No. 13-7239

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ZACHARY ADAM CHESSER,

Plaintiff-Appellant,

v.

BARBARA KATENBRINK CHESSER, STACY ANDERSON, LORI BATTISTONI, MARYSE C. ALLEN,

Defendants-Appellees,

and

PAULA MENGES, SEAN KIRGAN, GEORGE PIRO, STEPHEN HEBERT, FEDERAL BUREAU OF INVESTIGATION, UNITED STATES SECRET SERVICE,

Parties-in-Interest

Appeal from the United States District Court
for the Eastern District of Virginia
in Case No. 1:13-cv-00129-LO-IDD (O'Grady, J.)

APPELLANT'S REPLY BRIEF

Appearance on inside cover

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes, Rules and Regulations

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

Agents of the FBI and Secret Service disclosed private information about Zachary Chesser to Chesser's mother—a fellow member of law enforcement—in an effort to help her win custody of Chesser's son. These same agents, without justification, forcibly prevented the travel of Chesser's son and otherwise interfered in Chesser's parental relationship with his son. Outrageous? Yes. Fantastic? Unfortunately, no.

Chesser, a federal prisoner convicted on terrorism charges, is not the most sympathetic victim. But he maintains fundamental constitutional rights and his rights were repeatedly and wantonly violated by these agents. And what these agents did to Chesser, they could do to any citizen. They have at their fingertips immense amounts of data on nearly every American. From it, they can glean the most intimate details of citizens' lives. These agents work for us and, for better or worse, we allow them access to this information for our own protection. We trust them to use it only for that purpose. When they violate that trust, they must be held accountable.

Accountability is what this case is ultimately about. When Chesser looked to the courts to hold these agents accountable, the same district court that presided over his terrorism conviction hand-waved his complaint, dismissing it as "frivolous" without analysis. And on reconsideration, the district court failed to recognize large swaths of Chesser's theory of liability and reached unsupportable (and, on appeal, largely undefended) legal conclusions. The district court abdicated its role as a vehicle for accountability. This requires reversal.

The actions by these federal agents require personal liability; without it, they will remain unaccountable. The government, not defending the district court, asks this Court to shield these agents from accountability. The government asserts that Chesser has no remedy against these agents and that, even if he did, they are immune from it. The government is wrong on both points. Chesser has a preexisting remedy against the individual defendants pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and because decades of precedent gave the

individual defendants notice that their actions were unconstitutional, they are not entitled to qualified immunity.[1]

ARGUMENT

I. CHESSER'S COMPLAINT IS NOT "FRIVOLOUS."

We showed in our opening brief that Chesser's constitutional and Privacy Act claims are neither factually nor legally frivolous. *See* Br.28-40. Not only are Chesser's factual allegations rational, they are supported by documentary evidence. *See* Br.28-31. And his legal theories are well founded in case law and statute. *See* Br.31-40. There is no support for the district court's contrary conclusion.

The government does not defend the district court's holding. The amicus does, but fails to rehabilitate it. At the outset, the amicus relies on the wrong statutory provision—28 U.S.C. § 1915(d) rather than 28 U.S.C. § 1915A—throwing much of his argument off course. *See, e.g.*, Amicus Br.9 (relying on language found only in § 1915(d) to argue for greater deference

[1] Both the government and the amicus concede that the district court failed to recognize Chesser's Privacy Act claims. This requires remand.

to the district court); *id.* at 14 (asserting Chesser must only pay a filing fee to maintain his action).

The amicus then claims that "frivolous" has not been defined (and, thus, that such a finding requires special deference). Amicus Br.13-14. Not so. The Supreme Court has said that a complaint is factually frivolous "when the facts alleged rise to the level of the irrational or the wholly incredible." *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Our opening brief showed that government misuse of confidential information is common and backed up his allegations with documentary evidence. See Br.28-30. The amicus has no response. Instead, the amicus focuses on the acknowledgment that Chesser's original complaint contained "'nonmeritorious claims.'" Amicus Br.13 (quoting Br.20). To the amicus, this is a concession of frivolousness. The amicus is mistaken. "Nonmeritorious" does *not* equate to "frivolous." *See, e.g.*, 28 U.S.C. § 1915A(b)(1) (distinguishing between "fail[ing] to state a claim" and being "frivolous"); *Neitzke v. Williams*,

490 U.S. 319, 320 (1989) (failing to state a claim does not render a complaint frivolous).[2]

In any event, the amicus's point depends on a false premise, one that will reappear in his defense of the district court's denial of Chesser's motion for reconsideration: that the district court was justified in dismissing Chesser's *meritorious* claims on the ground that they were included alongside nonmeritorious ones. This "meat-axe approach" has been rejected by this Court, *McLean v. United States*, 566 F.3d 391, 398 (4th Cir. 2009), and by the Supreme Court: "*Only the bad claims are dismissed; the complaint as a whole is not*. If Congress meant to depart from this norm" in the PLRA "we would expect some indication of that, and we find none." *Jones v. Bock*, 549 U.S. 199, 221 (2007) (emphasis added; internal quotation marks and alterations omitted).

