No. 21-147

IN THE
Supreme Court of the United States

ERIK EGBERT,

Petitioner,

v.

ROBERT BOULE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 34 MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici are the Reporters Committee for Freedom of the Press; the Associated Press; the Atlantic Monthly Group LLC; Boston Globe Media Partners, LLC; Cable News Network, Inc.; California News Publishers Association; the Center for Investigative Reporting (d/b/a Reveal); Committee to Protect Journalists; Dow Jones & Company, Inc.; the E.W. Scripps Company; First Amendment Coalition, First Look Institute, Inc., publisher of *The Intercept*; Freedom of the Press Foundation; Gannett Co., Inc.; Investigative Reporting Workshop at American University; Knight First Amendment Institute at Columbia University; Los Angeles Times Communications LLC; the Media Institute; Mother Jones; MPA – The Association of Magazine Media; National Association of Black Journalists; National Newspaper Association; National Press Photographers Association; New England First Amendment Coalition; the New York Times Company; the News Leaders Association; News Media Alliance; Online News Association; the Philadelphia Inquirer; ProPublica; Radio Television Digital News Association; the Seattle Times Company; Society of Environmental Journalists; Society of Professional Journalists; and TIME USA, LLC.

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[1] Pursuant to Supreme Court Rule 37, counsel for amici curiae state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the amici curiae, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief; and counsel of record for all parties have provided written consent to the filing of the brief.

As organizations dedicated to protecting the First Amendment interests of journalists, amici have a pressing interest in ensuring that effective remedies are available when federal officials retaliate against reporters engaged in lawful newsgathering.

SUMMARY OF THE ARGUMENT

Since 1971, this Court has recognized a damages remedy when federal officials violate the Constitution's "search-and-seizure" guarantees in the "common and recurrent sphere of law enforcement." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017) (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)). And for just as long, the federal courts have recognized "that the irresistible logic of *Bivens* leads to the conclusion that damages are recoverable in a federal action under the Constitution for violations of First Amendment rights" as well. *Butler v. United States*, 365 F. Supp. 1035, 1039 (D. Haw. 1973).[2] After all, "[w]here the occasion for exercising First Amendment rights has passed," *id.* at 1040, the choice of remedy will often be—as in the classic *Bivens* fact pattern—either "damages or nothing," *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment). A reporter whose camera is shattered by a "vengeful officer" cannot ask a federal court to enjoin it back together. *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

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[2] *See also, e.g.*, *Yiamouyiannis v. Chem. Abstracts Serv.*, 521 F.2d 1392, 1392–93 (6th Cir. 1975); *Paton v. La Prade*, 524 F.2d 862, 869–70 (3d Cir. 1975); *Dellums v. Powell*, 566 F.2d 167, 194–95 (D.C. Cir. 1977); *Gibson v. United States*, 781 F.2d 1334, 1342 (9th Cir. 1986). As discussed in more detail below, while some courts have concluded these decisions no longer bind in light of *Abbasi*, *see Loumiet v. United States*, 948 F.3d 376, 382 (D.C. Cir. 2020), they nevertheless describe ground rules under which the federal government long operated—with Congress's acquiescence. They are therefore surely relevant to "weigh[ing] the costs and benefits of allowing a damages action to proceed," *Abbasi*, 137 S. Ct. at 1858, whatever their precedential force now.

On those footings, the availability of a remedy is of fundamental importance to the freedom of the press. The newsgathering right, while "supremely precious," is also "delicate and vulnerable." *NAACP v. Button*, 371 U.S. 415, 433 (1963). When retaliation chills reporting—when, for instance, an unlawful arrest drives a journalist from the scene of a newsworthy event—the impact on First Amendment freedoms is "immediate and irreversible," as much so as any classic prior restraint. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Nothing can, at that point, restore to the public news never gathered or photos never taken. As a result, the right to report depends critically on an adequate deterrent to abuse.

