

No. 21-184

---

IN THE  
**Supreme Court of the United States**

---

KEVIN BYRD,

*Petitioner,*

*v.*

RAY LAMB,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

**MOTION FOR LEAVE TO FILE AND BRIEF OF  
PROFESSOR SETH W. STOUGHTON AS  
*AMICUS CURIAE* IN SUPPORT  
OF PETITIONER**

---

Melanie L. Bostwick  
*Counsel of Record*  
Zachary Hennessee  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
1152 15th Street, N.W.  
Washington, D.C. 20005  
(202) 339-8400  
mbostwick@orrick.com

*Counsel for Amicus Curiae*

---

**MOTION FOR LEAVE TO FILE BRIEF AS  
*AMICUS CURIAE* SUPPORTING PETITIONER**

*Amicus curiae* Professor Seth W. Stoughton respectfully moves for leave to file the attached brief in support of Petitioner. *Amicus* timely notified the counsel of record of his intention to submit an *amicus* brief in this case, as required by Supreme Court Rule 37.2(b). Petitioner's counsel consented to the filing, but Respondent's counsel indicated that he was not representing Respondent in the Supreme Court. *Amicus* then directly notified Respondent, who declined consent to the filing of this brief. *Amicus* submits this motion for leave to file pursuant to this Court's Rule 37.2(b).

Professor Stoughton is a law professor and former police officer who regularly writes about and lectures on policing issues. He has filed multiple *amicus* briefs on this topic with the Court. This case concerns Professor Stoughton because it is the latest in a series of Fifth and Eighth Circuit decisions that have effectively erased the constitutional private right of action for Fourth Amendment violations by federal law enforcement officers, which this Court recognized a half-century ago in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This Court has emphatically held that *Bivens* remains settled law in the law enforcement context, and seven Courts of Appeals continue to recognize these types of *Bivens* claims. Yet, in the Fifth and Eighth Circuit, *Bivens* is effectively a dead letter, available only in the extraordinarily unlikely event that the identical facts of *Bivens* themselves are replicated.

In the attached brief, Professor Stoughton explains why this Court should grant review to rectify this deep circuit split and clarify that *Bivens* remains available to address federal law enforcement officers' Fourth Amendment violations. Specifically, the brief examines the twin functions of *Bivens*—to compensate victims and deter future unconstitutional conduct—and explains how legal and factual developments in the past 50 years have amplified the need for the *Bivens* remedy in the law enforcement context. It also explains why the *Bivens* remedy is particularly needed in the very circuits where it is has been functionally overruled.

Accordingly, Professor Stoughton respectfully submits that the attached brief should be accepted in connection with this Court's consideration of the certiorari petition.

Respectfully submitted,

/s/ Melanie L. Bostwick

Melanie L. Bostwick

*Counsel of Record*

Zachary Hennessee

ORRICK, HERRINGTON &

SUTCLIFFE LLP

1152 15th Street, N.W.

Washington, D.C. 20005

(202) 339-8400

[mbostwick@orrick.com](mailto:mbostwick@orrick.com)

September 7, 2021

**TABLE OF CONTENTS**

	<b>Page</b>
MOTION FOR LEAVE TO FILE BRIEF AS <i>AMICUS CURIAE</i> SUPPORTING PETITIONER .....	M-1
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	4
I. <i>Bivens</i> Is A Critical Tool To Hold Federal Law Enforcement Officers Accountable For Their Misconduct And To Vindicate Constitutional Rights.....	6
II. The Number Of Federal Law Enforcement Officers Engaged In Ordinary Policing Activities Has Grown Dramatically.....	12
A. The ranks of federal law enforcement are significant and growing rapidly. ....	13
B. Federal law enforcement officers increasingly engage in ordinary policing activities. ....	15
III. <i>Bivens</i> 's Unavailability In The Fifth And Eighth Circuits Is Especially Problematic Given The High Concentration Of Federal Law Enforcement Officers In These Circuits.....	19
CONCLUSION .....	25

