

No. 25-3386

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RENÉ QUIÑONEZ and MOVEMENT INK LLC,
Plaintiffs–Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Defendants–Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:22-cv-3195-WHO
Hon. William H. Orrick

**BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF
PLAINTIFFS-APPELLANTS AND REVERSAL**

David Zimmer
Zimmer, Citron & Clarke LLP
130 Bishop Allen Dr.
Cambridge, MA 02139
Tel.: 617.943.0586
dzimmer@zimmercitronclarke.com

Bryna Godar
Harrison Stark
State Democracy Research Initiative
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706

Counsel for Amici Curiae Law Professors

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. FEDERALISM GIVES STATES A CENTRAL ROLE IN PROMOTING AN ACCOUNTABLE NATIONAL GOVERNMENT	4
A. The Constitution’s federal structure envisions state-level recourse for national-level wrongs	4
B. In practice, state laws and institutions have long been used to check federal overreach	7
II. TAKING ACCOUNT OF FEDERALISM CONFIRMS THAT THE WESTFALL ACT DOES NOT BAR PLAINTIFFS-APPELLANTS’ BANE ACT CLAIMS.....	11
A. The Westfall Act’s text and context show that Congress preserved state authority to redress the constitutional wrongs of federal actors.....	12
B. The district court’s statutory analysis was mistaken	16
CONCLUSION	17
CERTIFICATE OF COMPLIANCE.....	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics</i> , 403 U.S. 388 (1971).....	9, 16, 17
<i>Bond v. United States</i> , 564 U.S. 211 (2011).....	4
<i>Bond v. United States</i> , 572 U.S. 844 (2014).....	11
<i>Buchanan v. Barr</i> , 71 F.4th 1003 (D.C. Cir. 2023).....	6, 7, 8, 15, 17
<i>Elliott v. Swartwout</i> , 35 U.S. (10 Pet.) 137 (1836).....	8
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	6, 12
<i>Hernandez v. Mesa</i> , 589 U.S. 93 (2020).....	10
<i>Idaho v. Horiuchi</i> , 253 F.3d 359 (en banc), <i>vacated as moot</i> , 266 F.3d 979 (9th Cir. 2001) (en banc).....	9
<i>Little v. Barreme</i> , 6 U.S. (2 Cranch) 170 (1804).....	8
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024).....	12
<i>Mitchell v. Harmony</i> , 54 U.S. (13 How.) 115 (1851).....	8
<i>Murray v. Schooner Charming Betsy</i> , 6 U.S. (2 Cranch) 64 (1804).....	8

<i>Rivera v. Cnty. of L.A.</i> , 745 F.3d 384 (9th Cir. 2014).....	10
<i>Smith v. Shaw</i> , 12 Johns. 257 (N.Y. 1815).....	8
<i>Tanzin v. Tanvir</i> , 592 U.S. 43 (2020).....	17
<i>U.S. Forest Serv. v. Cowpasture River Pres. Ass’n</i> , 590 U.S. 604 (2020).....	12
<i>United States v. Bass</i> , 404 U.S. 336 (1971).....	12
<i>United States v. Smith</i> , 499 U.S. 160 (1991).....	16
<i>Westfall v. Erwin</i> , 484 U.S. 292 (1988).....	12
<i>Wheeldin v. Wheeler</i> , 373 U.S. 647 (1963).....	9
<i>Wyeth v. Levine</i> , 555 U.S. 555 (2009).....	11, 17
<i>Wyoming v. Livingston</i> , 443 F.3d 1211 (10th Cir. 2006).....	9
Statutes	
28 U.S.C. § 2679.....	3, 14, 16
42 U.S.C. § 1983.....	6
Tom Bane Civil Rights Act (“Bane Act”), Cal. Civil Code § 52.1.....	<i>passim</i>

Pub. L. No. 100-694, 102 Stat. 4563.....13

Rules

Federal Rule of Appellate Procedure 29(a)(4)(E).....2

Other Authorities

134 Cong. Rec. 15963.....14

Akhil Reed Amar, *Of Sovereignty and Federalism*,
96 Yale L.J. 1425 (1987).....5, 6

