abuse of process claims. Because the Government has not established that the Plaintiffs' false arrest, false imprisonment, and abuse of process claims are meritless, as discussed above, the Plaintiffs' IIED claim cannot be dismissed for lack of jurisdiction at this stage. Accordingly, the Government's motion to dismiss is denied with respect to the IIED claim asserted in Count Two.15

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Because the Government did not assert that the Amended Complaint fails to state a claim for IIED in its motion to dismiss, I do not address the merits of the Plaintiffs' IIED claim.

4. Conclusion as to Count Two

For the reasons explained above, Count Two of the Amended Complaint is dismissed with respect to all Defendants other than the United States. As to the United States, the abuse of process claim asserted [*43] in Count Two is dismissed to the extent that it arises out of the alleged conduct of federal prosecutors. All other claims asserted in Count Two survive the Government's motion to dismiss.

B. Count Three: The Act to Prevent Pollution from Ships

Count Three asserts claims under two provisions of the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C.A. 1904(h) and 1910. I address each provision in turn.

1. Section 1904(h)

Under 1904(h), "[a] ship unreasonably detained or delayed" pursuant to the APPS "is entitled to compensation for any loss or damage suffered thereby." The First Amended Complaint alleges that the actions taken by the Defendants to enforce the APPS against the vessel owner and operator caused the Plaintiffs to be "unreasonably detained or delayed." ECF No. 3 134.

However, because the Plaintiffs plainly do not constitute a "ship," which is defined under 1901(a)(12) as "a vessel of any type whatsoever," I conclude that 1904(h) does not provide the Plaintiffs a remedy for the alleged detention and delay they personally suffered. Indeed, the APPS defines "person" separately from "ship," indicating that 1904(h) was not intended to apply to persons such as the Plaintiffs. Compare id. 1901(a)(10), with id. 1901(a)(12).

The Plaintiffs concede that the plain text [*44] of 1904(h) does not grant them a remedy. See ECF No. 31 at 10. Nevertheless, the Plaintiffs contend that the word "ship" should be construed to include them because they were treated as synonymous with "ship" by the Security Agreement, which allegedly required them to remain in the United States as surety for the ship's release. But courts may not disregard the plain terms of a statute "based on some extratextual consideration." Bostock v. Clayton Cty., 140 S. Ct. 1731, 1749, 207 L. Ed. 2d 218 (2020); see also id. at 1737. Thus, I conclude that the First Amended Complaint fails to state a claim under 1904(h). Accordingly, the claim under 1904(h) asserted in Count Three is dismissed as to all Defendants.

2. Section 1910

Count Three also asserts claims under 1910(a), which provides that "any person having an interest which is, or can be, adversely affected" may bring an action against (1) "any person alleged to be in violation of" the APPS; (2) the Secretary of Homeland Security, if the Secretary has allegedly failed to perform any non-discretionary act or duty under the APPS; (3) the Administrator of the Environmental Protection Agency, if the Administrator fails to perform any non-discretionary act or duty under the APPS; or (4) the Secretary of Homeland Security,16

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The text of 1910(a)(4) applies to the Secretary of the Treasury. However, since the APPS was enacted, the duties discussed in 1910(a)(4) have been reassigned to the Secretary of Homeland Security. See Angelex Ltd. v. United States, 123 F. Supp. 3d 66, 70 n.2 (D.D.C. 2015) (citing Monarch Shipping Co v. United States, No. 13-80661-CIV, 2013 U.S. Dist. LEXIS 152076, 2013 WL 5741836, at *5 n.4 (S.D. Fla. Aug. 15, 2013)).

if the Secretary has failed to "take action [*45] under section 1908(e)," which prescribes the circumstances under which a ship's departure clearance may be refused, revoked, or granted.17

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Section 1910(b)(1) further requires that plaintiffs must provide notice, in writing and under oath, to "the alleged violator, the Secretary concerned or the Administrator, and the Attorney General" more than sixty days before commencing an action under 1910(a). The First Amended Complaint contains no allegations that the Plaintiffs have satisfied this written notice requirement. However, because the Defendants do not object under 1910(b)(1), I focus on whether the First Amended Complaint states a plausible claim for relief under 1910(a).