The Supreme Court has said a complaint is legally frivolous "where none of the legal points are arguable on their merits" (*Neitzke*, 490 U.S. at 325 (internal quotation marks and alterations omitted)). As we showed,

[2] Contrary to the amicus's suggestion, Amicus Br.13 (citing SJA1), it is for this Court, not Chesser, to evaluate the district court's decision.

decades of case law and statute provide ample support for Chesser's legal theories. *See* Br.28-40. The amicus does not respond. Chesser's complaint is not legally frivolous.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING CHESSER'S MOTION FOR RECONSIDERATION.

Our opening brief also showed that the district court's denial of Chesser's motion for reconsideration was premised on numerous legal errors and was, therefore, an abuse of discretion. *See* Br.40-49. The amicus is again on his own in defending the district court's decision, and again he comes up short.

Neither of the amicus's arguments carries the day. First, the amicus argues that Chesser's constitutional claims fail because "there are no privacy rights under the Fifth Amendment." Amicus Br.18. This argument is curious given the overwhelming precedent to the contrary. *See* Br.32-33. The amicus's confusion appears to stem from his reliance on *Fisher v. United States*, 425 U.S. 391 (1976), which held that the Fifth Amendment's bar on *self-incrimination* did not allow petitioners to evade government subpoenas on the basis that the subpoenaed documents contained private information.

Id. at 400-01. *Fisher* is inapposite. It says nothing about *due process* interests in confidentiality and autonomy, and certainly does not undermine the precedent recognizing and protecting those interests.[3]

Second, the amicus argues that because Chesser also filed claims on behalf of plaintiffs who did not sign his complaint, *Chesser's* claims should be dismissed. Amicus Br.15-16, 19. But as already explained, *see supra*, p. 5, this baby-out-with-the-bath-water approach is contrary to law. The proper course is to dismiss the unsigned plaintiffs from the action, not to dismiss the signed plaintiff's claims.

III. THE INDIVIDUAL DEFENDANTS ARE LIABLE FOR THEIR VIOLATIONS OF CHESSER'S CONSTITUTIONAL RIGHTS.

The government, as noted above, makes no effort to defend the district court's decisions. Instead, the government seeks to blunt any liability for federal law enforcement agents who violate citizens' privacy rights. With a ballooning surveillance state and new privacy abuses reported regularly, the government's push to immunize its agents is understandable. But

[3] The amicus also relies, at 18, on Justice Scalia's concurrence in *National Aeronautics and Space Administration v. Nelson*, 562 U.S. 134 (2011). But a concurrence is not controlling.

this state of play is also why the government's effort must fail. The deterrent effect of personal liability is a necessary and beneficial part of regulating law enforcement's use of the vast amount of private information they acquire about us every day.[4] That the individual defendants violated Chesser's right to confidentiality for the purpose of also violating his right to autonomy in his familial relations underscores the damage undeterred officers can do with our private facts at their disposal.

In addition to being wrong on policy, the government is wrong on the law. As elaborated below, Chesser *already* has a *Bivens* remedy available to him, and the individual defendants had fair warning that they could not, consistent with the Constitution, misuse confidential information obtained

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[4] Just by monitoring our movements, for example, the government obtains "'a wealth of detail about [our] familial, political, professional, religious, and sexual associations.'" *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). And unlike in earlier times, a single agent can learn these details about countless individuals from the comfort of his office. *See, e.g.*, Devlin Barrett, *U.S. Spies on Millions of Drivers*, Wall. St. J. (Jan. 26, 2015) ("The Justice Department has been building a national database to track in real time the movement of vehicles around the U.S."). No "very tiny constable," *United States v. Jones*, 132 S. Ct. 945, 959 n.3 (2012) (Alito, J., concurring), is even needed.

through surveillance to interfere with the custody and care of a person's child.[5]

A. Chesser May Recover Monetary Damages From The Individual Defendants.

1. Chesser already has a *Bivens* remedy.

The government's primary argument is that this Court should not "recognize a *new Bivens* remedy" for the constitutional violations documented by Chesser. Gov't Br.16 (emphasis added). This argument, however, assumes that which must be proven; *i.e.*, that Chesser seeks a *new Bivens* remedy. A *Bivens* remedy is "new" only if it "extend[s] *Bivens* liability to a[] new *context* or new *category of defendants*." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (emphasis added); *accord Minneci v. Pollard*, 132 S. Ct. 617, 623 (2012) (distinguishing Eighth Amendment *Bivens* action brought against "personnel employed by the *government*," from one brought against

[5] While "new issues of constitutional law" are usually "addressed in the first instance by the District Court," *Toll v. Moreno*, 441 U.S. 458, 462 (1979) (per curiam), efficiency is best served by rejecting the government's arguments here and now, rather than waiting for an inevitable second appeal in this case.

"personnel employed by a *private* firm"). Permitting a *Bivens* remedy here does neither.