Petitioner asks this Court to tear down the deterrent that has tempered retaliation in diverse jurisdictions for decades now—arguing not only that Respondent's claim should fail, but that damages should never be available when federal officials violate the First Amendment. *See* Pet'r Br. at 25. Petitioner is wrong in particular and wrong as a general matter. Because Respondent ably explains why this Court should not hesitate to extend a remedy in this case, *see* Resp't Br. at 40–49, amici focus on the second point. Petitioner's categorical claim is inconsistent with the fact-sensitive *Bivens* framework, *see Abbasi*, 137 S. Ct. at 1859–62, and in any event flawed on its own terms. As the experience of the press demonstrates, often a damages remedy for retaliation is both workable and indispensable to the enforcement of First Amendment rights. To strip reporters of that recourse—not just on facts that resemble the ones presented here, but also in a broad and varied class of cases not before this Court—would

invite officials to punish the press for performing its constitutional function. This Court should reject the invitation, and the decision below should be affirmed.

ARGUMENT

I. The press is a tempting target for federal officials seeking to retaliate against reporting on matters of public concern.

"[T]here is practically universal agreement" that the First Amendment exists "to protect the free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966), and "information relating to alleged governmental misconduct" in particular "has traditionally been recognized as lying at the core" of that purpose, *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). But because few federal officials enjoy having their shortcomings aired in public, retaliation against newsgathering is far from unknown—even in a system that has long qualified the temptation with the threat of personal liability.

In light of that history of reprisals, the concern that dismantling any deterrent would invite fresh abuses is far from speculative. And because hostility to the press can infect a broad range of policy decisions—as well as a broad class of officials, from the highest to the pettiest—that diverse experience underscores the need to consider each retaliatory exercise of power on its own terms, to avoid prejudging facts not presented and treating unlike cases alike. *Cf. Abbasi*, 137 S. Ct. at 1859–60 (listing facts that may distinguish one *Bivens* claim from another, of which "the constitutional right at issue" is only one).

To start at the very top: American Presidents themselves have encouraged selective enforcement of the law in order to gain leverage over the media. As Robert Caro has documented, President Lyndon B. Johnson dangled approval of a merger between Texas National Bank and Houston's National Bank of Commerce—run by *Houston Chronicle* president John Jones—as carrot and stick to secure favorable coverage from the *Chronicle*. *See* Robert A. Caro, The Passage of Power 523–27 (2012). The Nixon Administration for its part conspired to use the threat of antitrust litigation against ABC, CBS, and NBC as a "sword of Damocles" in an effort to coerce the networks into distorting programming. Walter Pincus & George Lardner, Jr., *Nixon Hoped Antitrust Threat Would Sway Network Coverage*, Wash. Post (Dec. 1, 1997), https://perma.cc/C42R-HKN8. That retaliatory temptation has hardly faded with time or the transition from one administration to the next. *See generally* Sonja R. West, *Presidential Attacks on the Press*, 83 Mo. L. Rev. 915 (2018); Amended Complaint, *PEN Am. Ctr., Inc. v. Trump*, No. 1:18-cv-09433 (S.D.N.Y. Feb. 6, 2019) (collecting allegations of retaliation on the part of President Donald Trump).

Surveillance is another context frequently (and regrettably) marred by federal retaliation against journalists engaged in lawful newsgathering. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 523 & n.7 (1985) (resolving on other grounds a Fourth Amendment *Bivens* claim predicated on a warrantless wiretap). As the Church Committee documented in the 1970s, successive administrations engaged in the "wiretapping of newsmen" in a manner likely "to undermine the constitutional guarantee of a free and

independent press"—surfacing not evidence of crime but "the attitudes of various newsmen toward certain politicians and . . . advance notice of forthcoming newspaper and magazine articles dealing with administration policies." S. Select Comm. to Study Governmental Operations with Respect to Intel. Activities, Intelligence Activities and the Rights of Americans, S. Rep. No. 94-755, bk. II, at 201 (1976), https://perma.cc/33MW-648U. That practice, too, has yet to be broken even when exposed: Several components of the Executive Branch were recently caught inappropriately gathering information on journalists' constitutionally protected activities. *See* Geneva Sands, *DHS Opens Investigations into Intelligence Collection on Journalists*, CNN (July 31, 2020), https://perma.cc/3U9F-B4WY; Jana Winter, *CBP Launches Review of Secretive Division that Targeted Journalists, Lawmakers, and Other Americans*, Yahoo! News (Dec. 31, 2021), https://perma.cc/Q4GS-A3CW.