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Ahmed v. Weyker</i> , 984 F.3d 564 (8th Cir. 2020).....	3, 5, 19
<i>Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics</i> , 403 U.S. 388 (1971).....	6, 9
<i>Carlson v. Green</i> , 446 U.S. 14 (1980).....	5, 6, 9, 10
<i>Corr. Serv. Corp. v. Malesko</i> , 534 U.S. 61 (2001).....	6, 10
<i>Farah v. Weyker</i> , 926 F.3d 492 (8th Cir. 2019).....	5
<i>FDIC v. Meyer</i> , 510 U.S. 471 (1994).....	10
<i>Gamble v. United States</i> , 139 S. Ct. 1960 (2019).....	15
<i>Guerrero v. Scarazzini</i> , 274 F. App'x 11 (2d Cir. 2008).....	11
<i>Hui v. Castaneda</i> , 559 U.S. 799 (2010).....	9
<i>King v. United States</i> , 917 F.3d 409 (6th Cir. 2019).....	11

<i>Minneeci v. Pollard</i> , 565 U.S. 118 (2012).....	6, 9, 19
<i>Oliva v. Nivar</i> , 973 F.3d 438 (5th Cir. 2020).....	4, 5
<i>Whren v. United States</i> , 517 U.S. 806 (1996).....	20
<i>Ziglar v. Abbasi</i> , 137 S. Ct. 1843 (2017).....	2, 4, 5, 6, 12
<b>Statutes and Regulations</b>	
28 C.F.R. § 50.15(c)(1).....	8
28 U.S.C. § 2679(b)(1) .....	9
28 U.S.C. § 2679(b)(2)(A) .....	5, 9
28 U.S.C. § 2680(h) .....	5, 9
42 U.S.C. § 1983.....	10
Jaime Zapata Border Enf't Sec. Task Force Act, Pub. L. No. 112-205, § 2, 126 Stat. 14871487 (2012).....	18
<b>Other Authorities</b>	
T.A. Badger, <i>Teen killed by DEA agent buried in San Antonio</i> , Midland Reporter-Telegram (Feb. 13, 2003), <a href="https://tinyurl.com/y2gszk2e">https://tinyurl.com/y2gszk2e</a> .....	24

- Radley Balko, Opinion, *State-Federal Task Forces Are Out of Control*, Wash. Post (Feb. 14, 2020), <https://tinyurl.com/to55y68> .....11
- Radley Balko, *South Carolina police shot a man to pieces over \$100 worth of pot, then lied about it*, Wash. Post (Mar. 17, 2017), <https://tinyurl.com/lr6o2zd> .....11
- Jerome P. Bjelopera, Cong. Rsch. Serv., R41780, *The Federal Bureau of Investigation and Terrorism Investigations* (2013), <https://tinyurl.com/y4sbhfbe>.....18
- Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135 (1995).....15
- GianCarlo Canaparo & Zack Smith, *Count the Crimes on the Federal Law Books. Then Cut Them.*, The Daily Signal (June 23, 2020), <https://tinyurl.com/yf5r794>;.....16
- Kade Crockford, *Beyond Sanctuary: Local Strategies for Defending Civil Liberties*, The Century Foundation (Mar. 21, 2018), <https://tinyurl.com/y22pbatl>.....11