Allowing Chesser to recover money damages from these officers for their violations of his due process rights would tread no new ground. Law enforcement officers are the classic defendants in *Bivens* actions for good reason: they are ubiquitous in citizens' lives and have the demonstrated capacity to inflict great harm. Thus, there is no new "category of defendants" in this case. *Malesko*, 534 U.S. at 68. And violations of "substantive due process," Gov't. Br.15 n.7, have long been recognized as an appropriate context for *Bivens* relief because "a damages remedy is surely appropriate *** for an invasion of personal interests in liberty" protected by the Fifth Amendment. *Davis v. Passman*, 442 U.S. 228, 245 (1979);[6] *accord Malesko*, 534

[6] *Davis* also fatally undermines the government's argument that a violation of "substantive due process" "is particularly unsuitable for *** a *Bivens* remedy." Gov't Br.15 n.7. In any event, whether defendants disclosed private facts about Chesser and whether they interfered with his familial relations in the absence of a compelling government interest are "[q]uestions [that] have definite answers." *Wilkie v. Robbins*, 551 U.S. 537, 556 (2007). Courts deal with questions like these every day. *See, e.g.*, *Doe v. City of New York*, 15 F.3d 264, 269-70 (2d Cir. 1994); *Fakoya v. Cnty. of Clark*, 2014 WL 5020592, at *5 (D. Nev. 2014).

U.S. at 519 (observing that the Court has already "recognized an implied damages remedy under the Due Process Clause of the Fifth Amendment") (citing *Davis*, 442 U.S. 228); *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (same).

The context of this case is not new and the category of defendants in this case is not new. Accordingly, providing Chesser a damages remedy against law enforcement officers for their violation of his substantive due process rights would not, as the government contends, extend *Bivens*. What the government is actually seeking is to contract the scope of remedies already available to citizens when federal agents violate their constitutional rights. The government cites no support for such a retraction, and there is none.

2. Congress has ratified the availability of Chesser's *Bivens* remedy.

The government makes much of the danger of implying remedies in the absence of Congressional action. Gov't Br.14-15. But the government is again assuming that which must be proven; *i.e*, that Congress has *not* acted. In fact, Congress has acted. Since the Supreme Court's decisions in *Davis*

and *Bivens*—which, respectively, implied a damages remedy (1) for a violation of substantive due process and (2) against law enforcement officers—Congress has considered and ratified a personal damages remedy for constitutional violations.

Congress has actually ratified a personal damages remedy for constitutional violations twice. Three years after *Bivens*, Congress amended the Federal Torts Claim Act ("FTCA") to expand the right of individuals to sue the government for certain law enforcement torts. In doing so, Congress deliberately retained the right of individuals to sue government officers for constitutional torts and rejected proposed legislation from the Department of Justice ("DOJ") that would have "made the governmental remedy exclusive." Jack Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. Rev. 497, 512 (1976). Instead, Congress endorsed the "'*Bivens* case and its progen[y]'" "'as a *counterpart*'" to the FTCA's waiver of sovereign immunity. *Carlson v. Green*, 446 U.S. 14, 20 (1980).

Then, in 1979, the Supreme Court extended the availability of a *Bivens* remedy to violations of substantive due process. *See Davis*, 442 U.S. 228. Nine years later, in 1988, Congress took steps to immunize federal government officials from most tort liability, substituting the government as a defendant under the FTCA for these claims and making the FTCA the exclusive remedy. *See* Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at 28 U.S.C. § 2679). The DOJ again sought to make the FTCA the exclusive remedy for *constitutional* torts, and, again, was rebuffed. Instead, a "major feature" of the Westfall Act was "that the exclusive remedy expressly [did] *not extend to so-called constitutional torts*," which Congress recognized are "more serious intrusion[s] of the rights of an individual," and therefore "merit[] special attention." H.R. Rep. No. 100-700, at 6 (1988) (emphasis added) (citing *Bivens*). The Westfall Act "speaks as clearly as Congress could of an intent to permit [a *Bivens*] remedy to continue." *Kelley v. FBI*, --- F. Supp. 3d. ----, 2014 WL 4523650, at *24 n.21 (D.D.C. 2014).

However one interprets this Congressional action with regard to *further* extensions of *Bivens* (*cf., e.g.*, *Vance v. Rumsfeld*, 701 F.3d 193, 208 (7th

Cir. 2012) (en banc) (Wood, J., concurring)), it is clear evidence that Congress approved of the breadth of the remedy as it existed in 1988, which, as discussed above, covered claims for violations of substantive due process and against law enforcement officers. Accordingly, and contrary to the government's argument, the damages remedy sought by Chesser is well-known to Congress and endorsed by it.

3. The Privacy Act does not affect Chesser's *Bivens* remedy.

The government argues that the existence of the Privacy Act precludes the implication of a "new" *Bivens* remedy for violations of the privacy right to confidentiality. Although we have explained that the government's premise—that such a remedy would be "new"—is incorrect, we assume that the government would, accepting the correct premise, argue that the Privacy Act justifies carving out privacy violations from *Bivens*' reach because the it is both an adequate alternative remedy for such violations, *Minneci*, 132 S. Ct. 623-26, and "a comprehensive scheme" designed to guard against such violations, *Bush v. Lucas*, 462 U.S. 367, 386.