But perhaps the single most common setting in which federal animus threatens press rights is the one that bears the closest resemblance to *Bivens* itself: the "common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1856–57. A number of federal agencies are called, at times, to provide policing or security functions in connection with significant public events. *See, e.g.*, Conrad Wilson, *DHS Sent More Than 750 Federal Officers, Spent Millions Responding to Portland Protests*, OPB (Apr. 22, 2021), https://perma.cc/3WTW-3LE4. And just as those deployments can bring federal officials into conflict with demonstrators exercising the right to assemble, *see The U.S. Park Police Attack on Peaceful Protesters*

at Lafayette Square: Oversight Hearing Before the H. Comm. on Nat. Res., 116th Cong. (2020), so too do they present risks for journalists exercising the right to gather the news. "When wrongdoing is underway," after all, "officials have great incentive to blindfold the watchful eyes of the Fourth Estate." *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012).

In June 2020, for instance, officers of the U.S. Park Police assaulted an Australian news crew that was documenting the agency's dispersal of peaceful protestors from Lafayette Square. *See* Rachel Abrams & Katie Robertson, *Australia Asks for Investigation After Police Attack 2 Journalists in U.S.*, N.Y. Times (June 4, 2020), https://perma.cc/V5XU-ZFGH. As video of the incident showed, the officers' attack was entirely unprovoked; the reporters, not in violation of any law, were clearly identified as members of the media, standing off to the side of the protest, and actively engaged in newsgathering. *See id.* Still, federal officials violently assaulted them for performing the press's fundamental role in "possibly the most conspicuous public forum in the Nation." *Thomas v. News World Commc'ns*, 681 F. Supp. 55, 64 (D.D.C. 1988).

Journalists covering racial justice protests in Portland in 2020 confronted similar—and equally unjustified—violence at the hands of agents of the U.S. Marshals. Some reporters were targeted with chemical munitions, others by rubber bullets or simply physical strikes. *See Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1129–35 (D. Or. 2020). Whatever the method, a district court found that federal agents' use of excessive force

against clearly identified members of the news media "appear[ed] to indicate intentional targeting," *id.* at 1146, and a panel of the Ninth Circuit—in denying a stay of the district court's injunction against future abuses—agreed, *see Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827–29 (9th Cir. 2020). And these are, of course, just the highest-profile incidents of excessive force drawn from the last few years, not an exhaustive register of federal misconduct targeting the press.

While these examples are uniformly troubling, amici's claim is not that a *Bivens* remedy would necessarily be available in each and every one. *But see, e.g.*, *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 160–61 (D.D.C. 1976) (recognizing a *Bivens* remedy for retaliatory surveillance); *Patterson v. United States*, 999 F. Supp. 2d 300, 303 (D.D.C. 2013) (recognizing a *Bivens* remedy for a retaliatory arrest by U.S. Park Police); *Index Newspapers*, 977 F.3d at 851 n.10 (O'Scannlain, J., dissenting) (noting that allegations of retaliation against journalists in Portland "may well support *Bivens* actions"). The more important point is this: Federal retaliation has long been a real and present threat to press freedom, and it beggars belief to suggest, as Petitioner does, that a court could collapse these diverse incidents of misconduct into a single cursory *Bivens* analysis of "First Amendment retaliation claims." Pet'r Br. at 25. They involve officers of different "rank," different varieties of "official action," different remedial landscapes, different degrees of legal novelty, and different degrees of intrusion into the decisionmaking process of other branches. *Abbasi*, 137 S. Ct. at 1860. This Court's precedent could not be clearer that each

such claim would need to be considered on its facts, *see id.*, just as Respondent asks only that the facts of his particular claim—not all imaginable First Amendment claims—be considered here, *see* Resp't Br. at 44 ("This case concerns only the specific claim Mr. Boule brought.").