33 U.S.C.A. 1910(a).

a. Claims Against the Government Defendants

To the extent that the Plaintiffs intend to assert claims against the Government under 1910, the First Amended Complaint fails to state a claim for relief. Section 1910(a) only permits suits against two Government entities: the Administrator of the Environmental Protection Agency and the Secretary of Homeland Security. See 33 U.S.C.A. 1910(a)(2)-(4); see also 33 U.S.C.A. 1901(a)(1) (defining "person" for purposes of the APPS). Although the First Amended Complaint does not name the Administrator of the Environmental Protection Agency as a defendant, it does name the Department of Homeland Security as a defendant. Assuming that the Department of Homeland Security is the functional equivalent of the Secretary of Homeland Security for purposes of suits under 1910(a), such suits are permitted only when they are based on the Secretary's alleged failure to act. See id. 1910(a)(2), (a)(4). The Plaintiffs' claims under 1910 do not challenge any failure to act by the Secretary, the Department, or any other Government entity. By contrast, the Plaintiffs' APPS claims revolve around [*46] two affirmative acts: the detention of the vessel and the execution of the Security Agreement. Thus, I conclude that the First Amended Complaint fails to state a claim against the Government under 1910(a). Accordingly, any claims under 1910 asserted in Count Three are dismissed as to the Government.

b. Claims Against the Individual Defendants

The First Amended Complaint does not specify the Defendants against whom the Plaintiffs assert their APPS claims. The Individual Defendants argue that the Plaintiffs' APPS claims lie "solely against the United States," because any suit against an officer under the APPS would lie against that officer in his official capacity only. ECF No. 21 at 1 n.1. However, 1910(a)(1) explicitly provides that individuals may bring suit against "any person alleged to be in violation" of the APPS or its regulations, which suggests that individual-capacity claims against officers may be available. Further, the Individual Defendants' motion to dismiss acknowledges that the First Amended Complaint names them in their individual capacities only. See ECF No. 21 at 1. It is well established that a plaintiff "may sue a governmental officer in her individual capacity for alleged wrongs committed [*47] by the officer in her official capacity." Powell v. Alexander, 391 F.3d 1, 23-24 (1st Cir. 2004) (alterations omitted) (quoting Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1990)). "It simply 'does not follow that every time a public official acts under color of state law, the suit must of necessity be one against the official in his or her official capacity.'" Id. at 24 (quoting Melo v. Hafer, 912 F.2d 628, 636 (3d Cir. 1990)). Because the Individual Defendants do not provide any persuasive explanation or authority for their argument that 1910 does not permit an individual-capacity suit, I proceed to analyze whether the First Amended

Complaint states a plausible claim for relief against them under 1910(a)(1), subject to the limitations imposed by the doctrine of qualified immunity for these individual-capacity claims.18

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Although the First Circuit has not specifically held that qualified immunity protects federal officials who are sued under the APPS, "numerous courts have held that the doctrine of qualified immunity provides a defense to . . . federal statutory causes of action" other than 42 U.S.C. 1983. Gonzalez v. Otero, 172 F. Supp. 3d 477, 508-09 (D.P.R. 2016); see Gonzalez v. Lee Cty. Housing, 161 F.3d 1290, 1300 n.34 (11th Cir. 1998) (collecting cases); see also Bartolomeo v. Plymouth Cty. House of Corr., 2000 U.S. App. LEXIS 20915, 2000 WL 1164261, at *1 (1st Cir. 2000) (per curiam) (concluding, without deciding, that qualified immunity was available in ADA suit).

I turn, therefore, to whether facts alleged in the First Amended Complaint are sufficient to support a predicate violation underlying the Plaintiffs' claim under 1910(a)(1). The majority of the allegations under the APPS discuss 1904(h), which, as mentioned above, provides that a ship "unreasonably detained or delayed" pursuant to the APPS is "entitled to any loss or damage suffered thereby." Whether an unreasonable detention or delay of a ship constitutes a "violation" of the APPS for purposes of 1910(a)(1) is a matter of first impression.19

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One district court recently observed that, for purposes of jurisdiction, 1910 "seems . . . to be an authorization for four different kinds of actions, none of which are at issue" in a suit for compensation for unreasonable detention or delay under 1904(h). Nederland Shipping Corp. v. United States, No. 19-1302-RGA, 456 F. Supp. 3d 584, 2020 U.S. Dist. LEXIS 76072, 2020 WL 1989166, at *6 (D. Del. Apr. 27, 2020), appeal docketed, No. 20-2269 (3d Cir. July 7, 2020). However, the court did not directly address the question presented here.

On the one hand, [*48] because 1904(h) is a remedy provision, its terms are not technically violated when a ship is unreasonably detained or delayed. Thus, the text of 1904(h) suggests that a ship's unreasonable detention or delay is not a predicate "violation" of the APPS for purposes of 1910(a)(1). On the other hand, the provision of a remedy for unreasonable detention or delay implies that such detention or delay would violate the APPS. But I need not decide this issue. In the absence of clearly established law on point, the Individual Defendants are entitled to qualified immunity on the Plaintiffs' claims under the APPS to the extent they are predicated on an alleged violation of 1904(h).

