ORAL ARGUMENT NOT YET SCHEDULED

Nos. 22-5133 & 22-5139

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RADIYA BUCHANAN, *et al.*, *Plaintiffs-Appellants*,

v.

WILLIAM P. BARR, *et al.*, *Defendants-Appellees*.

BLACK LIVES MATTER D.C., *et al.*, *Plaintiffs-Appellants*,

v.

WILLIAM P. BARR, *et al.*, *Defendants-Appellees*.

Consolidated Appeals from the U.S. District Court for the District of Columbia (Nos. 1:20-cv-1469 & 1:20-cv-1542) (Hon. Dabney L. Friedrich, District Judge)

Brief Amicus Curiae of Bipartisan Former Members of Congress in Support of Appellants and Reversal

Gabriel K. Gillett
Christina T. Lopez
JENNER AND BLOCK LLP
353 N Clark Street
Chicago, IL 60654
Tel: (312) 222-9350
ggillett@jenner.com

Ishan K. Bhabha
Lauren J. Hartz
Jonathan A. Langlinais
JENNER AND BLOCK LLP
1099 New York Ave., NW, Suite 900
Washington, DC 20001
Tel: (202) 639-6000

Jacob D. Alderdice
JENNER AND BLOCK LLP
1155 Avenue of the Americas
New York, NY 10036
Tel: (212) 891-1600

Counsel for Amici Curiae Bipartisan Former Members of Congress

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel for *amici curiae* certify as follows:

A. Parties and *Amici*

Except for the *amici curiae* listed below, all parties, intervenors, and amici appearing before this court and the district court are listed in the Brief for Appellants.

Amici curiae include thirty-three former members of Congress:†

- Former Representative Jason Altmire (D-PA)
- Former Representative Les AuCoin (D-OR)
- Former Representative Doug Bereuter (R-NE)
- Former Representative Howard Berman (D-CA)
- Former Representative Bruce Braley (D-IA)
- Former Representative William Brodhead (D-MI)
- Former Representative Yvonne Burke (D-CA)
- Former Representative Thomas Campbell (R-CA)
- Former Representative Lois Capps (D-CA)
- Former Representative Mike Capuano (D-MA)

† *Amici*'s affiliations are listed for identification purposes. *Amici*'s views are solely their own and do not represent the views of any public or private institution.

- Former Representative Tony Coelho (D-CA)
- Former Representative Sam Coppersmith (D-AZ)
- Former Representative Mickey Edwards (R-OK)
- Former Representative William Enyart (D-IL)
- Former Representative Barney Frank (D-MA)
- Former Senator and Representative Tom Harkin (D-IA)
- Former Representative Paul W. Hodes (D-NH)
- Former Representative Steve Israel (D-NY)
- Former Representative Richard Lehman (D-CA)
- Former Representative Mel Levine (D-CA)
- Former Representative Tim Mahoney (D-FL)
- Former Representative Paul McHale (D-PA)
- Former Representative Jim Moran (D-VA)
- Former Representative Bruce Morrison (D-CT)
- Former Representative and Secretary Leon Panetta (D-CA)
- Former Representative Harley Rouda (D-CA)
- Former Representative Max Sandlin (D-TX)
- Former Representative Claudine Schneider (R-RI)
- Former Representative Patricia Schroeder (D-CO)
- Former Representative Chris Shays (R-CT)

- Former Representative Gerry Sikorski (D-MN)
- Former Representative Peter Smith (R-VT)
- Former Representative Richard Stallings (D-ID)

B. Ruling Under Review

Reference to the ruling under review appears in the Brief for Appellants. *See* Appellants' Br. at ii.

C. Related Cases

Reference to any related cases pending before this Court appears in the Brief for Appellants. *Id.* at ii.

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INTEREST OF *AMICI*[1]

Amici curiae are a bipartisan group of former Members of Congress who served for a collective 444 years in the House of Representatives and Senate. Nineteen *amici* served in Congress in the 1980s, when Congress debated the proper scope of *Bivens* over the course of several years. Sixteen served in the 100th Congress and voted on the Westfall Act in 1988, including Mr. Barney Frank, the bill's sponsor in the House of Representatives.

Through the Westfall Act, Congress incorporated *Bivens* actions as they existed in 1988 into federal law to complement the remedies provided by the Federal Tort Claims Act. *Amici* are concerned that the district court's ruling would unravel this bipartisan compromise and undermine the carefully considered legislative framework Congress has crafted to give effective remedies for Americans who are injured by federal officials.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the summer of 2020, Attorney General William Barr and other federal officials, the Appellees, carried out an unwarranted and unprovoked attack on

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[1] All parties have provided consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*'s counsel made a monetary contribution to the preparation or submission of this brief. *Amici*'s affiliations are listed for identification purposes. *Amici*'s views are solely their own and do not represent the views of any public or private institution.

peaceful protesters gathered in and around Lafayette Square, a quintessential public forum in our Nation's capital. Without warning, government officials clad in riot gear emerged from the shadow of the White House swinging clubs, charging on horseback, and firing rubber bullets and chemical irritants at the protesters. A public gathering place inextricably linked with First Amendment freedoms became a grim scene of political violence and chaos.