To instead bar a damages remedy for *any* First Amendment violation would provide federal officials with a gratuitous green light to act on animus towards the press. And it would do so across the sweeping, heterogenous set of facts that might be presented in the future, foreseeable now or not. *Cf. Abbasi*, 137 S. Ct. at 1858 (noting that relevant features of the *Bivens* inquiry are "difficult to predict in advance"). That harsh and hasty step would be unwise in the extreme; it would carry with it, too, a predictable chilling effect. This Court should decline to take it.

II. When federal officials retaliate against the press, the choice of remedy is often—as in *Bivens* itself—"damages or nothing."

If anything, a thumb on the scale should generally favor *Bivens* claims in the First Amendment context. What these diverse incidents do have in common is that, "due to their very nature," each is "difficult to address except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1862. As a number of federal courts have recognized since *Bivens* was decided, "once a citizen's first amendment rights have been violated, he is without redress in the absence of monetary award." *Berlin Democratic Club*, 410 F. Supp. at 161. Intuitively, the consequences of a chilling effect on newsgathering will often be

impossible to unwind. The information to be gathered may no longer exist, or the moment at which the public "would be most receptive" to hearing it may have passed—throttling disclosure on matters of public concern "as effectively . . . as if a deliberate statutory scheme of censorship had been adopted." *Bridges v. California*, 314 U.S. 252, 269 (1941); *cf. Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) ("The peculiar value of news is in the spreading of it while it is fresh[.]"). To put it bluntly, if an official's goal is to muzzle the press, retaliation is attractive because it works. The only response is to "deter the officer" before a chill can set in. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (emphasis omitted).

The example of retaliatory arrest makes the point crisp. As this Court has recognized, it is hardly a novel insight that "some police officers may exploit the arrest power as a means of suppressing speech." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018). When reporters cover the law enforcement response to major public events, for instance, officers face an obvious incentive to insulate their own actions from scrutiny by retaliating against the journalists documenting them. Any reporter driven from the scene "is irrevocably prevented from capturing a unique set of images that might otherwise hold officials accountable." John S. Clayton, Note, *Policing the Press: Retaliatory Arrests of Newsgatherers After* Nieves v. Bartlett, 120 Colum. L. Rev. 2275, 2289 (2020). They cannot be enjoined back. And just as "[i]t is facile to suggest that no damage is done when a demonstration is broken up by unlawful arrests simply because . . . the demonstration might be held at another day or time," something is irretrievably lost

each time a reporter is prevented from bringing the public the day's news. *Dellums*, 566 F.2d at 195.

For much that reason, law enforcement officers too often take a "catch-and-release" approach to deterring press coverage of their conduct—arresting journalists for offenses that will never stand up to scrutiny, confident that detention will shut down reporting in the meantime. PEN America, Press Freedom Under Fire in Ferguson 10 (2014). As the Justice Department itself has warned, in instances where officials would rather not let the facts of their conduct be reported, the fig-leaf cover of public-order offenses is "all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights." Statement of Interest of the United States at 1–2, *Garcia v. Montgomery Cty.*, No. 8:12-cv-03592 (D. Md. Mar. 4, 2013), https://perma.cc/V4CC-G8BB. That insight applies with as much force to the operations of federal officers as it does to state and local officials. And no wonder, then, that federal courts have recognized the particular importance and propriety of the *Bivens* remedy in cases of retaliatory arrest. *See Patterson*, 999 F. Supp. 2d at 303; *Dellums*, 566 F.2d at 195.