In their response to the Government's motion to dismiss, the Plaintiffs suggest that their 1910(a)(1) claim is based on the Individual Defendants' alleged violation of 1908(e), which permits the Secretary of Homeland Security to require "the filing of a bond or other surety satisfactory to the Secretary" before granting departure clearance to a ship that is reasonably detained for suspected APPS violations. The Plaintiffs contend that the "bond or other surety" referred to in 1908(e) was not intended to include crew [*49] members, and thus that the Individual Defendants violated 1908(e) by treating them as a "surety" under the Security Agreement. ECF No. 31 at 10-11.

However, the First Amended Complaint does not specifically allege any violation of 1908(e). Even if it did, the Plaintiffs cannot establish that the Individual Defendants violated 1908(e). As the Fourth Circuit concluded in Angelex Ltd. v. United States, 1908(e) "grants the Coast Guard broad discretion to . . . dictate the terms of any bond that it may accept." 723 F.3d 500, 507 (4th Cir. 2013). Furthermore, "the language of 1908(e) does not provide any 'judicially manageable standards' by which to review" the conditions of release demanded by the Coast Guard. Id. (quoting Heckler v. Chaney, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985)). "Congress did not 'outline (even in the broadest brushstrokes) the parameters for what form or amount a bond or other surety should take.'" Id. (quoting Giuseppe Bottiglieri Shipping Co. v. United States, 843 F. Supp. 2d 1241, 1248 (S.D. Ala. 2012)). Because the terms of a surety agreement are not substantively reviewable under 1908(e), see id. at 506-09, it cannot be said that the Individual Defendants violated 1908(e) by negotiating the Security Agreement or acting in accordance with it.20

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This does not mean that the terms of a surety agreement are absolutely shielded from judicial review. The reasonableness of the Coast Guard's actions under 1908(e) are subject to substantive review under 1904(h), the APPS's "after-the-fact damages remedy." Angelex, 723 F.3d at 508-509. However, I have already determined that the Plaintiffs are not proper plaintiffs under 1904(h) and that the Individual Defendants are entitled to qualified immunity on any suit under 1910(a)(1) that is predicated on an alleged violation of 1904(h). Accordingly, I do not reach the question of whether the terms of the Security Agreement were substantively reasonable.

Because I have determined that the First Amended Complaint does not allege any clearly established violations of the APPS by the Individual Defendants, I conclude the Individual [*50] Defendants are entitled to qualified immunity on the Plaintiffs' claims under 1910(a)(1). Accordingly, any claims under 1910 asserted in Count Three are dismissed as to the Individual Defendants.

C. Count Five: Peonage, Involuntary Servitude, and Human Trafficking

Count Five asserts claims against all Defendants for violations of 18 U.S.C.A. 1581, 1584, and 1592, pursuant to the civil remedy provision in 18 U.S.C.A. 1595. Section 1581(a) prohibits holding any person in a condition of peonage or arresting any person "with the intent of placing him in . . . a condition of peonage." The Supreme Court has defined "peonage" as "a status or condition of compulsory service, based upon the indebtedness of the peon to the master." Pollock v. Williams, 322 U.S. 4, 9, 64 S. Ct. 792, 88 L. Ed. 1095 (1944) (quoting Clyatt v. United States, 197 U.S. 207, 215, 25 S. Ct. 429, 49 L. Ed. 726 (1905)). Section 1584(a) prohibits "knowingly and willfully hold[ing]" a person "to involuntary servitude." "Involuntary servitude" includes "the compulsion of services by the use or threatened use of physical or legal coercion."21

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Another related statute, 18 U.S.C.A. 1589 (West 2020), prohibits "forced labor," which the First Circuit has found to be a "species of involuntary servitude." United States v. Bradley, 390 F.3d 145, 156 (1st Cir. 2004) (emphasis omitted), vacated on other grounds sub nom. Bradley v. United States, 545 U.S. 1101, 125 S. Ct. 2543, 162 L. Ed. 2d 271 (2005). "Forced labor" includes labor compelled by physical coercion as well as "by means of the abuse or threatened abuse of law or legal process" or "by means of any scheme, plan, or pattern intended to cause [a] person to believe" that he would suffer serious harm or physical restraint if he did not perform such labor. 18 U.S.C.A. 1589(a)(1)-(4). Congress added the prohibition on forced labor in response to the definition of "involuntary servitude" announced in Kozminski, which it found to be unduly narrow. Bradley, 390 F.3d at 150. Although the Plaintiffs do not explicitly rely on 1589, they do invoke it by referring to the "abuse of law or legal process."