- DEA, *Task Forces*,  
<https://tinyurl.com/8upydy4r> ..... 18
- Dep't of Just., Bureau of Just. Stats.,  
 No. NCJ 187231, *Federal Law  
 Enforcement Officers, 2000* (July  
 2001), <https://tinyurl.com/y3tdz5lb> ..... 14
- Dep't of Just., Bureau of Just. Stats.,  
 No. NCJ 238250, *Federal Law  
 Enforcement Officers, 2008* (June  
 2012), <https://tinyurl.com/4fhm333c> ..... 14, 20, 21
- Dep't of Just., Bureau of Just. Stats.,  
 No. NCJ 249681, *National Sources  
 of Law Enforcement Employment  
 Data* (April 2016),  
<https://tinyurl.com/wyvtnzkk> ..... 14
- Dep't of Just., Bureau of Just. Stats.,  
 No. NCJ 251922, *Federal Law  
 Enforcement Officers, 2016 –  
 Statistical Tables* (Oct. 2019),  
<https://tinyurl.com/yyj8ketl> ..... 13
- Dep't of Just., Bureau of Just. Stats.,  
 No. NCJ 254958, *Federal Justice  
 Statistics* (April 2021),  
<https://tinyurl.com/r2duy6up> ..... 15, 21
- Dep't of Just., Bureau of Just. Stats.,  
 No. NCJ-151166, *Federal Law  
 Enforcement Officers, 1993* (Dec.  
 1994), <https://tinyurl.com/s2vnrnzr> ..... 14



- Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. 825 (2000) .....15
- Malcolm Russell-Einhorn, et al., Nat'l Inst. of Just., NCJ 201782, *Federal-Local Law Enforcement Collaboration in Investigating and Prosecuting Urban Crime, 1982-1999: Drugs, Weapons, and Gangs* (May 2000), <https://tinyurl.com/y2z9p79u>.....17
- FBI, *Violent Gang Task Forces*, <https://tinyurl.com/y4br6dkv>.....18, 22
- Fed. Comm. Comm'n, *Employee Profile at the FCC* (July 30, 2019), <https://tinyurl.com/2twjmhzx> .....14
- Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Wall St. J. (July 23, 2011), <https://tinyurl.com/47ez8rwd> .....17
- Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 Colum. L. Rev. 1, 28-55 (2019) .....16
- Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845 (2001).....7

ICE, <i>Border Enforcement Security Task Force</i> , <a href="https://tinyurl.com/yxzrgw8v">https://tinyurl.com/yxzrgw8v</a> .....	19
John C. Jeffries, Jr., <i>The Liability Rule For Constitutional Torts</i> , 99 Va. L. Rev. 207 (2013) .....	7
John C. Jeffries, Jr. & Hon. John Gleeson, <i>The Federalization of Organized Crime: Advantages of Federal Prosecution</i> , Hasting L.J. 1095 (1995) .....	16
Jason McCammack, U.S. Cust. & Border Prot., <i>A New Way Forward</i> , <a href="http://tinyurl.com/4ucf9zkg">http://tinyurl.com/4ucf9zkg</a> .....	23
Emilie Munson, <i>Biden administration shifts hundreds of agents from northern to southern border</i> , Times Union (Apr. 16, 2021), <a href="https://tinyurl.com/3utcs2sd">https://tinyurl.com/3utcs2sd</a> .....	22
Nicole Narea, <i>Biden’s immigration policy isn’t Trump’s — but it’s still a disappointment</i> , Vox (Aug. 4, 2021), <a href="https://tinyurl.com/vxz4kusp">https://tinyurl.com/vxz4kusp</a> .....	21
<i>NYPD, Feds Working Together In Attempt To Stop Rash Of Cellphone Store Robberies</i> , CBS N.Y. (Mar. 5, 2019), <a href="https://tinyurl.com/y344n3cj">https://tinyurl.com/y344n3cj</a> .....	19

James E. Pfander, <i>Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation</i> , 114 Penn St. L. Rev. 1387 (2010) .....	7
James E. Pfander et al., <i>The Myth of Personal Liability: Who Pays When Bivens Claims Succeed</i> , 72 Stan. L. Rev. 561 (2020) .....	8
Ellen S. Podgor, <i>The Dichotomy Between Overcriminalization and Underregulation</i> , 70 Am. U. L. Rev. 1061 (2021).....	16
Cynthia Pompa, <i>President Trump Is Accelerating the Militarization of the Southwest Border</i> , ACLU (Dec. 5, 2018), <a href="https://tinyurl.com/yyckug8d">https://tinyurl.com/yyckug8d</a> .....	21
John Rappaport, <i>How Private Insurers Regulate Public Police</i> , 130 Harv. L. Rev. 1539 (2017) .....	8
Alexander A. Reinert, <i>Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model</i> , 62 Stan. L. Rev. 809 (2010).....	7, 9
Nick Sibilla, <i>After Almost Beating Student To Death, Cops Demand Legal Immunity</i> , Forbes (Mar. 16, 2020), <a href="https://tinyurl.com/yykdfv3h">https://tinyurl.com/yykdfv3h</a> .....	11

