No. 21-147

IN THE
# Supreme Court of the United States

ERIK EGBERT,

*Petitioner*,

v.

ROBERT BOULE,

*Respondent*.

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## BRIEF OF THE DKT LIBERTY PROJECT, LAW ENFORCEMENT ACTION PARTNERSHIP, AND RETIRED CBP OFFICER JAMES WONG AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT


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## QUESTIONS PRESENTED

1. Whether a damages claim lies under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), when a rogue federal law enforcement officer triggers multiple unfounded investigations against a U.S. citizen as retaliation for the citizen's truthful reporting of the officer's misconduct.

2. Whether a damages claim lies under *Bivens* when a rogue federal law enforcement officer enters a U.S. citizen's private property within the United States without a warrant, conducts an unauthorized search, and assaults the citizen on his property.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

### Cases



### Statutes

**TABLES OF AUTHORITIES** *(continued)*

**Page(s)**

**Other Authorities**

**TABLES OF AUTHORITIES** *(continued)*

**Page(s)**

**TABLES OF AUTHORITIES** *(continued)*

**Page(s)**

**TABLES OF AUTHORITIES** *(continued)*

**Page(s)**

**TABLES OF AUTHORITIES** *(continued)*

**Page(s)**

**TABLES OF AUTHORITIES** *(continued)*

**Page(s)**

**TABLES OF AUTHORITIES** *(continued)*

**Page(s)**

## INTEREST OF *AMICI CURIAE*[1]

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The not-for-profit Liberty Project advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties that threaten the reservation of power to the citizenry that underlies our constitutional system.

The Law Enforcement Action Partnership (LEAP) is a nonprofit composed of police, prosecutors, judges, corrections officials, and other criminal-justice professionals who seek to improve public safety, promote alternatives to arrest and incarceration, address the root causes of crime, and heal police–community relations through sensible changes to our criminal-justice system.

James Wong is a retired Customs and Border Protection officer who served more than thirty years in state and federal law enforcement. When he retired, he served as the Deputy Assistant Commissioner assigned to the Office of Internal Affairs. That Office had responsibility for, among other things, internal criminal and serious misconduct investigations.

*Amici* share a steadfast belief that the Fourth Amendment's prohibition against unreasonable searches and seizures lies at the heart of American freedom, and that the rigorous enforcement of this

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part and no one other than the *amici* and their counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

prohibition—including through actions brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)—is imperative to preserving our system of limited government.

## INTRODUCTION AND SUMMARY OF ARGUMENT

When this Court first authorized citizens to bring damages actions against federal officers 50 years ago in *Bivens*, it recognized that earlier judge-made rules designed to constrain Fourth Amendment violations (namely, the exclusionary rule) had proven woefully inadequate to the task. In response, the Court built upon a common law tradition predating the Founding that authorized private parties to sue government officials who infringe their rights.

Four years ago, this Court reaffirmed "the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017). *Bivens*, the Court explained, "vindicate[s] the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward." *Id.* at 1856–57.

*Amici* agree. *Bivens* has proven a powerful tool for policing the Fourth Amendment's bounds on federal power "in this common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1857. Recent evidence shows that *Bivens* actions are much more likely to be meritorious than previously thought (especially compared to other forms of civil rights litigation), while courts have proven more than capable of screening unmeritorious claims at little or no cost to federal defendants or the judicial system. And the benefits of

*Bivens* actions redound not only to the individuals whose Fourth Amendment rights are vindicated, but to society at large. *Bivens* actions serve a wide array of systemic interests, from exposing individual misconduct and institutional deficiencies in government agencies to incentivizing policymakers to adopt reforms to prevent future abuses.

Drawing an unprincipled distinction from *Bivens* in the search-and-seizure context for officers purportedly engaged in "immigration-related" functions would be especially ill advised at the present time. Public trust in law enforcement is at a historic low, straining the relationship between officers and the communities they serve and reducing citizens' willingness to cooperate with law enforcement. *Bivens* is an important tool for repairing this relationship, providing a vehicle through which accusations of federal misconduct may be heard and redressed in an open and neutral forum. Denying aggrieved individuals a day in court and sweeping their allegations under the rug will only exacerbate public distrust in law enforcement, to the detriment of public officials and the communities who depend on them alike.