United States v. Kozminski, 487 U.S. 931, 948, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988). Further, as relevant here, 1592(a) prohibits knowingly removing, confiscating, or possessing "any actual or purported passport or other immigration document . . . of another person" either "in the course of" violating 1581 or 1584 or "with intent to violate" the same. If any of these sections is violated, 1595(a) provides that the individual [*51] victim may bring a civil action against the perpetrator or anyone who knowingly benefits from the violation.

1. Claims Against the Government Defendants

To the extent that Count Five makes a claim against the Government under 1595, rather than only the Individual Defendants,22

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The text of Count Five is addressed to "each of the defendants" and does not differentiate between the Government and Individual Defendants, and the Plaintiffs' responses to the Defendant's motions to dismiss do not clarify the issue. I address the Government's argument in the interest of completeness.

the Government asserts that it retains sovereign immunity for that claim. Because sovereign immunity is "jurisdictional in nature," Villanueva, 662 F.3d at 126, I address it first. Again, "absent a waiver, sovereign immunity . . . shields the United States from suit." Id. A waiver of sovereign immunity must be "unequivocally expressed in statutory text." Marina Bay Realty Tr. LLC v. United States, 407 F.3d 418, 422 (1st Cir. 2005) (quoting Lane v. Pena, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996)). The text of 1595(a) provides that:

An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in

violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

18 U.S.C.A. 1595(a). Because the statutory text authorizes civil actions only against perpetrators or knowing [*52] beneficiaries of violations and does not mention the United States, I conclude that 1595(a) does not "unequivocally express" a waiver of sovereign immunity. Marina Bay, 407 F.3d at 422. Accordingly, Count Five is dismissed as to the Government.

2. Claims Against the Individual Defendants

The Individual Defendants assert that they are entitled to qualified immunity on the Plaintiffs' claims under 1581, 1584, 1592, and 1595.23

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As I have previously mentioned in discussing the availability of qualified immunity on the Plaintiffs' claims under the APPS, although the First Circuit has not specifically addressed whether government officials are entitled to qualified immunity for alleged violations of these provisions, other courts have found that qualified immunity is available in these circumstances, and the Plaintiffs do not suggest otherwise. See McCullough v. Finley, 907 F.3d 1324, 1332-33 (11th Cir. 2018) (applying qualified immunity doctrine to claims under 18 U.S.C.A. 1595); Gonzalez, 172 F. Supp. 3d at 508-09.

Again, "[c]ourts need not engage in the first" part of the qualified immunity test "and may choose, in their discretion, to go directly to the second"that is, the "clearly established" prong. Penate, 944 F.3d at 366 (citing Eves, 927 F.3d 575, 584 (1st Cir. 2019)) (quotation marks omitted). I exercise that discretion here.

The core of the Plaintiffs' claims under 1581 and 1584 is that the Security Agreement and their subsequent parole and arrests placed them in a condition of involuntary servitude and peonage. Specifically, the Plaintiffs contend that they were subjected to involuntary servitude because they were forced to answer federal officials' questions and to testify in grand jury proceedings and depositions. They argue that this amounted to peonage because their physical presence in the United States, which was necessary to their testimony, was compelled as collateral for [*53] the vessel's debts. Indeed, the Security Agreement, which purported to require the Plaintiffs to remain in the United States, "constitute[d] surety satisfactory . . . for the release of the Vessel." In re Material Witness Jaroslav Hornof, No. 2:17-mj-00174-JHR, ECF No. 5-4 at 2 (D. Me. Aug. 7, 2017).

The Plaintiffs have not identified any cases holding that providing information to law enforcement officials in connection with a criminal investigation or testifying in a criminal proceeding constitutes labor or service for purposes of 1581 or 1584. Nor have they cited to any authority suggesting that the compelled testimony of a non-citizen in United States courts constitutes "involuntary servitude" under 1584 or any related statute. Further, no court has held that a contract such as the Security Agreement places crew members in a condition of peonage

under 1581. Thus, I conclude that the First Amended Complaint fails to allege any clearly established violation of 1581, 1584, or 1592 by the Individual Defendants. See Morse, 869 F.3d at 23. Accordingly, the Individual Defendants are entitled to qualified immunity, and Count Five is dismissed as to them.24

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Because I conclude that the Individual Defendants are entitled to qualified immunity for the reasons discussed above, I do not address their additional arguments that they are absolutely immune from suit under 1595(a), that the First Amended Complaint fails to sufficiently allege indebtedness under 1581, or that the First Amended Complaint fails to sufficiently allege coercion under 1584.

