No. 18-1451

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MYNOR ABDIEL TUN-COS; JOSÉ PAJARITO SAPUT; LUIS VELASQUEZ PERDOMO; EDER AGUILAR ARITAS; EDUARDO MONTANO FERNÁNDEZ; PEDRO VELASQUEZ PERDOMO; JOSÉ CÁRCAMO; NELSON CALLEJAS PEÑA; GERMAN VELASQUEZ PERDOMO
Plaintiffs-Appellees,

v.

B. PERROTTE, ICE AGENT; T. OSBORNE, ICE AGENT; D. HUN YIM, ICE AGENT; P. MANNEH, ICE AGENT; A. NICHOLS, ICE AGENT
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia (1:17-cv-00943 (AJT-TCB))

BRIEF OF PROFESSOR STEPHEN I. VLADECK AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae states that he is an individual, not a corporation, and therefore does not have a parent corporation nor is there any publicly held corporation that owns 10% or more of any stock.

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STATEMENT OF INTEREST[1]

Amicus curiae Stephen I. Vladeck is the A. Dalton Cross Professor in Law at the University of Texas School of Law. His teaching and research focus on federal jurisdiction, constitutional law, national-security law, and military justice. Having written extensively regarding the history and development of *Bivens* remedies,[2] Professor Vladeck submits this brief to provide the Court with additional context surrounding the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and to support correction of the aberration in *Bivens* case law engendered by the panel's erroneous decision.

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[1] No party's counsel authored any part of this proposed brief, and no party or person other than *amicus*, its members, or its counsel made any monetary contribution intended to fund preparation or submission of this brief. *See* FRAP 29(a).

[2] *See, e.g.*, *Implied Constitutional Remedies After* Abbasi, in Am. Const. Soc'y, Supreme Court Review, 2016–2017, at 179 (Steven D. Schwinn ed., 2017); Carlos M. Vasquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509 (2013); Stephen I. Vladeck, Bivens *Remedies and the Myth of the "Heady Days,"* 8 U. St. Thomas L.J. 513 (2011); Stephen I. Vladeck, *National Security and* Bivens *after* Iqbal, 14 Lewis & Clark L. Rev. 255 (2010).

INTRODUCTION

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized a federal cause of action allowing individuals to recover damages against federal officers who violate their constitutional rights. Prior to *Bivens*, however, the Supreme Court had for nearly two centuries recognized that plaintiffs could *already* seek damages sounding in state tort law or the "general law" (before *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)) from federal officers who had exceeded their authority—irrespective of which federal agency employed them or the specific context in which the claims arose. Consistent with that understanding, state courts have long imposed damages against federal officers under state law. Similarly, state legislatures have enacted statutes providing for tort actions without limiting the categories of defendants subject to recovery.

This longstanding precedent of liability for federal officials demonstrates the panel's error in categorically exempting ICE agents from liability for injuries caused by their unconstitutional actions. Properly understood, the question presented to the Court in *Bivens* was whether to provide a federal damages remedy *in addition to* existing remedies—*not* whether a remedy should exist *at all*. Yet in denying Plaintiffs-Appellees a *Bivens* remedy, the panel answered exactly the wrong question, assessing whether *any* cause of action should exist, rather than

whether a federal remedy should *also* be permitted. With the question appropriately framed, the panel's emphasis on the ICE agents' positions was erroneous. *En banc* review is necessary to restore the universally accepted existence of federal officers' liability for their unconstitutional actions.[3]

ARGUMENT

I. PRIOR TO *BIVENS*, THE SUPREME COURT RECOGNIZED DAMAGES CLAIMS SOUNDING IN STATE TORT LAW OR THE "GENERAL LAW" AGAINST FEDERAL OFFICIALS

In the 180 years preceding *Bivens*, the Supreme Court repeatedly recognized that persons aggrieved by federal officials acting beyond their authority could hold those officials accountable through either state tort law or the "general law." *See generally* Stephen I. Vladeck, Bivens *Remedies and the Myth of the "Heady Days,"* 8 U. St. Thomas L.J. 513, 514 (2011); *see also id.* at 515 (prior to *Bivens*, "it was black-letter law that federal officers could be held liable under state (or, as was typically the case prior to *Erie*, 'general') law, at least where sovereign or official immunity did not preclude recovery" (footnotes omitted)).

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[3] In addition, because the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (amending 28 U.S.C. § 2679(b)), has been interpreted to foreclose state tort claims against federal officials since 1988, including those arising out of constitutional violations, *see generally* Vladeck, *State Law*, *supra*, at 566, the effect of the panel's decision is to deprive citizens of *all* damages claims for constitutional violations by ICE officials, no matter how egregious.