There is no reason to believe that *Bivens* will unduly impede federal officers' ability to do their jobs. Even where *Bivens* is available, qualified immunity shields federal officers from personal liability unless they violate clearly established law, just as it does for state officers in actions brought under 42 U.S.C. § 1983. In fact, abandoning *Bivens* will serve only to provide federal officers with an additional layer of immunity not available to state officials, inverting the original understanding of the Constitution as a check primarily on *federal* power.

*Bivens* must apply to this case, which mirrors the facts of *Bivens* itself: A federal law enforcement officer entered a U.S. citizen's private property within the United States without a warrant, conducted an unauthorized search, and assaulted the citizen on his property. Petitioner urges this Court to hold that *Bivens* does not apply merely because Petitioner exercised "immigration-related" functions. But the carveout Petitioner urges this Court to adopt would prove entirely unworkable, particularly in light of ever-increasing exercise by the U.S. Customs and Border Protection of general law enforcement authority.

This Court should affirm the Ninth Circuit and reaffirm the continuing importance of *Bivens* in our constitutional framework, particularly in cases, as here, that arise in the precise context in which *Bivens* originated.

## ARGUMENT

### I. *BIVENS* IS AN EFFECTIVE TOOL FOR PROTECTING FOURTH AMENDMENT RIGHTS.

Fifty years into the *Bivens* era, the evidence is unequivocal: The private right of action for Fourth Amendment violations authorized by that decision has proven one of the most effective mechanisms for policing and preventing government misconduct. Although this Court has been reluctant to extend *Bivens* to entirely new contexts, *Bivens* remains a powerful tool in the "common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1857. It should not be unduly constrained by refusing to apply *Bivens* within that sphere, as Petitioner urges this Court to do.

Empirical analysis demonstrates that *Bivens* has provided an important pathway for private citizens to obtain redress for the violation of their right against unreasonable searches and seizures by federal officials. A recent survey of five federal district courts across the country found that 38.9 percent of counseled *Bivens* actions—and 9.5 percent of pro se *Bivens* actions—resulted in a victory for plaintiffs. Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 839 (2010). And notably, *Bivens* actions alleging Fourth Amendment violations (like the one here) were by far the most likely to succeed, with an overall success rate of 28.9 percent, compared to 15.3 percent for prison-condition claims and 11.8 percent for other claims. *Id.* at 836 n.138.

To be sure, courts do occasionally confront meritless *Bivens* actions, just as they occasionally confront meritless actions of all types. But they have proven adept at identifying and screening such actions when they arise. For example, the same multidistrict survey cited above found that "almost 20% of the *Bivens* claims identified . . . were dismissed sua sponte because the district court screened them for frivolity and determined that they should be dismissed out of hand," thereby avoiding the "burdens of *Bivens* litigation about which courts and commentators express concern—no defendant is subject to intrusive discovery or the potential of liability, and no attorney even has to review the complaint and prepare an answer or motion to dismiss." Reinert, 62 STAN. L. REV. at 840.

As one commentator has observed, these findings "persuasively refute[]" the prior "assumption that *Bivens* claims typically lack merit" and "threaten[] to

overwhelm the federal judiciary." James E. Pfander, Iqbal*,* Bivens*, and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN ST. L. REV. 1387, 1407 (2010). Many plaintiffs who assert Fourth Amendment claims under *Bivens* have in fact had their constitutional rights infringed by federal officials, and those who have not are unlikely to advance beyond the very earliest stages of litigation. Truncating *Bivens*, as Petitioner would have this Court do, will leave those Americans who have suffered a violation of their most fundamental rights in the "immigration-related" context without a remedy, while gaining next to nothing in terms of easing federal dockets.

But *Bivens* actions are not limited to remedying the violation of individual citizens' rights. Rather, one of the most important effects of such constitutional tort litigation has been to incentivize government agencies to adopt institutional reforms to ensure that constitutional constraints are not violated in the first place. It has done so through its "informational" and "fault-fixing" functions. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 858–65 (2001).