The question in this case is whether federal officials are immune from the civil consequences of their clear violations of peaceful protestors' constitutional freedoms. Appellants, who were among the peaceful protestors gathered in Lafayette Square, filed suit against these officials in their personal capacities for violating Appellants' First, Fourth, and Fifth Amendment rights, relying on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In the decision below, the district court had no trouble concluding that Appellants adequately stated claims against District of Columbia and state officials for essentially the same conduct, and no trouble rejecting these defendants' qualified immunity defenses. But the district court dismissed Appellants' *Bivens* claims and held that federal officials cannot be sued for damages for violently attacking peaceful protesters in a public forum, reasoning that Congress had been silent on this issue and might not approve of such a remedy.

This comes as a surprise to *amici*, many of whom were deeply involved in years-long debates over the proper scope of *Bivens* when they served in Congress in the 1980s. Contrary to the district court's conclusion, Congress affirmatively acted to endorse *Bivens* as it stood when it passed the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563. More commonly known as the "Westfall Act," the legislation amended the Federal Tort Claims Act to give federal officials personal immunity from most tort claims but expressly denied federal officials blanket immunity from *Bivens* claims as they existed in 1988. 28 U.S.C. § 2679.

The Westfall Act reflects an important bipartisan compromise on *Bivens* that was forged after careful consideration and more than a decade of debate. *Bivens* was controversial and much discussed in the halls of Congress in the 1970s and 1980s, and Congress considered several proposals to limit *Bivens* or overrule it altogether. Yet Congress ultimately rejected these proposals and instead "left *Bivens* where it found it" in 1988. *Hernandez v. Mesa*, 140 S. Ct. 735, 748 n.9 (2020). Under this framework, *Bivens* actions that were available to Americans in 1988—including to those protesting in our Nation's capital—would continue to play a complementary role in Congress's overall framework for giving redress to those who are injured by federal officials. That bipartisan compromise has stood unchanged for the last 34 years.

Relevant here, that bipartisan compromise expressly preserved *Bivens* actions for protesters gathered outside of government buildings in the District. When it passed the Westfall Act, Congress was familiar with the case law on *Bivens* that had emerged as of 1988 and was acutely aware of this Court's decision in *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), issued more than a decade earlier. In *Dellums*, the Court held that *Bivens* actions were available to enforce the First and Fourth Amendment rights of protesters—including Members of Congress with whom *amici* served—who had been arrested on the Capitol steps during the historic May Day protests of 1971. *Dellums* was a salient part of the body of law Congress intended to preserve when it passed the Westfall Act. The Nixon Administration's response to the May Day protests—which gave rise to this Court's decision in *Dellums*—is remarkably similar to Appellees' response to the 2020 protests in Lafayette Square, as photographic evidence illustrates. Appellees should therefore be allowed to proceed with their *Bivens* claims in this case, as Congress intended.

Amici are concerned that the district court's decision would undermine the legislative scheme Congress has crafted to protect individuals from unlawful conduct by federal officials—and in particular, violent crackdowns on peaceful protesters exercising their First Amendment rights in an iconic public forum. The district court erred because it misunderstood the significance of *Dellums*—focusing on whether *Dellums* differs from Supreme Court precedent on *Bivens* under the

Court's "new context" test and hypothetical concerns about the security of elected officials, rather than focusing on the critical inquiry of whether Congress intended to permit litigants to seek damages for constitutional violations in cases like this one. The Westfall Act and its history make it clear that it did. Congress already did the hard work of striking a balance between security and the need to protect First Amendment activities in our Nation's capital.

The Supreme Court has concluded that, in passing the Westfall Act, Congress left *Bivens* as it found it in 1988. At that time, protestors could bring *Bivens* claims against federal officials who violated their First and Fourth Amendment rights. In this case, respect for the will of Congress requires the Court to do the same. The judgment of the district court should therefore be reversed.

ARGUMENT

I. SUPREME COURT PRECEDENT AND SEPARATION-OF-POWERS PRINCIPLES REQUIRE CAREFUL EVALUATION OF CONGRESSIONAL ACTION TO PRESERVE *BIVENS* CLAIMS.

Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and subsequent cases, plaintiffs have a judicially implied cause of action against federal officials for the violation of certain constitutional rights. In *Bivens*, the U.S. Supreme Court held that a violation of an individual's Fourth Amendment rights by *federal* officials could give rise to a federal cause of action for damages. In other words, *Bivens* "provides a federal law analog to the right of

individuals to bring constitutional tort claims against state and local government officials." James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 125 (2009).

