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HOMELAND OBSCURITY: HOW NONIDENTIFICATION PRACTICES POSE BARRIERS TO RECOVERY AND WEAKEN PUBLIC CONFIDENCE IN FEDERAL LAW ENFORCEMENT

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The very essence of civil liberty ... certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

—Chief Justice John Marshall¹

INTRODUCTION

“Kristi Noem is going to have a bad day,” wrote California Governor Gavin Newsom in a post on X before signing S.B. 627 into law.² Titled the “No Secret Police Act,” the law bans federal and local law enforcement authorities from using most face coverings while performing their duties.³ The practice of federal agents covering their faces and wearing plain clothes⁴ during immigration arrests has become increasingly prevalent—or has at least made its way to the center of public criticism—in the wake of the second Trump administration’s immigration policy, which seeks to deport one million people per year and to make three thousand arrests per day.⁵ Accordingly, S.B. 627 exemplifies California’s mitigatory approach to concerns that masking practices erode senses of “public perception, officer-community interactions, and accountability.”⁶

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

2. Governor Newsom Press Office (@GovPressOffice), X (Sep. 20, 2025, at 11:17 ET), <https://x.com/GovPressOffice/status/1969420779793367518> [<https://perma.cc/9H5C-2SQD>]. Kristi Noem is the former Secretary of the Department of Homeland Security (DHS) and was the primary actor executing the Trump administration’s deportation scheme between 2025 and 2026. See *NOEM, Kristi*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/N000184> [<https://perma.cc/4XSG-6E9Y>].

3. See S.B. 627, 2025 Reg. Sess. (Cal. 2025).

4. This Note will refer to such practices as “nonidentification practices.”

5. See Soumya Karlamangla, *California Bars ICE Agents from Wearing Masks in the State*, N.Y. TIMES (Sep. 20, 2025), <https://www.nytimes.com/2025/09/20/us/california-ice-agents-masks-law.html> [<https://perma.cc/CB6H-WDQQ>]; *Mass Deportation: Analyzing the Trump Administration’s Attacks on Immigrants, Democracy, and America*, AM. IMMIGR. COUNCIL (July 23, 2025), <https://www.americanimmigrationcouncil.org/report/mass-deportation-trump-democracy/> [<https://perma.cc/HMH7-L2LM>]; Priscilla Alvarez, *ICE Has Deported Nearly 200K People Since Trump Returned to Office, on Track for Highest Level in a Decade*, CNN (Aug. 28, 2025), <https://www.cnn.com/2025/08/28/politics/ice-deportations-immigrants-trump> [<https://perma.cc/E3A2-3L4L>].

6. S.B. 627 § 1(a); see Miranda Jeyaretnam, *California Bans ICE Agents from Wearing Masks to Conceal Identity*, TIME (Sep. 22, 2025, at 17:00 ET), <https://time.com/7319259/>

This new California law is seemingly the first state law of its kind to protest the Trump administration's approach to raids conducted primarily by Immigration and Customs Enforcement (ICE), but also by other federal and local law enforcement agencies, as it pertains to face coverings.⁷ This law, and others like it, represent the public's cognitive dissonance as nonidentification practices show law enforcement officers acting as members of a secret police in a country that holds itself out as a shining example of true democracy.⁸ But the practical implications of such policies are also worth assessing.

This Note argues that the practice of federal officers concealing their physical identities during recent immigration raids impedes plaintiffs' ability to recover for constitutional torts, raises concerns about the practical effectiveness of government accountability, and gives rise to the degradation of public confidence in federal law enforcement. Part I of this Note lays out and assesses the Trump administration's deportation policy and the existing availability of remedies for victims of constitutional torts by federal officers, paying special attention to the rise and fall of the *Bivens* cause of action, the Federal Tort Claims Act (FTCA), and how the idea of deterrence has changed within American jurisprudence. Part II argues that the practice of federal law enforcement officers concealing their identities in furtherance of President Trump's deportation scheme presents procedural impediments to recovery for plaintiffs based on the remedies identified in Part I. Part III examines

california-ice-immigration-agents-mask-ban-secret-police-newsom-law-challenge/ [https://perma.cc/2SFG-CUTL]; Lauren Gambino, *Kristi Noem: The Made-for-TV Official Executing Trump's Mass Deportations*, GUARDIAN (June 7, 2025, at 08:00 ET), <https://www.theguardian.com/us-news/2025/jun/07/kristi-noem-trump-secretary-homeland-security> [https://perma.cc/Q3S2-83KH].

7. Karlamangla, *supra* note 5. ICE is not the only federal agency involved in the Trump administration's deportation scheme. The Department of Homeland Security has enlisted agencies such as the U.S. Marshals Service, the Internal Revenue Service (IRS), the Drug Enforcement Agency (DEA), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and others to aid in carrying out mass deportations. See Ximena Bustillo & Chiara Eisner, *As Trump Shrinks Other Parts of Government, Immigration Task Forces Grow*, NPR (Mar. 4, 2025, at 17:15 ET), <https://www.npr.org/2025/03/04/nx-s1-5311686/trump-immigration-task-force> [https://perma.cc/3K36-GEDJ].

8. See Michael Sozan, *An American Democracy Built for the People: Why Democracy Matters and How to Make It Work for the 21st Century*, CTR. FOR AM. PROGRESS (Sep. 26, 2024), <https://www.americanprogress.org/article/an-american-democracy-built-for-the-people-why-democracy-matters-and-how-to-make-it-work-for-the-21st-century/> [https://perma.cc/S9XN-TL62].

California's legislative response to identify the public concerns surrounding nonidentification practices and their impact on public confidence in law enforcement. Lastly, Part IV argues that Congress should (1) create clearly defined guidelines to limit the use of nonidentification practices and (2) codify a private right of action for plaintiffs against individual federal officers for constitutional rights violations.

Ultimately, the increased risk of physical harm stemming from the Trump administration's deportation policy,⁹ coupled with an insufficient federal remedial scheme for such harms,¹⁰ demonstrates how this gap in effective modes of relief has opened the door for federal officials to avoid systems of governmental and personal accountability by engaging in the practice of concealing their identities.¹¹ Even if nonidentification practices are not founded in the *purpose* of avoiding litigation, they at least contribute to the broader problem of a general inaccessibility to constitutional tort remedies federally.

With a codified cause of action on the books, individuals vulnerable to abuse by federal law enforcement will be better shielded by the threat of personal liability that such officers who otherwise may commit constitutional torts face. The cause of action, coupled with clear identification policies (which would ease procedural barriers for plaintiffs), could work to mend the structural accountability gap at the forefront of public concern since the onset of the Trump administration's sweeping deportation scheme. To mend public confidence in the country's accountability system and in the people's perception of and experience with public safety, it is imperative that Congress codify what the judiciary's work had been doing prior to the fall of *Bivens*—protecting citizens from abuse by making them whole at the expense of bad actors. This requires a re-understanding and re-application of the idea of deterrence from one that flashes its shiny teeth to one that has some bite.

9. See Alvarez, *supra* note 5; Allie Preston, *Masked and Unidentifiable: The Risks of Federal Law Enforcement Operating Without Identification*, CTR. FOR AM. PROGRESS (Aug. 28, 2025), <https://www.americanprogress.org/article/masked-and-unidentifiable-the-risks-of-federal-law-enforcement-operating-without-identification/> [<https://perma.cc/TBM9-HRX2>].

10. See Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 NOTRE DAME L. REV. 1869, 1870-71 (2021).

11. See Preston, *supra* note 9.

I. BACKGROUND

A. The Trump Administration's Deportation Policy and General Concerns over Agency Nonidentification Practices

On President Trump's first day in office as a second-term president, his administration issued ten proclamations and orders initiating bold changes to U.S. immigration policy,¹² with one such order directing the Secretary of Homeland Security to "promptly take appropriate action to use all other provisions of the immigration laws ... to ensure the efficient and expedited removal of aliens from the United States."¹³ Accordingly, Immigration and Customs Enforcement (ICE) officers began carrying out mass deportation operations.¹⁴ Across America, ICE agents have detained "farmhands and meat processors; garment and construction workers; graduate students; the mayor of Newark, New Jersey; and people who turn out to be completely innocent."¹⁵ Available data shows that ICE "arrests have doubled, and the number of people in detention is at an all-time high."¹⁶ In August of 2025 alone, ICE booked 28,308 people into detention, compared to the 8,188 people ICE booked in August of the previous year.¹⁷ As a result, there has been public backlash, with some denouncing the policy as "[a]n attack on [] democracy" and "an attempt to overhaul the federal government,"

12. See *After Day One: A High-Level Analysis of Trump's First Executive Actions*, AM. IMMIGR. COUNCIL (Jan. 21, 2025), <https://www.americanimmigrationcouncil.org/fact-sheet/after-day-one-high-level-analysis-trumps-first-executive-actions/> [https://perma.cc/FT6L-VNHR].

13. See Exec. Order No. 14159, 90 Fed. Reg. 8443 (Jan. 20, 2025).

14. See Alvarez, *supra* note 5; Brandon del Pozo, *Take Off the Mask, ICE*, ATLANTIC (July 7, 2025), <https://www.theatlantic.com/ideas/archive/2025/07/face-covering-masks-ice-officers/683392/> [https://perma.cc/QY7A-U7VE].

15. del Pozo, *supra* note 14.

