No. 14-5194
ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

AMIR MESHAL,
Plaintiff-Appellant,

v.

CHRIS HIGGENBOTHAM ET AL.,
Defendants-Appellees,

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF *AMICI CURIAE* LAW PROFESSORS JAMES E. PFANDER, CARLOS M. VÁZQUEZ, AND STEPHEN I. VLADECK IN SUPPORT OF PLAINTIFF-APPELLANT

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December 22, 2014

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28.1, *amici* certify the following:

A. Parties Appearing Before the District Court

All parties, intervenors and *amici* appearing before the district court and this Court are listed in the Brief for Plaintiff-Appellant.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Plaintiff-Appellant.

C. Related Cases

Counsel is not aware of any related cases.

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INTEREST OF *AMICI CURIAE*

Amici curiae are three Federal Courts scholars with special expertise in the history and scope of judicial remedies to challenge official action, particularly after and in light of the Supreme Court's 1971 decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Although *amici* differ in their views of some of these developments, *amici* were impelled to write in this case by the district court's conclusion that the Plaintiff-Appellant's *Bivens* claim should be dismissed because "this Court is not writing on a clean slate; rather, it is constrained by binding precedent." *Meshal v. Higgenbotham*, No. 09-2178, __ F. Supp. 2d __, 2014 WL 2648032, at *12 (D.D.C. June 13, 2014). As *amici* explain in the brief that follows, not only are the precedents the district court believed it was constrained to follow based upon deeply flawed understandings of both the Supreme Court's treatment of *Bivens* and subsequent actions by Congress, they are also distinguishable from the appalling allegations of Plaintiff-Appellant's complaint.

James E. Pfander is the Owen L. Coon Professor of Law at Northwestern University School of Law, a member of the American Law Institute, and a prolific and widely cited author on both the law governing individual government officers' liability to private litigation and the scope

of *Bivens*. *See, e.g.*, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010) (with Jonathan Hunt); *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009) (with David Baltmanis); *The Story of* Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau, *in* FEDERAL COURTS STORIES 275 (Vicki C. Jackson & Judith Resnik eds., 2010). Professor Pfander is a member of the American Law Institute.

Carlos M. Vázquez is a professor of law at the Georgetown University Law Center, a member of the American Law Institute (and an adviser to its project on the *Restatement (Fourth) of the Foreign Relations of the United States*), and also a leading expert on the availability of federal remedies to challenge unlawful government action. Professor Vázquez's influential writings in this field include *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1996); *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); and, together with Professor Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509 (2013).

Stephen I. Vladeck is a professor of law at American University Washington College of Law, whose research and scholarship focus on the intersection between national security and the federal courts. Professor Vladeck has written in detail about both *Bivens* and the availability of remedies more generally to victims of post-September 11 U.S. counterterrorism abuses, including *National Security and* Bivens *After* Iqbal, 14 LEWIS & CLARK L. REV. 255 (2010); Bivens *Remedies and the Myth of the "Heady Days,"* 8 U. ST. THOMAS L.J. 513 (2011); and *The New National Security Canon*, 61 AM. U. L. REV. 1295 (2012).

SUMMARY OF ARGUMENT

This case illustrates the fundamental disconnect between the Supreme Court's understanding of the availability of federal causes of action to enforce constitutional rights under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and that of the lower courts. As the district court explained, "To deny [Meshal] a judicial remedy under *Bivens* raises serious concerns about the separation of powers, the role of the judiciary, and whether *our* courts have the power to protect *our* own citizens from constitutional violations by our government when those violations occur abroad." *Meshal*, 2014 WL 2648032, at *1. Despite those serious concerns, the district court held that

it could not recognize a cause of action under *Bivens*, because, in its view, such non-recognition was mandated by recent circuit court decisions—especially this Court's ruling in *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012).

If affirmed, the result of the district court's decision would be to leave the Appellant—a U.S. citizen entitled to the full protections of the Constitution—without *any* judicial remedy for "appalling (and, candidly, embarrassing) allegations" of mistreatment and abuse by federal law enforcement officers, *Meshal*, 2014 WL 2648032, at *12 (quotation marks omitted), and to thereby create "a doctrine of constitutional triviality where private actions are permitted only if they cannot possibly offend anyone anywhere." *Vance v. Rumsfeld*, 701 F.3d 193, 230 (7th Cir. 2012) (en banc) (Williams, J., dissenting), *cert. denied*, 133 S. Ct. 2796 (2013).