Courts are cautious about extending *Bivens* to new contexts to preserve the separation of powers, and more specifically Congress's prerogative to decide the scope of federal remedies. Out of deference to Congress and its role in "determining the nature and extent of federal-court jurisdiction under Article III," in deciding the limits of sovereign immunity, and in crafting remedies for people who are injured by federal officials, the Supreme Court has generally declined to extend *Bivens* actions to new contexts. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017). For that reason, when asked to apply *Bivens*, courts consider whether the claim arises in a new context and whether there are any "special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at 1857 (quotation marks omitted). Although the Supreme Court's approach to *Bivens* actions has changed since *Bivens* was decided in the early 1970s, it has evolved to become *more* attentive and deferential to Congress and how Congress chooses to provide remedies against federal officials.

An important threshold question in the *Bivens* analysis, then, is whether Congress has in fact taken "affirmative action" to authorize a damages suit. *Id.* Although the district court's analysis focused on whether Appellants' claims present

a "new context" from those recognized by Supreme Court precedent, in applying the "special factors" step, it overlooked that Congress has taken affirmative action to endorse relevant case law applying *Bivens*—in this case, the D.C. Circuit's decision in *Dellums*, a case with facts that mirror the facts of the present case. This is a crucial oversight because it is Congress's prerogative to enshrine this case law in statute, regardless of whether the case law comes from the Supreme Court or the Courts of Appeals.

That also follows as a matter of statutory interpretation. As Appellants point out, Appellants' Br. 25-30, Congress legislates against the backdrop of existing judicial precedent, and it "is always appropriate [to assume] that our elected representatives like other citizens, know the law." *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 945-46 (D.C. Cir. 2005); *see also Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994). When Congress is acutely aware of a consistent judicial interpretation and leaves it undisturbed, this is evidence that Congress "acquiesces in, and apparently affirms" that interpretation. *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979)); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983); *Jackson v. Modly*, 949 F.3d 763, 772-73 (D.C. Cir. 2020). There is, of course, no rule that Congress cannot incorporate or affirm decisions of this Court or the Courts of Appeals more generally. *See, e.g.*, *Tex. Dep't*

of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (2015) (holding that Congress was aware of appellate precedent when it amended the FHA).

II. THROUGH THE WESTFALL ACT, CONGRESS PRESERVED *BIVENS* ACTIONS AS THEY WERE UNDERSTOOD IN 1988.

The fundamental error in the decision below is that it fails to recognize the affirmative action Congress took to preserve *Bivens* actions as they existed in 1988. Congress was acutely aware of the burgeoning case law on *Bivens* when it passed the Westfall Act, including this Court's decision in *Dellums*, and it adopted a legislative compromise that endorsed that case law. Thus, despite purporting to analyze whether Congressional activity supports a *Bivens* claim in this action, the district court ignored this crucial action by Congress entirely.

Over the course of several decades beginning in 1946, Congress fashioned a comprehensive framework for giving redress to citizens who are injured by federal officials through the Federal Tort Claims Act ("FTCA"). The act waives the sovereign immunity of the United States by making it liable for damages for injuries 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" to the same extent that a private citizen would be liable under tort law. *See* 28 U.S.C. § 1346(b)(1).

Bivens actions are an integral part of this framework, and Congress has long relied on *Bivens* actions to play a parallel, complementary role to the FTCA to ensure

that private citizens have adequate remedies for injuries caused by federal officials. *Carlson v. Green*, 446 U.S. 14, 20 (1980); *see also* S. Rep. No. 93-588, at 3 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2790-91. Indeed, the Supreme Court has found Congress's intended role for *Bivens* claims to be "crystal clear." *Carlson*, 446 U.S. at 20.

That vision for the complementary role of *Bivens* actions carried through to the passage of the Westfall Act in 1988. Congress could have easily overruled *Bivens* and the case law that developed in its wake. Indeed, the Westfall Act itself is an example of Congress's willingness to overrule cases that go too far in exposing federal officials to liability. *Bivens* was by no means uncontroversial in the halls of Congress when it was decided in 1971, and Congress took an intense interest in the appropriate scope of *Bivens* actions and the FTCA in the 1970s and 1980s.

During this period, several bills were introduced that would have either overruled *Bivens* or significantly limited it. All of these bills would have granted federal officials personal immunity for constitutional violations by amending the FTCA to make suits against the United States the exclusive remedy in at least some of these cases. *See* S. 492, 99th Cong. (1985); S. 1775, 97th Cong. (1981); S. 695, 96th Cong. (1979); H.R. 2659, 96th Cong. (1979); S. 3314, 95th Cong. (1978). However, Congress rejected all of these proposals.