16. Jiachuan Wu, Laura Strickler, Joe Murphy, Nigel Chiwaya & Julia Ainsley, *U.S. Deportation Tracker: Counting Arrests, Deportations*, NBC NEWS (Apr. 10, 2026, at 16:01 ET), <https://www.nbcnews.com/data-graphics/us-immigration-tracker-follow-arrests-detentions-border-crossings-rcna189148> [https://perma.cc/5CHV-YVFJ].

17. *CBP vs ICE Book-Ins to Detention, October 2018 — 04/04/2026*, TRAC IMMIGR., https://tracreports.org/immigration/detentionstats/book_in_agen_program_table.html [https://perma.cc/9ATH-C8RT].

while noting that the Trump administration has been “depriving [immigrants] of support from civil society.”¹⁸

To compound this effect, the public is outraged by the means with which federal agents have been conducting these raids: in plain clothes and with face-concealing masks on.¹⁹ ICE itself claims that its agents employ this practice to remain anonymous for safety purposes, including to prevent “doxing,”²⁰ which the agency says “can (and has) placed [ICE agents] and their families at risk.”²¹

Regardless of the agency’s stated justifications, it is not illegal for federal agents to wear masks while carrying out their official duties, and the Department of Homeland Security even endorses these practices.²² On the other hand, many citizens and political leaders have expressed concerns over the risks associated with masking. One such risk is that members of the public or other law enforcement officers may be unable to distinguish masked federal agents from masked vigilantes.²³ Without a clear distinction between law enforcement officers and members of the public, this practice “makes policing more challenging and dangerous, as community members or fellow officers may mistake them for a lawbreaker.”²⁴ Although the Code of Federal Regulations requires immigration officers to, at the time of arrest, “[i]dentify himself or herself as an immigration officer who is authorized to execute an arrest” and to inform the arrested individual that he is under arrest and why,²⁵ reports and social media posts depicting widespread non-compliance have struck fear into the hearts of many Americans.²⁶ This has

18. *Mass Deportation: Analyzing the Trump Administration’s Attacks on Immigrants, Democracy, and America*, *supra* note 5.

19. *See del Pozo*, *supra* note 14.

20. The practice of “doxing,” also spelled as “doxxing,” is generally understood as “the collection of a [person’s] private information ... by an unauthorized user, who then publishes the information in an attempt to shame or embarrass the [person].” *See Protect Yourself from Doxing*, UCLA, <https://compliance.ucla.edu/privacy/doxing> [<https://perma.cc/V2M7-DGMW>].

21. *Immigration Enforcement Frequently Asked Questions*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/immigration-enforcement-frequently-asked-questions> [<https://perma.cc/DA2X-VBQW>].

22. Martin Kaste, *Lawmakers Seek to Ban Federal Agents from Wearing Masks*, NPR (July 25, 2025, at 16:20 ET), <https://www.npr.org/2025/07/25/nx-s1-5480219/lawmakers-ban-federal-immigration-agents-masked> [<https://perma.cc/2YR3-VXGV>].

23. Preston, *supra* note 9.

24. *Id.*

25. 8 C.F.R. § 287.8(c)(2)(iii)(A)-(B) (2025).

26. *See* Preston, *supra* note 9.

prompted local leaders, activists, and even the FBI itself to call on federal law enforcement agencies to better “identify themselves during operations and cooperate with individuals who request further verification.”²⁷ This call came as a response to five cited incidents where civilians disguised themselves as immigration officers and used the nationwide deportation program to commit “kidnappings, street crime, and sexual violence” in targeted communities.²⁸

Whether these reports present legitimate concerns or, rather, over-indulge in a sort of mass hysteria, it is at least notable that nonidentification practices have impacted the public’s perception of safety and justice. This critical issue for the public can be posed as follows: Where the President has promised significant increases in immigration arrests and where the risk of constitutional violations to both Americans and non-Americans seems more relevant now than ever, how do nonidentification practices by federal officers affect a plaintiff’s ability to recover when such officers *do* commit constitutional violations, and are these remedial options sufficient?²⁹ To begin, it is important to discuss what remedies individuals have available to them at all.

B. The Rise and Fall of the Bivens Cause of Action and Traditional Understandings of Deterrence

One notable way to recover against federal officers is to bring suit through an implied right of action established in the Supreme Court case, *Bivens v. Six Unknown Named Agents*, which theoretically allows plaintiffs to sue the officers themselves for damages stemming

27. See Nathan Solis & Ruben Vives, *FBI Urges ICE Agents to Identify Themselves After Rise in Criminal Law Enforcement Impersonators*, POLICE1 (Nov. 7, 2025, at 11:23 PT), <https://www.police1.com/federal-law-enforcement/fbi-urges-ice-agents-to-identify-themselves-after-rise-in-criminal-law-enforcement-impersonators> [https://perma.cc/3JDV-ZMDL]; FED. BUREAU OF INVESTIGATION, OFF. PARTNER ENGAGEMENT, OPE-26-SA-02, PUB. SAFETY AWARENESS REP. 3 (2025), <https://propertyofthepeople.org/document-detail/?doc-id=26364028> [https://perma.cc/X6WT-9N4D].

28. Dell Cameron & Caroline Haskins, *FBI Warns of Criminals Posing as ICE, Urges Agents to ID Themselves*, WIRED (Nov. 4, 2025, at 14:30 ET), <https://www.wired.com/story/fbi-warns-of-criminals-posing-as-ice-urges-agents-to-id-themselves/> [https://perma.cc/WSJ9-5ZQV].

29. See *ICE and Border Patrol Abuses*, ACLU, <https://www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses> [https://perma.cc/BZ3C-37VT].

from constitutional violations.³⁰ Before *Bivens*, “there was no *obvious* way to pursue a claim for damages against the federal government or its agencies.”³¹ There, petitioner Webster Bivens brought a suit for civil damages against six agents of the Federal Bureau of Narcotics after they “forced their way into Bivens’ home with drawn firearms and proceeded to search the premises.”³² Bivens alleged that “the agents forcibly handcuffed [him] in the presence of his wife and children[,] ... threatened to arrest the entire family[,] ... [and] subjected [him] to a thorough and humiliating search of his person.”³³

Respondent federal agents argued that the privacy rights Bivens asserted fell under state authority, and Bivens was authorized to “obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts.”³⁴ The Court rejected this reasoning. For one, the Court noted that such a restrictive view of the Fourth Amendment essentially “seek[s] to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens.”³⁵ This could not be the case because, when an agent acts on behalf of the United States, he “possesses a far greater capacity for harm” than a private individual.³⁶ The fact that an officer operates under the authority and in the name of the United States has negative practical implications on the state law alternatives designed to protect an individual’s safety that cannot be overlooked in the context of federal civil rights claims.³⁷

30. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

31. James E. Pfander, *The Story of Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics* 4 (Northwestern Univ. Sch. L. Scholarly Commons, Fac. Working Papers, Paper No. 189, 2009) (emphasis added).

32. Brief for Petitioner, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (No. 301), 1970 WL 116899, at *2.

33. *Id.* at *2-3.

34. *Bivens*, 403 U.S. at 390.

35. *Id.* at 390-92.

36. *Id.* at 392.

37. See *id.* at 394-95. Justice Brennan illustrates this point as follows: if private person A does not want private person B to enter his home, person A can generally take certain protective measures such as barring the door or calling the police. See *id.* at 394. If person A grants person B entry to his home, person B will not be liable in trespass. See *id.* Thus,

It was likewise inappropriate, according to the Court, to expect the state itself to take these different statuses (a private citizen versus a federal officer) into account because states “may not authorize federal agents to violate the Fourth Amendment, ... [nor] may [they] undertake to limit the extent to which federal authority can be exercised.”³⁸ The solution to these broad constitutional parameters of federal law enforcement authority, the Court reasoned, was an independent claim necessary to the plaintiff.³⁹

The Court asked: If a plaintiff can prove he suffered an injury resulting from a Fourth Amendment violation committed by federal agents, can he be entitled to damages?⁴⁰ The answer was yes, because a damages award does not cut against the historical underpinnings of this type of remedy, nor the judicial bounds of awarding it.⁴¹ First, the Court reasoned that awarding damages for violations of someone’s personal liberty is nothing new.⁴² Second, although the Fourth Amendment itself does not speak on preferred enforcement mechanisms, “[i]t is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”⁴³ Lastly, the Court found that the facts in this case “involve[d] no special factors counseling hesitation in the absence of affirmative action by Congress,”⁴⁴ and it was unable to find any congressional declaration explicitly prohibiting plaintiffs from recovering damages.⁴⁵ *Bivens* thus marks a notable shift in a plaintiff’s ability to bring action against federal agents for constitutional violations in that she can be entitled to recover damages.

alternatives to protecting one’s own privacy exist and may justify the state in restricting liability in trespass in certain situations. *See id.* However, if person B is a federal officer who demands entry “under a claim of federal authority[], person A] stands in a far different position.” *See id.*

38. *See id.* at 395.

39. *See id.*

40. *See id.* at 397.

41. *See id.* at 395-97.

42. *See id.* at 395 (“Historically, damages have been regarded as the ordinary remedy for an invasion of personal interest in liberty.”).

43. *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

44. *Id.*

45. *Id.* at 397.

