No. 21-1346

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JANE ROE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who drafted and introduced the Judiciary Accountability Act of 2021. *Amici* include the chief architects of the bill and its sponsors, many of whom spearheaded the ongoing congressional investigations into the judicial branch's handling of complaints of workplace harassment, discrimination, and retaliation. Based on these efforts, *amici* understand the pressing need to pass a law that extends the statutory protections against these forms of misconduct to employees of the federal judiciary. At the same time, *amici* also understand and wish to make clear that the need for and introduction of the Judiciary Accountability Act of 2021 has no bearing on the question of whether an implied cause of action to bring claims of sex discrimination in the federal judiciary already exists directly under the Fifth Amendment or any other provision of the Constitution. Accordingly, *amici* have an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal judiciary employs over 30,000 people. Yet none of those individuals are protected by the foundational federal statutes that prohibit workplace discrimination, retaliation, and other forms of misconduct, like Title VII of the Civil

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

Rights Act of 1964. *See* 42 U.S.C. §§ 2000e(b), 2000e-16; 5 U.S.C. §§ 2102, 2103. As this very case illustrates, the systems currently in place for redressing employment discrimination in the judiciary are deeply flawed: Plaintiff-Appellant Jane Roe alleges that she "did everything possible, within the judiciary's existing mechanisms, to seek meaningful, prompt, and effective action on her complaints" of sexual harassment, retaliation, and sex discrimination, yet she was "stonewalled" at every turn and "intimidated from exercising her protected rights" by an institution intent on shielding itself from accountability. J.A. 20-21, ¶¶ 5-6.

Recent congressional oversight makes clear that Roe's experience is far from unique. *See, e.g.*, *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 116th Cong. (Feb. 13, 2020) (statement of Rep. H. Johnson) (explaining that "it would be a mistake to treat" the decades-long pattern of sexual harassment by Judge Alex Kozinski "as an isolated problem" and describing ongoing congressional assessment of "whether the judiciary's efforts to create a safe, respectful, diverse, and inclusive workplace are actually working"); *id.* (testimony of Olivia A. Warren) (describing persistent sexual harassment by Judge Stephen Reinhardt and the shortcomings of judicial branch workplace misconduct protections); Letter from Reps. Nadler, H. Johnson, Sensenbrenner & Scanlon to James C. Duff et al. (Feb. 6,

2020), *available at* judiciary.house.gov/uploadedfiles/02.06.2020_murguia_letter.pdf (explaining that the Tenth Circuit's response to years-long sexual harassment by Judge Carlos Murguia "calls into question the adequacy of the Judiciary's recent steps to better protect its employees from wrongful workplace conduct"); *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (June 13, 2018) (statement of Sen. Feinstein) ("[T]here is in fact a serious problem. . . . I think young women are still intimidated."); *id.* (statement of Sen. Grassley) (demanding "specific details" of the Judicial Conference's plans to "confront and fix these serious problems of sexual harassment and other workplace misconduct in the federal judiciary").

Roe's experience is also reflected in the growing congressional record showing that workplace misconduct in the judicial branch is often accompanied by retaliation or the threat of retaliation. *See, e.g.*, *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 116th Cong. (Feb. 13, 2020) (testimony of Deeva Shah) ("Law clerks from numerous Federal courts shared . . . that they had felt demeaned, belittled, and humiliated during their clerkships," and the "theme that united these experiences was that the law clerks did not feel comfortable reporting,

either because the reporting procedures were unclear, their confidentiality could not be guaranteed, or, because the fear of retaliation was too high."); *id.* (testimony of Chai Feldblum) ("People are unlikely to come forward, and organizations will lose the opportunity to stop bad behavior early if people are not protected from retaliation."); *id.* (testimony of Dahlia Lithwick) ("I think that part of the problem is because we all feel that the machinery will never change, and that all we are doing is harming our own prospects and our own careers by coming forward."); *id.* (letter for the record from Jaime A. Santos) ("One might reasonably ask why I did not file an official complaint. . . . [T]o be candid, I feared retaliation.").