In 1988, Congress once again had an opportunity to either abrogate *Bivens* or curtail the scope of permissible *Bivens* claims. In January 1988, the Supreme Court ruled in *Westfall v. Ervin* that federal employees could be sued in their personal capacities for state common law torts unless the employees' actions were both "within the scope of their employment" and involved an exercise of governmental discretion. 484 U.S. 292, 295-300 (1988), *superseded by statute as stated in United States v. Smith*, 499 U.S. 160 (1991). In response, Congress acted swiftly to pass the Westfall Act. In doing so, Congress amended the FTCA to make it the exclusive remedy for virtually all wrongful acts committed by federal employees within the scope of their employment. 28 U.S.C. § 2679(b)(1). But Congress chose to add express language clarifying that the exclusivity of the FTCA did not apply to a civil action "which is brought for a violation of the Constitution of the United States." *Id.* § 2679(b)(2)(A). The text of the Westfall Act reflects that Congress intended for *Bivens* actions to continue playing a complementary role with the FTCA, as those actions had been understood under *Bivens* and its progeny as of 1988.

Congress's intent to preserve *Bivens* claims is not only clear from the plain language of the Westfall Act; it is also reiterated throughout the legislative history. When an initial draft of the Westfall Act was considered in the House of Representatives' Committee on the Judiciary's Subcommittee on Administrative Law and Governmental Relations in April 1988, Representative Frank Wolf (R-VA),

a primary proponent of the bill, described the Supreme Court's decision in *Westfall* as creating "an immediate crisis of personal liability exposure for the entire federal workforce." *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 33 (1988) (testimony of Rep. Frank Wolf) (hereinafter, "*Hearing on H.R. 4358, H.R. 3872, and H.R. 3083*"). But Rep. Wolf was also clear that the bill "in no way, in no way at all . . . infringe[s] or diminish[es] any legal rights of individuals." *Id.* at 34.

When Rep. Barney Frank (D-MA), the bill's sponsor in the House, introduced the Westfall Act to the entire House in June 1988, he was also clear that "the more controversial issue of constitutional torts [was] not covered by this bill. If you are accused of having violated someone's constitutional rights, this bill [would] not affect it." 134 Cong. Rec. H4719 (daily ed. June 27, 1988) (statement of Rep. Frank). A June 1988 House Report formally adopted this opinion, noting that the Westfall Act makes clear that its protections to government officials did "not extend to constitutional torts." H.R. Rep. No. 100-700, at 8 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5952.

Others testifying before the House of Representatives expressed similar views. The Assistant Attorney General of the Department of Justice's ("DOJ") Civil Division, speaking on behalf of the United States, agreed "completely" that the DOJ

"want[ed] to avoid the constitutional torts issue" and that the statute did that "as drafted" because the Westfall Act was "not intended to apply to, cases that allege violations of constitutional rights, or what commonly are known as *Bivens* cases." *Hearing on H.R. 4358, H.R. 3872, and H.R. 3083*, 100th Cong. 58, 78 (testimony and statement of Robert L. Willmore, Deputy Assistant Attorney General, Civil Division).

Likewise, the Senate viewed the Westfall Act as not abrogating *Bivens* case law as it stood. Sen. Chuck Grassley (R-IA), who introduced the bill in the Senate, stressed that "this bill does not have any effect on the so-called *Bivens* cases or constitutional tort claims." 134 Cong. Rec. S15214 (daily ed. Oct. 7, 1988) (statement of Sen. Grassley). Senator Grassley would know, as just years prior, he and then-Senator Dole introduced a bill proposing to subject *Bivens* claims to a similar regime. *See* S. 1775, 97th Cong. (1981). However, Congress declined to pass that bill, a clear sign that its omission of immunity for *Bivens* claims was purposeful—yet the district court's opinion below would supply that omission improperly. *See Nichols v. United States*, 578 U.S. 104, 110 (2016) (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)) ("To supply omissions transcends the judicial function").

The reasons why Congress chose to preserve *Bivens* claims as they stood in 1988 are plain enough. Put simply, "the *Bivens* remedy is more effective than the

FTCA remedy" at protecting constitutional rights for several reasons. *Carlson*, 446 U.S. at 20. *First*, constitutional rights are sacred, and their protection is of paramount importance in our system of government. But when a person's constitutional rights are violated, the injuries suffered are often intangible. This makes tort law—and by extension the FTCA—a relatively poor vehicle for enforcing constitutional rights because recovery in a tort suit generally requires a plaintiff to show some tangible loss.

Second, by holding federal officials directly accountable for their actions, *Bivens* offers a more effective deterrent against invasions of people's constitutional rights. *Carlson*, 446 U.S. at 21-22. This is particularly true for senior federal officials, such as the Attorney General, who have more power than others to commit constitutional torts on a large scale, but who cannot realistically be deterred by the normal workplace disciplinary process. *Bivens* actions therefore play a complementary role to the FTCA by providing added deterrence where it is arguably needed most. Without *Bivens*, there is little to deter senior federal officials from carrying out truly outrageous and *ad hoc* violations of constitutional rights with impunity—whether in the District of Columbia or anywhere else.