In the aftermath of the *Bivens* decision, the Court expanded such protections outside of the context of the Fourth Amendment to reach “violations of [] Equal Protection ..., the Eighth Amendment, and the free speech component of the First Amendment.”⁴⁶ For example, in *Davis v. Passman*, plaintiff Shirley Davis brought an action against Otto E. Passman, a United States Congressman, seeking backpay after Passman terminated Davis from her position as Passman’s deputy administrative assistant because of her sex.⁴⁷ The Fifth Circuit held that Davis was not entitled to damages for her Fifth Amendment Due Process claim because the court could not imply a civil action for damages from the Fifth Amendment itself, nor could it “countermand the clearly discernible will of Congress” by creating a damages remedy that it did not expressly provide.⁴⁸

The Supreme Court disagreed. Relying on *Bivens*, the Court held that the plaintiff’s claim *could* rest solely on the Fifth Amendment to establish a cause of action.⁴⁹ The Court also held that damages in this case were appropriate because awarding this type of remedy to victims of constitutional wrongs committed by federal agents is not unheard of, impractical, nor expressly prohibited by Congress, especially where “it is damages or nothing.”⁵⁰ Relying on principles outlined in *Marbury v. Madison*, the Court stressed that a plaintiff’s ability to receive damages for injuries resulting from the actions of federal officers is rooted in a very similar proposition to that in which the federal judiciary is rooted: People who are wrongfully injured must be made whole, and the courts have the power, and duty, to do just that.⁵¹

One year after *Davis*, the Supreme Court affirmed another *Bivens* cause of action in the case, *Carlson v. Green*.⁵² There, the plaintiff, Marie Green, brought an action against the federal prison guards who allegedly provided her son with inadequate medical treatment while he was incarcerated and where he died as a result.⁵³ Green

46. See Pfander, *supra* note 31, at 18.

47. *Davis v. Passman*, 442 U.S. 228, 230-31 (1979).

48. *Id.* at 232-33.

49. *Id.* at 242 (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)).

50. See *id.* at 245-47.

51. See *id.* at 242.

52. See *Carlson v. Green*, 446 U.S. 14, 17-18 (1980).

53. Gregory P. Williams, Comment, *Carlson v. Green: The Inference of a Constitutional Cause of Action Despite the Availability of a Federal Tort Claims Act Remedy*, 22 WM. & MARY

alleged that the guards violated her son's Eighth Amendment and Fifth Amendment rights.⁵⁴ Extracting a framework from *Davis* and *Bivens*, the Court established that a *Bivens* cause of action can be defeated in two ways.⁵⁵ First, when "special factors counselling hesitation [exist] in the absence of affirmative action by Congress."⁵⁶ Second, if it is shown that "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed equally effective."⁵⁷

Green's claim survived the first method of defeating a *Bivens* claim because the defendants were of no "independent status" such that "judicially created remedies against them might be inappropriate,"—meaning the fact that the defendants were federal officers did not shield them from court-created remedies.⁵⁸ However, there was a lengthier discussion surrounding whether the Federal Tort Claims Act (FTCA)⁵⁹ preempted the use of the *Bivens* cause of action when it was amended post-*Bivens* to "create a cause of action against *the United States* for intentional torts committed by federal law enforcement officers" by waiving the government's sovereign immunity in cases similar to the *Bivens* fact pattern.⁶⁰ Amending the FTCA to include liability against the United States for intentional torts, the Court followed, was an "explicit congressional declaration that persons injured by federal officers' violations ... may not recover money

L. REV. 561, 562-63 (1981).

54. *Id.* at 563.

55. *See Carlson*, 446 U.S. at 18-19.

56. *Id.* at 18.

57. *Id.* at 18-19.

58. *See id.* at 19.

59. More generally, the FTCA waives the United States government's sovereign immunity and allows victims of tort violations—including those committed by federal agents—to sue the United States as an entity under certain circumstances. MICHAEL D. CONTINO & ANDREAS KUERSTEN, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 26 (2023), https://www.congress.gov/crs_external_products/R/PDF/R45732/R45732.8.pdf [<https://perma.cc/F8G8-7MVK>]. The FTCA and its provisions relevant to this Note's topic will be discussed in greater depth in Part I.D.

60. *Carlson*, 446 U.S. at 19-20 (emphasis added); 28 U.S.C. §§ 2671-2680. Also called the "law enforcement proviso," this 1974 FTCA amendment works as an exception to the intentional tort exception to the FTCA's waiver of sovereign immunity. CONTINO & KUERSTEN, *supra* note 59. The law enforcement proviso "renders the United States potentially liable for certain intentional torts committed by federal investigative or enforcement officers," and came about as a response to widespread public frustration with federal law enforcement officers abusing their authority. *Id.*

damages from the agents but must be remitted to another remedy.”⁶¹ The Court found, however, that the FTCA amendment made clear that Congress intended for it and *Bivens* to run parallel to each other.⁶² Thus, a plaintiff could choose to sue under *Bivens*—where the defendants are the individual wrongdoers—or under the FTCA—where the defendant is the United States.

In an attempt to understand Congress’s intent in amending the FTCA in relation to the *Bivens* remedy, the Court pointed out some notable characteristics that distinguished the two.⁶³ For one, actions taken against individuals, as opposed to the United States as an entity, provide for a more effective deterrent.⁶⁴ Second, a *Bivens* action, like a Section 1983 action,⁶⁵ may result in the award of punitive damages, which are barred by the FTCA.⁶⁶ Thus, the “constitutional design” would be misconstrued if federal officers were held to a different standard of liability than state officers for committing the same constitutional violations.⁶⁷ Third, FTCA plaintiffs do not have the option of having a jury as they would under a *Bivens* claim.⁶⁸ Ultimately, the Court concluded that *Bivens* runs concurrently with the FTCA because, among the reasons discussed above, a *Bivens* action is a more effective means of deterring bad behavior from federal officers.⁶⁹

While Green’s claim survived, the seeds of doubt in the theory behind *Bivens* deterrence were just being sowed. Justice Rehnquist,

61. *Carlson*, 446 U.S. at 19.

62. *See id.* at 19-20; S. Rep. No. 93-588, at 2791 (1973) (clarifying that the amended FTCA that included a cause of action against the United States “should be viewed as a counterpart to the *Bivens* case and its progeny”).

63. *Id.* at 20-21; *see also* Williams, *supra* note 53, at 566-67 (explaining the distinctions made by the Court in *Carlson*).

64. *Carlson*, 446 U.S. at 21.

65. 42 U.S.C. § 1983 is a federal statute that “provides a legal remedy when a person acting under the authority of state law violates a plaintiff’s federally protected rights.” *What Are the Elements of a Section 1983 Claim?*, THOMSON REUTERS (June 13, 2022), <https://legal.thomsonreuters.com/blog/what-are-the-elements-of-a-section-1983-claim/> [https://perma.cc/E667-LGNY]. The statute does not create any new civil rights but instead creates a means with which individuals can seek redress for violations of those rights. *Id.*

66. *Carlson*, 446 U.S. at 21-22.

67. *Id.* at 22 (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

68. *Id.*

69. *See id.* (“[W]e hold that only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to *protect against repetition of such conduct.*” (emphasis added)).

in his dissenting opinion, doubted that threats of personal liability would actually deter federal officers' bad behavior.⁷⁰ He stated: "[I]t is not clear that ... any marginal increase in deterrence would outweigh other considerations that counsel against judicial creation of this type of remedy[.]"⁷¹ especially given that the Court in *Bivens* exercised a kind of authority that is traditionally held by the legislature.⁷² And while deterrence seemed to be the goal of *Bivens*, Rehnquist rejected the idea that meeting that goal would be worth such a consequential precedent. This fear was especially relevant given his hesitance over whether a personal-damages policy would be effective in practice and without explanation as to why other means of deterrence would be ineffective.⁷³ Thus, regardless of fears of judicial power grabs and separation-of-powers concerns, it was clear around the time of *Green* that there were significant deviations in the theory, practical impact, and policy goals surrounding the idea of deterrence. *Bivens* was being questioned not only about what it does (the deterrence it seeks to achieve and whether it achieves it), but also where it should come from (Congress or the Supreme Court).

C. The Fall of Bivens and the Evolution of Contemporary Understandings of Deterrence

Since the early 1980s, the Supreme Court has refused to apply the *Bivens* remedy beyond contexts which had been established in the three prior *Bivens* cases: *Davis*, *Carlson*, and *Bivens* itself.⁷⁴ Today, a plaintiff is narrowly confined to almost precisely matching

70. See *id.* at 46 n.13 (Rehnquist, J., dissenting) ("Although the court states that a *Bivens* remedy is recoverable against individuals, it does not state that the damages paid in a *Bivens* action actually come out of the federal employee's pocket. And even if they did, ... it is not clear that the award would promote deterrence.").

71. *Id.* Such considerations include "the amount of damages necessary to offset the benefits of the objectionable conduct, the risk that the wrongdoer might escape liability, the clarity with which the objectionable conduct is defined, and the perceptions of the individual who is a potential wrongdoer." *Id.* at 45.

72. See *id.* at 52-53.

73. See *id.* at 46 n.13.

74. See Henry Rose, *The Demise of the Bivens Remedy Is Rendering Enforcement of Federal Constitutional Rights Inequitable but Congress Can Fix It*, 42 N. ILL. U. L. REV. 229, 233-37 (2022).

the facts of those cases to successfully access a *Bivens* remedy.⁷⁵ To explain the rationale behind modern cases which seek to limit the *Bivens* remedy, this Note will focus on three recent Supreme Court cases.