This Court need not—and, therefore, should not—read these recent decisions to foreclose this proceeding. As *amici* explain in the brief that follows, the analyses undertaken in *Doe*, *Vance*, and the Fourth Circuit's ruling in *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), are all predicated on two fundamental misunderstandings of the relationship between *Bivens* and constitutional remedies: *First*, these opinions have completely neglected the complementary role that *state* tort remedies have

historically played in ensuring that victims of constitutional violations are entitled to *some* judicial redress, whether as a matter of federal or state law. *Second*, and as importantly, these decisions have overlooked the significance of the Westfall Act's displacement of such state remedies in affecting the scope of relief that should be available under *Bivens*.

Indeed, and tellingly, the Supreme Court has never declined to recognize a *Bivens* cause of action for a non-servicemember plaintiff who would otherwise have had no remedy for a colorable constitutional violation under state or federal law. Only the lower courts have held that, where such a plaintiff was truly faced with "*Bivens* or nothing," he was entitled to nothing.

Of course, a three-judge panel of this Court has no authority to overrule circuit precedent. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996). But *Doe* can easily be distinguished on its unique facts, since this Court's refusal to recognize a *Bivens* cause of action in that case was tied expressly to the functional similarities between military contractors serving in the field (such as Doe) and U.S. servicemembers—and, thus, to the categorical unavailability of *any* federal damages claims to servicemember plaintiffs under the Supreme Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). *See Doe*, 683 F.3d at 394–95; *see also*

United States v. Stanley, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983). Where a plaintiff who is not a servicemember or its functional equivalent brings a *Bivens* claim for a colorable constitutional violation, no precedent of the Supreme Court—or this circuit—compels the district court's conclusion that, as between a *Bivens* remedy or no remedy, courts must, or even should, choose the latter.

ARGUMENT

I. HISTORICALLY, VICTIMS OF CONSTITUTIONAL VIOLATIONS BY FEDERAL OFFICERS HAVE NOT BEEN LEFT WITHOUT ANY JUDICIAL REMEDY

A. From the Founding Until the Westfall Act, Victims of Constitutional Violations by Federal Officers Routinely Vindicated Their Rights Through State Tort Claims

As *amici* and others have demonstrated in detail, "in a pre-*Bivens* world, litigants could mount state common law tort claims as-of-right against federal officials and use such claims to test the constitutionality of federal action." James E. Pfander & David P. Baltmanis, *W(h)ither* Bivens*?*, 161 U. PA. L. REV. ONLINE 231, 231 (2013) [hereinafter Pfander & Baltmanis, *W(h)ither* Bivens*?*]; *see also* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 134 (2009) ("In 1971 and for much of the nation's history, state common law provided victims with a right of action that . . . could eventually result in [the] vindication of their constitutional rights.")

[hereinafter Pfander & Baltmanis, *Rethinking* Bivens]; Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 531 (2013) ("From the beginning of this nation's history, federal (and state) officials have been subject to common law suits . . . on the theory that the government lacks the power to authorize violations of the Constitution."). *See generally* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 135–37 (1997).

Of course, federal officers were still entitled to invoke available immunity defenses to shield them from liability in appropriate cases. *See* Vázquez & Vladeck, *supra*, at 533–37. And even where such defenses were unavailable or otherwise unsuccessful, officers were often able to pursue private bills in order to obtain indemnification for scope-of-employment constitutional violations from Congress. *See* 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 (2010). In all cases, however, "the existence of a cause of action in tort was assumed," Vázquez & Vladeck, *supra*, at 535, usually provided by the common law, or, after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the law of the state in which the constitutional violation occurred. *See*, *e.g.*,

Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) ("When it comes to suits for damages for abuse of power, federal officials are usually governed by local law." (citing *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 10, 12 (1817))). *See generally* Pfander & Baltmanis, *Rethinking* Bivens, *supra*, at 123 n.28 (citing the range of state-law causes of action that were available to challenge federal official action).

That this understanding of remedies for unconstitutional federal action prevailed at the time *Bivens* was decided is best illustrated by the government's brief in *Bivens* itself—which argued that an implied constitutional cause of action was unnecessary entirely *because* state law furnished an adequate remedy. *See* Brief for the Respondents, *Bivens*, 403 U.S. 388 (1971) (No. 301), 1970 WL 116900. A federal remedy might be appropriate, the government conceded, if it were "indispensable for vindicating constitutional rights." *Id.* at 24. But where state law furnished an adequate ground for damages relief, there was no need to imply a cause of action directly into the Constitution:

> Since some showing of need is a prerequisite for fashioning a right of action with respect to a federal statute, a federal action for damages for violation of a constitutional right should not be judicially created unless this is vital to protect constitutional rights. The Court has required no less; as we have shown, causes of action under the Constitution in the absence of a statutory basis have been created only in the rare case where

> such a remedy was indispensable for vindicating constitutional rights.