III. CONGRESS WAS ACUTELY AWARE OF *DELLUMS* AND ENDORSED IT THROUGH THE WESTFALL ACT.

Because the district court failed to recognize the Westfall Act's affirmative impact on *Bivens*, the district court also misunderstood the significance of this

Court's decision in *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) (Wright, C.J.), which bears striking resemblance to the circumstances here. In *Dellums*, this Court held that the Chief of the Capitol Police, a federal official, could be held liable for violating the First and Fourth Amendment rights of protesters gathered on the steps of the House of Representatives. The district court gave short shrift to *Dellums*, reasoning that the case was irrelevant to whether Appellants' claims presented a new *Bivens* context. But separate from the "new context" analysis, the court should consider the impact of *Dellums* on Congress's intent to allow a *Bivens* remedy in cases such as this one. It failed to do so entirely. The circumstances of *Dellums*, described below, show that Congress was acutely aware of the case when it passed the Westfall Act in 1988 and intended to preserve *Dellums*. That strongly supports the conclusion that Appellants should be allowed to proceed with their *Bivens* claims in this case.

A. Appellants' Case Is Remarkably Similar to *Dellums*.

In its decision below, the district court expressed concern about whether Congress would approve of a *Bivens* remedy for protesters gathered near government buildings in Washington. But when the Supreme Court announced its decision in *Bivens* in June 1971, Congress was no stranger to large-scale protests in the capital or unlawful crackdowns by federal officials. Nor was Congress

unfamiliar with questions about how to balance a robust right to protest in the Nation's capital with the security of elected officials.

The early 1970s were, to put it mildly, a tumultuous time in the United States. This was especially true in Washington. The city had been shaken just a few years earlier by riots and civil unrest following the assassination of Martin Luther King, Jr., in April 1968.[2] On March 1, 1971, members of the notorious Weather Underground managed to smuggle a bomb into the Capitol and detonate it in a men's bathroom below the Senate chamber.[3] And in April 1971, hundreds of thousands of protesters marched on Washington to protest the Vietnam War in front of the Capitol, the White House, and the Supreme Court.[4]

Of particular relevance here, *Bivens* was decided just weeks after the 1971 May Day protests, during which tens of thousands of protesters from across the country gathered in Washington for mass demonstrations against the Vietnam War.[5]

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[2] Danielle Rindler, Lauren Tierney, Armand Emamdjomeh, & Michael E. Ruane, *The Four Days in 1968 That Reshaped D.C.*, Wash. Post (Mar. 27, 1968), https://www.washingtonpost.com/graphics/2018/local/dc-riots-1968.

[3] Steve Gorman, *Factbox: Bombings, Shootings, Beatings – U.S. Capitol's History of Violence*, Reuters (Jan. 7, 2021), https://reut.rs/3GRkrv2; John W. Finney, *Bomb in Capitol Causes Wide Damage*, N.Y. Times (Mar. 2, 1971).

[4] James M. Naughton, *200,000 Rally in Capital to End War*, N.Y. Times (Apr. 25, 1971).

[5] *See generally* Lawrence Roberts, *Mayday 1971: A White House at War, A Revolt in the Streets, and the Untold History of America's Biggest Mass Arrest* (Mariner's Books 2020); Georgetown University, Booth Family Center for Special Collections,

The organizers hoped these demonstrations would force a response from the Nixon Administration and an eventual withdrawal from hostilities in Southeast Asia.

Associated Press

The protesters did indeed provoke a response from the Nixon Administration, though the response went far beyond what they likely imagined. "The people that

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The Most Influential Protest You've Never Heard of: May Day, 1971, https://bit.ly/3up5VU9 (last visited Sept. 30, 2022); Will Bunch, *The Protest that Changed America, 50 Years Later*, Phila. Inquirer (Apr. 27, 2021), https://bit.ly/3E4dJjU.

lead this are left-wing sons of bitches," Nixon declared in recorded conversations in the Oval Office.[6] "Little bastards are draft dodgers, country-haters, or don't-cares."[7] When the President and his senior advisers learned of the protesters' plans to snarl traffic in the city, the President gave Attorney General John Mitchell an unambiguous order: "Bust them."[8]

And so, they did. Working closely with the Metropolitan Police Department, the Nixon Administration deployed between 10,000 and 12,000 Army and Marine troops (including paratroopers from the U.S. 82nd Airborne Division) to conduct dragnet arrests across the city.[9] Between May 3rd and May 5th, federal and District officials arrested over 12,000 people—the single largest mass arrest in American history.[10]

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[6] Roberts, *Mayday 1971* at 112.

[7] *Id.*

[8] *Id.* at 305. President Nixon later confided that "I don't want the impression that this being tough on these people is just the idea of [Metropolitan Police Department Chief] Wilson and the Attorney General. . . . It's my idea, you know. I gave the signal to everybody. I said, 'Now bust these bastards.'" *Id.* at 304.

[9] Georgetown University, *The Most Influential Protest You've Never Heard of*; Will Bunch, *The Protest that Changed America, 50 Years Later*.

[10] Lawrence Roberts, *Who Was Behind the Largest Mass Arrest in U.S. History?*, N.Y. Times (Aug. 6, 2020), https://nyti.ms/3RrpgwX; Roberts, *Mayday* 1971 at 292; Georgetown University, *The Most Influential Protest You've Never Heard of*; Will Bunch, *The Protest that Changed America, 50 Years Later*.