With respect to its informational function, *Bivens* actions can bring to light individual and systemic abuses that might otherwise go unnoticed by policymakers. "When constitutional tort victims pursue litigation, motivated by the availability of compensatory damages, valuable information is unearthed and exposed." Gilles, 35 GA. L. REV. at 859. This litigation can encourage other victims of government misconduct to come forward, exposing patterns of abuse. And the crucible of discovery can fix attention on problem

actors and institutional deficiencies within law enforcement agencies.

Studies confirm that constitutional tort litigation has notified "officials of misconduct allegations that did not surface through . . . other reporting systems," such as civilian complaints and use-of-force reports. Joanna C. Schwartz, *What Police Learn From Lawsuits*, 33 CARDOZO L. REV. 841, 845 (2012) (noting that "lawsuits have filled critical gaps in police department internal reporting systems"). For example, the Los Angeles Sheriff's Department's periodic review of suits brought against its officers revealed "clusters of improper vehicle pursuits, illegal searches, and warrantless home entries" for which no civilian complaint existed, and which "did not appear in officers' use-of-force reports." *Id.* Once the Department's auditor identified the trend, he was able to recommend policy changes to prevent additional violations going forward. *Id.* at 854.

In fact, a growing number of law enforcement agencies have begun to "mine lawsuits for data about misconduct allegations and the details of those allegations." Schwartz, 33 CARDOZO L. REV. at 846–47. The results of these efforts have often surprised policymakers and driven targeted reforms. *See*, *e.g.*, *id.* at 853–54 (Director of Los Angeles Sheriff's Department's risk management bureau: "There's times when [we] think[] it's a single incident" and "couldn't see [a] problem but by having it centralized in our operation we were able to say 'we're seeing a pattern here, a problem across all the units.'"). That sort of mining helped Portland's tort review board identify a spike in excessive force claims involving blows to the head. *Id.*

at 854. After further review "revealed that the allegations were primarily made regarding officers on the night shift at one Portland police station," the board implemented "retraining and closer supervision," after which "allegations of head strikes in that station declined." *Id.*

*Bivens* actions can also provide critical information to the public. "Even when a civilian complaint or use-of-force report is filed," studies have shown that "the litigation process can unearth details that did not surface during the internal investigation." Schwartz, 33 CARDOZO L. REV. at 845. For example, litigation revealed serious flaws in an internal investigation conducted after James Chasse died of blunt-force trauma following a use-of-force incident involving two Portland police officers. *Id.* at 873. In particular, discovery revealed that the police department's internal affairs personnel had failed to interview all of the officers on the scene or the nurses who observed Chasse at the jail shortly thereafter, "and did little to investigate allegations that officers had been laughing and joking at the scene." *Id.* (internal quotation marks omitted). Most glaringly, the investigation made no attempt to improve the audio quality of a critical recording made the night of the incident in which the officers described and reenacted their confrontation with Chasse. *Id.* During litigation, plaintiff's counsel improved the audio, "at which point it became clear that the officer said he 'tackled' Chasse, contradicting his [subsequent] statement to internal affairs." *Id.*

With respect to its "fault-fixing" function, *Bivens* actions can encourage policymakers to proactively protect constitutional rights in two ways. First, "the damages a plaintiff recovers contribute[] significantly

to the deterrence of civil rights violations in the future" by forcing government actors to internalize the costs of misconduct. *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986). Federal agencies like CBP naturally wish "to minimize the amount of their budget that is lost to paying damages," and *Bivens* actions "give[] [these agencies] a greater incentive to monitor, supervise, and control the acts of their employees" to ensure that they are hewing to constitutional strictures. Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 796 (1999); *see also* John C. Jeffries, Jr., *The Liability Rule For Constitutional Torts*, 99 VA. L. REV. 207, 240 (2013) ("[D]amages for constitutional violations . . . heighten the disincentives for governments to engage in conduct that might result in constitutional violations.").