In the 2017 case *Ziglar v. Abbasi*, six men who were detained for multiple months in a federal facility during the United States's investigative response to the September 11th terrorist attacks brought a *Bivens* action against multiple federal officials.⁷⁶ There, the Court made clear that, in the years since *Bivens*, *Passman*, and *Carlson*, “[it had] since adopted a far more cautious course,” permitting the creation of a new right of action only where Congress’s intent to confer such a remedy is explicit.⁷⁷ The Court stated that “*Bivens* is well-settled law in *its own context*, but expanding the *Bivens* remedy is now considered ‘disfavored’ judicial activity.”⁷⁸ Thus, in squaring this desire to narrow *Bivens*’s scope with the framework set out in *Carlson*, the Court declared that it would refuse to expand *Bivens* to cover a new “context” if there are “special factors counselling hesitation in the absence of affirmative action by Congress.”⁷⁹ A claim presents a new *Bivens* context only “[i]f the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court.”⁸⁰

In holding that the Court of Appeals erred in its decision to allow the plaintiffs’ detention policy claims to move forward under *Bivens*, the Court called on Congress to decide the proper balance among competing interests as they relate to the effects of deterrence, noting that doing so is not the appropriate job for courts in most situations.⁸¹ On one hand, imposing personal liability on federal officers in certain high-stakes situations may impede an officer’s willingness to take necessary action.⁸² On the other, “the very fact that some executive actions have the sweeping potential to affect the liberty of

75. See *id.* at 241.

76. *Ziglar v. Abbasi*, 582 U.S. 120, 120 (2017).

77. *Id.* at 132-33; see Danielle C. Jefferis, *RIP Bivens*, 103 NEB. L. REV. 1, 10 (2023).

78. See *Ziglar*, 582 U.S. at 121 (emphasis added).

79. See *id.* (internal quotations omitted).

80. *Id.* at 122.

81. See *id.* at 146.

82. *Id.* at 145.

so many is a reason to consider proper means to impose restraint and to provide some redress from injury.”⁸³

Three years after the Court handed down its opinion in *Ziglar*, the Court made another *Bivens* determination in *Hernandez v. Mesa*.⁸⁴ There, the parents of fifteen-year-old Sergio Adrián Hernández Güereca brought a claim for damages against Border Patrol Agent Jesus Mesa, Jr., who shot and killed Hernandez as he crossed the border into Mexico, for violations of his Fourth and Fifth Amendment rights.⁸⁵ Although the Court found that the plaintiffs’ *Bivens* claim constituted a new context, “multiple, related factors” suggested that *Bivens* should not be extended.⁸⁶ The Court paid special attention to whether it would be encroaching on the authority of the other branches of government.⁸⁷ For example, the Court gave significant weight to the fact that expanding *Bivens* here would have a “potential effect on foreign relations” should the judiciary interfere with the executive branch’s “lead role in foreign policy.”⁸⁸ Similarly, since imposing *Bivens* would involve “regulating the conduct of agents at the border[,] ... the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field.”⁸⁹ Thus, the Court ultimately declined to extend *Bivens*.

The reasoning here signaled a notable shift in the weight given to federal officers’ freedom to act without fear of liability, fueled by increased attention to national security concerns. But this approach seems dramatically overexclusive in drawing the line of personal liability at those who operate in the national security space because those officers have the most potential for physical harm (such as ICE and CBP). The system then functionally shields federal officers by restricting the imposition of personal liability on those involved in national security based on a precedent meant to do the opposite.

The final nail in *Bivens*’s coffin was the Supreme Court’s holding in *Egbert v. Boule*. There, respondent Robert Boule owned and

83. *Id.* at 145-46.

84. *See Hernandez v. Mesa*, 589 U.S. 93, 103-14 (2020).

85. *Id.* at 93.

86. *Id.* at 103.

87. *See id.* at 113.

88. *See id.* at 103-04 (internal quotations omitted).

89. *Id.* at 108.

operated “Smuggler’s Inn,” a bed-and-breakfast on the border between the United States and Canada with a high rate of smuggling.⁹⁰ At one point, Boule served as a paid confidential informant to federal agents, helping them apprehend individuals who sought to cross into the United States illegally.⁹¹ One night, after Boule had alerted Agent Erik Egbert, a Border Patrol agent, that he had arranged transportation with a Turkish national, Agent Egbert arrived on Boule’s property and a fight broke out, whereby Agent Egbert allegedly picked up Boule and threw him against a car.⁹²

Boule sued Agent Egbert under the Fourth Amendment for excessive force and under the First Amendment for unlawful retaliation.⁹³ The federal district court rejected application of a *Bivens* remedy to Boule’s claims, but the Ninth Circuit reversed, explaining that “a *Bivens* remedy is still available in appropriate cases and there are ‘powerful reasons’ to retain it in its ‘common and recurrent sphere of law enforcement.’”⁹⁴ And although Agent Egbert was an officer charged with protecting and enforcing national security, “national security concerns must not become a talisman used to ward off inconvenient claims ... [or] a label used to cover a multitude of sins.”⁹⁵

The Supreme Court disagreed, putting worries about *Bivens*’s separation-of-powers implications at the forefront of its consideration in determining whether the Court should recognize a new *Bivens* context. First, the Court held that “[e]ven a single sound reason to defer to Congress is enough to require a court to refrain from creating such a remedy.”⁹⁶ Second, “[i]f there is even a single ‘reason to pause before applying *Bivens* in a new context,’ a court may not recognize a *Bivens* remedy.”⁹⁷ Lastly, if Congress has provided for “an alternative remedial structure,” a court should not

90. *Egbert v. Boule*, 142 S. Ct. 1793, 1800 (2022).

91. *Id.*

92. *Id.* at 1801.

93. *Boule v. Egbert*, 998 F.3d 370, 385 (9th Cir. 2021).

94. *Id.*

95. *Id.* at 389 (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 143 (2017)) (citation modified).

96. *Egbert*, 142 S. Ct. at 1803 (quoting *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021)) (citation modified).

97. *Id.* (quoting *Hernandez v. Mesa*, 589 U.S. 93, 102 (2020)) (citation modified).

afford a plaintiff a *Bivens* remedy.⁹⁸ Applying those principles, the Court held that the Ninth Circuit should not have recognized a cause of action for Boule's excessive force claim because Congress was "better positioned to create remedies in the border-security context, and the Government already has provided alternative remedies that protect plaintiffs like Boule."⁹⁹ Because Agent Egbert was engaged in national security-related duties, the court could not apply a *Bivens* cause of action—full stop.¹⁰⁰

Additionally, the Court held that the Ninth Circuit was wrong to find that the excessive force claim was similar enough to the one asserted in *Bivens* such that *the court* could apply a cause of action here.¹⁰¹ In effect, it established that, absent a factual scenario that meets one of the three cases that established a *Bivens* context, the Court is barred from expanding it because that is a job for Congress.¹⁰² Accordingly, Boule's First Amendment claim also failed.¹⁰³ Lastly, the Court held that Boule had access to alternative remedies—the executive branch's investigative measures and the ability to file grievances through the agency—that precluded his use of a *Bivens* cause of action.¹⁰⁴ In so holding, Justice Thomas pointed out that *Bivens* "is concerned solely with deterring the unconstitutional acts of individual officers," and therefore, whether a remedy sufficiently effectuates that goal is a question best left for Congress to decide.¹⁰⁵

Ultimately, *Egbert v. Boule* appears to overexaggerate the reach that true national security concerns have on *Bivens* litigation and overrely on other remedial structures to replace the deficiencies of the *Bivens* cause of action. This destruction of the *Bivens* remedy undercuts its purpose of deterring unconstitutional conduct. Thus, as it appears certain that the Supreme Court is no longer in the business of expanding *Bivens*, it is up to Congress to enforce a system of deterrence that protects individuals from such abuse. Before looking into how nonidentification practices fit into this issue, it is

98. *Id.* at 1804 (quoting *Ziglar*, 582 U.S. at 137).

99. *Id.*

100. *Id.*

101. *Id.* at 1805.

102. *See id.*

103. *See id.* at 1807.

104. *See id.* at 1806.

105. *Id.* at 1806-07 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71, 74 (2001)).

important to assess one Congress made scheme that seeks to fulfill what *Bivens* no longer can: the Federal Tort Claims Act (FTCA).

D. The Federal Tort Claims Act

Another remedy that an individual who was injured by federal law enforcement may have available to them is to bring an action against the United States through the FTCA, which waives the federal government's sovereign immunity for certain state tort claims.¹⁰⁶ Sovereign immunity can be traced back to colonial times and is premised on the idea that "the king can do no wrong," or that the government is deserving of special protection from civil liability by virtue of its existence as a sovereign entity.¹⁰⁷ Until the mid-twentieth century, the federal government's sovereign immunity prevented plaintiffs from recovering in tort from the misconduct of its officers unless plaintiffs successfully urged Congress to pass a private bill for direct money damages funneled through it, the national legislature.¹⁰⁸ This meant that individuals could not recover financially through the nation's judiciary.¹⁰⁹

In response to the growing inefficiencies of that system, Congress passed the FTCA in 1946 to waive such immunity, limited by certain exceptions.¹¹⁰ It is important to note at the outset that the FTCA does not provide a cause of action for *constitutional* violations, and the substantive law is dictated by state law.¹¹¹ Nonetheless, the FTCA allows plaintiffs to recover damages for certain intentional

106. CONTINO & KUERSTEN, *supra* note 59, at 26.

107. See Liam Grah, Comment, *Adjusting Immunity for Unconstitutional Torts*, 2024 U. CHI. LEGAL FORUM 427, 429.

108. *Id.* at 430.