Pete Copeland / Washington Star

Washington Star / Washington Post

Douglas Chevalier / Washington Post

Georgetown University Library

The facts of *Dellums* arose on May 5, 1971, the third day of the planned protests. In the afternoon, undeterred by the Nixon Administration's heavy-handed tactics, approximately 1,200 protesters marched to the Capitol to advocate for the peaceful end of the Vietnam War.[11] The protesters had been invited to gather on the steps of the House of Representatives by four Members of Congress—Rep. Ronald Dellums of California, Rep. Bella Abzug of New York, Rep. Charles Rangel of New York, and Rep. Parren Mitchell of Maryland.[12]

Stuart Lutz / Gado / Getty Images

[11] Roberts, *Mayday* 1971 at 287-92; James M. Naughton, *Protesters Fail to Stop Congress, Police Seize 1,146*, N.Y. Times (May 6, 1971); William L. Claiborne & Bart Barnes, *1,200 Protesters Arrested at Capitol*, Wash. Post (May 6, 1971); John W. Finney, *3 Representatives Decry Arrests on Capitol Steps*, N.Y. Times (May 6, 1971).

[12] *See supra* note 11.

Brig Cabe / Washington Post

The protests at the Capitol were peaceful and relatively orderly. Officials with the Metropolitan Police Department would later testify that the event was "fairly mild" and that "it was a reasonably orderly crowd" aside from "a few particular misbehaviors." *Dellums*, 566 F.2d at 183. Nevertheless, after consulting with the Department of Justice and Carl Albert, the Speaker of the House, and while Members of Congress were delivering speeches, U.S. Capitol Police Chief James M. Powell ordered the arrest of the protesters for unlawful assembly. *Id.* at 173-74, 183. While Rep. Abzug was addressing the crowd, the doors to the Capitol were sealed, and police cordoned off the bottom of the steps to prevent protesters from dispersing. *Id.*

at 174. When Rep. Dellums approached the police to offer to persuade the crowd to disperse, he was struck in the ribs with a billy club.[13]

The events that day made national news,[14] and several Members took to the floors of the House and Senate to comment on what had transpired.[15] On November 11, 1971, Rep. Dellums filed a class-action suit in the U.S. District Court for the District of Columbia against Chief Powell, among others. *Dellums*, 566 F.2d at 173. At trial in December 1974, a jury found in Rep. Dellums's favor on his *Bivens* claim and awarded him and each class member $7,500—roughly $45,000 in today's dollars—for violating their First Amendment rights. *Id.* at 174 & n.6. On appeal, although the Court vacated and remanded the jury's award as excessive, this Court

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[13] Roberts, *Mayday 1971* at 291.

[14] *See, e.g.*, *supra* note 11; Rudy Abramson, *War Protesters Seized on Steps of the Capitol*, L.A. Times (May 6, 1971); Harry F. Rosenthal, *Capitol Hill Protests Bring 1,200 Arrests*, Owensboro Inquirer (May 6, 1971); Associated Press, *Thousands Protest War Across Nation*, Sioux Falls Argus-Leader (May 6, 1971).

[15] 117 Cong. Rec. 13723-24 (1971) (statement of Rep. Waggonner); *id.* at 13724 (statement of Rep. Daniel); *id.* at 13724 (statement of Rep. Green); *id.* at 13724-25 (statement of Rep. Burleson); *id.* at 13725 (statement of Rep. Williams); *id.* at 13725 (statement of Rep. Pelly); *id.* at 13725 (statement of Rep. Kuykendall); *id.* at 13726 (statement of Rep. McClory); *id.* at 13726 (statement of Rep. Bow); *id.* at 13726 (statement of Rep. Talcott); *id.* at 13726-27 (statement of Rep. Blackburn); *id.* at 13727 (statement of Rep. Hunt); *id.* at 13727 (statement of Rep. McKay); *id.* at 13733-34 (statement of Rep. Flowers); *id.* at 13750-55 (statement of Rep. Abzug); *id.* at 13794-96 (statement of Rep. Sikes); *id.* at 13799-803 (statement of Rep. Ryan); *id.* at 13819-20 (statement of Sen. Packwood); *id.* at 13820 (statement of Sen. Metcalf); *id.* at 13846-47 (statement of Sen. Scott).

had no trouble affirming that plaintiffs had a cause of action under *Bivens*. *Id.* at 194-96.

Dellums does not merely stand for the abstract proposition that *Bivens* actions are available to enforce First Amendment rights. The similarities between the Nixon Administration's response to the May Day protests and the Trump Administration's response to the protests in Lafayette Square on June 1, 2020, are vivid. Pictures from each show that the Congress of *Dellums*, which later approved *Bivens* actions in the Westfall Act, would wholeheartedly support a *Bivens* remedy in this case—a modern callback to *Dellums*.