D. Count One: Bivens Claims

Count One of the First Amended Complaint asserts claims [*54] against the Individual Defendants for violations of the Plaintiffs' Fourth, Fifth, Sixth, and Thirteenth Amendment rights under Bivens."A Bivens claim is an implied cause of action for civil damages against federal

officials" for constitutional violations. Pag Gonz z v. Moreno, 919 F.3d 582, 586 n.1 (1st Cir.

2019). As the Supreme Court explained in Ziglar v. Abbasi, Bivens remedies have been "approved" in only three contexts: (1) in Bivens itself, 403 U.S. at 388, for a Fourth Amendment claim asserted against law enforcement officers for handcuffing a man in his own home without a warrant; (2) in Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979), for a Fifth Amendment sex discrimination claim against a Congressman for firing his female secretary; and (3) in Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), for an Eighth Amendment claim against prison officials for failing to provide an inmate with medical care.25

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The Plaintiffs assert that the Supreme Court recognized a Bivens remedy in a fourth context in al-Kidd, because the Court reached the merits of the plaintiff's Bivens claim challenging his detention under the material witness statute. However, al-Kidd did not directly address the appropriateness of a Bivens remedy, and the Supreme Court clarified more recently in Abbasi that it has only approved of a Bivens remedy on three occasions, not including al-Kidd. See Abbasi, 137 S.Ct. at 1855.

137 S. Ct. 1843, 1854-55, 198 L. Ed. 2d 290 (2017). Courts considering whether to recognize an implied cause of action under Bivens in "new context[s]" should proceed with caution because it is generally the role of Congress, not the courts, to provide for a damages remedy. Id. at 1857 (quoting Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 74, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)). Extensions of Bivens are "disfavored," id. (quoting Iqbal, 556 U.S. at 675), and "a Bivens remedy will not be available" in cases

presenting new contexts "if there are 'special factors counselling hesitation'" id. (quoting Carlson, 446 U.S. at 18).

The Individual Defendants argue [*55] that Count One should be dismissed because this case presents a "new context" for a Bivens claim and "special factors counsel[] hesitation" in allowing a Bivens remedy here. Id.

1. New Context

To present a "new context," a case need only differ in some "meaningful way" from the three Bivens cases discussed above. Abbasi, 137 S. Ct. at 1859. Even differences that are "small, at least in practical terms," can indicate a "new context." Id. at 1865. "[A] case can present a new context for Bivens purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; . . . if there are potential special factors that were not considered in previous Bivens cases," if it implicates a "new category of defendants," or if there were "alternative remedies" available to the plaintiffs. Id. at 1857, 1865. "[T]he rank of the officers involved; . . . the generality or specificity of the official action; . . . the statutory or other legal mandate under which the officer was operating; [and] the risk of disruptive intrusion by the Judiciary into the functioning of other branches" could also justify the conclusion that a case presents a "new context." Id. at 1860.

The Plaintiffs assert that this case does [*56] not present a new context because it involves arrests unsupported by probable cause and therefore "does not differ meaningfully [from] Bivens itself." ECF No. 30 at 3. However, the plaintiff in Bivens challenged a warrantless arrest in a narcotics investigation. 403 U.S. at 389. The Plaintiffs, by contrast, challenge their detention on board a foreign vessel, the restraints on their freedom upon entering the country, and the veracity of the warrants supporting their arrests as material witnessesnone of which were at issue in Bivens.Further, while the plaintiff in Bivens asserted only a Fourth Amendment claim, see id., the Plaintiffs also assert claims under the Fifth, Sixth, and Thirteenth Amendments.

Additionally, the identity of the Individual Defendants strongly suggests that this case presents a new context. Four of the Individual Defendants are Coast Guard officials, who are members of the military and thus generally not subject to liability under Bivens. See Abbasi, 137 S. Ct. at 1859 (discussing Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)). Three are prosecutors, who have never been recognized by the Supreme Court as proper defendants under Bivens. And two Defendants are Customs and Border Protection officials, a category of defendants potentially implicating immigration and national security concerns, [*57] even if such concerns are not the focus of the dispute here.26

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The Individual Defendants also suggest that the identity of the Plaintiffsnon-citizen crew members of a foreign vesselsupports finding that this case presents a new context. Recently, the

Supreme Court declined to extend Bivens to a cross-border shooting in which a federal official on United States land shot and killed a Mexican citizen on foreign land. Hernandez v. Mesa, 140 S. Ct. 735, 206 L. Ed. 2d 29 (2020). In that case, although the Court did not hold that non-citizens are categorically precluded from asserting Bivens claims, it noted that "the potential effect on foreign relations" is a factor counseling hesitation in Bivens cases, because "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." Id. at 744 (quoting Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403, 200 L. Ed. 2d 612 (2018)).