Jeffrey Standen, <i>The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct</i> , 2000 B.Y.U. L. Rev. 1443 (2000) .....	8
The Brownwatch, <i>Father can't file suit over DEA slaying – 14 Year Old Latina Killed by Police</i> (Feb. 7, 2005), <a href="https://tinyurl.com/yxde2nvh">https://tinyurl.com/yxde2nvh</a> .....	24
<i>The Constitution in the 100-Mile Border Zone</i> , ACLU, <a href="http://tinyurl.com/243ybkw9">http://tinyurl.com/243ybkw9</a> .....	22
<i>The Federalization of Criminal Law</i> , Am. Bar Ass'n, <a href="https://tinyurl.com/ra3ztztx">https://tinyurl.com/ra3ztztx</a> .....	16, 17
U.S. Att'y's Off., E. Dist. of Tex., <i>Statement of the United States Attorney for the Eastern District of Texas Regarding Prosecution of Matin Azizi-Yarand</i> (May 2, 2018), <a href="https://tinyurl.com/ycl4cxg2">https://tinyurl.com/ycl4cxg2</a> .....	23
U.S. Att'y's Off., N. Dist. Of Tex., <i>North Texas OCDETF Strike Force</i> , <a href="https://tinyurl.com/yy78gxkg">https://tinyurl.com/yy78gxkg</a> .....	23

- U.S. Att’y’s Off., W. Dist. Of Tex.,  
*Central Texas Joint Terrorism Task  
 Force Arrests Two for Allegedly  
 Providing Material Support to  
 Terrorists* (June 18, 2014),  
<https://tinyurl.com/y6qfz2gh> .....23
- U.S. Border Patrol, *Border Patrol Agent  
 Nationwide Staffing by Fiscal Year*,  
<https://tinyurl.com/y3dbwves> .....22
- U.S. Census Bureau, *Resident  
 Population for the 50 States, the  
 District of Columbia, and Puerto  
 Rico: 2020 Census*,  
<https://tinyurl.com/5b6km64k> .....21, 24
- U.S. Customs & Border Prot.,  
*Nationwide Enforcement  
 Encounters: Title 8 Enforcement  
 Actions and Title 42 Expulsions*  
 (August 12, 2021),  
<https://tinyurl.com/ddsfbdwh> .....22
- U.S. Drug Enf’t Agency, *Houston High  
 Intensity Drug Trafficking Area  
 along with the DEA announce the  
 establishment of a new HIDTA  
 initiative in Beaumont, Texas* (Jan.  
 27, 2020),  
<https://tinyurl.com/yxapeegl> .....23
- U.S. Marshals Serv., *Fugitive Task  
 Forces*, <https://tinyurl.com/y4tkb2th> .....18