CNN

Tyrone Turner / DCist / WAMU

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B. When It Passed the Westfall Act, Congress Was Acutely Aware of *Dellums* and *Bivens* Actions Brought to Challenge the Suppression of Political Dissent.

As the history discussed above demonstrates, *Dellums* was among the *Bivens* cases that Congress endorsed when it passed the Westfall Act. The Court's decision in *Dellums* was not some obscure opinion buried in the pages of the Federal Reporter, one that Congress might not have noticed. On the contrary, *Dellums* was, at the time, an unusually conspicuous case regarding the application of *Bivens*. After all, *Dellums* involved constitutional violations committed against Members of Congress themselves, and the arrests took place on the steps of the Capitol. The protest at the Capitol on May 5th made national news, and it was certainly a major

story within Washington and on Capitol Hill. In this instance, "[i]t is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on." *Bob Jones Univ.*, 461 U.S. at 600-01.

Nor did Congress's institutional memory of the incident disappear when the 92nd Congress adjourned. Rep. Dellums and Rep. Rangel continued to serve in Congress in 1988 when the Westfall Act was passed (Rep. Mitchell served through the end of the 99th Congress in 1987). Of the Members who served in the 92nd Congress in 1971 when the May Day Protests took place, 107 continued to serve in the 100th Congress. And of the members who served in the 95th Congress when *Dellums* was decided, a full 219 continued to serve in the 100th Congress. Among the *amici*, Representatives Frank, Coelho, and fourteen other members served in the 100th Congress, and *amici* have no doubt that when Congress preserved *Bivens* in the Westfall Act, claims like those at issue in *Dellums*—including Appellants' claims in this case—were being preserved with it.

Dellums also informed debates over other legislation passed by Congress, both before and during the 100th Congress. For example, the monetary awards in *Dellums* were expressly cited by the Department of Justice as one justification for its requested budget increases in 1978. *See Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1978: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 95th Cong. 272 (1977).

Dellums also informed the debate over the Civil Liberties Act of 1988 during the 100th Congress, a bipartisan effort to acknowledge and provide restitution for violating the constitutional rights of Japanese Americans during World War II. 134 Cong. Rec. S4267-80 (daily ed. Apr. 19, 1988) (statement of Sen. Matsunaga). Rep. Dellums himself drew on his experience in *Dellums v. Powell* during floor debates over the Civil Liberties Act of 1988. 133 Cong. Rec. H7568-69, 7576-77 (daily ed. Sept. 17, 1987) (statement of Rep. Dellums).

And *Dellums* proved to be a highly influential case. By 1988, several other courts had relied on *Dellums* to recognize *Bivens* claims brought under the First Amendment. *See* Appellants' Br. at 29-30 (collecting cases). The issue was in fact a recurring one, particularly in the District of Columbia, which is unsurprising given its special status as a venue for organized political dissent. *See, e.g.*, *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *overruling on other grounds recognized by United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871 (D.C. Cir. 2010); 133 Cong. Rec. S3243 (daily ed. Mar. 17, 1987) (statement of Sen. McClure remarking on the Court's decision in *Hobson*).

Congress affirmed judicial interpretations of *Bivens* as they stood in 1988—including this Court's decision in *Dellums*. That is no accident or oversight. Congress always intended for *Bivens* actions to complement the FTCA so that Americans have adequate redress for the violation of their constitutional rights, and

it never intended to leave Americans with no effective remedy against ad hoc violations of protesters' First Amendment rights.

IV. THE DISTRICT COURT IMPROPERLY DISCERNED CONGRESSIONAL INTENT FROM UNRELATED SECURITY MEASURES.

Despite the history and Congressional actions described above, the district court concluded that Congressional activity weighs *against* a *Bivens* cause of action providing a remedy in this case, on the basis of unrelated security measures enacted or hearings held by Congress. *See* Op. at 14-16, ECF No. 160. That analysis ignored the will of Congress and its support for the fundamental right of peaceful protest. Congress has been acutely aware of the relevant security considerations for elected representatives. *Dellums*, for example, involved over a thousand protesters standing shoulder-to-shoulder with Members of Congress on the Capitol steps. Yet in 1988, Congress still chose to preserve *Bivens* actions. The district court's opinion effectively second-guesses that judgment by Congress.

In concluding that Congressional activity weighed against a remedy in this case, the district court cited the following: (1) That Congress appropriated funds for the protection of the President and made it a crime to threaten the President; (2) the 1979 Report issued by the House Select Committee on Assassinations (H.R. Rep. No. 95-1828 (1979)); and (3) a 2014 Congressional Hearing regarding the Secret

Service response to an individual who jumped the White House fence. *See* Op. at 15.

None of these examples indicates that Congress was willing to permit violence towards peaceful protesters to go unpunished, even if the protests supposedly created theoretical security threats. It is undisputed that no individual in this case threatened the President in any way. No individual came close to breaching or threatened to breach the White House perimeter. And nothing in any of those examples supports the type of violent governmental response that is alleged by Plaintiffs in this case.