Thus, viewing this case as a whole, it is likely that "judicial precedents provide a less meaningful guide for official conduct" under the present circumstances than in an ordinary law enforcement situation such as the narcotics investigation at issue in Bivens. Id. at 1864. Accordingly, I conclude that this case presents a "new context" in all respects, which triggers a "special factors" analysis. Id. at 1865.

2. Special Factors Counseling Hesitation

Under the "special factors" analysis in Abbasi, the Court stated that "a Bivens action is not 'a proper vehicle for altering an entity's policy'" or challenging the "formulation and implementation of a general policy." Id. at 1860. The Court also recognized the availability of alternative remedies, including habeas relief, as a special factor. Id. at 1862-63. This case involves both of these special factors. The first is present because the Plaintiffs challenge the Coast Guard's policy of executing security agreements that cause crew members to remain in the United States in exchange for the release of a vessel, as well as the Individual Defendants' implementation of that policy. The second special factor is also [*58] present because there were additional remedies available to the Plaintiffs, including habeas relief, motions challenging their arrest warrants, and APPS awards arising out of the criminal proceeding. Indeed, the Plaintiffs have pursued each of these alternative remedies, suggesting that a Bivens remedy is unnecessary.

The Plaintiffs assert that habeas is not an adequate alternative remedy because it cannot compensate petitioners. But Abbasi forecloses this argument by specifically recognizing habeas relief as an alternative. See id. at 1863, 1865. The Plaintiffs further assert that habeas relief did not serve as an adequate alternative here because, during their detention, it did not actually lead to a decision on their claim that the Defendants obtained the material witness warrants by fraud. However, Zak was free to raise the arguments relating to the alleged fraud in the habeas proceeding, and the other Plaintiffs were free to do the same in their motions challenging the material witness warrants before the Magistrate Judge. Indeed, the Plaintiffs raised substantially similar fraud claims in both the habeas proceeding and the proceedings related to the warrants, but they ultimately chose not to press [*59] these claims, opting instead to focus on their request for prompt depositions. Thus, even assuming that the adequacy of alternative remedies is relevant to the "special factors" analysis, I am not persuaded that the alternative remedies available to the Plaintiffs were inadequate.

Because I have determined that this case would extend Bivens to a new context and that special factors counsel hesitation, I conclude that a Bivens remedy is not available to the Plaintiffs.27

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Because I conclude that a Bivens remedy is unavailable in this context, I need not and do not address the Individual Defendants' arguments that they are entitled to qualified or absolute immunity on this claim.

Accordingly, Count One is dismissed.

E. Count Six: The Racketeer Influenced and Corrupt Organizations Act

Count Six asserts that the Individual Defendants participated in an enterprise that engaged in a pattern of illegal racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C.A. 1962(c). Thus, in order to state a RICO claim, "a plaintiff must [*60] allege: (1) conduct, (2) of an enterprise, (3) through either a pattern of racketeering activity . . . or a single collection of an unlawful debt." Home Orthopedics Corp. v. Rodrez, 781 F.3d 521, 528 (1st Cir. 2015) (internal quotation marks and alterations omitted). The plaintiff must also allege that he suffered "an economic injury" caused by "the defendant's racketeering conduct," Painters & Allied Trades Dist. Council 82 Health Care Fund v. Forest Pharms., Inc., 915 F.3d 1, 8, 12 (1st Cir. 2019), because only a person "injured in his business or property by reason of" a RICO violation may bring a civil action under RICO pursuant to 18 U.S.C.A. 1964(c).

1. Racketeering Activity

The allegations of "racketeering activity" in Count Six are based solely on the claims of peonage, involuntary servitude, and human trafficking asserted in Count Five. ECF No. 3 152; see 18 U.S.C.A. 1961(1)(B) (defining "racketeering activity" to include "any act which is indictable under" 18 U.S.C.A. 1581-1592). Because I have determined that the Individual Defendants are entitled to qualified immunity with respect to those claims, I conclude that qualified immunity shields the Individual Defendants from RICO liability as well. See, e.g., Cullinan v. Abramson, 128 F.3d 301, 312 (6th Cir. 1997) (holding that qualified immunity protected city officials from RICO claim); Gonzalez, 172 F. Supp. 3d 477, 508-09 (D.P.R. 2016).