Akhil Reed Amar, *Using State Law to Protect Federal Constitutional
Rights: Some Questions and Answers About Converse-1983*,
64 U. Colo. L. Rev. 159 (1993).....6–7

Brief for the Respondents, *Bivens v. Six Unknown Agents of Fed.
Bureau of Narcotics*, 403 U.S. 388 (1971) (No. 301)
970 WL 122211.....9

The Federalist No. 26 (Alexander Hamilton) (C. Rossiter ed., 1961).....5

The Federalist No. 28 (Alexander Hamilton) (C. Rossiter ed., 1961).....5

The Federalist No. 51 (James Madison) (C. Rossiter ed., 1961).....5

Bryna Godar, *Explainer: Can States Prosecute Federal Officials?*,
State Democracy Research Initiative,
University of Wisconsin Law School (July 17, 2025),
[https://statedemocracy.law.wisc.edu/featured/2025/explainer-
can-states-prosecute-federal-officials/](https://statedemocracy.law.wisc.edu/featured/2025/explainer-can-states-prosecute-federal-officials/).....9

Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109 (1969).....8

Thomas A. Koenig & Christopher D. Moore, *Of State Remedies and
Federal Rights*, 75 Cath. U. L. Rev. (forthcoming).....7–8, 15

*Legislation to Amend the Federal Tort Claims Act: Hearing on
H.R. 4358, 3872, and 3083 Before the H. Subcomm. on*

<i>Admin. Law and Governmental Relations of the H. Comm. on the Judiciary</i> , 100th Cong. 40 (1988)	14
Carlos M. Vázquez & Stephen I. Vladeck, <i>State Law, the Westfall Act, and the Nature of the Bivens Question</i> , 161 U. Pa. L. Rev. 509 (2013).....	7, 9, 15

INTEREST OF *AMICI*

Amici are eleven law professors with recognized expertise on matters of federalism, state public law, and/or remedies for governmental misconduct. They have written and published extensively in these areas. They have a professional interest in promoting a proper understanding of the federalism principles that underlie this case and in ensuring adequate avenues for the redress of constitutional violations. Their names are listed below, with institutional affiliations provided for identification purposes only:

- **Vikram David Amar**, Daniel J. Dykstra Endowed Chair and Distinguished Professor of Law, UC Davis School of Law
- **Jessica Bulman-Pozen**, Betts Professor of Law and Faculty Co-Director, Center for Constitutional Governance, Columbia Law School
- **Barry Friedman**, Jacob D. Fuchsberg Professor of Law and Faculty Director, Policing Project, New York University School of Law
- **Aziz Huq**, Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School
- **Gillian Metzger**, Harlan Fiske Stone Professor of Constitutional Law and Faculty Co-Director, Center for Constitutional Governance, Columbia Law School
- **Alexander A. Reinert**, Max Freund Professor of Litigation & Advocacy; Director, Center for Rights and Justice; and Co-Director, Floersheimer Center for Constitutional Democracy, Benjamin N. Cardozo School of Law
- **Joanna C. Schwartz**, Honorable Harry Pregerson Professor of Law, UCLA School of Law

- **Miriam Seifter**, Richard E. Johnson Bascom Professor of Law and Faculty Co-Director, State Democracy Research Initiative, University of Wisconsin Law School
- **Carolyn Shapiro**, Professor of Law and Co-Director, Institute on the Supreme Court of the United States, Chicago-Kent College of Law
- **Fred O. Smith, Jr.**, Professor of Law, Stanford Law School
- **Robert Yablon**, Professor of Law & Faculty Co-Director, State Democracy Research Initiative, University of Wisconsin Law School

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that (i) neither party’s counsel authored this brief in whole or in part; (ii) neither party, nor their counsel, contributed money that was intended to fund preparing or submitting the brief; and (iii) no person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

René Quiñonez alleges that federal government officials violated his First and Fourth Amendment rights. In the proceedings below, he sought to vindicate those constitutional rights by alleging claims for monetary damages under California’s Tom Bane Civil Rights Act (“Bane Act”), Cal. Civil Code § 52.1, which provides a cause of action against anyone who interferes with the “exercise or enjoyment of rights secured by the Constitution or laws of the United States.” *Id.* § 52.1(b), (c). The district court concluded that those claims would be “futile,” reasoning that a federal statute, the Westfall Act, precludes all state-law damages

actions against federal officials, even those predicated on federal constitutional violations. 1-ER-41.