Meanwhile, congressional efforts to address harassment, retaliation, and other forms of discrimination in the judicial branch remain ongoing. *See, e.g.*, *id.* (statement of Rep. H. Johnson) (explaining Congress's ongoing assessment of "whether the judiciary's efforts to create a safe, respectful, diverse, and inclusive workplace are actually working"); Letter from Reps. H. Johnson, Speier & N. Torres to the Hon. Gene Dodaro, Comptroller General of the United States (Nov. 24, 2020), *available at* hankjohnson.house.gov/sites/hankjohnson.house.gov/files/documents/GAO%20Request%2011.24.2020.pdf (asking the Government Accountability Office to "review the judicial branch's current efforts to stop workplace sexual harassment and other forms of workplace discrimination and retaliation").

As part of these efforts, the Judiciary Accountability Act of 2021 was introduced in both the House of Representatives and the Senate last month to "fill[] the void left by the judiciary's inaction" "[i]n the face of . . . egregious misconduct." 167 Cong. Rec. S5180 (daily ed. July 29, 2021) (statement of Sen. Hirono); *see* Judiciary Accountability Act of 2021, H.R. 4827, 117th Cong. (2021); Judiciary Accountability Act of 2021, S. 2553, 117th Cong. (2021) (collectively, "Judiciary Accountability Act"). Drawing on Representative Speier's Congressional Accountability Act of 1995 Reform Act, which overhauled the process for resolving workplace discrimination and harassment claims in Congress, the Judiciary Accountability Act would "ensure that every employee that comes forward after being a victim of sexual harassment has statutory protections and anti-discrimination rights." Press Release, H. Comm. on the Judiciary, *Nadler & Johnson Introduce Bipartisan, Bicameral Legislation to Hold Judiciary Accountable to Workers* (July 29, 2021), *available at* judiciary.house.gov/news/documentsingle.aspx?DocumentID=4685 (statement of Rep. N. Torres); *see also id.* (statement of Rep. Mace) ("Our third branch of government, the Judiciary, charged with enforcing our laws, must abide by the same workplace standards as the rest of government."); *id.* (statement of Sen. Whitehouse) ("All federal judicial branch employees deserve to feel safe at work, which is why we need to strengthen protections against sexual harassment and workplace misconduct.").

Among other things, the bill would extend to judicial branch employees the application of federal civil rights statutes that prohibit discrimination based on race, color, religion, sex, national origin, age, and disability, *see* Judiciary Accountability Act § 2; create a federal statutory protection for whistleblowers in the judiciary, *id.* § 3; and establish offices with the authority to investigate workplace misconduct complaints in the federal judiciary, *id.* §§ 4-7. This bill, if passed, would ensure strong statutory rights and remedies for judicial branch employees.

Importantly, however, this bill has no bearing on the question of whether Roe can bring free-standing constitutional claims for equitable relief against the federal defendants sued here in their official capacities. It also has no bearing on one of the key issues presented in this case: whether an implied cause of action to seek damages for sex discrimination in the federal judiciary already exists under the Fifth Amendment pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and its progeny.[2] As the Supreme Court has made clear, that inquiry must focus on whether Roe's claim "arises in a 'new context' or involves a 'new category of defendants,'" *Hernández v. Mesa*, 140 S. Ct. 735, 743 (2020) (quoting

[2] Because the district court held that the workplace discrimination Roe described in her complaint failed to state a cognizable constitutional claim, it declined to determine whether Roe had a cause of action to seek damages to remedy that misconduct. *See* J.A. 1512. Should this Court reverse on the former issue, it might be appropriate to remand to the district court to consider the *Bivens* question in the first instance. *See* Appellant's Br. 49-50. However, *amici* offer this brief to assist this Court should it decide to address the *Bivens* question itself.

Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)), which in turn requires an analysis of whether the instant case is "different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017). An unenacted statute proposed years after *Bivens* and the relevant cases extending *Bivens* were decided simply has no place in that analysis.

Moreover, while Congress can "pre-empt a *Bivens* remedy" with a new statute that "it explicitly declare[s] to be a substitute for recovery directly under the Constitution and view[s] as equally effective," *Carlson v. Green*, 446 U.S. 14, 18-19 (1980), the Judiciary Accountability Act of 2021, if passed, would do precisely the opposite: it expressly does not "abolish, diminish, or infringe upon any right or remedy provided by the Constitution of the United States or any other law," Judiciary Accountability Act § 9(1), nor does it "relieve any person or Government agency from liability under the Constitution of the United States or any other law," *id.* § 9(2). That plain text is enough to settle the matter: any new remedies for judicial misconduct created by the Judiciary Accountability Act would supplement and not preempt any preexisting remedies available directly under the Constitution.