But the insight is broader: Because the public forfeits something irreplaceable whenever the freedoms of speech and the press are chilled, First Amendment claims are distinctively in need of the remedy—and the "deterrent effect"—that *Bivens* alone can provide. *Carlson v. Green*, 446 U.S. 14, 21 (1980). The Federal Tort Claims Act (FTCA) won't do, because wringing money from the United States cannot deter the individual rogue officer, *see id.* The

FTCA is therefore not a fit safeguard against the "individual instances of . . . law enforcement overreach" that retaliation often entails. *Abbasi*, 137 S. Ct. at 1862. State law remedies will often be unavailable too. The gravest acts of retaliation rely on official powers, *see supra* Part I, and are therefore shielded by the Westfall Act to the extent accomplished "in the course of [an officer's] official duties," *Osborn v. Haley*, 549 U.S. 225, 229 (2007). The last effective line of defense against retaliation is therefore a *Bivens* remedy "or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

This Court should choose the *Bivens* remedy and reject the suggestion to leave the freedom of the press with nothing. If "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (citation omitted), surely official action that permanently "limit[s] the stock of information from which members of the public may draw" is more troubling still, *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978). Petitioner's rule would encourage just that kind of attack on the rights of the news media. Amici urge this Court to reject it.

III. When federal officials retaliate against the press, no special factors uniformly counsel hesitation in all imaginable cases.

Amici do not discount the possibility that, in some cases, "special factors counselling hesitation" will prevent the award of a *Bivens* remedy when federal officials retaliate against the news media.

Abbasi, 137 S. Ct. at 1857 (citation omitted). But Petitioner advances a more radical suggestion—that special factors will *uniformly* counsel hesitation in the First Amendment context. *See* Pet'r Br. at 27–29. That confidence is misplaced. Even if this Court's precedent tolerated that sort of broad-based generalization, *contra Abbasi*, 137 S. Ct. at 1858 (emphasizing that the fact-sensitive *Bivens* analysis does not traffic in "whole categories of cases"), Petitioner's case for it is flawed root and branch. Federal courts not only *can* adjudicate First Amendment retaliation claims without undue disruption, they long *have*—with Congress's awareness and acquiescence. Any assessment of the "impact on governmental operations systemwide" must take stock of that experience, *id.*, before discarding a remedy of such importance to the freedoms of speech and the press.

For instance, it should go without saying that a significant share of the federal workforce is subject to the jurisdiction of the U.S. Court of Appeals for the District of Columbia Circuit. That circuit has recognized *Bivens* claims for (some) First Amendment violations nearly as long as there have been *Bivens* claims. In *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), the circuit upheld a remedy under *Bivens* for a First Amendment claim against federal officers who arrested demonstrators protesting on the steps of the Capitol. As the court noted, the analysis required was much like the inquiry a traditional *Bivens* claim already entailed, calling for similar "types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights." *Id.* at 194

(citation omitted). What's more, the court found, the governing First Amendment standards were straightforward—especially so in a case that involved citizens "arrested while lawfully exercising 'basic constitutional rights in their most pristine and classic form.'" *Id.* at 194–95. (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)). And to deny a remedy would leave a grave harm unredressed: "at stake" was the "loss of an opportunity to express to Congress one's dissatisfaction with the laws and policies of the United States," and to do so at a moment uniquely likely to garner "attention in the press," *id.* at 195.

On the authority of *Dellums* and its progeny,[3] district courts in that circuit continued to adjudicate a broad swathe of First Amendment retaliation claims for more than forty years. In 2013, for instance, a district court reaffirmed its core holding that a *Bivens* remedy is available in cases of retaliatory arrest. *See Patterson*, 999 F. Supp. 2d at 315. And other district courts extended the logic of *Dellums* to a diverse range of settings and defendants.[4] While the circuit recently

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[3] *See, e.g.*, *Haynesworth v. Miller*, 820 F.2d 1245, 1257 n.96 (D.C. Cir. 1987), *abrogated on other grounds*, *Hartman v. Moore*, 547 U.S. 250 (2006) ("[T]he task of assessing damages for injuries to First Amendment interests would not present particularly difficult problems of judicial administration.").