Several early decisions illustrate the practice. In *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the Supreme Court found that a U.S. ship commander was liable for trespass where he had seized a neutral ship pursuant to an invalid presidential order that exceeded congressional authorization. As Chief Justice Marshall explained: "If [an officer's] instructions [from the Executive Branch] afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him . . . ." *Id.* at 178; *see also Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 125 (1804) (permitting claim against U.S. federal official for improper seizure); *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 490, 492 (1806) (same). Likewise, in *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806), the Supreme Court considered a claim that the defendant federal officer had entered the plaintiff's home to collect a fine that had been (improperly) imposed by a court-martial. Because the court-martial had no jurisdiction, the defendant's execution of the court-martial order was improper, and "[t]he court and the officer [were] all trespassers." *Id.* at 337.

The Court followed this practice throughout the early years of the Republic. A dozen years after *Wise*, the Supreme Court concluded that a customs officer who had no authority to seize cargo must face an action in state court. *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1 (1817). And in considering a tort action brought by the master of a French ship that had been seized by a U.S. official, Justice Story

observed that "this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress." *The Apollon*, 22 U.S. (9 Wheat) 362, 367 (1824). Because the seizure in question was "wholly without justification under our laws," *id.* at 372, the U.S. official could not avoid plaintiff's damages claim.

Similarly, in *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836), the Court reviewed a claim against a customs-duty collector who had collected duties from the plaintiff, despite the plaintiff's challenge to the collection. Because the collection of duties was not covered by the congressional act, the Court found the defendant personally liable. *Id*. at 158. Further, in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852), the Supreme Court affirmed a jury verdict awarding damages against a U.S. Army lieutenant-colonel who, pursuant to direction from his commanding officer, had seized the plaintiff's goods. The Court observed that "the law did not confide to [the defendant's commanding officer] a discretionary power over private property"; as such, the order was "to do an illegal act; to commit a trespass upon the property of another." *Id.* at 137. The same year, in *Teal v. Felton*, 53 U.S. (12 How.) 284 (1852), the Supreme Court upheld the ability of state courts to hear an action in trover against a federal postmaster.

Actions against federal officials for constitutional torts remained common throughout the nineteenth century. For example, in *Buck v. Colbath*, 70 U.S. (3

Wall.) 334 (1866), the Supreme Court affirmed the plaintiff's ability to bring a trespass action against a federal marshal, "[seeing] nothing . . . to prevent the marshal from being sued in the State court, in trespass for his own tort, in levying [the writ] upon the property of a man against whom the writ did not run, and on property which was not liable to it." *Id.* at 347. In *Bates v. Clark*, 95 U.S. 204 (1877), the Supreme Court affirmed a judgment finding U.S. Army officers liable for trespass where they had without authority seized the plaintiff's goods. *Id*. at 209.

Twenty years later, the Supreme Court again reiterated that a federal official could be held personally liable for actions exceeding his or her authority. In *Belknap v. Schild*, 161 U.S. 10 (1896), the plaintiff sued U.S. naval officers for patent infringement. The Court observed that "the exemption of the United States from judicial process does not protect their officers and agents . . . from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States. Such officers or agents . . . are therefore personally liable to be sued for their own personal infringement of a patent." *Id*. at 18 (citation omitted) (citing *Barreme* and *Bates*).

Fifty years later, on the far side of *Erie*, the Court restated the view that no jurisdictional difficulty arises when a suit is brought against a government officer

to recover damages for his or her unauthorized personal actions. In *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), the Court observed that "if [wrongful actions by Government officers] are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not . . . forbid a court from taking jurisdiction over a suit against him," and "the principle that an agent is liable for his own torts is an ancient one and applies even to certain acts of public officers or public instrumentalities." *Id.* at 686–87 (citing *Sloan Shipyards Corp. v. Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922), and *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580 (1943)) (rejecting claim where official acted within the scope of his authority, and the lawsuit was in effect a suit against the sovereign). Shortly before its decision in *Bivens*, the Court reiterated this view in *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), citing *Slocum* for the proposition that "[w]hen it comes to suits for damages for abuse of power, federal officials are usually governed by local law." *Id.* at 652.

In short, long before *Bivens*, and continuing after *Erie*, the Court "took for granted the existence of common-law damages remedies" where federal officers had exceeded their authority and had no claim to sovereign immunity. Vladeck, Bivens *Remedies*, *supra*, at 517. Through this lens, the question before the Court in *Bivens* would have been understood as "whether the common-law remedy

should remain the exclusive one" or a federal remedy should be provided *in addition to* the common-law remedy. *Id.*

II. STATE COMMON LAW AND LEGISLATION HAVE LONG RECOGNIZED DAMAGE CLAIMS, INCLUDING AGAINST FEDERAL OFFICERS

Consistent with this Supreme Court jurisprudence, state common law and statutory law have long imposed tort damages—including against federal officers—without regard to the identity of the defendant.