In light of these well-established principles, this Court should not construe the Judiciary Accountability Act of 2021 as bearing on the question of whether Roe has a cause of action directly under the Fifth Amendment for sex discrimination in the

federal judiciary. And to the extent that such a cause of action exists, the Act, if passed, plainly would not preempt it.

ARGUMENT

I. The Judiciary Accountability Act of 2021 Has No Bearing on the Question of Whether a Judicial Branch Employee Has a Previously Recognized Cause of Action Directly Under the Fifth Amendment for Sex Discrimination in the Federal Judiciary.

Plaintiff-Appellant Jane Roe brings her constitutional claims for damages pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). *See* Compl. ¶ 11. In *Bivens*, reasoning that "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," 403 U.S. at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)), the Supreme Court held that a victim of an unlawful arrest and search could file a Fourth Amendment claim for damages against the responsible agents even in the absence of a federal statute authorizing such a claim, *id.* at 397-98. Since then, the Court has extended *Bivens* on two occasions: once to recognize an implied cause of action for a congressional staffer's Fifth Amendment claim for unlawful termination on the basis of sex, *see Davis v. Passman*, 442 U.S. 228 (1979),

and again for a federal prisoner's Eighth Amendment claim for failure to provide necessary medical treatment, *see Carlson*, 446 U.S. 14.[3]

In subsequent cases, the Court has made clear that whether a plaintiff can bring a claim under *Bivens* depends in part on whether the plaintiff has a previously recognized cause of action. In other words, the initial inquiry conducted by a court presented with a *Bivens* claim is whether that claim "arises in a 'new context' or involves a 'new category of defendants.'" *Hernández*, 140 S. Ct. at 743 (quoting *Malesko*, 534 U.S. at 68).[4] "The proper test for determining whether a case presents a new *Bivens* context" involves a fact-intensive analysis of whether "the case is different in a meaningful way from previous *Bivens* cases decided by this Court." *Abbasi*, 137 S. Ct. at 1859. "A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; . . . the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches," and so on and so forth. *Id.* at 1860; *see id.* at 1859-

[3] In *Davis*, the Court made clear that Title VII did not "foreclose alternative remedies available to those not covered by the statute," a category which at the time included both congressional and judicial branch employees. 442 U.S. at 247.

[4] If a court finds that the claim does arise in a new context, a *Bivens* cause of action may still be available, but only if there are no "'special factors [that] counse[l] hesitation' about granting the extension" to a new context. *Hernández*, 140 S. Ct. at 743 (alterations in original) (quoting *Abbasi*, 137 S. Ct. at 1857).

60 (clarifying that the Court did not endeavor to create an "exhaustive list").

The Judiciary Accountability Act of 2021 has no bearing on that analysis. Nothing in the test the Supreme Court has laid out suggests that pending congressional legislation is relevant to the inquiry in any way. And so far as *amici* are aware, the Court has never considered such legislation in determining whether to recognize a *Bivens* remedy. In fact, in *Davis v. Passman*, the Court recognized that congressional staff have a Fifth Amendment right to seek damages for sex discrimination, *see Davis*, 442 U.S. at 234, despite the respondent's argument that pending legislation would render such a cause of action unnecessary, *see* Br. of the Hon. Morris Udall et al. as *Amici Curiae* in Support of Reversal, *Davis v. Passman*, 442 U.S. 228 (1979) (No. 78-5072), 1978 WL 207325, at *4-5 & n.1 (describing the respondent's argument). Thus, the introduction of the Judiciary Accountability Act of 2021 provides no basis to conclude that this case is "different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Abbasi*, 137 S. Ct. at 1859.

II. The Judiciary Accountability Act of 2021, If Passed, Would Preserve Any Remedies that Judicial Branch Employees Have Directly Under the Fifth Amendment.