109. *Id.*

110. *Id.* at 432-33.

111. Christopher L. Svendsen, Note, *Deficiencies in the Federal Tort Claims Act "Law Enforcement Proviso" and the Need for Reform*, 107 IOWA L. REV. 1857, 1867 (2022). Intentional torts, governed by state law, are different from constitutional torts, although there is some overlap as to who they protect and what they purport to do. Because this Note focuses on an individual's ability to recover from the bad acts of federal officers, both are relevant to the discussion in terms of how they may compensate a plaintiff. For a deeper dive into the difference between common law and constitutional torts, see William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515 (1989), and Noah Smith-Drelick, *The Constitutional Tort System*, 96 IND. L.J. 571 (2021).

common law torts committed by federal law enforcement officers through what is known as the law enforcement proviso.¹¹² The law enforcement proviso waives the United States's sovereign immunity for claims of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution committed by federal law enforcement officers during the course and within the scope of employment.¹¹³

Notably, the law enforcement proviso may be overcome by the discretionary function exception, which acts as an exception to the general waiver of sovereign immunity for "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."¹¹⁴ Interpretations vary on how this exception does and should function, but it ultimately has the capacity to defeat a claim that would otherwise be empowered by the law enforcement proviso.¹¹⁵ It is grounded in the idea that public policy favors insulating government officials from liability for their decision-making so that they may be able to make choices freely.¹¹⁶

There is a circuit split over whether the law enforcement proviso waiver or the discretionary function exception dominates.¹¹⁷ The majority of circuits hold that the discretionary function exception still applies even if that discretion allegedly resulted in an intentional tort committed in the course of employment.¹¹⁸ Therefore, in most circuits, "if a plaintiff brings a suit against the United States for an intentional tort committed by an investigative or law enforcement officer, they must establish that the actions of the officer were not discretionary."¹¹⁹

Bringing it all together, if a plaintiff elects to bring suit against the United States under the FTCA, the individual may try to prove

112. See 28 U.S.C. § 2680(h). The law enforcement proviso is contained within the intentional torts exception and works as "an exception to the exception" to the waiver of the United States's sovereign immunity. See Svendsen, *supra* note 111, at 1866.

113. Svendsen, *supra* note 111, at 1866-67.

114. *Id.* at 1868 (quoting 28 U.S.C. § 2680(a)) (emphasis added).

115. See Grah, *supra* note 107, at 433; Svendsen, *supra* note 111, at 1868.

116. See Grah, *supra* note 107, at 433-44.

117. See Svendsen, *supra* note 111, at 1868.

118. See *id.*

119. *Id.*

under the law enforcement proviso waiver that (1) the plaintiff had exhausted all of his administrative remedies;¹²⁰ (2) the officer who harmed him is at least an employee of the United States;¹²¹ and (3) the officer committed the tortious conduct at issue while directly performing a function contemplated by the law enforcement proviso, which was expanded in the Supreme Court case *Millbrook v. United States*, but which is still interpreted narrowly by many courts.¹²² Finally, the plaintiff would need to prove that the discretionary exception does not apply. To do this, the plaintiff would need to prove that (1) the action was not “a matter of choice for the acting employee,” which can be shown through “a statute, regulation, or policy [which] specifically prescribes the agent’s actions;”¹²³ and (2) the action was not “based on considerations of public policy.”¹²⁴

Ultimately, while the FTCA “creates a mechanism to compensate victims of governmental wrongdoing” and seeks to protect the public by deterring tortious misconduct, the FTCA also aims to protect the United States.¹²⁵ Accordingly, exceptions to the FTCA¹²⁶ exist to uphold certain valid government interests, and the context in which they apply is sometimes the subject of legal debate, which is evident in the jurisdictional variations of the application, scope, and interplay of the discretionary function exception with other FTCA provisions.¹²⁷ Nonetheless, these exceptions often pose a challenge for plaintiffs as they limit those plaintiffs’ ability to recover for the

120. CONTINO & KUERSTEN, *supra* note 59, at 35.

121. *See id.* at 8. Some courts require a showing that the employee is also an “investigative or law enforcement officer,” and not just an employee of the United States. *See Svendsen, supra* note 111, at 1870-71. An “investigative or law enforcement officer” is defined in the law enforcement proviso as “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.” 28 U.S.C. § 2680(h). However, the Supreme Court has extended this caveat outside of those parameters, defining this misconduct as anything “within the scope” of the officer’s employment. *See Millbrook v. United States*, 569 U.S. 50, 56-57 (2013).

122. *See Svendsen, supra* note 111, at 1872.

123. Grah, *supra* note 107, at 434 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

124. *Id.* (quoting *Berkovitz*, 486 U.S. at 537).

125. *See CONTINO & KUERSTEN, supra* note 59, at 6.

126. There are many situations that are not mentioned in this Note that the FTCA also exempts from its waiver of sovereign immunity. To review this list, see 28 U.S.C. § 2680.

127. *See Svendsen, supra* note 111, at 1868; *see generally* Grah, *supra* note 107 (discussing the circuit split over whether the discretionary function exception applies to torts that can also be considered constitutional violations).

wrongful acts of federal officers. American plaintiffs are then left with two options if they hope to redress their injuries: *Bivens* or the FTCA. As discussed, it is tremendously difficult to succeed on a *Bivens* claim today. The FTCA, too, poses its own challenges to plaintiffs. It is therefore important to assess the viability of and access to such modes of redress to know what a plaintiff may be up against, and how nonidentification practices ultimately upend an already insufficient federal remedial scheme.

II. NONIDENTIFICATION PRACTICES POSE AN IMPEDIMENT TO RECOVERY FOR PLAINTIFFS

As discussed in Part I, it is not easy for a plaintiff to recover for the tortious or wrongful acts of a federal law enforcement officer based on the existing federal remedial system and immunity doctrines. It does not appear that it is supposed to be. There are some good reasons to accept that policy choice.¹²⁸ However, it is unclear whether those same policy considerations hold water when the executive branch launches a campaign to invade large American cities, detain and deport droves of a certain class of individuals, and, in the course of this campaign, injure many while scaring the rest.¹²⁹

But most importantly, it is essential to assess how these litigation options serve the public when the whole scheme is conducted with officers donning masks and in plain clothes. How may this prevent a plaintiff from jumping over the initial procedural hurdle before the substantive case-proving challenge can even begin? Accordingly, with the background of the limitations on recovery against federal

128. See Grah, *supra* note 107, at 431-32 (identifying the cited purposes of sovereign immunity being the idea of “sovereign dignity” and financial protection); see also *Hernandez v. Mesa*, 589 U.S. 93, 113 (2020) (Gorsuch, J., concurring in part) (“Foreign policy and national security decisions are ‘delicate, complex, and involve large elements of prophecy’ for which ‘the Judiciary has neither aptitude, facilities[,] nor responsibility.’” (quoting *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 284 (2018))); Grah, *supra* note 107, at 433-35 (noting that the FTCA’s discretionary function exception reflects the policy choice to protect governmental policy decisions from tort-based interference by courts and to shield the government from liability that would upend the efficiency of those policies).

129. See *supra* Part I.A; see also Matt Loffman, *Poll: Nearly Two-Thirds of Americans Say ICE Has Gone Too Far in Immigration Crackdown*, PBS (Feb. 5, 2026, at 09:49 ET), <https://www.pbs.org/newshour/politics/poll-nearly-two-thirds-of-americans-say-ice-has-gone-too-far-in-immigration-crackdown> [<https://perma.cc/JH7J-EGX3>] (“A majority of Americans—62%—believe ICE’s actions are making Americans less safe.”).

law enforcement officers set, this Part assesses the ways in which nonidentification practices further restrict a plaintiff's ability to recover in opposition to favorable public policy.

A. Procedural Barriers to Bringing a Bivens Claim Against an Individual Officer

Nonidentification practices pose a problem to *Bivens* plaintiffs beyond the substantive limitations set by the Supreme Court. To successfully plead a *Bivens* claim, a plaintiff must allege:

(1) she has a constitutionally protected right; (2) a federal officer acting under color of federal authority violated that right; (3) she lacks a statutory cause of action, or an available statutory cause of action does not provide a meaningful remedy; and (4) an appropriate remedy, namely damages, can be imposed.¹³⁰

With a *Bivens* cause of action, the plaintiff is suing the individual officer, not the United States nor the agency the individual works for.¹³¹ Therefore, it is essential for the plaintiff to identify the precise defendant so they may be individually served process.¹³² Additionally, the plaintiff must be able to name her defendant before the statute of limitations runs out.¹³³ But there is another option. If the officer's identity is unknown, the plaintiff may file the complaint under "John Doe" or "Jane Doe" to preserve the case before it is statutorily barred.¹³⁴ The plaintiff may then be able to use the discovery

130. Trina Realmuto, Mary Kenney, Havan Clark & Tiffany Lieu, *Bivens Basics: An Introductory Guide for Immigration Attorneys*, NAT'L IMMIGR. LITIG. ALL. & AM. IMMIGR. COUNCIL 2-3 (2021).