As Plaintiffs-Appellants' brief explains, Appellants' Br. at 28–32, the district court was incorrect: the Westfall Act expressly allows for actions “brought for a violation of the Constitution of the United States.” 28 U.S.C. § 2679(b)(2)(A). That language plainly encompasses actions brought pursuant to state laws like the Bane Act.

Amici submit that this result comports with foundational tenets of federalism. As Part I details, the Constitution's structure envisions an active role for state laws and institutions in redressing the constitutional violations of federal actors. Because governments may not reliably right the wrongs of their own officials, the system counts on the federal government and the states to check one another. Historically, state-level causes of action were the primary way for individuals to recover for injuries caused by federal actors. California's Bane Act carries forward that rich tradition.

Part II explains that the Westfall Act must be interpreted in light of these federalism principles and traditions. When Congress seeks to alter the balance of state and federal power, it is expected to speak clearly, and the Westfall Act simply contains no clear indication that Congress meant to deprive states of their ability to provide recourse against federal officers who act unconstitutionally. To the

contrary, the Westfall Act’s text and context show that Congress meant to preempt certain common-law tort claims without interfering with actions seeking relief for constitutional violations. Accordingly, this Court should reverse the judgment below and allow Quiñonez to proceed on his Bane Act claims.

ARGUMENT

I. FEDERALISM GIVES STATES A CENTRAL ROLE IN PROMOTING AN ACCOUNTABLE NATIONAL GOVERNMENT.

A. The Constitution’s federal structure envisions state-level recourse for national-level wrongs.

Courts and commentators frequently laud the liberty-protecting properties of federalism. They posit that, by diffusing sovereign power between the state and national levels, our constitutional system reduces the potential for government at either level to become oppressive or despotic. *See, e.g., Bond v. United States*, 564 U.S. 211, 221 (2011) (“State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” (quoting *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotations omitted))). The underlying idea is not merely that governmental power is less threatening when divvied up. It is also that separate, co-dependent sovereigns can actively check one another.

From the beginning, the ability of the people to harness each level of government to push back on abuses by the other has been central to the federalist

vision. This is largely what James Madison had in mind when he referred to the nation’s “compound republic” as offering “a double security . . . to the rights of the people[:] The different governments will control each other, at the same time that each will be controlled by itself.” The Federalist No. 51, at 323 (James Madison) (C. Rossiter ed., 1961). Alexander Hamilton put it even more pointedly: Just as “the general government will at all times stand ready to check the usurpations of the state governments, . . . [states] will have the same disposition towards the general government. . . . *If [the people’s] rights are invaded by either, they can make use of the other as the instrument of redress.*” The Federalist No. 28, at 181 (Alexander Hamilton) (C. Rossiter ed., 1961) (emphasis added). Hamilton saw it “as an axiom in our political system that the State governments will . . . afford complete security against invasions of the public liberty by the national authority.” *Id.* at 181; *see also* The Federalist No. 26, at 172 (Alexander Hamilton) (C. Rossiter ed., 1961) (conveying the expectation that states would “be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government”).

As these early statements indicate, a central virtue of the Constitution’s federal structure is that it “abhors a remedial vacuum.” Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1505 (1987). When one level of government defies constitutional constraints or fails to right its own wrongs, the

other can step in to fill the gap. By providing an alternative avenue for redress, federalism addresses the persistent concern that governments will not reliably self-police. *See Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (“In the tension between federal and state power lies the promise of liberty.”).