The government would be wrong. As shown below, "Congress did not intend, by enacting the Privacy Act, to limit the privacy rights of individuals, nor did it intend to limit their remedies for invasions of those privacy interests." *O'Donnell v. United States*, 891 F.2d 1079, 1085 (3d Cir. 1989). Congress intended the Privacy Act to be a sword for citizens. This Court should reject the government's attempt to transform it into a shield for its agents.

a. The Privacy Act is a limited scheme enacted to enhance *privacy protections.*

As described by the government, the Privacy Act has four goals: "restrict[ing] disclosure of personally identifiable records maintained by agencies," "grant[ing] individuals rights of access to agency records maintained on themselves," "grant[ing] individuals the right to seek amendment of agency records maintained on themselves," and "establish[ing] a code of 'fair information practices' which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records." DOJ, Overview of the Privacy Act of 1974 at 4 (2012) ("DOJ Overview"); *accord* 5 U.S.C. § 552a(b)-(e).

In furtherance of these goals, the Privacy Act waives sovereign immunity and allows for limited civil actions against the United States when an agency "intentional[ly] or willful[ly]" violates the Act's provisions. 5 U.S.C. § 552a(g)(4). With *Bivens* in the background, an early version of the Privacy Act provided that its civil remedy provision "shall be the exclusive remedy for the wrongful action or omission of any officer or employee." Senate Committee on Government Operations, Legislative History of the Privacy Act of 1974 at 371-72 (1976) ("Privacy Act Legislative History"); *see also id.* at 764-66. But that exclusivity provision was removed before final passage.

The Privacy Act "was passed in great haste during the final week of the Ninety-Third Congress." DOJ Overview at 1. While "the Act's imprecise language, limited legislative history, and somewhat outdated regulatory guidelines have rendered it a difficult statute to decipher and apply," *id.*, it was enacted only as a "*first step* in a continuining effort *** to give" the right to privacy "life and substance." Privacy Act Legislative History at v (emphasis added). The Privacy Act was a reaction to "long-standing com-

plaints of governmental threats to privacy which" Congress feared would "haunt Americans in the years ahead unless this legislation is enacted." *Id.* at 770. It was intended to "add a *new* dimension of rights to the citizen," *id.* at 785 (emphasis added), by closing "loopholes for the gathering, use and disclosure of information," *id.* at 769, and by "establish[ing] certain *minimum* standards for handling and processing personal information," *id.* at 771 (emphasis added). Thus, although the Privacy Act was an important achievement, Congress recognized that it was "certainly not the final word on privacy," *id.* at 780, and "should *not* be construed as a final statement by Congress on the right of privacy and other related rights as they may be developed or interpreted by the courts," *id.* at 168 (emphasis added).

b. The Privacy Act does not provide an adequate alternative to a* Bivens *remedy for violations of privacy rights.

The Privacy Act "concern[s] the obligations of agencies *as distinct from individual employees* in those agencies." *Martinez v. Bureau of Prisons*, 444 F.3d 620, 624 (D.C. Cir. 2006) (per curiam) (emphasis added). Accordingly, it provides for damages against the United States, not individuals, when an

agency intentionally or willfully violates its provisions. *See* 5 U.S.C. § 552a(g)(4). Congress considered making this remedy "exclusive," Privacy Act Legislative History at 371-72, but ultimately chose not to.

The government argues that a waiver of sovereign immunity is an adequate alternative to personal liability for individual officers. *See* Gov't Br.19. But the Supreme Court rejected that argument in *Carlson*. *See* 446 U.S. at 20-21. The reason is simple: "the purpose of *Bivens* is to *deter the officer*." *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (emphasis added); *accord Malesko*, 534 U.S. at 70. A remedy against the United States provides no deterrent for individuals. *See Holly v. Scott*, 434 F.3d 287, 296 (4th Cir. 2006). Accordingly, like the FTCA in *Carlson*, the Privacy Act is a "'*counterpart*'" to *Bivens* here, not a substitute. 446 U.S. at 20.

Moreover, Congress's provision of an *additional* remedy against the United States, which "permit[s] claimants to bypass qualified immunity," *Meyer*, 510 U.S. at 485, comports with the intent of Congress to "add a *new* dimension of rights to the citizen." Privacy Act Legislative History at 785 (emphasis added). Substituting such a remedy for a *Bivens* claim, and

thereby eliminating an important deterrent to abuse, does not. Congress was deliberate in its choice that the Privacy Act's remedies would not be exclusive, *see supra*, p. 16; that choice should be respected.