Id. at 23–24 (footnote omitted).

Of course, the majority in *Bivens* rejected the government's argument, choosing to recognize a federal remedy notwithstanding the availability (and potential adequacy) of state tort suits to remedy Bivens's claims. *See, e.g.*, *Bivens*, 403 U.S. at 394–95. But the more important point for present purposes is the dual nature of the remedial scheme *Bivens* contemplated—in which federal remedies would provide a backstop to state remedies to vindicate "'the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Id*. at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). The necessary implication of that holding, as even the government understood, was that a cause of action implied directly from the Constitution would be especially appropriate in cases in which plaintiffs had no meaningful cause of action available to them under state law—and so, in the Solicitor General's words, a federal remedy was "indispensable for vindicating constitutional rights." *Id.* at 406 (Harlan, J., concurring) (quoting Brief for Respondents, *supra*, at 19, 24).

B. *Bivens* Supplemented, Rather than Supplanted, the Existing Framework for Constitutional Remedies Against Federal Officers

Although *Bivens* itself did not address the question, *see* Vázquez & Vladeck, *supra*, at 547, the decision was widely understood as providing a supplementary federal cause of action—as opposed to a preemptive one. *See, e.g.*, Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1540 (1972) ("[T]he existence of a federal substantive cause of action in no way forecloses continued access to state tort remedies for those plaintiffs who would favor the state cause of action. . . . The federal remedy is independent, not preemptive, of the state common law causes of action."). Thus, when Congress amended the Federal Tort Claims Act (FTCA) in 1974 to exempt law enforcement officers from the FTCA's exception for intentional torts, *see* Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (codified at 28 U.S.C. § 2680(h)), it was clear that it viewed FTCA claims (which derived from the law of the state in which the tort was committed) and *Bivens* claims as "parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 19–20 (1980). As the Senate Report accompanying the 1974 amendments explained,

> [A]fter the date of enactment of this measure, innocent individuals who are subjected to raids of the type conducted in

> Collinsville, Illinois, 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, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791 (emphasis added).

At the same time, Congress also rejected a Justice Department proposal that would have substituted the federal government as the defendant in all intentional tort suits—including those arising under the Constitution, as in *Bivens*. *See* Pfander & Baltmanis, *Rethinking* Bivens, *supra*, at 131 & n.79; *see also* Jack Boger *et al.*, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 510–16 (1976) (summarizing the government's proposal—and Congress's rejection thereof). Thus, the 1974 amendments reflected the endorsement by all three branches of the remedial scheme *Bivens* contemplated: State tort regimes would still be a significant mechanism for redressing constitutional violations by federal officers, but a federal remedy would be available in cases in which those regimes were inadequate—and, as in *Bivens* and *Carlson*, even in some cases in which they were not. *See*

Pfander & Baltmanis, *Rethinking* Bivens, *supra*, at 131–32. Pursuant to this approach, if courts were truly faced with a choice between "*Bivens* or nothing," they were generally to choose *Bivens*.

C. The Westfall Act Has Been Consistently Misinterpreted By Lower Courts to Eliminate State-Law Remedies Without Expanding *Bivens*

The reason why this prevailing understanding has been lost to history is because of the Westfall Act, which Congress enacted in response to the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), and the consequences and implications of which have been overlooked by lower courts. In *Westfall*, the Supreme Court had refused to hold that federal officers are categorically immune from non-constitutional tort suits under state law. *See id*. at 296–98. Congress responded by providing that, in all cases in which federal officers are sued for "scope-of-employment" torts, the remedy provided by the FTCA would be exclusive, and "Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred." Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (codified at 28 U.S.C. § 2679(b)). To that end, the Act provided detailed procedures for converting a state tort

suit against a federal officer acting within the scope of his employment into an FTCA claim against the United States. *See, e.g.*, *Jacobs v. Vrobel*, 724 F.3d 217, 220–21 (D.C. Cir. 2013); *see also Osborn v. Haley*, 549 U.S. 225, 238, 241 (2007) (describing the mechanics of the Westfall Act).