Second, *Bivens* actions (and the information they uncover) "can trigger bad publicity" that puts pressure on policymakers to prevent constitutional violations. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1681 (2003). Indeed, "even for an agency that doesn't care about payouts (perhaps because those payouts come from some general fund rather than the agency's own budget), media coverage of abuses or administrative failures can trigger embarrassing political inquiry and even firings, resignations, or election losses." *Id.*; *see also* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1151 (2016) (noting that *Bivens* actions can put critical "nonfinancial pressures" on policymakers "by generating publicity about allega-

tions of misconduct and by revealing previously unknown information about the details of that misconduct").

The fault-fixing function played by constitutional torts like *Bivens* has been on heightened display in recent years. Responding to nearly half-a-billion dollars in payouts for police misconduct, the City of Chicago has been "working to break that expensive pattern and concentrating on implementing police reforms" by "look[ing] at the deep seated issues within the department to start rooting out those problems." Cheryl Corley, *Police Settlements: How the Cost of Misconduct Impacts Cities and Taxpayers*, NPR (Sept. 19, 2020), https://tinyurl.com/2enbq5dl. And faced with increasing costs under municipal liability policies, "city insurers have demonstrated surprising success in 'policing the police,' eliminating risky protocols, ousting police chiefs and even closing problematic departments altogether." Kit Ramgopal & Brenda Breslauer, *The Hidden Hand That Uses Money to Reform Troubled Police Departments*, NBC NEWS (July 19, 2020), https://tinyurl.com/39scutxe; *see also* Rachel B. Doyle, *How Insurance Companies Can Force Bad Cops Off the Job*, THE ATLANTIC (June 10, 2017), https://tinyurl.com/10b93ra7 (describing how "liability insurers can put a private-sector spin on reform, by demanding structural changes in the police departments that they cover"); Martin Kaste, *When It Comes to Police Reform, Insurance Companies May Play a Role*, NPR (Apr. 1, 2016), https://tinyurl.com/szz6qgri (reviewing how insurers have encouraged reforms in police departments, including by distributing pamphlets on how to perform a strip search, meeting with police

chiefs following use-of-force incidents, and paying for special training for police departments).

The individual and systemic benefits engendered by *Bivens* have come at a surprisingly low cost. *Bivens* cases make up an exceedingly small fraction of federal courts' dockets. "As a percentage of total civil filings involving federal questions, *Bivens* suits filed between 2001 and 2003 ranged anywhere from 0.7% to 2.5% of the work of" surveyed district courts, "and 1.2% of the total federal question filings." Reinert, 62 STAN. L. REV. at 835. Expanding the pool to include all civil actions filed in federal court, *Bivens* actions comprise less than 0.17 percent of cases. *Id.* at 837 (finding 243 *Bivens* filings out of 143,092 total civil filings in the districts surveyed). And, as noted above, many of these cases are quickly disposed of through preliminary screening.

Unlike "one size fits all" mechanisms for policing government misconduct, *Bivens* leaves policymakers free to adopt the reforms that they deem best suited to the context in which they operate. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991) ("[A] damages award does not require discontinuation of such practices, [but] it exerts significant pressure on government and its officials to respect constitutional bounds."). This not only facilitates institutional buy-in within government agencies, but also encourages experimentation and adaptation.

Put simply, *Bivens* has proven to serve critical functions in not only righting individual wrongs, but incentivizing systemic reforms to the benefit of both

law enforcement and those they are tasked with protecting and serving. This Court should not deprive individual plaintiffs of a remedy or remove those incentives merely because a federal officer is purportedly engaged in "immigration-related" functions.

## II. *BIVENS* IS AN ESPECIALLY IMPORTANT TOOL AT THIS MOMENT.

It is no secret that the relationship between law enforcement agencies of all stripes and the communities they police has become strained in recent years. Unchecked abuses, as well as high-profile incidents involving the excessive use of force (especially against members of marginalized communities), have caused public trust in law enforcement generally—and CBP officers in particular—to plummet. This distrust harms not only law enforcement personnel, who find it increasingly difficult to safely and effectively do their jobs, but also the public, who depend on transparent and accountable law enforcement to keep their communities safe. In this environment, it is more important than ever that individuals have a neutral forum in which their complaints involving official misconduct can be heard and redressed.