[4] *See, e.g.*, *Berlin Democratic Club*, 410 F. Supp. at 160–61 (retaliatory surveillance); *Pope v. Bond*, 641 F. Supp. 489, 494–95 (D.D.C. 1986) (retaliatory workplace actions); *Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 73–76 (D.D.C. 2009), *aff'd sub nom.*, *Navab-Safavi v. Glassman*, 637 F.3d 311 (D.C. Cir. 2011) (retaliatory contract termination); *Hartley v. Wilfert*, 918 F. Supp. 2d 45, 50–52 (D.D.C. 2013) (retaliatory

called these holdings into doubt on a forward-looking basis,[5] *see Loumiet*, 948 F.3d at 382, the point relevant to *this* Court's decisionmaking is that the federal government did not grind to a halt in the decades that officials had notice of the risk of liability should they punish the exercise of press or speech rights. On the contrary, the principle's track record as "a fixed principle in the law" in the seat of government in which so many officers serve provides "powerful reasons to retain it" here. *Abbasi*, 137 S. Ct. at 1857.

Expanding the lens to other jurisdictions only sharpens the point. When federal marshals deployed to Portland, for instance, they deployed with little reason to doubt they could be held personally liable for any First Amendment violations. *See, e.g.*, *Gibson*, 781 F.2d at 1342; *Mendocino Env't Ctr. v. Mendocino*

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property seizure); *Pinson v. U.S. Dep't of Justice*, 246 F. Supp. 3d 211, 219–21 (D.D.C. 2017) (retaliatory prison administration).

[5] In amici's view, the suggestion that *Abbasi* forbids lower courts from considering their own past precedent when weighing a *Bivens* claim overreads that case. When observing that a *Bivens* context is new if it differs from one addressed "*by* this Court," *Abbasi* was describing the contexts that are new *to* this Court; a lower tribunal cannot, of course, bind a higher one on the question whether *Bivens* should be extended to a particular setting. 137 S. Ct. at 1859 (emphasis added); *accord Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) ("*We* regard a context as 'new' if it is 'different in a meaningful way from previous *Bivens* cases decided by this Court.'" (emphasis added) (quoting *Abbasi*, 137 S. Ct. at 1859)). But it would undermine the settlement interests that *Abbasi* underlined, *see* 137 S. Ct. at 1856–57, to discard wholesale circuit precedent that—in addition to presenting no clear conflict with *Abbasi*—has long "provide[d] instruction and guidance to federal law enforcement officers," *id.* If this Court intended that dramatic step, it would have said so.

Cty., 14 F.3d 457, 464 (9th Cir. 1994); *Index Newspapers*, 977 F.3d at 851 n.10 (O'Scannlain, J., dissenting) (noting that allegations of retaliation against journalists in Portland "may well support *Bivens* actions"). Far from chilling agents' willingness to "tak[e] urgent and lawful action in a time of crisis," *Abbasi*, 137 S. Ct. at 1863, the degree of retaliatory violence that federal agents directed at the press suggests that federal officers are *insufficiently* deterred under current law, *see Index Newspapers*, 977 F.3d at 827–29. Stripping away the safeguards existing now would hardly improve things.

And against that backdrop, Petitioner's suggestion that Congress has consciously withheld a remedy for First Amendment violations makes little sense. Until very recently, Congress had every reason to believe one already existed. The settled expectation—reflected in this Court's own decisions—was long that when a "vengeful officer is federal," his retaliatory acts are "subject to an action for damages on the authority of *Bivens*." *Hartman*, 547 U.S. at 256. And while this Court has assumed rather than decided as much, *see, e.g.*, *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012), that distinction had limited practical significance—from the perspective of Congress and agents of the Executive—because of the governing standards in the circuit courts.