131. *Id.* at 3-4.

132. Trina Realmuto & Emma Winger, *Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation*, NAT'L IMMIGR. LITIG. ALL., AM. IMMIGR. COUNCIL & NAT'L IMMIGR. PROJECT NAT'L LAWS. GUILD 8 (2022).

133. In *Bivens* actions, the statute of limitations is "the personal injury statute of limitations of the state where the constitutional tort occurred," pursuant to 42 U.S.C. § 1983. Realmuto et al., *supra* note 130, at 3. In California, for example, the statute of limitations for personal injury actions is two years from the date of the injury. *See* CAL. CIV. PROC. CODE § 335.1 (West 2003).

134. Realmuto et al., *supra* note 130, at 3.

process and applicable relation back doctrine to amend the complaint to name the officer, once known.¹³⁵

However, this significantly raises the hurdles that plaintiffs must overcome. If the plaintiff cannot recall not only the officer's name or what his face looked like, but also which agency he is affiliated with, the plaintiff's attempts at using discovery tools to find that information become drastically more involved. At that point, it is a race against the clock to find such information, including requesting the production of documents from multiple federal agencies and other law enforcement entities. Moreover, there is the risk that the person who injured the plaintiff may not even be associated with federal law enforcement at all, or that he is a local or state law enforcement officer.¹³⁶ In those cases, there is the risk that a plaintiff will expend their resources bringing about litigation that is, in turn, misdirected.

Additionally, even if the defendant is discovered, the plaintiff still must meet the "relation back" standard if this discovery occurred after the statute of limitations ran and the plaintiff seeks to switch out the party names in the original timely filed complaint.¹³⁷ In that case, under Rule 15(c) of the Federal Rules of Civil Procedure (FRCP), an amendment will relate back to the original complaint when (1) the amendment arises out of the same "conduct, transaction, or occurrence set out ... in the original pleading;" (2) the new party "received such notice of the action that it will not be prejudiced in defending on the merits;" and (3) the new party "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."¹³⁸

Much of the litigation surrounding Rule 15(c) has to do with the third prong concerning mistake. Before 2010, "virtually all federal circuit courts had adopted the position that Rule 15(c) allowed relation back when a plaintiff *misidentified* a prospective defendant but not when the plaintiff *lacked knowledge* of the prospective defendant's identity."¹³⁹ In *Krupski v. Costa Crociere*, the Supreme

135. *Id.*

136. *See supra* Part I.A.

137. *See* *Krupski v. Costa Crociere*, 560 U.S. 538, 541 (2010).

138. Fed. R. Civ. P. 15(c)(1)(B)-(C).

139. *See* Meg Tomlinson, Note, *Krupski and Relation Back for Claims Against John Doe Defendants*, 86 FORDHAM L. REV. 2071, 2084 (2018) (emphasis added).

Court ruled that the knowledge-of-mistake requirement should focus on whether the *defendant* knew or should have known that it was the proper party, but for a mistake.¹⁴⁰ Nonetheless, many courts hold that Rule 15(c) does not allow relation back for John Doe defendants because the complaints inherently lack of knowledge; but some courts allow relation back for John Doe defendants when the plaintiff identifies them “with reasonable specificity in the complaint,” as opposed to “placeholders not tied to any identifiable party.”¹⁴¹ In other words, many courts will not allow a plaintiff to use Rule 15(c) to replace a John Doe defendant after the statute of limitations ran if the reason for adding the defendant was a lack of knowledge of the defendant’s identity.¹⁴² That creates obvious challenges for the plaintiff in a world where federal law enforcement officers are concealing their identities by wearing masks and refusing to display their names or agency affiliations. While the FRCP provide certain methods for easing the burden on plaintiffs when it comes to defendant identification (for example, the discovery process and “relation back” doctrine), their consistency and reliability are limited. Today, it appears that many federal officers, through use of nonidentification practices, are making themselves out as unidentifiable such that plaintiffs may not be able to bring a *Bivens* action against them by the time the statute of limitations is up. Whether purposeful or not, that practice seriously undermines a crucial element of a plaintiff’s case and imposes an unfair burden in the context of federal civil rights law.¹⁴³ And although there is real value in making it somewhat challenging for plaintiffs to sue individual officers for constitutional violations, reflected in doctrines like qualified immunity¹⁴⁴ and in the need for insulated decision-

140. See 560 U.S. at 548-50 (“[R]epose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity.”).

141. See Tomlinson, *supra* note 139, at 2095.

142. See *id.* at 2092.

143. See *id.* at 2084 (explaining that *Bivens* plaintiffs often get stuck in a “catch-22,” where, “before filing suit, she cannot enlist the court’s help through discovery requests or orders to discover the identity of unknown defendants, but she cannot file suit without naming a defendant”).

144. Qualified immunity is a legal doctrine whereby government officials are protected from lawsuits in their personal capacity unless the official “violated a ‘clearly established’ statutory or constitutional right.” *Qualified Immunity*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/qualified_immunity [<https://perma.cc/N83M-RGU5>]. Courts

making, these nonidentification practices are notably deceptive, and seem to rig the rules for plaintiffs who seek to vindicate valid claims.

B. Procedural Barriers to Bringing an FTCA Claim Against the United States

Nonidentification practices also present a problem for plaintiffs who seek to sue the United States under the FTCA. In many cases, plaintiffs may bring both a *Bivens* and an FTCA claim, but there are important differences between the two.¹⁴⁵ Most notably, and as discussed *supra* Part I.B, in an FTCA case the plaintiff is not entitled to a jury and cannot receive punitive damages or injunctive relief.¹⁴⁶

But before a plaintiff can file an FTCA claim against the United States, the plaintiff must file and exhaust administrative remedies with the appropriate federal agency.¹⁴⁷ For reasons similar to those discussed in Part II.A, this may be challenging for a plaintiff who does not know with which agency they must file administrative claims, and it may mean that the plaintiff must dedicate more time and resources to deciphering that before they may proceed with an FTCA action. As to the substance of the administrative complaint, fortunately for the plaintiff, “an administrative claim need not meet formal pleading requirements,” and must only “be specific enough ... ‘to ease court congestion and avoid unnecessary litigation.’”¹⁴⁸ But the plaintiff should additionally allege how the plaintiff was injured, the cause, how the acts of the officer were connected to the injury, the nature of the injury, and a demand for a specific sum of damages for the plaintiff’s claim to have a better chance at surviving.¹⁴⁹

A plaintiff then needs to draft a complaint “with care to avoid the application of the exceptions to the FTCA.”¹⁵⁰ Therefore, if a plaintiff

must make qualified immunity decisions early in the litigation process, often before the discovery process begins. *Id.*

145. Realmuto et al., *supra* note 130, at 6.

146. *Id.* at 7.

147. *Id.*; 28 U.S.C. § 2675.

148. See *Johnson by Johnson v. United States*, 788 F.2d 845, 848-49 (2d Cir. 1986) (quoting S. REP. NO. 89-1327, at 2 (1966), as reprinted in 1966 U.S.C.C.A.N. 2515, 2516).

149. See *Donahue v. TSA*, 457 F. Supp. 2d 137, 141 (E.D.N.Y. 2006).

150. Ian Wallach, *Drafting a Tort Complaint Against the Federal Government and Its Contractors and the Limitations on the Independent Contractor and Discretionary Function*

seeks to sue the United States after sustaining injury from a federal officer throughout the course of the recent deportation raids, the plaintiff would need to keep in mind the discretionary function exception and its ability to override the law enforcement proviso.¹⁵¹ Importantly, to know whether the officer who conducted the alleged wrongs was using discretion, it is helpful for the plaintiff to know what type of employment that officer has, with what agency, and what level of supervisory authority he holds. This is where nonidentification practices are harmful to a plaintiff's chance at successfully pleading an FTCA claim.

The FTCA is a carefully curated legal scheme that aims to balance the competing interests of governmental efficiency, accountability, and protection.¹⁵² It has been tweaked over the decades in an attempt to strike a balance between these interests.¹⁵³ While the FTCA is especially careful to protect the United States from liability, it should not be the case that federal officers or their supervisors may elect to strengthen those protections by employing practices that further restrict a plaintiff's ability to recover in tort against the United States. If the American public is to trust the legislative scheme of the FTCA, it cannot be overridden, and the public's statutory rights rendered moot, by masking and plainclothes practices rather than by the carefully curated decisions made by democratically elected leaders in Congress.

III. NONIDENTIFICATION PRACTICES ERODE PUBLIC CONFIDENCE IN LAW ENFORCEMENT

Nonidentification practices likewise impact the public's perception of law enforcement by decreasing feelings of confidence. This has real impacts. In response to the recent deportation raids, people across the country have launched widespread protests, with the

Exceptions, FED. LAW., Mar. 2017, at 65, 66, <https://www.fedbar.org/wp-content/uploads/2017/03/Tort-Complaint-pdf-1.pdf> [<https://perma.cc/5T8R-7XXD>].

151. See *supra* Part I.D for a description of the law enforcement proviso and the discretionary function exception of the FTCA.