As to CBP officers specifically, recent data has revealed a troubling lack of accountability when it comes to constitutional abuses. *Compare No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse* 1, American Immigration Council (May 2014), https://tinyurl.com/2p9ycp28 (data shows a "lack of accountability and transparency which afflicts the U.S. Border Patrol and its parent agency, U.S. Customs and Border Protection" for complaints including "physical, sexual, and verbal abuse,"

including that, "among those cases in which a formal decision" on a complaint "was issued, *97 percent* resulted in 'No Action Taken'" (emphasis added)), *with Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered* 1, American Immigration Council (August 2017), https://tinyurl.com/yw6hc8u4 (allegations of excessive force "occur with regularity, but they rarely result in any serious disciplinary action").

Unsurprisingly, these abuses have led to "a general lack of trust in the Border Patrol agency" among Americans, "which includes: lack of trust that Border Patrol officials will protect the rights and civil liberties of all people; lack of trust that Border Patrol officials will keep border residents safe; and lack of trust that Border Patrol officials who abuse their authority will be held accountable for their abuses." *Public Opinion About the Border, at the Border* 2–4, US Immigration Policy Center (Nov. 6, 2019), https://tinyurl.com/3hy2dtt7 (detailing results of scientific polling of thousands of voters across four southwestern border states).

As to law enforcement more broadly, decades of "[s]tudies have shown that police officers use force against racial minorities at disproportionately high rates, and there is reason to believe much of this force is unjustified." Elias R. Feldman, *Strict Tort Liability for Police Misconduct*, 53 COLUM. J. L. & SOC. PROBS. 89, 90 & n.5, 98–106 (2019). Indeed, "[m]assive racial disparities exist in rates of police traffic stops, stop and frisks, citations, and narcotic search warrants." Brandon Hasbrouck, *Abolishing Racist Policing With the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1115–16 (2020).

For example, police "[o]fficers are almost *three times* more likely to search Black and Latinx drivers than White drivers," even while "data show[s] that officers are *more* likely to find weapons and contraband on White people." *New Era of Public Safety: An Advocacy Toolkit for Fair, Safe, and Effective Community Policing* 14, 41, The Leadership Conference on Civil and Human Rights (2019), https://tinyurl.com/4ja3baax (emphasis added). Likewise, "Black people are three times more likely to be killed by officers than White people." *Id.* at 14; *see also id.* at 44 (noting that police are also "more likely to use force, including lethal force, against Black, Latinx, Indigenous, and Asian people than against White people"). In fact, "between 2010 and 2012, Black men aged 15–19 were *21* times more likely to be killed by officers than their White male counterparts." *Id.* at 14 (emphasis added). Moreover, Black people "are killed by police at a rate nearly ten percentage points higher than the rate at which they commit violent crimes"—and they are killed "even more disproportionately among victims who are unarmed, as well as among victims killed during generally innocuous types of police interactions, such as traffic or pedestrian stops." Feldman, 53 COLUM. J. L. & SOC. PROBS. at 99–100 & n.40.

These abuses have led to widespread distrust of law enforcement. One poll conducted in 2020 found that "only 19 percent of Black adults" reported that "they were confident in the police." Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, NY TIMES (Aug. 12, 2020), https://tinyurl.com/dh00vlnt. And while this distrust is most pronounced among minorities, the downward trend in

2020 was consistent across demographics. In fact, by the summer of 2020, "confidence in the police had fallen . . . to 48 percent," marking "the 'first time in the 27-year trend that this reading [wa]s below the majority.'" *Id.* While trust in law enforcement rebounded somewhat in 2021—to 51 percent—"the latest three-point uptick is not statistically significant, the measure remains shy of its 2019 level[,]" and trust is well below levels seen in the 1990s and 2000s. Megan Brenan, *Americans' Confidence in Major U.S. Institutions Dips*, GALLUP (July 14, 2021), https://tinyurl.com/27pxd8j9.