Only in light of developments post-*Abbasi* has that remedy been called into question, and members of Congress promptly reacted with alarm. *See, e.g.*, Press Release, Reps. Johnson, Raskin Introduce Bill to Hold Federal Law Enforcement Officers Accountable (June 15, 2020), https://perma.cc/959H-

5CHX (expressing particular concern that a damages remedy be available for First Amendment violations like the ones that took place in Lafayette Park). The suggestion that the decision below worked a revolution in the experience of judicial remedies, a watershed "extension" of *Bivens* to the First Amendment, is pseudohistory. Pet'r Br. at 12. *Bivens* remedies had already been recognized for some instances of retaliation, and the disruption to federal operations that Petitioner insists is inevitable did not come to pass.

Lacking evidence that First Amendment remedies have, in fact, impeded the normal functioning of government, Petitioner argues in the alternative that something intrinsic to First Amendment claims makes them unsuitable for adjudication. *See* Pet'r Br. at 27–29. But again these arguments miss the mark, in part because Petitioner insists on treating different First Amendment cases alike. Consider again a reporter subjected to a retaliatory arrest for documenting the operations of federal law enforcement. Far from "skat[ing] through early stages of litigation by simply asserting a retaliatory motive for arrest[]," Pet'r Br. at 30, that journalist must generally "plead and prove the absence of probable cause," *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019). In other words, the claim is strictly *harder* to make out than the Fourth Amendment *Bivens* claim that this Court rejected Petitioner's invitation to discard. *See Egbert v. Boule*, 142 S. Ct. 457, 457 (2021) (mem.) (declining to grant certiorari on the question whether *Bivens* should be overruled). Where a member of the press has suffered the distinctive First Amendment injury a retaliatory

detention represents, they deserve an opportunity to make that case. The suggestion that courts will then be crowded with frivolous claims is, itself, frivolous.

The broader argument that retaliation claims are distinctively "nebulous" in some way is likewise misplaced. Pet'r Br. at 12. The rule against retaliation is one of the simplest in constitutional law; as this Court put it, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions." *Hartman*, 547 U.S. at 256. Speakers cannot be punished for speaking, publishers cannot be punished for publishing, and reporters cannot be punished for reporting. *Cf. Quraishi v. St. Charles Cty.*, 986 F.3d 831, 839 (8th Cir. 2021) (holding that a reasonable officer would not need a case on point to understand "that deploying a tear-gas canister at law-abiding reporters is impermissible"). As one circuit put it, that rule "is not an abstract principle but an irrefutable precept." *Tobey v. Jones*, 706 F.3d 379, 391 n.6 (4th Cir. 2013). And indeed, this Court has contrasted the kind of novel *Bivens* claims that might present "difficulty in defining a workable cause of action" with the "simple" rules governing First Amendment retaliation, which ask questions with "definite answers" and provide "established methods for identifying the presence of an illicit reason." *Wilkie v. Robbins*, 551 U.S. 537, 555–57 (2007). If anything, then, First Amendment retaliation claims are distinctively straightforward—as the decision below recognized, *see* Pet. App. at 43a, and as federal courts have recognized for decades now, *see Dellums*, 566 F.2d at 194–95. Those deprived of their First Amendment rights by a federal officer

deserve an opportunity to make that "established" showing. *Wilkie*, 551 U.S. at 556. The press has long relied on that safeguard, and this Court should not discard it.

* * *

"First Amendment freedoms need breathing space to survive." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Day after day, the media goes about its work knowing full well that the news may be "embarrassing to the powers-that-be," *N.Y. Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring), and that some federal officials would gladly "censor the press" when it "censure[s] the Government," *id.* at 717 (Black, J., concurring). But reporters pursue their constitutional function with confidence that the federal courts will perform theirs—restraining the worst impulses of the "vengeful officer" with threat of the remedy the Constitution requires. *Hartman*, 547 U.S. at 256. That understanding is essential to the freedom of the press. This Court should reaffirm it here.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge that the decision below be affirmed.

Respectfully submitted,

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