The government attempts to escape from under the weight of this authority by pointing to the Privacy Act's criminal penalties. *See* Gov't Br.17-18. But a criminal *penalty* is not a *remedy* at all, let alone a remedy available to Chesser. *See* Douglas Laycock, *Modern American Remedies* 1 (4th ed. 2010) ("A remedy is anything a court can do *for a litigant* who has been wronged or is about to be wronged.") (emphasis added). Even the government recognizes the distinction between "Remedies and Penalties for Violating the Privacy Act." DOJ, EOUSA Resource Manual at 142, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title3/usa00142.htm. *Bivens* is foundationally concerned with *private* enforcement of individual rights under the Constitution. Provisions allowing for public enforcement are simply irrelevant. Indeed, on the government's theory, constitutional violations so heinous that they are also criminal—excessive force for example—would be removed from *Bivens*' reach entirely. This cannot be right.

See, e.g., *Graham v. Connor*, 490 U.S. 386, 394 n.9 (1989) (acknowledging "excessive force claims brought against federal law enforcement and correctional officials under *Bivens*"); *Schultz v. Braga*, 455 F.3d 470, 472, 475 (4th Cir. 2006) (same). The government's novel and unsupported argument is incorrect and should be rejected.

c. The Privacy Act is not a comprehensive scheme for protecting citizens' privacy.

Pursuant to the Supreme Court decisions in *Schweiker* and *Bush*, even if a remedy is not an adequate alternative, it may still preclude a *Bivens* remedy if it is part of a "comprehensive statutory scheme." *Schweiker*, 487 U.S. at 428; *accord Bush*, 462 U.S. at 386. In other words, applying "additional *Bivens* remedies" is inappropriate "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations *that may occur in the course of [that program's] administration*." *Schweiker*, 487 U.S. at 423 (emphasis added). The Privacy Act, which the government concedes is "a difficult statute to decipher," DOJ Overview at 1, is not a comprehensive

scheme as contemplated in *Schweiker* and *Bush* and, therefore, does not preclude a *Bivens* claim.

i. Importantly, *Schweiker* and *Bush* involved *procedural* due process claims. The plaintiffs complained of "an allegedly unconstitutional denial of a *statutory* right (Social Security benefits in one instance and employment in a particular Government job in the other)" and, therefore, "the harm resulting from the alleged constitutional violation [could] in neither case be separated from the harm resulting from the denial of the *statutory right*." *Schweiker*, 487 U.S. at 428 (emphases added). In such circumstances, a court may be justified in attributing to Congress an intent to limit the means by which citizens can pursue grievances concerning a statutory right to the scheme that provides that right in the first place. *See id.* at 423; *Bush*, 462 U.S. at 389. Thus, for example, if Chesser were suing the defendants for arbitrarily denying his request for an amendment to their records containing his information, *see* 5 U.S.C. § 552a(d)(2), *Schweiker* and *Bush* might bar a *Bivens* claim because such amendment is a right granted solely by the Privacy Act and, therefore, it would be natural to limit redress for its denial

to the mechanisms in the Act. *See Lange v. Taylor*, 2012 WL 255333, at *3 (E.D.N.C. 2012).

This is not that case, however. This case does not concern the administration of the Privacy Act. And it was not the Privacy Act that gave rise to the right to privacy, but vice versa: the Privacy Act is an expression of Congress's desire to *add* protections for a *constitutional* right already in existence. *See supra*, pp. 16-17. Thus, the Privacy Act stands on very different ground vis-à-vis a citizen's freestanding constitutional right to privacy than it does to statutory rights granted by the Act. After all, "the Founders did not fight a revolution to gain the right to government agency protocols." *Riley v. California*, 134 S. Ct. 2473, 2491 (2014). This vital difference takes this case outside the realm of *Schweiker* and *Bush*. Unlike in *Schweiker* and *Bush*, here there is *no* justification for attributing to Congress an intent, in adding protections for a preexisting constitutional right, to silently constrict the means by which citizens can pursue redress for violations of that right. *See O'Donnell*, 891 F.2d at 1085; *cf. Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, *** the requirement of clear

statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (internal quotation marks omitted).

ii. Even if *Schweiker* and *Bush* did apply to this case, they would not foreclose Chesser's *Bivens* remedy. Distilled, these cases require this Court "to determine whether Congress has sufficiently attended to the rights and remedies available to" citizens whose privacy has been violated as "to foreclose" other remedies. *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 410 (4th Cir. 2003). *Bush* involved the sprawling federal personnel system, developed through more than a "century" of "legislation, various executive orders, and the promulgation of detailed regulations by the Civil Service Commission." 462 U.S. at 381-85 (footnotes omitted). *Schweiker* involved "the Social Security system," the "administrative structure and procedures" of which "are of a size and extent difficult to comprehend." 487 U.S. at 424 (internal quotation marks omitted). *Judicial Watch* involved taxes. 317 F.3d at 410. As this Court described, "[i]t would be difficult to con-

ceive of a more comprehensive statutory scheme, or one that has received more intense scrutiny from Congress, than the Internal Revenue Code." *Id.*