U.S. Marshals Serv., <i>Fugitive Task Forces</i> , <a href="https://tinyurl.com/yykzwdxg">https://tinyurl.com/yykzwdxg</a> .....	22
Eric Wang, Note, <i>Tortious Constructions: Holding Federal Law Enforcement Accountable by Applying the FTCA’s Law Enforcement Proviso over the Discretionary Function Exception</i> , 95 N.Y.U. L. Rev. 1943 (2020).....	10
Simone Weichselbaum, <i>Some big cities pulling their police officers out of federal joint task forces</i> , Statesman (Nov. 29, 2020), <a href="https://tinyurl.com/y3uwknow">https://tinyurl.com/y3uwknow</a> .....	23
Simone Weichselbaum, <i>Why Some Police Departments Are Leaving Federal Task Forces</i> , The Marshall Project (Oct. 31, 2019), <a href="https://tinyurl.com/y2dphwnx">https://tinyurl.com/y2dphwnx</a> .....	10, 12, 18
White House Office of the Press Secretary, <i>Statement by the President on the Passage of the Southwest Border Security Bill</i> (Aug. 12, 2010), <a href="https://tinyurl.com/y4dor9nw">https://tinyurl.com/y4dor9nw</a> .....	21

**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

Seth W. Stoughton is an Associate Professor at the University of South Carolina School of Law and an Associate Professor (Affiliate) in the University's Department of Criminology and Criminal Justice. Professor Stoughton also served for five years as a police officer with the Tallahassee Police Department. As a legal academic, Professor Stoughton has focused his research on policing issues. He is the principal co-author of *Evaluating Police Uses of Force* (NYU Press) as well as multiple book chapters, and his scholarship on policing and how it is regulated has appeared in top law journals. His writing on policing has also appeared in publications including *The New York Times*, *The Atlantic*, and *TIME*. He regularly lectures on topics related to policing and has filed multiple *amicus* briefs on policing issues with the Court. Earlier this year, Professor Stoughton testified as a use-of-force expert in the trial of Derek Chauvin.

Professor Stoughton submits this *amicus* brief to describe developments since this Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that have amplified the necessity of the private right of action for constitutional violations committed by federal law enforcement officers. In the fifty years since *Bivens*, the ranks of federal law enforcement have grown significantly, and federal law enforcement officers are now

---

<sup>1</sup> No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and his counsel made a monetary contribution intended to fund the preparation or submission of the brief.

routinely engaged in ordinary policing activities. By effectively limiting *Bivens* to its facts, the Fifth and Eighth Circuits have eliminated a key mechanism of accountability for constitutional violations committed by federal law enforcement officers. Professor Stoughton accordingly urges this Court to grant certiorari to reaffirm that *Bivens* remains available to deter and redress unconstitutional searches and seizures occurring in the context of ordinary law enforcement operations.

### SUMMARY OF ARGUMENT

Just four years ago, this Court in *Ziglar v. Abbasi* reaffirmed the “continued force” and “necessity” of *Bivens* in the “common and recurrent sphere of law enforcement.” 137 S. Ct. 1843, 1856-57 (2017). Seven circuits have taken the Court at its word and continue to uphold *Bivens* claims involving line-level federal law enforcement officers’ Fourth Amendment violations. But in the Fifth and Eighth Circuits, *Bivens* is “essentially a relic, technically on the books but practically a dead letter.” Pet. App. 10a (Willett, J., concurring). The consequences of these courts’ erroneous decisions to effectively overrule *Bivens* are profound.

I. *Bivens* is a critical tool to hold federal police officers accountable for their misconduct. It serves two important purposes: to deter future unconstitutional abuses, and to provide victims redress when their constitutional rights are violated. *Bivens* originally operated as a complement to state tort lawsuits, but due to the enactment of the Westfall Act in 1988, *Bivens* is now the *only* remedy for federal officers’ constitutional violations. In the Fifth and Eighth Circuits,



however, *Bivens* is now “off the table,” too. Pet. App. 9a. (Willett, J., concurring); see *Ahmed v. Weyker*, 984 F.3d 564, 571 (8th Cir. 2020). Therefore, federal officers in those jurisdictions now “operate in something resembling a Constitution-free zone,” where they can “inflict excessive force ... with little fear of liability.” Pet. App. 10a. (Willett, J., concurring).

**II.** *Bivens*’s continued availability to deter and remedy these types of abuses has never been more important. The ranks of federal law enforcement have grown significantly since *Bivens* was decided and are now greater than they have ever been in the United States’ history. Additionally, due to the pervasive federalization of criminal law and increased collaboration between federal law enforcement officers and their state and local counterparts, federal officers are more likely to be engaged in routine law enforcement activities than at any time in the past.