For over a century, state courts have routinely enforced state law against federal officers. For example, in *Hirsch v. Rand*, 39 Cal. 315 (1870), the Supreme Court of California considered a U.S. marshal's wrongful arrest of a foreign tourist, involving a refusal to investigate the plaintiff's identity. The court concluded that the officer was liable for damages for the common-law tort of false imprisonment: "[T]he ultimate fact . . . was the commission of the trespass by the defendant [where he had] arrested and imprisoned the plaintiff without probable cause, or lawful authority to do so." *Id.* at 318. Similarly, in *Park v. Hayden*, 61 N.Y.S. 264 (App. Div. 1899), the owner of a tugboat seized by a U.S. marshal alleged that the marshal negligently failed to use proper care in protecting the boat from thieves and natural elements. Following dismissal by the trial court, the Appellate Division reversed and granted a new trial to consider proof of the marshal's negligence and the boat's actual value. Citing the Supreme Court's reasoning in

Buck, the Appellate Division concluded that the color of law "furnishes no protection whatever for illegal or negligent acts committed in the discharge of [a federal officer's] duty." *Id.* at 266. Other state courts have similarly permitted damages actions where federal officials committed constitutional torts, *see, e.g.*, *Grumon v. Raymond*, 1 Conn. 40 (1814) (damages awarded against magistrate for issuance of general warrant); *Burlingham v. Wylee*, 2 Root 152 (Conn. 1794) (damages awarded against public official for issuing warrant without jurisdiction).

Numerous other courts have acknowledged the well-established precedent permitting such actions. For example, *Neu v. McCarthy*, 33 N.E.2d 570 (Mass. 1941), considered whether to hold a soldier liable for following his superior's orders and running a red light, causing a collision. Despite a remand to address jury instruction-related issues, the court noted that "[a] person who enters military service is not thereby relieved from his obligation to observe the law . . . . [G]enerally, he is liable for his torts as are other persons." *Id.* at 572; *see also, e.g.*, *Dysart v. Lurty*, 41 P. 724 (Okla. 1895) (holding that where a federal officer exceeds his authority and commits a wrong, his principal will be liable for damages); *Evans v. Massman Constr. Co.*, 115 S.W.2d 163, 168 (Mo. 1938), *rev'd on other grounds*, 343 Mo. 632 (Mo. 1938) ("There is no doubt but that an officer and agent of the United States is liable to respond in damages for a tortious act . . . if he, in fact, acts outside of and in defiance of the law. The fact that he acts in

obedience to orders of his superior officer and in good faith is not a defense."); *Christian Cnty. Court v. Rankin*, 63 Ky. (2 Duv.) 502 (1866) (finding soldiers liable for trespasses committed in violation of the laws of war, though commanded by their superior officers).

In addition to these common-law decisions imposing liability, many state statutes also provide a private right of action against tortfeasors and, importantly, do not exclude federal employees from their reach. For example, numerous state statutes providing for wrongful-death actions do not carve out federal officials from liability. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 71.002; Va. Code Ann. § 8.01-50; Ariz. Rev. Stat. Ann. § 12-611; Wash. Rev. Code § 4.92.090; Or. Rev. Stat. § 30.020; Mich. Comp. Laws § 600.2922. Similarly, Virginia's trespass statute, Va. Code Ann. § 8.01-124, provides an ejectment action to plaintiffs, with no accompanying limitation for actions against federal officials.

In short, state courts have long—and repeatedly—imposed damages against federal law-enforcement officers for their torts against individuals, without regard to the federal official's title. None of these decisions drew distinctions based upon the specific agency employing the federal officer, the circumstances of their misconduct, or whether or not their tortious conduct also offended the Constitution.

CONCLUSION

A long history of Supreme Court decisions and state court precedent and legislation in the two centuries preceding *Bivens* recognized that persons aggrieved by federal officials could hold those federal officials accountable. The panel's holding, which effectively immunizes a whole class of federal law-enforcement officers from tort liability solely by dint of their employer, is inconsistent with the historical understanding—and the understanding of the *Bivens* Court—that these individuals *would* be held liable for their actions under *some law*, whether under state law, general law, or (later) a *Bivens* action. Because the *Bivens* analysis is unconcerned with the broader question of whether *any* liability should be imposed, the panel's decision to carve out ICE officials from all liability is erroneous. The Court should grant the petition for rehearing *en banc* to bring this circuit's case law in line with this long-standing, well-accepted principle that federal officials should be liable to individuals for their constitutional torts.

Dated: July 1, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: July 1, 2019

s/ Donald P. Salzman
Donald P. Salzman

CERTIFICATE OF SERVICE

I certify that on July 1, 2019, the foregoing document was served on counsel through the CM/ECF system.

Dated: July 1, 2019

s/ Donald P. Salzman
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