The Privacy Act is nothing like the federal personnel system, the Social Security System, or the Internal Revenue Code. In contrast to those "elaborate remedial system[s] that ha[d] been constructed step by step, with careful attention to conflicting policy considerations," *Bush*, 462 U.S. at 388, the Privacy Act was "passed in great haste during the final week of the Ninety-Third Congress," DOJ Overview at 1, and Congress itself declared it to be only a "first step" to set "minimum standards" for government agencies, and it was "certainly not the final word on privacy," Privacy Act Legislative History at v, 770, 780. There is nothing in the Privacy Act's "imprecise language, limited legislative history, and somewhat outdated regulatory guidelines," DOJ Overview at 1, that "suggests that Congress has provided what it considers adequate remedial mechanisms" for violations of citizens' rights to privacy, *Schweiker*, 487 U.S. at 423.[7]

[7] This case is the inverse of *Judicial Watch*, where "legislative history" showed that "Congress *** considered, and rejected, a broader damages remedy" for individual misconduct. 317 F.3d at 411-12. Congress was ex-

iii. The government cites five non-binding cases that it claims "preclude[] *** *Bivens* remedies pertaining to the alleged improper disclosure of personal information." Gov't Br.17 (citing *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008); *Downie v. City of Middleburg Heights*, 301 F.3d 688 (6th Cir. 2002); *Lange*, 2012 WL 255333, at *3; *Lim v. United States*, 2011 WL 2650889, at *8 (D. Md. 2011); *Williams v. Dep't of Veteran Affairs*, 879 F. Supp. 578 (E.D. Va. 1995)). The government has mischaracterized three of these five cases. Neither *Downie* nor *Lange* nor *Lim* concerned public dissemination of private facts. *Downie* involved the "creation, maintenance, and dissemination of *false* records by federal agency employees." 301 F.3d at 697 (emphasis added). *Lange* involved a dispute over the *amendment* of records. 2012 WL 255333, at *3. And *Lim* does not even mention dissemination or disclosure. As described above, *supra*, p. 21-22, while the Privacy Act may very well preclude a *Bivens* remedy for denials of the statutory rights it created, it does not for the violation of one's preexisting rights to privacy.

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plicit that the Privacy Act "should *not* be construed as a final statement by Congress on the right of privacy and other related rights as they may be developed or interpreted by the courts." Privacy Act Legislative History at 168 (emphasis added).

The two cases that *do* involve the disclosure of private facts—*Wilson* and *Williams*—fail to consider the arguments raised above and, thus, have little relevance here beyond score-keeping. In *Wilson*, a former C.I.A. officer sued the Vice President and his aide for allegedly leaking her covert status to the press. 535 F.3d at 701-03. The D.C. Circuit held, over a dissent, that appellants could not pursue a *Bivens* claim because the Privacy Act's "comprehensive" scheme "is a 'special factor' that counsels hesitation in implying *Bivens* remedies." *Id.* at 706-07.

Appellants in *Wilson* did not argue that her case was distinguishable from *Schweiker* and *Bush* because it involved a fundamental constitutional, as opposed to a statutory, right. They also did not argue that the Privacy Act is, in any event, *not* a comprehensive scheme for the protection of citizens' privacy. Instead, they argued that "the Privacy Act should not be found 'comprehensive' and preclusive of *Bivens* remedies" *in their case* "because the Act exempts the Offices of the President and Vice President from its coverage." *Id.* at 707. That argument *assumes* that the Privacy Act is otherwise a comprehensive scheme for protecting citizens' privacy. But, as

explained above, such a conclusion is without merit. That ill-conceived argument resulted in bad law in the D.C. Circuit.[8] This Court should avoid that result.

In *Williams*, a veteran accused a government doctor of revealing confidential information about the veteran to the veteran's girlfriend. 879 F. Supp. at 580. The district court premised its holding that the Privacy Act barred a *Bivens* remedy on its conclusion that Congress's "failure to include additional remedies, such as damages against individual officials or punitive damages, does not appear to be inadvertent." *Id.* at 587. But the district court made no effort to examine the legislative history of the Privacy Act in coming to this conclusion. Had it, it would have discovered, as shown above, that there is *no* indication that Congress intended the Privacy

[8] Assuming, as the appellants in *Wilson* did, that the Privacy Act is an otherwise "comprehensive" scheme for protecting privacy, the majority was surely correct that the "intentional omission of the Presidential and Vice Presidential offices from the comprehensive coverage of the Privacy Act require[d it] to deny the additional remedies to the Wilsons which they seek," because "it is where Congress has *intentionally* withheld a remedy that [courts] must most refrain from providing one." 535 F.3d at 708-09 (emphasis added). *Accord Judicial Watch*, 317 F.3d at 411-12.

Act to exclude additional remedies. Indeed, it is just the opposite. *See supra*, p. 16-19, 22, 24. *Williams* is wrong and should not be followed.

4. Virginia's family law system does not affect the availability of Chesser's *Bivens* remedy for defendants' violation of Chesser's privacy right to autonomy.