**III.** These federal law enforcement officers and federally deputized state and local officers are disproportionately concentrated in the very circuits that hold that *Bivens* is no longer good law. As a consequence, the 95 million Americans who live in the Fifth and Eighth Circuits are both more likely to have their constitutional rights violated by federal law enforcement officers and less likely to have any recourse when that happens. For these Americans, the courthouse doors are “slammed shut” when federal officers violate their Fourth Amendment rights. Pet. App. 10a (Willett, J., concurring).

The Court should grant certiorari to clarify that it meant what it said in *Abbasi*: *Bivens* is still “settled

law” in the “common and recurrent sphere of law enforcement.” 137 S. Ct. at 1857.

## ARGUMENT

A Department of Homeland Security agent pointed his gun at Kevin Byrd, threatened to kill him, attempted to shoot him, and caused him to be detained for four hours—all without any indication that Mr. Byrd was engaged in any unlawful activity. Pet. App. 16a. These facts are a paradigmatic example of the “common and recurrent” “search-and-seizure” violations committed by federal law enforcement officers that *Abbasi* held may be “redress[ed]” by *Bivens* claims. 137 S. Ct. at 1856-57.

The Fifth Circuit nevertheless rejected Mr. Byrd’s *Bivens* claim, concluding that it involved a new context, different from *Bivens*, and that Congress’s failure to provide a statutory remedy for the DHS officer’s blatant Fourth Amendment violations counseled against allowing Mr. Byrd’s claim to proceed. Pet. App. 6a-7a. As Judge Willett explained in his concurrence: “‘Virtually everything’ beyond the specific facts” of *Bivens* “‘is a new context,’ ... [a]nd new context = no *Bivens* claim.” Pet. App. 9a (quoting *Oliva v. Nivar*, 973 F.3d 438, 442 (5th Cir. 2020), *cert. denied*, No. 20-1060 (U.S. May 24, 2021), *reh’g denied*, No. 20-1060 (U.S. Aug. 2, 2021)).

The Fifth Circuit’s conclusion directly contravenes *Abbasi* for two reasons. First, the court’s holding that “virtually every[]” claim that does not identically replicate *Bivens* involves a “new context,”

Pet. App. 6a (quoting *Oliva*, 973 F.3d at 442), disregards *Abbasi*'s instruction that only cases that are "different in a *meaningful* way from previous *Bivens* cases" involve a new context, and that "trivial" differences "will not suffice," 137 S. Ct. at 1859, 1865 (emphasis added). The Fifth Circuit's laundry list of superficial differences between this case and *Abbasi*, Pet. App. 6a-7a, can only be described as "trivial."

Second, the court's holding that "special factors" counsel against extending *Bivens* to provide redress for Mr. Byrd's Fourth Amendment violations, Pet. App. 7a, ignores *Abbasi*'s instruction that *Bivens* is "necess[ary]" to "vindicate the Constitution by allowing some redress for injuries" and to "provide[] instruction and guidance to federal law enforcement officers going forward," 137 S. Ct. at 1856-57. Congress has not been "silent[]" with respect to *Bivens* claims like Mr. Byrd's. *Contra* Pet. App. 7a. On the contrary, Congress has made it "crystal clear" that victims of "intentional wrongdoing ... shall have ... a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." *Carlson v. Green*, 446 U.S. 14, 20 (1980) (citing 28 U.S.C. § 2680(h)); *see* 28 U.S.C. § 2679(b)(2)(A) (specifically preserving claims "brought for a violation of the Constitution").