As with the 1974 FTCA amendments, which recognized (and approved of) the availability of *Bivens* claims, the Westfall Act clearly expressed Congress's intent to preserve (and even ratify) *Bivens*. To that end, the Act codified a critical exception to the exclusive-remedy provision, providing that it would not "extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A).

As *amici* have explained in separate writings, the Westfall Act bears importantly on the assessment of the availability of a *Bivens* action. In enacting the Westfall Act, Congress made clear that it did not mean to *constrict* the scope of remedies for constitutional violations by federal officers as compared to the pre-1988 status quo. *See* H.R. REP. No. 100-700, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949–50 (noting that the Westfall Act "would *not* affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights" (emphasis added)). Otherwise,

the Westfall Act would have raised serious constitutional questions, which Congress clearly did not intend to raise. *See* Pfander & Baltmanis, *W(h)ither Bivens?*, *supra*, at 232 ("[W]e all agree that the doctrine of constitutional avoidance lends support to [this reading]."). And as noted above, at the time of the enactment of the Westfall Act, federal officials who violated the Constitution were subject to common law tort remedies, especially if their violations caused injuries of the sort alleged here. Thus, after 1988, as before it, if faced with a choice between "*Bivens* or nothing," courts should generally have chosen *Bivens*.

In recent years, lower courts have routinely reached the opposite conclusion, refusing to recognize a cause of action under *Bivens* in cases in which, by those courts' own admission, there is no possible alternative remedy under state or federal law. *See, e.g.*, *Vance*, 701 F.3d 193; *Lebron*, 670 F.3d 540; *Doe*, 649 F.3d 762; *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc). *See generally* Stephen I. Vladeck, *National Security and* Bivens *After* Iqbal, 14 LEWIS & CLARK L. REV. 255 (2010). "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." Vázquez & Vladeck, *supra*, at 510.

Such analyses suffer from two separate—but equally problematic—flaws. *First*, by assuming that the Westfall Act cut off state-law remedies for federal officials' constitutional violations without simultaneously expanding the availability of *Bivens* claims, *see* Vázquez & Vladeck, *supra*, at 523–30, these courts have implicitly adopted the very reading of the Act that, as described above, both (1) finds no support in statutory text or legislative history; and (2) raises serious constitutional questions. *Second*, as described below, these decisions have rested on over-readings of the Supreme Court's *Bivens* jurisprudence—which has *never* left a non-servicemember plaintiff without any remedy under state or federal law for a colorable constitutional violation. Assuming that these non-servicemember plaintiffs were left to *Bivens* or nothing, these courts, for the first time, chose nothing.

II. THE SUPREME COURT HAS NEVER REJECTED A *BIVENS* CLAIM FOR A NON-SERVICEMEMBER PLAINTIFF WHO WOULD OTHERWISE HAVE HAD NO EFFECTIVE REMEDY

In refusing to recognize a *Bivens* claim in *Doe*, then-Chief Judge Sentelle stressed the Supreme Court's perceived hostility to "new" *Bivens* claims:

> The implication of a *Bivens* action, consistent with the dicta in *Bivens* itself and the later holdings of the Supreme Court and this court, is not something to be undertaken lightly. In the forty-two years since the Supreme Court decided *Bivens*, only twice has it extended *Bivens* remedies into new classes of cases . . . . In 1988, the Supreme Court acknowledged that "[o]ur more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." More recently, the Court explained that "[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants."

683 F.3d at 394 (citations omitted). It is certainly true that the Supreme Court has only recognized "new" *Bivens* claims on two occasions, and that two of the Justices have expressed hostility to *Bivens* itself, *see, e.g.*, *Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012) (Scalia, J., joined by Thomas, J., concurring) (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., joined by Thomas, J., concurring)). But the Plaintiff-Appellant is *not* seeking the recognition of a "new" *Bivens* claim, as the Court has already recognized the existence of a *Bivens* claim for violations of the Fourth Amendment, *see Bivens*, 403 U.S. 388, and the Fifth Amendment's Due Process Clause, *see Davis v. Passman*, 442 U.S. 228 (1979), especially where, as in *Bivens*, the plaintiffs allege abuse at the hands of federal law enforcement officers. It is the *defendants* who are seeking a new exception to *Bivens*. Moreover, and in any event, as we explain below, the Supreme Court has never declined to recognize a *Bivens* claim where such non-

recognition would leave non-servicemember plaintiffs without *any* remedy under state or federal law for a colorable constitutional violation.