The government argues that "the Virginia child custody court proceedings provided a comprehensive alternative mechanism for resolving all issues related" to the custody of Chesser's son. Gov't Br.21. This is true as far it goes, but it has no relevance to this case. Chesser is not seeking custody of his son from the individual defendants. He is seeking monetary damages from them for their unconstitutional interference with his care and custody of his son while he still had full parental rights and, thus, was "presum[ed]" to be "act[ing] in the best interests of" his son. *Troxel v. Granville*, 530 U.S. 57, 68 (2000). Custody is not at issue here and, therefore, Virginia's custody proceedings have no bearing on this case.

In any event, there is no support for finding Virginia's custody court proceedings either an adequate alternative to a *Bivens* remedy or a comprehensive remedial scheme counseling hesitation. It is not an adequate

alternative to *Bivens* because, like the Privacy Act, it provides no deterrence to federal agents. And it does not counsel hesitation for the simple reason that it was not enacted by Congress. The comprehensiveness of a remedial scheme is used to gauge whether *Congress* intended additional remedies. *See Schweiker*, 487 U.S. at 423. One obviously cannot glean congressional intent from a *state* system. Moreover, Virginia's custody system is not designed to protect Chesser's right to autonomy at all, so it cannot be the case that it provides him a remedy, incomplete or otherwise, for federal interference with that right.

The government is likewise incorrect that this case "raises the possibility of conflicting federal and state court judgments on the custody issue." Gov't Br.21.[9] To reiterate, Chesser does not, in this case, seek custody of his son or any declaration as to the propriety of Virginia's custody determination. *See* Br.20 n.10 ("abandon[ing] *** challenge to the Virginia court's disposition of [Chesser's] parental rights"). As we pointed out in

[9] It is surely correct that the federal government should avoid "'delicate issues of domestic relations.'" Gov't Br.21. If the individual defendants had proceeded with this in mind, we would not be here.

our opening brief, and as the government seems to ignore, three of the four constitutional violations identified in Chesser's complaint occurred *before* he lost his parental rights. *See* Br.44-45.[10] This Court may proceed without worry that its decision will conflict with Virginia's custody determination.

5. If Chesser does not already have a *Bivens* remedy, this Court should recognize one.

Even if allowing monetary damages against the individual officers in this case were assumed to be a "new context" for *Bivens*, it should be endorsed. While *Bivens* is by no means a favorite child, it is still good law. *See Minneci*, 132 S. Ct. at 621 (confirming the vitality of *Bivens* and restating the test for extending its holding). This case falls within the heartland of *Bivens*—federal law enforcement officers violating the constitutional rights of the subjects of their investigations—and, therefore, permitting a *Bivens* remedy here is natural. As in *Bivens*, there is no adequate alternative remedy available to Chesser against these officers. *See supra*, pp. 17-20. And no special factors counsel hesitation. *See supra*, pp. 10 n.6, 20-24. To the contra-

[10] The final violation, therefore, was only one of confidentiality, not autonomy.

ry, in the face of the modern surveillance state, the deterrent effect that accompanies personal liability is needed more than ever to assure that those who watch us do not misuse what they see. This is especially true when, as here, officers misuse their access to citizens' private information to further violate fundamental rights.

The Seventh Circuit's recent decision in *Engel v. Buchan*, 710 F.3d 698 (7th Cir. 2013), should guide this Court. Engel was a prisoner released from custody after his murder conviction was overturned due to the state's failure to disclose exculpatory evidence. *Id.* at 701. Upon his release, Engel brought a *Bivens* claim against an FBI agent accused of helping local police suppress evidence of Engel's innocence; *i.e.*, for violating Engel's *due process* rights. *Id.* The agent argued that the court should not recognize a *Bivens* claim in this context. The court rejected the agent's arguments and allowed a *Bivens* claim.[11]

[11] The court did not consider whether, in light of *Bivens* and *Davis*, a *Bivens* remedy against a law enforcement officer for his violation of a citizen's due process rights already existed.

Relying on the Supreme Court's decision in *Wilkie v. Robbins*, 551 U.S. 537 (2007), the court followed "a two-step framework for evaluating whether to authorize an implied right of action for damages against a federal official for a constitutional violation," evaluating first whether Engel had an adequate alternative remedy and second whether any "'special factors'" counseled against recognizing an implied cause of action. *Engel,* 710 F.3d at 704. The court held that none of the remedies identified by the agent was an adequate alternative because none "provide[d] 'roughly similar incentives' for constitutional compliance and 'roughly similar compensation' for victims of *Brady* violations." *Id.* at 707. The court then held that no special factors counseled hesitation. To the contrary, the court recognized that Engel's case, involving "an FBI agent *** accused of violating the constitutional rights of a person targeted for a criminal investigation and prosecution," "parallels *Bivens* itself." *Id.* at 708. Finally, the court rejected the agent's argument that the Supreme Court's doctrinal shift in this area should bar recognizing new claims. "[S]haky or no," the court explained, "*Bivens* remains the law, and we are not free to ignore it." *Id.*

Just as in *Engel*, the facts here parallel *Bivens*: law enforcement officers violating the rights of a person whom they are investigating. Pursuant to *Bivens*, federal law enforcement officers already face personal liability for misconduct in gathering information about citizens. Providing citizens the same remedy when those same defendants misuse information gathered is a natural complement to *Bivens*, especially where, as here, law enforcement officers misuse that information to violate other fundamental rights.