This has always been a two-way street: “Citizens can rely on the federal government to provide supplemental remedies for constitutional wrongs committed by states, and vice versa.” Amar, *supra*, at 1505. Just as the federal government can use its laws (such as 42 U.S.C. § 1983) to help keep state-level actors within constitutional bounds, states can use their laws to give recourse to those harmed by federal malfeasance. As Judge Walker of the D.C. Circuit recently observed, “[r]elying on state causes of action to hold federal officers accountable put[s] an important structural check on federal power.” *Buchanan v. Barr*, 71 F.4th 1003, 1014–15 (D.C. Cir. 2023) (Walker, J., concurring); *see also id.* at 1012 (“The Framers saw state common-law suits as an important check on federal misconduct.”); *Gregory*, 501 U.S. at 458 (“[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”); Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. Colo. L. Rev. 159, 172 (1993) (“The overall architecture of constitutional

federalism is . . . designed to encourage states to use state law to vindicate federal constitutional rights against the federal government.”).

B. In practice, state laws and institutions have long been used to check federal overreach.

In this case, Plaintiffs-Appellants seek to use state law—specifically, California’s Bane Act—to obtain relief from federal officers for alleged constitutional violations. There is a deeply rooted tradition of such actions—and, more broadly, of state laws providing redress for federal wrongs.

From “the Founding, constitutional claims against federal officials were litigated in state tort suits.” *Buchanan*, 71 F.4th at 1014 (Walker, J., concurring). This was the standard way—indeed, often the only way—for those injured by federal actors to obtain compensation. *See, e.g., id.* at 1012 (“For most of our history, those injured by federal officers’ unconstitutional conduct could sue for damages in state court.”); 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 the nation’s history, federal (and state) officials have been subject to common law suits as if they were private individuals, just as English officials were at the time of the Founding.”); Thomas A. Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights*, 75 Cath. U. L. Rev. (forthcoming) (manuscript at 17) (available at <https://ssrn.com/abstract=4462807>)

(“[D]amages suits brought under state law [against federal officials] . . . were the norm for all of American history.”).

Such litigation typically took the following form: The plaintiff would bring a common-law claim—such as an action for trespass—against a federal official. The federal defendant would assert in defense that they were discharging their federal duties and thus could not be held liable. The plaintiff, in turn, would challenge that defense by arguing that the official’s actions were unconstitutional or otherwise unauthorized by federal law. If the court agreed, the plaintiff could recover. *See, e.g., Buchanan*, 71 F.4th at 1014 (Walker, J., concurring) (describing this practice). There are myriad high-profile historical examples of such suits. *See, e.g., Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176 (1804); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 116 (1804); *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 150 (1836); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 128 (1851); *Smith v. Shaw*, 12 Johns. 257, 270 (N.Y. 1815); *see also* Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1128 n.89 (1969) (collecting additional examples of common-law actions encompassing constitutional torts).¹

¹ Notably, states have checked federal wrongdoing not just through civil damages remedies but also through criminal prosecutions of federal actors who commit state crimes that are not necessitated by their lawful federal responsibilities. As the Tenth Circuit explained in an opinion by then-Judge Michael McConnell, “state criminal law provides an important check against abuse of power by federal officials, [while] the supremacy of federal law precludes the use of state prosecutorial power to frustrate the legitimate and reasonable exercise of federal

The practice of using state law to remedy federal injuries was so well-settled that “[i]t was common ground among the Justices and the litigants” in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Vázquez & Vladeck, *supra*, at 511. Indeed, just a few years earlier, the Court had written: “When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. Federal law, however, supplies the defense.” *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963). *Bivens* successfully urged the Court to supplement that state-tort pathway by recognizing an implied federal cause of action for damages against federal officials who violated constitutional rights. *Bivens*, 403 U.S. at 390–92; *see also id.* at 409 (Harlan, J., concurring in the judgment). The federal government, meanwhile, insisted that such a federal cause of action was unnecessary given the “body of state [tort] law” that already allowed for “substantial recovery” when federal officers violated the Fourth Amendment. Brief for the Respondents at 10, 38, *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (No. 301), 1970 WL 122211, at *10, *38; *cf. Hernandez v. Mesa*, 589 U.S. 93, 115–16 (2020) (Thomas, J., concurring) (“From authority.” *Wyoming v. Livingston*, 443 F.3d 1211, 1213 (10th Cir. 2006); *see also Idaho v. Horiuchi*, 253 F.3d 359, 362 (en banc), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001) (en banc) (“When federal officers violate the Constitution, either through malice or excessive zeal, they can be held accountable for violating the state’s criminal laws.”); Bryna Godar, *Explainer: Can States Prosecute Federal Officials?*, State Democracy Research Initiative, University of Wisconsin Law School (July 17, 2025), <https://statedemocracy.law.wisc.edu/featured/2025/explainer-can-states-prosecute-federal-officials/>.