While a bill that has not yet been passed into law can have no bearing on the question of whether a *Bivens* remedy exists, a statute *can* "pre-empt a *Bivens* remedy" if Congress "explicitly declare[s] [the new remedy] to be a *substitute* for

recovery directly under the Constitution and view[s] [it] as equally effective." *Carlson*, 446 U.S. at 18-19 (emphasis in original). The plain text of the Judiciary Accountability Act makes clear that the bill would have no preclusive effect on any constitutional remedy that Roe may possess.

In analyzing whether Congress "intends [a] statutory remedy to replace [any] . . . *Bivens* remedy," *id.* at 19 n.5, courts begin with the text of the relevant statute. For example, in *Hui v. Castaneda*, 559 U.S. 799 (2010), the Supreme Court examined the text of 42 U.S.C. § 233(a) to assess whether that law precluded a *Bivens* action against U.S. Public Health Service personnel for constitutional violations arising out of their official duties. *Hui*, 559 U.S. at 805. The law stated that a claim under the Federal Tort Claims Act (FTCA) for damages against the United States "shall be *exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee* (or his estate) whose act or omission gave rise to the claim." *Id.* (quoting 42 U.S.C. § 233(a)). Based on this plain text, the Court held that § 233(a) barred a suit against Public Health Service officers and employees "for actions arising out of the performance of medical or related functions within the scope of their employment" because, "[b]y its terms, § 233(a) limits recovery for such conduct to suits against the United States." *Id.* at 806.

In *Carlson*, where the defendants similarly argued that the FTCA barred damages suits directly under the Eighth Amendment for federal officers' failure to provide adequate medical care in a prison setting, the Court looked to the text of the FTCA and its amendments (which post-dated *Bivens*) and found no textual evidence "that Congress meant to pre-empt a *Bivens* remedy." *Carlson*, 446 U.S. at 19. In the absence of textual evidence of preemption, the Court considered the history of the FTCA's amendments, particularly one that created a cause of action against the United States for intentional torts committed by federal law enforcement officers. *Id.* at 19-20 (citing 28 U.S.C. § 2680(h)). The Court concluded that "the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson*, 446 U.S. at 19-20; *see id.* at 20 (citing the statement in the Senate Report accompanying 28 U.S.C. § 2680(h), S. Rep. No. 93-588, at 3 (1973), that "this provision should be viewed as a *counterpart* to the *Bivens* case and its [progeny], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*" (alteration and emphasis in original)).

Here, analysis of whether the Judiciary Accountability Act of 2021 preempts any constitutional cause of action for sex discrimination in the judiciary can "begin[] and end[] with the text." *Hui*, 559 U.S. at 805; *see Bostock v. Clayton County*, 140

S. Ct. 1731, 1749 (2020) ("[W]hen the meaning of the statute's terms is plain, our job is at an end."). Not only does the Judiciary Accountability Act of 2021 lack any statement that it intends to preclude other causes of action under the Constitution, it contains an explicit statement that it is *not* designed to have that effect. Specifically, Section 9 of the bill states that it does not "abolish, diminish, or infringe upon any right or remedy provided by the Constitution of the United States or any other law," Judiciary Accountability Act § 9(1), nor does it "relieve any person or Government agency from liability under the Constitution of the United States or any other law," *id.* § 9(2).

That text could not be clearer: the proposed law does not restrict or preclude any preexisting constitutional right or remedy.

CONCLUSION

For the foregoing reasons, this Court should not construe the Judiciary Accountability Act as bearing on the question of whether a cause of action exists directly under the Fifth Amendment for sex discrimination in the federal judiciary.

Respectfully submitted,

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Dated: August 27, 2021

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Senator of Hawaii

Blumenthal, Richard
Senator of Connecticut

Whitehouse, Sheldon
Senator of Rhode Island

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Johnson, Jr., Henry C. "Hank"
Representative of Georgia

Nadler, Jerrold
Representative of New York

Speier, Jackie
Representative of California

Torres, Norma J.
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 3,128 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amici curiae* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word size 14-point Times New Roman font.

Executed this 27th day of August, 2021.

/s/ Miriam Becker-Cohen
Miriam Becker-Cohen

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on August 27, 2021.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 27th day of August, 2021.

/s/ Miriam Becker-Cohen
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