A. The Supreme Court Has Declined to Recognize a *Bivens* Cause of Action Where Congress Has Provided a Statutory Remedy

In one line of post-*Bivens* cases, the Court has declined to recognize a federal cause of action for damages directly from the Constitution in cases in which Congress has provided some kind of statutory alternative. For example, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court refused to recognize a government employee's *Bivens* claim for First Amendment retaliation because of the "elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by [government] supervisors and procedures—administrative and judicial—by which improper action may be redressed." *Id.* at 385. To similar effect, the Court in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), held that there was no need to infer a *Bivens* remedy for social security claimants whose benefits were terminated in violation of their due process rights. As Justice O'Connor explained, "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its

administration, we have not created additional *Bivens* remedies." *Id*. at 423.

Most recently, in *Hui v. Castaneda*, 559 U.S. 799 (2010), the Court unanimously held that a provision in the Public Health Service Act providing that FTCA remedies are the exclusive means of pursuing remedies against Public Health Service officers, *see* 42 U.S.C. § 233(a), validly displaced *Bivens* claims. *See* 559 U.S. at 808–12. Although in all of these cases there were reasons to doubt whether the remedy Congress had provided was commensurate with the relief that would have been available under *Bivens*, the upshot of each of these decisions was that none forced the Supreme Court to choose between "*Bivens* or nothing." Instead, in each of these cases, victims of colorable constitutional violations were left to a remedy that, in the Supreme Court's view, was adequate to vindicate their constitutional rights. *See Spagnola v. Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (per curiam) ("As we read *Chilicky* and *Bush* together, then, courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies.").

B. The Supreme Court Has Declined to Recognize a *Bivens* Remedy Where State Law Provides an Alternative

The same can be said about most of the cases in which the Supreme Court has identified "special factors counseling hesitation" as the basis for declining to infer a *Bivens* remedy. Thus, in *FDIC v. Meyer*, 510 U.S. 471 (1994), in which the Court recognized such "special factors" militating against the extension of *Bivens* to encompass claims against a federal agency, the Court concluded that such an extension was unnecessary largely because the plaintiff had a viable *Bivens* cause of action against the individual government officers responsible for the alleged constitutional violation. *See id*. at 485–86 ("Meyer brought precisely the claim that the logic of *Bivens* supports—a *Bivens* claim for damages against Pattullo, the FSLIC employee who terminated him."); *see also Malesko*, 534 U.S. at 72 (noting that *Meyer* found the *Bivens* remedy against the individual officer "sufficient").

To similar effect, in *Malesko*, the Court declined to recognize a *Bivens* claim against a contractor operating federal prisons largely because the contractor, as a private party, was amenable to liability under state law. *See* 534 U.S. at 72 ("Nor are we confronted with a situation in which claimants in respondent's shoes lack effective remedies. It was conceded at oral

argument that alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*." (citations omitted)); *see also id*. at 74 (describing the additional federal administrative remedies against the Bureau of Prisons available to the Respondent).

Comparable reasoning was on display in *Wilkie v. Robbins*, 551 U.S. 537 (2007), in which the Court declined to recognize a *Bivens* remedy against Bureau of Land Management employees who allegedly extorted the owner to grant an easement to the Bureau. As Justice Souter explained for the Court, there were several reasons militating against the recognition of a new *Bivens* cause of action, including the fact that "Robbins had ready at hand a wide variety of administrative and judicial remedies to redress his injuries." *Id*. at 562.

But perhaps the best evidence of the significance of alternative remedies even to the Court's "special factors" jurisprudence is its most recent foray into *Bivens*—the 2012 decision in *Pollard*, 132 S. Ct. 617. There, in explaining why a prisoner could not pursue a *Bivens* claim against private prison employees, Justice Breyer stressed that this was so "primarily because Pollard's Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law.

And in the case of a privately employed defendant [who is not covered by the Westfall Act], state tort law provides an 'alternative, existing process' capable of protecting the constitutional interests at stake." *Id*. at 623 (quoting *Wilkie*, 551 U.S. at 550); *see also id*. at 626 ("[W]e can decide whether to imply a *Bivens* action in a case where an Eighth Amendment claim or state law differs significantly from those at issue here when and if such a case arises.").