the ratification of the Bill of Rights until 1971, the Court did not create implied private actions for damages against federal officers alleged to have violated a citizen's constitutional rights. Suits to recover such damages were generally brought under state tort law.” (internal quotations, alterations, and citations omitted)).

In short, for most of American history, there would have been no question that our federal system allowed for the sort of state cause of action that Plaintiffs-Appellants seek to pursue here to recover for injuries caused by federal officers' unconstitutional acts. The main difference between Plaintiffs-Appellants' Bane Act suit and a traditional common-law tort action is simply that the asserted constitutional violation comes in through the front door rather than the back door: The Bane Act lets plaintiffs directly bring claims for unconstitutional conduct as opposed to using the unconstitutionality of an officer's conduct to defeat the officer's federal-authorization defense. *See Rivera v. Cnty. of L.A.*, 745 F.3d 384, 393 (9th Cir. 2014) (explaining that the Bane Act “is a cause of action for violations of constitutional . . . rights”). As detailed below, Plaintiffs-Appellants' claims for constitutional violations remain as viable today as they would have been in the past. Contrary to the district court's ruling, nothing in the Westfall Act forecloses them.

II. TAKING ACCOUNT OF FEDERALISM CONFIRMS THAT THE WESTFALL ACT DOES NOT BAR PLAINTIFFS-APPELLANTS' BANE ACT CLAIMS.

As Part I makes clear, the government's assertion that the Westfall Act bars Plaintiffs-Appellants from using California's Bane Act to pursue their constitutional claims has significant federalism implications. It would mean that Congress has deprived states of their traditional, constitutionally grounded role in redressing federal wrongdoing. Because Congress did not unmistakably convey such an intention, the government's reading of the Westfall Act must be rejected.

The Supreme Court has repeatedly stressed that statutes must be construed with federalism principles in mind, and courts should presume that lawmakers do not encroach upon state powers and prerogatives. The “well-established principle” is that courts must “be certain of Congress’ intent before finding that federal law overrides the usual constitutional balance of federal and state powers.” *Bond v. United States*, 572 U.S. 844, 858 (2014) (citations and internal quotation marks omitted). Of particular relevance here, the Court has explained that “respect for the States as ‘independent sovereigns in our federal system’” requires courts “to assume that ‘Congress does not cavalierly pre-empt state-law causes of action.’” *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996)). If Congress “wishes to significantly alter the balance between federal and state power,” it must “enact exceedingly clear language” to do

so. *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 590 U.S. 604, 621–22 (2020); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 435 n.5 (2024) (“The federalism canon tells courts to presume federal statutes do not preempt state laws because of the sovereignty States enjoy under the Constitution.”); *Gregory*, 501 U.S. at 464 (explaining that, unless “absolutely certain” about Congress’s intent, courts should not construe laws to alter the federal-state balance in ways that could pose “potential constitutional problem[s]”); *United States v. Bass*, 404 U.S. 336, 349 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”). As the sections below detail, nothing in the Westfall Act forecloses the use of state causes of action to remedy constitutional violations by federal actors—much less forecloses them with the clarity that the Supreme Court demands.

A. The Westfall Act’s text and context show that Congress preserved state authority to redress the constitutional wrongs of federal actors.

As its shorthand name indicates, the Westfall Act was Congress’s pinpoint response to the Supreme Court’s decision in *Westfall v. Erwin*, 484 U.S. 292 (1988).² *Westfall* was not a case about the use of state law to remedy constitutional violations by federal actors. Instead, the Court addressed the extent to which federal actors can face state tort liability for conduct that does *not* violate the

² The law’s official title is “Federal Employees Liability Reform and Tort Compensation Act of 1988.” *See* Pub. L. No. 100-694, § 1, 102 Stat. 4563, 4563.