2. Injury to Business or Property

The First Amended Complaint also fails to state a claim under RICO because it does not sufficiently [*61] allege that the Individual Defendants' conduct caused the Plaintiffs to suffer an injury to "business or property," as required by 1964(c). The Plaintiffs contend that the First Amended Complaint satisfies this requirement for several reasons. First, they assert that the First Amended Complaint sufficiently alleges an injury to business or property because they "were confined to the Portland area for months against their will." ECF No. 30 at 9. But alleged confinement is not itself an economic loss. See Zareas v. Bared-San Martin, 209 F. App'x 1, 2 (1st Cir. 2006) (per curiam) (explaining that "claims for personal injuries . . . are not 'business or property' and are not cognizable under RICO"); Evans v. City of Chicago, 434 F.3d 916, 927 (7th Cir. 2006) (characterizing a claim of false imprisonment as a personal injury claim for RICO purposes). Further, the Security Agreement required that the Plaintiffs continue to receive their wages, a daily meal allowance, and health care during their time in the United States. Thus, I conclude that the Plaintiffs' alleged confinement does not constitute an injury to "business or property" under 1964(c).

The Plaintiffs also suggest that their alleged confinement caused them to suffer economic loss because their fear of being subjected to such detention again has driven them from [*62] their maritime careers. But economic losses, including loss of income, that derive from a plaintiff's personal injuries "do[] not constitute a cognizable injury to 'business or property' within the meaning of 1964(c)." Evans, 434 F.3d at 927; see Anderson v. R.J. Reynolds Tobacco Co., No. Civ.A. 99-11382-GAO, 1999 U.S. Dist. LEXIS 22261, 1999 WL 33944684, at *2 (D. Mass. Sept. 20, 1999) (collecting authorities).

Further, the Plaintiffs argue that they suffered an injury to their property interests because Special Agent Root confiscated their passports and because the Security Agreement effectively seized and forcibly amended their employment contracts. Even assuming that the Plaintiffs had property interests in their passports and employment contracts, a complaint must allege a "concrete financial loss and not mere injury to a valuable intangible property interest" in order to meet RICO's economic injury requirement. Crimson Galeria Ltd. P'ship v. Healthy Pharms, Inc., 337 F. Supp. 3d 20, 37-38 (D. Mass. 2018) (quoting Maio v. Aetna, 221 F.3d 472, 483 (3d Cir. 2000)). The Plaintiffs have not asserted any specific pecuniary loss as a result of either the alleged seizure of their passports or the alleged seizure and amendment of their employment contracts. See id. Because confinement alone does not satisfy RICO's economic injury requirement, I conclude that the alleged injury to the Plaintiffs' interests in their passports and employment [*63] contracts also do not constitute injury to "business or property" under 1964(c).

Finally, the Plaintiffs assert that the Individual Defendants' conduct injured their business and property interests by depriving them of employment opportunities after they returned to their

home countries. Specifically, the Plaintiffs contend that certain of the Individual Defendants served them with trial subpoenas, which required them to return to the United States for the trial of the vessel owner and operator and therefore prevented them from signing contracts to return to sea. Assuming without deciding that such a loss of opportunity constitutes an injury to "business or property" under 1964(c), but see Evans, 434 F.3d at 927, the alleged loss was caused by the service of trial subpoenas, not by the Defendants' conduct that the Plaintiffs have alleged to be racketeering activity. Thus, even if the Individual Defendants' conduct could be deemed "racketeering activity," the Plaintiffs' alleged loss of employment opportunities would not support a civil RICO claim under 1964(c), because that loss was not caused by the conduct that the Plaintiffs have argued constituted "racketeering activity." See Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992) (explaining that both but-for and proximate [*64] causation are required to establish a 1964(c) claim).

The facts alleged in the First Amended Complaint are insufficient to support any of the Defendants' theories of injury to "business or property" as required by 1964(c). Thus, I conclude that Count Six fails to state a claim under RICO and that the Individual Defendants are entitled to qualified immunity as to Count Six. Accordingly, Count Six is dismissed.28

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Because I conclude that Count Six fails to state a claim for the reasons explained above, I do not address the Individual Defendants' additional arguments that they are absolutely immune from RICO liability, that the First Amended Complaint fails to sufficiently allege a RICO enterprise, and that the First Amended Complaint fails to sufficiently allege each Individual Defendant's personal participation in a RICO violation.