Although each of these decisions has not been without controversy, they are all consistent with the broader principle neglected by the lower courts in recent cases: when faced with non-servicemember plaintiffs for whom the available remedies are *Bivens* or nothing, the Court has not only never chosen "nothing"; it has strongly implied—as Justice Breyer did in *Pollard*—that it would choose *Bivens* if and when it had to. Put another way, as Chief Justice Rehnquist explained in 2001, the Court has approved of *Bivens* remedies when necessary "to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct." *Malesko*, 534 U.S. at 70.

C. The Only *Bivens* Cases in Which the Supreme Court Has Declined to Recognize any Remedy Involve Servicemember Plaintiffs

The only cases in which the Supreme Court has truly been faced with a choice between "*Bivens* and nothing," and chosen nothing, have involved claims brought by military servicemembers. Thus, in *Chappell*, 462 U.S. 296, the Court rejected a *Bivens* claim brought by Navy enlisted men against their superiors, who argued that they had been subjected to unconstitutional racial discrimination. As Chief Justice Burger explained, the Supreme Court had already read into the FTCA an atextual exemption that barred servicemembers from pressing *non*-constitutional tort claims for "for injuries arising out of their military service." *See id*. at 298–99 (citing *Feres v. United States*, 340 U.S. 135 (1950)). And "[a]lthough this case concerns the limitations on the type of nonstatutory damage remedy recognized in *Bivens*, rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in *Feres* guides our analysis in this case." *Id*. at 299; *see also id*. at 304 ("Taken together, the unique disciplinary structure of the military establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.").

Four years later, the Court extended this reasoning to encompass suits by servicemembers against individuals who were not their superiors in *Stanley*, 483 U.S. 669. Again, the majority relied upon the analogy to *Feres*, holding that the special factors identified in *Chappell* "extend beyond the situation in which an officer-subordinate relationship exists, and require abstention in the inferring of *Bivens* actions as extensive as the exception to the FTCA established by *Feres* . . . . We hold that no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'" *Id*. at 683–84 (quoting *Feres*, 340 U.S. at 146); *see also Klay v. Panetta*, 758 F.3d 369, 374 (D.C. Cir. 2014) ("*Stanley* thus frames the central inquiry in this case: Did plaintiffs' injuries arise out of activity incident to service?").

Although the *Feres* doctrine has been heavily criticized, *see, e.g.*, *Lanus v. United States*, 133 S. Ct. 2731, 2731–32 (2013) (Thomas, J., dissenting from the denial of certiorari), the relevant point for present purposes is that it is necessarily limited in its scope to suits by servicemembers, *see, e.g.*, *Perez v. P.R. Nat'l Guard*, 951 F. Supp. 2d 279, 288 (D.P.R. 2013), or, as noted below, similarly situated quasi-military personnel—a class of plaintiffs uniquely precluded from pursuing civil remedies arising out of their military service. No similar categorical bar

applies to any other class of plaintiffs. Thus, and because of *Feres*, servicemember suits are the only instance in which, faced with a choice between "*Bivens* or nothing," the Supreme Court has ever chosen nothing.

III. *DOE*, *ALI*, AND *RASUL II* SHOULD BE LIMITED TO THEIR UNIQUE FACTS

In Parts I and II, above, *amici* have demonstrated that (1) lower courts have adopted an unduly restrictive view of *Bivens* remedies because of a misreading of the Westfall Act; and (2) the Supreme Court has never declined to recognize a *Bivens* remedy where a non-servicemember plaintiff alleged a colorable constitutional violation for which there is no other remedy under state or federal law. Neither of these points would be relevant if this court were bound to follow the prior panel decision in *Doe*—or other prior decisions by this court refusing to recognize *Bivens* claims in contexts in which the plaintiff lacked any other remedy under state or federal law. As *amici* explain below, however, these prior decisions, though based on a misunderstanding of both the Westfall Act and the Supreme Court's *Bivens* doctrine, can and should be limited to their facts.

A. This Court's Decisions Refusing to Recognize *Bivens* Claims in the Face of No Alternative Remedy Can Be Distinguished

In this Court's decision in *Doe*, as in the en banc Seventh Circuit's ruling in *Vance*, the plaintiffs were U.S. citizen military contractors serving

with or accompanying the armed forces in the field in the context of ongoing combat operations—and were, therefore, functionally equivalent to servicemembers. As Chief Judge Easterbrook explained for the en banc Seventh Circuit,

> *Chappell* and *Stanley* hold that it is inappropriate for the judiciary to create a right of action that would permit a soldier to collect damages from a superior officer. Plaintiffs say that these decisions are irrelevant because they were not soldiers. That is not so clear. They were security contractors in a war zone, performing much the same role as soldiers. Some laws treat employees of military contractors in combat zones the same as soldiers.