Constitution. Specifically, the question was whether someone could pursue a state-law negligence claim against federal employees after those employees allegedly mishandled toxins at a military depot. The Supreme Court said yes, rejecting the federal government’s argument that federal employees should be absolutely immune from such state tort claims as long as they were acting within the scope of their employment.

Concerned that the *Westfall* decision exposed federal employees to new risks of liability for everyday state-law torts, Congress passed the Westfall Act to undo the Court’s decision, while also being careful not to alter the remedial landscape for constitutional violations. *See* Pub. L. No. 100-694, §§ 2(a)(4), (5), 102 Stat. 4563, 4563 (finding that *Westfall* “seriously eroded” “the immunity of Federal employees from *common law tort liability*,” raising “the threat of protracted personal tort litigation for the entire Federal workforce” (emphasis added)); *id.* § 2(b) (explaining that the Act’s purpose is “to protect Federal employees from personal liability for *common law torts* committed within the scope of their employment” (emphasis added)). The Act thus preempts certain state tort suits by providing that, for injuries caused by “the negligent or wrongful act or omission” of a federal employee “acting within the scope of his office or employment,” the “remedy against the United States provided by [the Federal Tort Claims Act]” “is exclusive of any other civil action or proceeding for money damages.” 28 U.S.C.

§ 2679(b)(1). But the Act then makes crystal clear that this provision “does 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.*” *Id.* § 2679(b)(2)(A) (emphasis added).

The Westfall Act’s carveout for constitutional claims could scarcely be clearer, and lawmakers were explicit during the legislative process that they did not seek to touch such claims. The chair of the House Judiciary Subcommittee on Administrative Law and Governmental Relations (where the bill originated) explained that the carveout language was designed “to make clear that the more controversial issue of constitutional torts is not covered by this bill. If you are accused of having violated someone’s constitutional rights, this bill does not affect it.” 134 Cong. Rec. 15963 (statement of Rep. Frank); *see also Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, 3872, and 3083 Before the H. Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 40 (1988) (statement of Rep. Frank) (explaining that “all sides agree that we do not want to do anything” involving the “separate and much more controversial issue . . . of constitutional torts”). Witnesses before the subcommittee, including executive branch officials, conveyed the same understanding. *See, e.g., id.* at 58 (statement of Robert L. Willmore, Deputy Assistant Attorney General of the Civil Division, Department of Justice)

(agreeing “that we want to avoid the constitutional torts issue” and that “the bill does that as drafted”); *id.* at 46 (statement of G. Jerry Shaw, General Counsel, Senior Executives Association) (explaining that there was broad support for “this legislative solution which reaches only common law, or non-constitutional state law, torts”). This was apparently the uniform understanding. No one offered contrary characterizations, and no one suggested that the legislation would prevent states from using their law to redress constitutional wrongdoing by federal actors. *See* Koenig & Moore, *supra* (manuscript at 35) (“[L]egislators took great care to remedy *only* the precise problem stemming from the Court’s decision in *Westfall v. Erwin*: time and time again, members of Congress expressed their desire that the Act not cover anything other than state common law tort suits against federal officers.”); *see also* *Buchanan*, 71 F.4th at 1017 (Walker, J., concurring) (“[T]he Westfall Act’s historical context provides no clear evidence that Congress wished to upset the long tradition of using state tort actions to police constitutional violations.”).³

³ Some scholars contend that the Westfall Act’s carveout is best read to allow not only actions (like those under the Bane Act) that directly seek relief for constitutional violations, but also traditional state tort suits involving unconstitutional conduct (such as a trespass claim against a federal officer who conducted an unreasonable search in violation of the Fourth Amendment). *See* Vázquez & Vladeck, *supra*. In other words, they would construe the Westfall Act to preempt only state tort suits that involve no alleged unconstitutional conduct—like the claims in *Westfall* itself. *Amici* take no position here on the Westfall Act’s treatment of constitutionally inflected common-law claims and instead focus solely