F. Count Four: Declaratory and Injunctive Relief

Count Four seeks declaratory and injunctive relief for the alleged violations contained in Counts One, Two, Three, Five, and Six. Because declaratory and injunctive relief are remedies rather than independent causes of action, they cannot be requested or established separately from liability on some other cause of action. See Payton v. Wells Fargo Bank, N.A., Civil Action No. 12-11540-DJC, 2013 U.S. Dist. LEXIS 27692, 2013 WL 782601, at *6 (D. Mass. Feb. 28, 2013) (citing Diamond Phoenix Corp. v. Small, No. 05-79-P-H, 2005 U.S. Dist. LEXIS 12798, 2005 WL 1530264, at *4 (D. Me. June 28, 2005)); accord Linton v. N.Y. Life Ins. & Annuity Corp., 392 F. Supp. 2d 39, 41 (D. Mass. 2005). Accordingly, Count Four is dismissed as a stand-alone claim.

Of course, the Plaintiffs may still be entitled to declaratory relief if they ultimately prevail on any of their claims.29

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Because, as I have already explained, I have resolved Counts 3, 5, and 6 against the Individual Defendants based on the "clearly established" prong of qualified immunity, I did not reach the question of whether the conduct underlying those claims was actually unlawful. However, to the extent that the Plaintiffs seek declaratory relief on these Counts against the Individual Defendants, "there is no basis for suing a government official for declaratory . . . relief in his or her individual or personal capacity." Hatfill v. Gonzales, 519 F. Supp. 2d 13, 19 (D.D.C. 2007); see also Feit v. Ward, 886 F.2d 848, 858 (7th Cir. 1989).

The Government moves to dismiss the Plaintiffs' request for declaratory relief on the grounds that it would be "superfluous." [*65] ECF No. 23 at 24. However, "federal courts retain substantial discretion in deciding whether to grant declaratory relief." Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 39 (1st Cir. 2006) (quoting Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 534 (1st Cir. 1995)). "[T]he discretion to grant declaratory relief is to be exercised with great circumspection . . . when a request for relief threatens to drag a federal court prematurely into constitutional issues that are freighted with uncertainty." Igartua-de la Rosa v. United States, 417 F.3d 145, 149 (1st Cir. 2005) (quoting Ernst & Young, 45 F.3d at 535). Because the parties have not sufficiently addressed the constitutional questions raised by the Plaintiffs' claims in Count Two, and because the record has not been developed by discovery, I decline to act on the Plaintiffs' request for declaratory relief at this stage.

The Plaintiffs' request for injunctive relief, by contrast, must be dismissed for lack of standing. "To have standing to pursue injunctive relief, a plaintiff must 'establish a real and immediate threat' resulting in 'a sufficient likelihood that [s]he will again be wronged in a similar way.'" Gray v. Cummings, 917 F.3d 1, 19 (1st Cir. 2019) (alteration in original) (quoting Am. Postal Workers Union v. Frank, 968 F.2d 1373, 1376 (1st Cir. 1992)). "Past injury, in and of itself," does not suffice. Id. The Amended Complaint does not allege any facts suggesting that the Plaintiffs are likely to be detained in the United States in connection with a pollution [*66] event again. To the contrary, it alleges that the Plaintiffs "have been driven from their maritime careers." ECF No. 3 144. Because the Amended Complaint does not allege that the Plaintiffs face a real and immediate threat of similar future harm, the Plaintiffs lack standing to pursue injunctive relief.

IV. CONCLUSION

For the reasons explained above, it is ORDERED that the Government's motion to dismiss (ECF No. 23) is DENIED IN PART, with respect to:

the false arrest, false imprisonment, and IIED claims asserted against the United States in Count Two;

the abuse of process claim asserted against the United States in Count Two, to the extent that it arises out of the alleged conduct of Special Agent Root; and

the Plaintiffs' request for declaratory relief on these surviving claims.

The Government's motion is GRANTED IN PART, with respect to all other claims asserted against the Government in the Amended Complaint, as well as the Plaintiffs' request for injunctive relief. It is further ORDERED that the Individual Defendants' motion to dismiss (ECF No. 21) is GRANTED. Additionally, as noted above, the Government has agreed that its motion (ECF No. 23) should not be construed as a motion [*67] for summary judgment. Accordingly, it is ORDERED that the Government's motion for leave to file a supplemental statement of fact (ECF No. 45) and the Government's motion for leave to file transcripts (ECF No. 51) are DENIED AS MOOT.

SO ORDERED.

Dated this 20th day of October, 2020.

/ s/ JON D. LEVY

CHIEF U.S. DISTRICT JUDGE