152. See Grah, *supra* note 107, at 432-44.

153. See CONTINO & KUERSTEN, *supra* note 59, at 2-3; see, e.g., Svendsen, *supra* note 111, at 1860 (explaining that Congress incorporated the law enforcement proviso into the FTCA scheme in response to political events that drew high levels of public attention to the actions of federal officials).

most attention-grabbing of them being in Minneapolis, Minnesota, in response to the killings of Renee Good and Alex Pretti by immigration authorities.¹⁵⁴ And while thousands of people marched on the streets in Minneapolis to protest their deaths and the presence of federal immigration authorities in their city,¹⁵⁵ it is not merely the agents' presence that has caused outrage, but the tactics they use to carry out their operations. Nonidentification practices are one such tactic. Indeed, "the images of masked federal officers [have] become a flashpoint in the Trump Administration's immigration enforcement operations," with the slogan "[c]ameras on, masks off" representing a sort of rallying cry among protestors.¹⁵⁶ And at the same time that 62 percent of Americans "believe ICE's action are making Americans less safe,"¹⁵⁷ many argue that the nonidentification practices they employ have hindered accountability, degraded relationships between local and state police departments, and resulted in decreased cooperation with, and trust in, law enforcement.¹⁵⁸

To identify ways in which nonidentification practices have affected the public, it may be effective to analyze how states have responded. In Virginia, for example, Senators Mark Warner and Tim Kaine published a press release calling upon immigration authorities to better identify themselves pursuant to DHS policy.¹⁵⁹

154. Kurt Streeter, *How Alex Pretti's Death Became a National Tipping Point*, N.Y. TIMES (Feb. 1, 2026), <https://www.nytimes.com/2026/02/01/us/alex-pretti-minneapolis.html> [<https://perma.cc/SNN6-EA7H>].

155. Danielle A. Scruggs, *Photos: Thousands Once Again Protest ICE in Minneapolis and Across the U.S.*, NPR (Jan. 30, 2026, at 21:20 ET), <https://www.npr.org/sections/the-picture-show/2026/01/30/g-s1-108087/photos-thousands-once-again-protest-ice-in-minneapolis-and-across-the-u-s> [<https://perma.cc/UG99-R7WG>].

156. Lisa Mascaro, *Masks Emerge as Symbol of Trump's ICE Crackdown and a Flashpoint in Congress*, LA TIMES (Feb. 9, 2026, at 08:52 PT), <https://www.latimes.com/world-nation/story/2026-02-09/masks-emerge-as-symbol-of-trumps-ice-crackdown-flashpoint-in-congress> [<https://perma.cc/4GT7-QKAJ>].

157. Loffman, *supra* note 129.

158. See Preston, *supra* note 9; Mascaro, *supra* note 156; Meg Anderson, *Police Say ICE Tactics Are Eroding Public Trust in Local Law Enforcement*, NPR (Mar. 30, 2025, at 05:00 ET), <https://www.npr.org/2025/03/30/nx-s1-5304236/police-say-ice-tactics-are-eroding-public-trust-in-local-law-enforcement> [<https://perma.cc/R5T2-LFHS>].

159. Press Release, Mark Warner, Senator, United States Senate, Warner, Kaine Push ICE to Require Agents Identify Themselves, Limit Use of Masks and Face Coverings During Enforcement Operations (May 23, 2025), <https://www.warner.senate.gov/public/index.cfm/2025/5/warner-kaine-push-ice-to-require-agents-identify-themselves-limit-use-of-masks-and-face-coverings-during-enforcement-operations> [<https://perma.cc/S4WV-B3NF>].

In describing their concerns with how nonidentification practices impact their constituency, they wrote:

The failure of ICE officers and agents to promptly and clearly identify who they are and the authority under which they are acting has led witnesses of immigration enforcement operations to justifiably question the law enforcement status, authority, and constitutionality of ICE officers and agents and their operations. Such actions compromise the safety of law enforcement officers and agents conducting the operation, the individual(s) being apprehended, bystanders, and other law enforcement who may be called to the scene to respond to a suspected crime.¹⁶⁰

Moreover, attorneys general from twenty-one states signed on to a letter calling upon Congress to “consider and advance legislation that would generally prohibit federal immigration agents from wearing masks that conceal their identity and require them to show their identification and agency-identifying insignia.”¹⁶¹

For a closer look, this Part will reflect on the legislation that California has passed in response to the public backlash at federal law enforcement’s use of nonidentification practices. In reflecting on this policy response, it may help to better understand the moving forces behind the public’s concern with nonidentification practices and states’ abilities to manage them.

A. California’s Legislative Response

On September 20, 2025, the California Legislature adopted S.B. 627, otherwise known as the No Secret Police Act, which aims to toughen existing masking limitations by making it a crime for law enforcement officers to cover their faces in the course of their duties.¹⁶² California is not the only state to call for or propose laws that prohibit masking and plain-clothes practices, and there is even legislation making its way through Congress that seeks to limit

160. *Id.*

161. See Letter from Multiple State Attorneys General to Members of the U.S. Congress, N.Y. STATE ATT’Y GEN. (July 15, 2025), <https://ag.ny.gov/sites/default/files/letters/letter-to-congress-on-ice-mask-legislation-letter-2025.pdf> [<https://perma.cc/3GZD-D2PH>].

162. See S.B. 627, 2025 Reg. Sess. (Cal. 2025).

certain federal law enforcement officers from using nonidentification practices.¹⁶³

The No Secret Police Act notes that “[e]xisting law makes it a misdemeanor to wear a mask ... with the purpose of evading or escaping discovery, recognition, or identification while committing a public offense, or for concealment, flight, evasion, or escape from arrest or conviction for any public offense.”¹⁶⁴ But S.B. 627 requires “any law enforcement agency operating in California to ... maintain and publicly post a written policy limiting the use of facial coverings.”¹⁶⁵

At the very beginning of the law’s text, the Legislature lists its policy reasons. For one, it recognizes that “[w]hether intended or not, members of the public may experience fear or intimidation when approached by officers whose faces are obscured.”¹⁶⁶ Moreover, the law notes that being able to see an officer’s face “is vital for promoting transparency, facilitating communication, and building trust between law enforcement agencies and the communities they serve,” with the law paying particular attention to preventing officers from using masks “in a manner that enables or conceals discriminatory or unlawful conduct.”¹⁶⁷

S.B. 627 includes a requirement that law enforcement agencies operating in California (excluding state police) maintain written policies regarding facial coverings, with certain “narrowly tailored exemptions,” and a requirement that agents do not wear face coverings while carrying out their duties.¹⁶⁸ One consideration included among these exemptions is for “[p]rotection of identity during prosecution.”¹⁶⁹ Another notable provision expressly excludes N95 medical or surgical masks used to protect against disease from the definition of “facial covering.”¹⁷⁰ And while some of these exceptions seem to undermine the law’s overall effectiveness, the law itself

163. See, e.g., S.B. 8462, 2025 Reg. Sess. (N.Y. 2025); H.B. 1312, 104th Gen. Assemb. (Ill. 2025); H.B. 4684, 194th Gen. Ct. (Mass. 2025); S. 2212, 119th Cong. (2025).

164. See S.B. 627, 2025 Reg. Sess. (Cal. 2025).

165. *Id.*

166. *Id.* § 1(b).

167. *Id.* § 1(d), (f).

168. *Id.* § 2(b)(1)-(3).

169. *Id.* § 2(b)(3)(D).

170. *Id.* § 3(b)(2)(B).

stresses the state's desire to stop the perceived federal overreach in response to immigration raids conducted in Los Angeles.¹⁷¹

On the same day the No Secret Police Act was passed, the Legislature also passed S.B. 805, or the No Vigilantes Act, which requires law enforcement agents operating in California “to visibly display identification that includes their agency and either a name or badge number to the public when performing their enforcement duties.”¹⁷² These two laws appear to go hand-in-hand in that they both seek to quell public safety concerns, respond to reports of impersonations, and create a structure whereby agents are clearly identifying not only themselves, as the No Secret Police Act aims to do, but also the agency they belong to.¹⁷³

Yet what makes these state laws novel, or as some may fairly characterize them, problematic, is that they impose these restrictions on *federal* law enforcement officers. Some criticize the laws for being a violation of the Supremacy Clause, noting that California lacks the ability to interfere with federal law enforcement.¹⁷⁴ California Governor Gavin Newsom himself acknowledged the lack of legal authority the state has in trying to limit the acts of federal law enforcement authorities, stating, “[i]t appears we don’t have the legal authority for federal agents, but we do for other law enforcement authorities.”¹⁷⁵ The Department of Homeland Security rejected the No Secret Police Act in a post on X, referring to the bill as “a disgusting, diabolical fundraising and PR stunt.”¹⁷⁶ Some proponents, on the other hand, pointed out that the masking and uniform

171. See Trần Nguyễn & Martha Bellisle, *California Bans Most Law Enforcement Officers from Wearing Masks During Operations*, ASSOCIATED PRESS (Sep. 20, 2025, at 18:15 ET), <https://apnews.com/article/california-ice-agents-immigration-raids-masks-ban-97936f70699b75d8b483a850967c2e42> [https://perma.cc/88HM-WCH9].

172. S.B. 805, 2025 Reg. Sess. (Cal. 2025) (Legislative Counsel’s Digest).

173. See *id.*

174. Ashleigh Fields, *Trump Administration Orders Federal Authorities to Ignore California Mask Law*, THE HILL (Sep. 26, 2025, at 16:24 ET), <https://thehill.com/homenews/state-watch/5524169-trump-administration-california-mask-law/> [https://perma.cc/5B5R-BH5U].