B. The district court’s statutory analysis was mistaken.

The district court’s rulings offer limited discussion of the Westfall Act’s text and context and even less on the background federalism principles and practices outlined above. Instead, the court’s conclusion that the Westfall Act precludes Plaintiffs-Appellants’ Bane Act claims rested almost entirely on a few lines from the Supreme Court that offhandedly refer to the Westfall Act’s carveout for constitutional violations as a “*Bivens*” exception. In their opening brief, Plaintiffs-Appellants correctly explain why these statements from the Supreme Court cannot bear the weight the district court gave them. Appellants’ Br. at 30–32. In short, the cases the district court cited—including, most notably, *United States v. Smith*, 499 U.S. 160 (1991)—simply did not consider the question at issue here and certainly did not hold that the constitutional carveout applies *only* to *Bivens* claims and not to claims under state laws like the Bane Act. *Bivens* actions and Bane Act actions are equally “civil action[s] against an employee of the Government . . . brought for a violation of the Constitution of the United States” within the plain text of the Westfall Act’s carveout. 28 U.S.C. § 2679(b)(2)(A). The text, after all, does not limit the carveout to *federal* civil actions, and the Act’s earlier uses of the term “civil action” all plainly encompass state civil actions. *See, e.g., id.* § 2679(b)(1)

on situations where a state law (again, like the Bane Act) expressly authorizes actions for constitutional violations. At a minimum, the language of the Westfall Act carveout plainly encompasses *those* suits.

(providing that remedial proceedings under the Federal Tort Claims Act are “exclusive of any other civil action”); *see also Buchanan*, 71 F.4th at 1017 (Walker, J., concurring) (“[R]eading the exception as a good-for-*Bivens*-only rule is in tension with the statutory text and context.”).

Federalism considerations again bolster Plaintiffs-Appellants’ argument. Just as the Supreme Court expects Congress to speak clearly when it seeks to alter the balance of federal and state power, the Court presumably holds itself to a similar standard given its “respect for the States as independent sovereigns in our federal system.” *Wyeth*, 555 U.S. at 565 n.3 (internal quotations omitted). It would therefore be entirely improper to treat the Court as having answered a significant question about the states’ role in remedying constitutional wrongs simply because it has sometimes summarized the Westfall Act carveout as a protection for *Bivens* actions. This is especially so given that the Court has not consistently referenced *Bivens* when describing the carveout. Recently, without any mention of *Bivens*, the Court explained that “the Westfall Act . . . left open claims for constitutional violations”—a description that certainly encompasses Bane Act claims. *Tanzin v. Tanvir*, 592 U.S. 43, 49 (2020).

CONCLUSION

Amici urge this Court to reverse the judgment below, with instructions to allow Quiñonez’s Bane Act claims to proceed.

Respectfully submitted.

Date: October 22, 2025

/s/ David Zimmer

David Zimmer

Zimmer, Citron & Clarke LLP

130 Bishop Allen Dr.

Cambridge, MA 02139

Tel.: 617.943.0586

dzimmer@zimmercitronclarke.com

Bryna Godar

Harrison Stark

State Democracy Research Initiative

University of Wisconsin Law School

975 Bascom Mall

Madison, WI 53706

bryna.godar@wisc.edu

harrison.stark@wisc.edu

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s) 25-3386

I am the attorney or self-represented party.

This brief contains 4087 **words**, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief (*select only one*):

☐ complies with the word limit of Cir. R. 32-1.

☐ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

☒ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

☐ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

☐ complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

☐ it is a joint brief submitted by separately represented parties.

☐ a party or parties are filing a single brief in response to multiple briefs.

☐ a party or parties are filing a single brief in response to a longer joint brief.

☐ complies with the length limit designated by court order dated _____.

☐ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ David Zimmer **Date** 10/22/2025
(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2025, I electronically filed the foregoing motion for leave to file a brief as amicus curiae with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: October 22, 2025

/s/ David Zimmer
David Zimmer

Counsel for Amici Curiae Law Professors