B. The Individual Defendants Are Not Entitled To Qualified Immunity.

In a final effort to protect its agents from liability, the government argues that they should be immune from liability because it was not clear in 2011 and 2012 that their actions were unconstitutional. *See* Gov't Br.22-27. This argument defies decades of case law, as well as common sense. The individual defendants "'knowingly violate[d] the law,'" *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam), and should be held to account.

"[T]he salient question" here "is whether the state of the law in" 2011 and 2012 "gave [defendants] *fair warning* that their alleged treatment of [Chesser] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)

(emphasis added). The individual defendants publicly disclosed confidential information about Chesser's familial relations. The individual defendants also forcibly prevented the parentally approved travel of Chesser's son and interfered in a state custody proceeding concerning him. These actions were clearly unconstitutional in 2011 and 2012 and, therefore, the individual defendants are not entitled to qualified immunity.

1. Nearly forty years ago, "[t]he Supreme Court *** clearly recognized that the privacy of one's personal affairs is protected by the Constitution." *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) (Wisdom, J.); *see Whalen v. Roe*, 429 U.S. 589 (1977). Nearly twenty-five years ago this Court confirmed that "[p]ersonal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy." *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); *see Senior Executives Ass'n v. United States*, 2013 WL 1316333, at *6 (D. Md. 2013) ("Following in the Supreme Court's footsteps, the Fourth Circuit has long recognized a right to privacy in personal information."). Sixteen years ago, this Court again acknowledged that "the Supreme Court has

recognized that individuals possess a constitutional 'interest in avoiding disclosure of personal matters' *** that touch on rights that 'are fundamental or implicit in the concept of ordered liberty,'" *Ferguson v. City of Charleston*, 186 F.3d 469, 482 (4th Cir. 1999), *rev'd on other grounds*, 532 U.S. 67 (2001); among those fundamental rights are "those of parents to retain custody over and care for their children, and to rear their children as they deem appropriate," *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 342 (4th Cir. 1994). In short, it has been clear for decades that a federal agent could not, consistent with the Constitution, disclose confidential information touching on a father's care and rearing of his son. Yet that is exactly what the individual defendants did.

The government attempts to evade this precedent by nit-picking factual differences between it and this case. But "factually analogous precedent is *not* a prerequisite for finding that a right is clearly established." *Tobey v. Jones*, 706 F.3d 379, 391 n.6 (4th Cir. 2013) (emphasis added); *accord Hope*, 536 U.S. at 741. "[U]nequivocal constitutional precedent provided [defendants] with more than adequate notice that they" could not release

confidential information about Chesser's care of his son to Chesser's adversary in a custody proceeding. *Tobey*, 706 F.3d at 391 n.6.

2. The constitutional pedigree of Chesser's "fundamental right *** to make decisions concerning the care, custody, and control of" his child is even stronger. *Troxel*, 530 U.S. at 65; *see also Hodge v. Jones*, 31 F.3d 157, 163 (4th Cir. 1994); *Jackson*, 15 F.3d at 343. Indeed, it "is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court. *Troxel*, 530 U.S. at 65. Pursuant to this right, "the relationship between parent and child [is] inviolable except for the most compelling reasons." *Jackson*, 15 F.3d at 343. Without a whiff of illegality or danger to the child, the individual defendants forcibly prevented Chesser's son from traveling as Chesser and his wife wished. Then, acting under color of federal law, these agents inserted themselves into a state custody dispute over Chesser's son, supporting Chesser's adversary with a selective leaking of information. These agents' actions would have been unconstitutional ninety years ago, *see Pierce v. Soc'y of Sisters of Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925), and there could be no doubt in 2011 that they remained so.

As before, the government nitpicks this considerable precedent for factual differences and, as before, it misses the point.[12] The "salient question *** is whether" the individual defendants in 2011 had "fair warning" that the constitution required them to (1) let Chesser and his wife rear their son as they saw fit and (2) keep out of the custody dispute between Chesser and his mother. *Hope*, 536 U.S. at 741. They surely did.

CONCLUSION

The district court's judgment should be reversed.

[12] The government's review of precedent is unhelpfully granular. It observes that no court has held "that a federal employee violates [the Constitution] by discouraging a third party from taking a child out of the country shortly prior to a state court hearing in which the custody of that child is to be determined." Gov't Br.25. It is also true, and equally irrelevant, that no court has held that it is unconstitutional to prevent the travel of a child with the initials T.C.

Dated: February 17, 2015

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-2739 Caption: Chesser v. Chesser

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Attorney for Zachary Adam Chesser

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I certify that, on this 17th day of February, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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