The low trust in law enforcement has profound consequences for government officials and the public alike. It is widely acknowledged that "community trust in the police is an important contributor to effective crime control." Jocelyn Fontaine et al., *Mistrust and Ambivalence Between Residents and the Police: Evidence From Four Chicago Neighborhoods* 1, URBAN INSTITUTE (Aug. 2017), https://tinyurl.com/1xpfnii9; *see also New Era of Public Safety: A Guide to Fair, Safe, and Effective Community Policing* 10, The Leadership Conference on Civil and Human Rights (2019), https://tinyurl.com/5dbqrewp ("[W]hen communities and police departments trust each other and interact positively, public safety improves because people are more likely to cooperate with police to address problems."). In particular, as the Department of Justice has recognized, "[p]olice officials rely on the cooperation of community members to provide information about crime in their neighborhoods, and to work with the police to devise solutions to crime and disorder

problems." *Importance of Police-Community Relationships and Resources for Further Reading* 1, Department of Justice, https://tinyurl.com/1rg21btx.

As community trust erodes, however, citizens become increasingly reluctant to cooperate with law enforcement. As one recent study found, "[c]rime victims' perceptions that they will be treated unfairly or not taken seriously by the police reduce the probability of them reporting offenses to law enforcement by 11 percent." J. Gabriel Ware, *Crime Victims Don't Report if They Don't Trust Cops: Study*, THE CRIME REPORT (Dec. 13, 2018), https://tinyurl.com/yq3clz8m. And a case study of crime reporting in the wake of a particularly brutal beating of a Black man by police in Milwaukee "found that after news of [the] beating broke . . . there was a nearly 20% drop in 911 calls reporting crimes to the Milwaukee police, driven by a much steeper decline in calls reporting violent crimes from the city's black community." *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence* 37, Giffords Law Center (Jan. 2020), https://tinyurl.com/7yhf42y6. "In total, researchers estimated that Milwaukee's residents placed at least 22,000 fewer 911 calls reporting crimes to the police in the year after they learned about the beating," with the "majority of these 22,000 'missing' 911 calls . . . from neighborhoods where at least 65% of the population was black." *Id.*

*Bivens* is critical to preventing further erosion of the public's trust in American law enforcement institutions generally and in CBP specifically. The informational function such actions serve can help to cure misperceptions about law enforcement misconduct by providing a neutral, public forum in which allegations

of abuse can be heard and their merits decided. *See Public Trust and Law Enforcement—A Discussion for Policymakers* 8, Congressional Research Service (July 13, 2020), https://tinyurl.com/3rm3mfpy ("It may be that the lack of reliable data on how often police use force and who is the subject of the use of force fuels the public's mistrust of the police."). And even when those actions uncover gross abuses, *Bivens* will provide redress to victims, signal that wrongdoers will be held to account, and encourage reforms. *See* Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 975 (2015) ("Tort is an important procedural mechanism for deliberative democratic accountability and governmental legitimacy as well as a catalyst for institutional reform."). The role that *Bivens* can play at this critical juncture cannot be overstated. *See New Era of Public Safety: A Guide to Fair, Safe, and Effective Community Policing* at 190 (noting that accountability "sends a message to communities that unjust and unconstitutional conduct is not tolerated and will receive swift discipline[,] builds public trust[,] and, in turn, strengthens the legitimacy of police departments and the criminal justice system at large").

Neutering *Bivens*, on the other hand, will only make matters worse. Denied their day in court, those who feel aggrieved by government misconduct will increasingly take to the streets to make their voices heard. And the law enforcement members who act with integrity to protect the communities they serve will be less able to distinguish themselves from bad actors and thus find themselves under a growing cloud of suspicion.

There is no discernible reason to invite such a response. For nearly half a century, *Bivens* has proven not only workable, but effective in policing constitutional bounds on government conduct. Refusing to apply it now, in the "immigration-related" context, would disserve the public, federal law enforcement, and the settled law of the land.