The Report issued by the House Select Committee on Assassinations is a particularly discordant example to select as weighing *against* a remedy for government officials' violence against protesters. As set forth in House Resolution 222, the Committee was charged with investigating, among other things, the assassinations of John F. Kennedy and Martin Luther King, Jr., and whether U.S. government officials adequately protected against and then investigated those assassinations. *See* H.R. Rep. 95-1828, at 10-11. In recounting Dr. King's life, the Report pays homage at length to the success and importance of peaceful protest and the civil rights movement. *Id.* at 265-81. The district court quotes a portion of the Report stating that the Committee "was acutely aware of the problem of ensuring that civil liberties are preserved, while affording adequate protection to the institutions of democratic society and to public figures," and that the Committee was

"mindful" of "costs that could accrue to . . . group protest." Op. at 15 (quoting H.R. Rep. 95-1828, at 464). The Select Committee's Report, like so many other instances of Congressional activity in this time period, recognized the importance of peaceful protest.

It is thus puzzling that the district court found that these examples supported the *denial* of a remedy in this case, on the basis that "[d]espite the[] concerns" for protest, "a damages remedy for federal officers' violations of protesters' rights was not among the reforms that the committee recommended or that Congress adopted." Op. at 15. This analysis is flawed for several reasons.

First, given the Select Committee's mandate (to investigate the assassinations of John F. Kennedy and Martin Luther King, Jr.), why would its ultimate recommendations have anything to do with whether protesters have a damages remedy for federal officers' violations of their rights?

Second, the sole case cited by the district court related to Congress's activity in the field actually underscores, by comparison, that the security-related examples cited by the district court are inapplicable to the present context. In *Chappell v. Wallace*, the Supreme Court held that the "unique disciplinary structure of the military establishment" and Congress's activity in the field cautioned against the recognition of a *Bivens* claim filed by a member of the military against his superior officer. 462 U.S. 296, 304 (1983). But in that case, Congress's activity in the field

was that it had "exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life." *Id.* at 302. In short, Congress had governing power and control over the ways in which members of the military sought recompense from one another. Applying this understanding to civilians protesting against their government in order to preclude a damages remedy on the basis of, for example, Congress appropriating funds for the prevention of assassinations, would be both illogical and antithetical to the core protections of the First Amendment.

Finally, and most importantly, when the Select Committee issued the Report in 1979, it did not need to suggest additional measures for protecting protesters' rights because those rights were already protected by an available damages remedy for protesters against federal officials—*Bivens* authorized it in 1971, and *Dellums* first applied it in the protest context in 1974. There would be no need for the Select Committee to reinstate those existing measures. But when dealing with federal officer liability in the Westfall Act in 1988, Congress expressly preserved that remedy—with full awareness of the Select Committee on Assassinations and the related events of the 1960s and '70s behind it.

In 1988, Congress spoke clearly to preserve the existence of a *Bivens* remedy, and *amici* all support maintaining that remedy for the core First Amendment right of

peaceful protest. By ignoring *Dellums*, the Westfall Act, or any other meaningful measure of Congress's views on peaceful protest in favor of unrelated security measures, the district court ignored Congress's voice on this issue. But it is the voice of Congress that should control whether a *Bivens* action remains available for peaceful protestors whose First Amendment rights are violently infringed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and this case should be remanded for further proceedings on Appellants' *Bivens* claims.

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Respectfully submitted,

/s/ Gabriel K. Gillett

JENNER & BLOCK LLP

Gabriel K. Gillett
Christina T. Lopez
353 N Clark Street
Chicago, IL 60654
Tel: (312) 222-9350
ggillett@jenner.com

Jacob D. Alderdice
1155 Avenue of the Americas
New York, NY 10036
Tel: (212) 891-1600

Ishan K. Bhabha
Lauren J. Hartz
Jonathan A. Langlinais
1099 New York Ave., NW, Suite 900
Washington, DC 20001
Tel: (202) 639-6000

Counsel for Amici Curiae Bipartisan Former Members of Congress

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,352 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6)-(7) because this brief has been prepared using Microsoft Office Word and is set in Times New Roman 14-point font.

/s/ Gabriel K. Gillett
Gabriel K. Gillett

Dated: November 30, 2022

CIRCUIT RULE 29(d) CERTIFICATE

This brief compiles with Circuit Rule 29(d) because a single brief for all *amici curiae* supporting Petitioners is not practicable. A separate brief is necessary for the *amici* listed with this brief because, as former Members of Congress, they have a unique perspective on the history of the Westfall Act and Congressional action to preserve *Bivens* remedies, as well as distinct interests in the issues in this case concerning Congressional intent and separation of powers.

/s/ Gabriel K. Gillett
Gabriel K. Gillett

Dated: November 30, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was filed electronically on November 30, 2022, and will therefore be served electronically on all counsel.

/s/ Gabriel K. Gillett
Gabriel K. Gillett

Dated: November 30, 2022