Vance, 701 F.3d at 199 (citations omitted); *see also United States v. Ali*, 71 M.J. 256, 276 (C.A.A.F. 2012) (Baker, C.J., concurring in the result) (voting to uphold the conviction of a civilian contractor by a court-martial because, "[w]hile Appellant was not a member of the United States Armed Forces, the war powers are implicated by the fact that Appellant was serving with and accompanying a military unit in combat and was an integral part of the unit and its mission"), *cert. denied*, 133 S. Ct. 2338 (2013).

Thus, it was the analogy to the servicemember cases—to *Chappell* and *Stanley*—that drove the decisions in *Vance* and *Doe* not to recognize a *Bivens* remedy even in cases in which there would be no alternative remedy under state or federal law. As Chief Judge Sentelle put it in *Doe*, "[g]ranted,

Doe is a contractor and not an actual member of the military, but we see no way in which this affects the special factors analysis." 683 F.3d at 394.

This court has also declined to afford a *Bivens* remedy in cases in which there would be no alternative under state or federal law to non-citizens formerly detained by the United States as "enemy combatants" at Guantánamo or in Iraq or Afghanistan. *See Ali v. Rumsfeld*, 649 F.3d 762, 773–74 (D.C. Cir. 2011); *Rasul v. Myers* ("*Rasul II*"), 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam); *see also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.) ("[W]e think that as a general matter the danger of foreign citizens' using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist."); *cf. Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012) (upholding 28 U.S.C. § 2241(e)(2) as applied to foreclose federal jurisdiction over *Bivens* claims brought by non-citizens formerly detained at Guantánamo). All of those cases, however, involved non-citizens lacking substantial voluntary connections to the United States—*i.e.*, plaintiffs who, under this court's precedents, are not protected by the Due Process Clause of the Fifth Amendment. *See Kiyemba v. Obama*, 555 F.3d 1022, 1026–27 (D.C. Cir. 2009), *vacated on other grounds*, 559 U.S. 131 (2010) (per

curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam).[1]

Ultimately, the only "national security" case *amici* could find in which this court has refused to recognize a *Bivens* remedy in a suit brought by a U.S. citizen who was neither a servicemember nor a contractor serving with or accompanying the armed forces in the field is the decision in *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008), in which the court rejected a lawsuit by a former CIA employee challenging the constitutionality of the public disclosure of her covert status. But *Wilson* rested on the court's conclusion that Congress had affirmatively precluded a *Bivens* remedy. As Chief Judge Sentelle explained, "because Congress created a comprehensive Privacy Act scheme that did not inadvertently exclude a remedy for the claims brought against these defendants, we will not supplement the scheme with *Bivens* remedies." *Id.* at 710.[2] Whether or not Congress *may* constitutionally

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[1]. In *Doe*, Chief Judge Sentelle asserted that "Those decisions . . . did not hinge on the plaintiffs' citizenship status." 683 F.3d at 396. Given the extent to which *Ali* and *Rasul II* both relied upon the citizenship-driven analysis of *Rasul v. Myers* ("*Rasul I*"), 512 F.3d 644 (D.C. Cir.), *summarily vacated*, 555 U.S. 1083 (2008), and the language quoted above from *Sanchez-Espinoza*, this statement is dubious, at best. But in any event, the relevant point for present purposes is that *Doe* only foreclosed *Bivens* claims to U.S. citizen military contractors serving with or accompanying the armed forces in the field—and cannot fairly be read as the district court read it here, *i.e.*, as holding that "the same special factors compelling hesitation in military cases also compel hesitation in [all] cases involving national security and intelligence." *Meshal*, 2014 WL 2648032, at *10.

[2]. The Fourth Circuit's decision in *Lebron* also appears to foreclose a *Bivens* remedy for a U.S. citizen plaintiff who is neither a servicemember nor an embedded military contractor, and who has no alternative remedy available to him under state or federal

displace *Bivens* remedies in favor of no remedies, as *Wilson* concluded, there is no argument that Congress has done so here.

Ultimately, then, where the plaintiff is a U.S. citizen with clearly established constitutional rights who is neither a servicemember nor an embedded contractor, and where neither Congress nor the states have provided any alternative remedy or foreclosed *Bivens* claims, no precedent of this court forecloses the existence of a cause of action under *Bivens*. Thus, the district court was simply wrong when it concluded that "this Court is not writing on a clean slate; rather, it is constrained by binding precedent." *Meshal*, 2014 2648032, at *12. As applied to the facts of this case, at least, the precedential slate is indeed clean.