## III. *BIVENS* DOES NOT POSE AN UNDUE THREAT TO FEDERAL LAW ENFORCEMENT.

This Court's decisions refusing to extend *Bivens* have expressed an understandable concern that the risk of personal liability might hamper federal officers in the discharge of their duties. *See*, *e.g.*, *Abbasi*, 137 S. Ct. at 1861 ("The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions[.]"); *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) ("[T]he risk of undermining border security provides reason to hesitate before extending *Bivens* into this field."); *cf.* Br. of National ICE Council as *Amicus Curiae* 12 ("[A]gents of the Border Patrol and ICE will now undertake their daily duties with the knowledge that one wrong action could lead to years of financially ruinous litigation[.]"). But this concern is overstated and pales in comparison to the benefits *Bivens* provides.

There is no evidence to support the assumption that the possibility of *Bivens* liability plays a role in federal law enforcement officers' day-to-day work. This is unsurprising, as these officers tend to enjoy broad indemnification from their federal employer. As one recent study found, "of the 171 successful cases in our dataset asserting *Bivens* claims, we found only eight in which the individual officer or an insurer was

required to make a compensating payment to the claimant." James E. Pfander et al., *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 566 (2020). Instead, "the federal government effectively held its officers harmless in over 95% of the successful cases brought against them, and paid well over 99% of the compensation received by plaintiffs in these cases." *Id.*

And of course, there is no need to speculate as to the effect a meaningful *Bivens* remedy would have on federal law enforcement. A remedy far more robust than *Bivens* already exists against *state* officers who infringe citizens' constitutional rights. *See* 42 U.S.C. § 1983. Far from preventing these officers from faithfully discharging their duties, this remedy has, if anything, proven too indulgent of state law enforcement, with Section 1983 claimants "far[ing] poorly compared to non-civil-rights plaintiffs." Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4, 7 (2015) ("Pretrial judgment rates for [Section 1983] plaintiffs are lower than in other classes of cases, pretrial dismissal rates are higher than for other class[es] of cases and have plaintiff trial win rates of 30 percent or less, which is lower than the rates for most classes of civil litigation.").

Denying a cause of action against a federal officer under *Bivens* where a cause of action would indisputably exist against a state officer "stand[s] the constitutional design on its head" by erecting "a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials." *Butz v. Economou*, 438 U.S. 478, 504 (1978). After all, "as every schoolboy knows, the Framers 'designed' the Bill of Rights not against 'state power,' but

against the power of the Federal Government." *Williams v. Florida*, 399 U.S. 78, 145 (1970) (Stewart, J., concurring in part and dissenting in part). "That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions." *Butz*, 438 U.S. at 504. This is all the more true today, when federal and state law enforcement partnerships are routine, blurring the distinction between federal and state officials. *See*, *e.g.*, U.S. Attorney's Office for the W. Dist. of Tenn., *Federal Agencies and Law Enforcement Partners* (July 1, 2021), https://tinyurl.com/kwccdv28 (listing 14 federal agencies and eight state and local law enforcement organizations with standing partnerships in the Western District of Tennessee); *see also* U.S. Customs and Border Prot., *CBP Statement on the AMO Unmanned Aircraft System in Minneapolis* (May 29, 2020), https://tinyurl.com/2p8hb3ku (U.S. Customs and Border Protection "routinely conducts operations with other federal, state, and local law enforcement entities to assist law enforcement").

No interest is served by taking such an incongruous approach to the enforcement of constitutional rights. This Court should take this opportunity to confirm parity in the protection of constitutional rights from rogue government action, whether by federal or state officers.

## IV. THE "IMMIGRATION-RELATED" LINE PETITIONER URGES IS A WHOLLY UNWORKABLE ONE.

This case maps neatly onto the facts of *Bivens*: Petitioner, a federal law enforcement officer, conducted a warrantless search on an American citizen's property. Petitioner nonetheless claims that *Bivens* should not apply because he, as a CBP officer, at times performs "immigration-related" functions. Pet'r Br. I. The wholesale exemption for officers performing "immigrated-related" functions that Petitioner urges is entirely unworkable, as the facts of this case and the ever-expanding scope of CBP's mandate make plain.