175. See Lindsey Holden, *California Lawmakers Pass Bill to Ban ICE Agents from Wearing Masks*, POLITICO (Sep. 11, 2025, at 21:15 ET), <https://www.politico.com/news/2025/09/11/california-lawmakers-pass-bill-ban-ice-agents-wearing-masks-00559803> [https://perma.cc/L788-AV6U].

176. Homeland Security (@DHSgov), X (Sep. 22, 2025, at 13:50 ET), <https://x.com/DHSgov/status/1970183948899696693> [https://perma.cc/X299-6MTR].

requirements are needed “to boost public trust in law enforcement and stop people from impersonating officers to commit crimes.”¹⁷⁷ And although, as at least one proponent pointed out in defense of the laws, “[f]ederal employees still have to follow general state rules ‘unless doing so would significantly interfere with performance of their duties,’”¹⁷⁸ it seems clear that DHS and the DOJ do not intend to follow its requirements.¹⁷⁹

Accordingly, on November 17, 2025, the DOJ filed suit in the U.S. District Court for the Central District of California requesting the court to declare that both laws violate the Supremacy Clause of the Constitution and to prevent California from enforcing them against federal officers.¹⁸⁰ The complaint alleged that both laws “purport to directly regulate the Federal Government in violation of the inter-governmental immunity doctrine” and are therefore invalid exercises of state power.¹⁸¹ In a press release, the DOJ characterized the laws as “illegal attempts to discriminate against and regulate the federal government,” arguing that they “threaten the safety of federal officers who have faced an unprecedented wave of harassment, doxxing, and even violence.”¹⁸² Unsurprisingly, on April 22, 2026, the Ninth Circuit granted the United States an injunction pending appeal preventing California from enforcing § S.B. 805 against federal officers.¹⁸³

Although California was ultimately unsuccessful in its attempts to regulate nonidentification practices, these laws highlighted the growing public concerns over federal law enforcement arresting

177. Nguyễn & Bellisle, *supra* note 171.

178. *Id.*

179. See Fields, *supra* note 174; Homeland Security (@DHSgov), *supra* note 176.

180. See Complaint at 14, United States v. California, No. 25-cv-10999 (C.D. Cal. Nov. 17, 2025). The Supremacy Clause of the United States Constitution states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

181. Complaint at 13, United States v. California, No. 25-cv-10999 (C.D. Cal. Nov. 17, 2025).

182. Press Release, DOJ Off. of Public Affairs, Justice Department Files Complaint Challenging California Mask Ban and Identification Requirements for Federal Officers (Nov. 17, 2025), <https://www.justice.gov/opa/pr/justice-department-files-complaint-challenging-california-mask-ban-and-identification> [<https://perma.cc/HLJ6-JWGT>].

183. United States v. California, 173 F.4th 1060, 1063 (9th Cir. 2026).

people while covering their faces and wearing plain clothes. And this litigation showed what many could have guessed: There is practically no policing how this federal deportation scheme is being carried out from a state or local legal perspective. Those most directly involved in ensuring the well-being of their communities have few options for preventing the way this scheme is being performed, and the public witnessed the futility of one such attempt. To sufficiently protect the rights of communities vulnerable to the inherent violence that comes along with this deportation scheme, there must be a top-down approach to easing barriers to individuals' ability to sue such officers while simultaneously preventing behaviors that seek to avoid such accountability.

IV. CONGRESS SHOULD REGULATE NONIDENTIFICATION PRACTICES AND FILL THE ACCOUNTABILITY GAP

Congress should follow in California's footsteps by passing legislation modeled after S.B. 627 and S.B. 805 and applying the requirements set forth in the California laws to all federal law enforcement officers. Although there is currently a bill titled the Visible Identification Standards for Immigration-Based Law Enforcement Act of 2025 (VISIBLE Act) pending in Congress,¹⁸⁴ this Act is limited in scope. The VISIBLE Act would apply only to immigration law enforcement officers such as ICE, CBP, and other agents who are "authorized, deputized, or designated under Federal law, regulation, or agreement to perform immigration enforcement functions[.]"¹⁸⁵ While the VISIBLE Act is a step in the right direction and aims to address the immediate concerns raised by Trump's deportation scheme,¹⁸⁶ the Act is ultimately underinclusive in the big picture. Although the recent immigration raids warrant urgent attention, they expose broader structural vulnerabilities that allow the executive branch to take advantage of an insufficient federal remedial scheme in non-immigration-related contexts, too. Those barriers are further exacerbated by nonidentification practices that

184. S. 2212, 119th Cong. (2025).

185. *Id.*

186. *See id.*

restrict plaintiffs in ways not explicitly authorized by the FTCA or the Supreme Court's limitations on *Bivens*.

Accordingly, to counteract not only the immediate harms presented by the Trump administration's deportation scheme, but also to foster long-term protections for future plaintiffs, Congress should pass legislation that requires visible identification and prohibits the donning of face masks by *all* federal officers. Essentially, while the legislative or judicial branches may seek to rebalance public and governmental interests against each other, it is untenable to permit federal agents themselves to create obstacles that prevent existing accountability mechanisms from operating as intended, especially when doing so allows officers to evade both individual liability for constitutional violations and liability against the United States based in tort.

Moreover, to effectuate the benefits that a clear nonidentification prohibition would have on plaintiffs navigating the federal remedial system, Congress should also codify the *Bivens* cause of action and allow plaintiffs to sue individual officers for constitutional violations. By restoring force to the founding principle underlying *Bivens*,¹⁸⁷ this legislation could incentivize constitutional compliance throughout the course of federal law enforcement operations and provide uniformity and predictability rather than leaving enforcement to inconsistent and restrictive judicial applications.

Admittedly, codifying a cause of action is not a simple undertaking. For the sake of brevity, this Note does not explore the full implications of such legislation, but there is a substantial body of academic work and public discourse that argues in favor of codifying *Bivens*.¹⁸⁸ Ultimately, codifying a right of action for individuals to hold government officers accountable for constitutional wrongdoing

187. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (“[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

188. See Rose, *supra* note 74, at 241-42; Amanda Pulido, *Zero to Hero: The Unavailability of Bivens and Why Congress Should Intervene*, 16 FIU L. REV. 807, 824-30 (2022); James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 141-50 (2009); Henry Rose, Essay, *A Federal Legislative Proposal to Address the Demise of the Bivens Remedy*, 49 J. LEGIS. 376, 380-88 (2023); Erwin Chemerinsky & Burt Neuborne, Opinion, *Renee Good's Family Should Be Able to Sue the Officer Who Killed Her*, N.Y. TIMES (Jan. 14, 2026), <https://www.nytimes.com/2026/01/14/opinion/renee-good-civil-rights-constitution.html> [https://perma.cc/LTV3-6DKD].

may restore the sort of deterrence and protection that plaintiffs were once entitled to. Coupled with the nonidentification prohibition, these pieces of legislation can work together to effectively deter unconstitutional conduct with the risk of individual liability and give individuals the chance to receive damages or injunctive relief stemming directly from their injuries.

CONCLUSION

The recent execution of a large-scale federal immigration deportation scheme has exposed a gap between the American promise that individuals have certain constitutional and legal rights they are entitled to have respected, and the reality that the existing remedial structure often fails to deliver that promise. As discussed, the combination of the Supreme Court's severe narrowing of the *Bivens* cause of action, the structural limitations of the FTCA, and the procedural difficulties that have come about as a result of widespread nonidentification practices has produced a system where constitutional and tort violations occur without effective avenues for redress. Under this system, government accountability is paralyzed.

Nonidentification practices have real consequences for those who are brave enough to seek redress. By frustrating a plaintiff's ability to identify their defendants and satisfy procedural requirements, nonidentification practices deepen obstacles imposed by federal immunity doctrines and the judicially restricted availability of recovery. Even when Congress has authorized some waiver of sovereign immunity, and when courts have narrowly preserved constitutional remedies, these practices can functionally render these safeguards moot. The result is a system that permits federal officers to insulate themselves from liability through practices that were never authorized by Congress.

At the same time, the public backlash reflected in state legislative responses such as California's No Secret Police Act and No Vigilantes Act reveal public concern that law enforcement is operating beyond visibility, verification, and consequence.¹⁸⁹ Even though these state efforts fail to survive Supremacy Clause scrutiny, they

189. See Nguyễn & Bellisle, *supra* note 171.

shine a light on the accountability gap that diminishes public confidence in law enforcement.

The solution must come from Congress and address the structural deficiencies laid out above. First, Congress should codify a right of action allowing individuals to seek damages against federal officers for constitutional violations. Second, Congress should impose clear, uniform limitations on face coverings and require visible identification for all federal law enforcement officers, as modeled after the legislation passed in California. These reforms would not eliminate long-standing immunity doctrines which seek to protect officers. Rather, together they would ensure that existing accountability mechanisms operate as intended and that individuals' constitutional rights may be enforced.

Chief Justice Marshall's observation that civil liberty consists of the right to claim the protection of the laws rings no less true today than when those words were written.¹⁹⁰ But that protection can be rendered moot when remedies are illusory and accountability is avoided. If Justice Marshall's idea is to become more than theoretical, Congress must act to close the structural gap that allows federal officers and the United States itself to evade responsibility. Then, the American promise of redress for injury may regain its force and public confidence may be meaningfully restored.

*Grace E. Pullen**

190. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

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