B. Affirming the District Court Would Effectively Vitiate *Bivens*

As a matter of first impression, then, this court should recognize the existence of a cause of action under *Bivens*. As Plaintiff-Appellant rightly explains,

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law. *See* 670 F.3d 540. But *Lebron*, which misunderstood both the implications of the Westfall Act and the Supreme Court's *Bivens* jurisprudence in such cases, and which, in any event, is not binding upon this court, can also be easily distinguished on its facts. There, the plaintiff was a U.S. citizen seeking damages "against top Defense Department officials for a range of policy judgments pertaining to the designation and treatment of enemy combatants." *Id*. at 547. Whether it is proper for courts in such cases to deny victims of constitutional violations a remedy in such circumstances tells us nothing about the proper resolution of cases such as this one, where a U.S. citizen seeks damages arising directly out of misconduct by federal law enforcement officers.

> Here, it is *Bivens* or nothing, and no special factors counsel hesitation. The core allegations of gross FBI misconduct during a law enforcement investigation place this case within the heartland of *Bivens*. The question here is not whether Mr. Meshal should or will ultimately prevail in obtaining relief, but rather whether he or any American citizen can pursue a remedy if that citizen is disappeared, tortured, and detained for months on end by U.S. officials. The district court wrongly concluded that no such remedy exists.

Brief for Plaintiff-Appellant at 2, *Meshal*, No. 14-5194 (D.C. Cir. filed Dec. 15, 2014). Although the government will surely argue that Plaintiff-Appellant seeks an unjustified "expansion" of *Bivens*, the above analysis underscores how it is these recent decisions that have instead carved out a newfound *exception* to *Bivens*. Whatever the merits of the exception recognized in cases like *Doe*, *Ali*, and *Rasul II*, it has never been applied to a case like this—in which *Bivens* is the only remedy for a non-servicemember plaintiff with clearly established constitutional rights claiming mistreatment at the hands of federal law enforcement officers.

More fundamentally, affirming the decision below would perpetuate the very misreadings of both the Supreme Court's *Bivens* jurisprudence and the Westfall Act that *amici* have endeavored to document and correct in their scholarship. Especially in circumstances in which state law cannot—or, as a matter of policy, *should* not—be the primary source of redress for constitutional violations by federal officers, *Bivens* vindicates a far more

universal constitutional imperative, *i.e.*, that litigants should have access to at least *some* judicial remedy to seek to vindicate their constitutional rights. And while immunity doctrines or other appropriate procedural hurdles may ultimately foreclose *relief* to litigants in such cases (as the *Bivens* Court anticipated, *see* 403 U.S. at 397–98), the question at the heart of *Bivens* is whether citizens have a right to redress in cases in which the defendant will *not* have immunity. The Supreme Court has repeatedly suggested that the answer is "yes," a view Congress endorsed in enacting the Westfall Act. But most importantly for purposes of this case, it has never said that the answer is "no."

CONCLUSION

For the foregoing reasons, *amici* respectfully suggest that the decision below be reversed.

Dated: December 22, 2014

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CIRCUIT RULE 29(d) CERTIFICATION

Pursuant to Circuit Rule 29(d), counsel for *amici curiae* Law Professors James E. Pfander, Carlos M. Vázquez, and Stephen I. Vladeck herein states that it would not be practical for all *amici* supporting Plaintiff-Appellant to file a single brief. Each group of *amici* intends to address a distinct set of issues from a distinct perspective. *Amici* could not give these issues appropriate attention in a single brief. *Amici* Law Professors James E. Pfander, Carlos M. Vázquez, and Stephen I. Vladeck have special expertise in the history and scope of judicial remedies to challenge official action, particularly after and in light of the Supreme Court's 1971 decision in *Bivens*. This brief therefore makes a unique contribution that will assist the Court in resolving the instant matter.

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CERTIFICATE OF COMPLIANCE

I, Jessica Ring Amunson, in reliance on the word count of the word processing system used to prepare this brief, certify that the foregoing complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) because it contains 6,780 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in Georgia 14-point font.

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CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, hereby certify that on this 22nd day of December, 2014, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system pursuant to Circuit Rule 25, causing a true and correct copy to be served on all counsel of record.

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