There can be no doubt that CBP officers perform both "immigration-related" and general law enforcement functions. *See*, *e.g.*, 8 U.S.C. § 1357(a)(5)(A) (granting CBP officers the authority to make arrests "for any offense against the United States . . . committed in the officer's . . . presence"). Indeed, since its inception in 1924, the Border Patrol has morphed from "a handful of mounted agents patrolling desolate areas along U.S. borders" into nearly 20,000 Border Patrol agents who, in CBP's own words, wield "broad law enforcement authorit[y]." U.S. Customs & Border Prot., *Border Patrol Overview* (Aug. 24, 2021), https://tinyurl.com/2762y9uj; U.S. Customs & Border Prot., *CBP Enforcement Statistics Fiscal Year 2022*, https://tinyurl.com/5bnsrzew. Gone are "[t]he days of agents lying-in-wait for hours at a time," acting as "border guards who simply watch over an area." U.S. Customs and Border Prot., *Holding the Line in the 21st Century* 11, 26 (Nov. 25, 2014), https://tinyurl.com/28cpmn6n. In their place are "border police, responsible for the national sovereignty and the

detection and prevention of crime through an increased use of intelligence, planning, integration, and prosecution." *Id.* at 26.

CBP's increased exercise of general police powers has become all the more prominent in recent years. Following the death of George Floyd in May 2020, CBP used a drone to surveil protests in Minneapolis—more than 250 miles from the closest border. Geneva Sands, *Customs and Border Protection Drone Flew over Minneapolis to Provide Live Video to Law Enforcement*, CNN (May 29, 2020), https://tinyurl.com/2p8mv8kn. CBP suppressed protests in Washington, D.C., and later deployed its Border Patrol Tactical Unit to police protests in Oregon. Karl Jacoby, *Op-Ed: The Border Patrol's Brute Power in Portland Is the Norm at the Border*, L.A. Times (July 22, 2020), https://tinyurl.com/y9p74sx3. Though these policing efforts have come into the public light recently, they "reflect[] the long history of unprecedented police powers granted to federal border agents over what has become a far more expansive border zone than most Americans realize." *Id.*

It is therefore not the case that "all actions taken by immigration officials in the course of their duties . . . are necessarily intertwined with the execution of immigration policy." *Lanuza v. Love*, 899 F.3d 1019, 1029 (9th Cir. 2018) (permitting *Bivens* action to proceed against Department of Homeland Security attorney). The line Petitioner proposes—which would exempt all officers performing "immigration-related" functions from *Bivens* suits—would prove entirely unworkable, especially in the face of CBP's expanding mandate. The facts of this case demonstrate as much:

Rather than exercising an "immigration-related" function, Petitioner entered the property of an American citizen, who operates an inn on American soil, and questioned him about a guest whom Petitioner knew had lawfully entered the country. Where this Court draws a new line, it should be a workable one, and the line Petitioner urges is anything but.

In any event, this Court has never held that a *Bivens* remedy is unavailable in "immigration-related" matters—wherever that line might fall. Petitioner treats any exercise of "immigration-related" enforcement functions as necessarily raising the sort of national-security concerns the Court previously found problematic in the *Bivens* context. Not so. A mere .3% of all CBP encounters last year involved noncitizens who had committed *any* crime; the noncitizens who posed a security risk—while not reported—is sure to be far less. U.S. Customs & Border Prot., *CBP Enforcement Statistics Fiscal Year 2022*, https://tinyurl.com/5bnsrzew. This Court has warned that "national-security concerns must not become a talisman used to ward off inconvenient claims" or "a label used to cover a multitude of sins." *Abbasi*, 137 S. Ct. at 1862 (internal quotation marks omitted); *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 536, 539 (2004) (plurality opinion) (explaining that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens" and that "the constitutional limitations safeguarding essential liberties . . . remain vibrant even in times of security concerns"). But that is precisely what Petitioner attempts here. This Court should not allow it.

## CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted.

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