Seven circuits have rightly rejected the Fifth Circuit's approach, *see* Pet. 4, but the Eighth Circuit has joined the Fifth in confining *Bivens* to its facts. *Ahmed*, 984 F.3d at 567-71; *Farah v. Weyker*, 926 F.3d 492, 497-502 (8th Cir. 2019). This schism—and the Fifth and Eighth Circuits' disregard of *Abbasi*—demands this Court's urgent attention because *Bivens* is

a critical tool to hold federal officers accountable for their unconstitutional abuses. *Infra* § I. *Bivens*'s continued viability matters now more than ever because there are more federal law enforcement officers engaged in ordinary policing than ever before in our nation's history. *Infra* § II. And the Fifth and Eighth Circuit's position that *Bivens* is a dead letter is especially problematic given the disproportionate concentration of federal law enforcement officers in those jurisdictions. *Infra* § III.

**I. *Bivens* Is A Critical Tool To Hold Federal Law Enforcement Officers Accountable For Their Misconduct And To Vindicate Constitutional Rights.**

This Court in *Bivens* recognized the “great[] capacity for harm” posed by an “agent acting—albeit unconstitutionally—in the name of the United States.” 403 U.S. at 392. The Court therefore inferred a damages remedy under the Constitution to “deter[] individual officers from engaging in unconstitutional wrongdoing,” *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 74 (2001), and to provide redress where the plaintiff lacks “any alternative remedy against individual officers,” *Minnecci v. Pollard*, 565 U.S. 118, 127 (2012). In the years since, the Court has repeatedly emphasized the “necessity” of *Bivens* to “vindicate the Constitution by allowing some redress for injuries” and to “provide[] instruction and guidance to federal law enforcement officers going forward.” *Abbasi*, 137 S. Ct. at 1856-57; *Malesko*, 534 U.S. at 70 (“The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.”); *Carlson*, 446 U.S.

at 21 (“[T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose.”).

Academic scholarship bears out these observations. Regarding *Bivens*’s redress and compensation function, one scholar found in a study of five federal district courts that about 39 percent of counseled *Bivens* claims succeed, either through settlement or merits disposition.<sup>2</sup> These findings “persuasively refute[]” two commonly held assumptions about the *Bivens* remedy: “that *Bivens* claims typically lack merit”<sup>3</sup> and that *Bivens* is “ineffective at achieving ... compensation” when individuals’ constitutional rights are violated.<sup>4</sup> *Bivens* claimants’ constitutional rights are in fact often violated, and *Bivens* enables them to receive compensation for their harms.

Scholars also find that *Bivens* has an important deterrent effect,<sup>5</sup> even though, in practice, individual

---

<sup>2</sup> Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 *Stan. L. Rev.* 809, 839 (2010).

<sup>3</sup> James E. Pfander, *Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation*, 114 *Penn St. L. Rev.* 1387, 1407 (2010).

<sup>4</sup> Reinert, *supra* note 2, at 846 (concluding that “for those scholars who have assumed that *Bivens* claims are ineffective at achieving the twin goals of deterrence and compensation, the data reported here may lead to rethinking”).

<sup>5</sup> *E.g.*, Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 *Ga. L. Rev.* 845, 854-55 (2001); John C. Jeffries, Jr., *The Liability Rule For Constitutional Torts*, 99 *Va. L. Rev.* 207, 240 (2013)

officials seldom contribute personal funds to resolve *Bivens* claims against them.<sup>6</sup> The mere possibility of a personal judgment acts as a deterrent,<sup>7</sup> particularly given the Department of Justice’s policy of indemnifying its employees against constitutional torts only when it is “in the interest of the United States.” 28 C.F.R. § 50.15(c)(1). For example, there is evidence that “some federal officers purchase liability insurance,” suggesting that these officers are concerned about *Bivens* judgments and are proactively attempting to avoid any such liability.<sup>8</sup> *Bivens* lawsuits also “deter in nonmonetary ways,” such as “by educating wrongdoers, creating stigma and adverse publicity,” and, in some cases, prompting employment-related

---

(“[D]amages for constitutional violations . . . heighten the disincentives for governments to engage in conduct that might result in constitutional violations.”); Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 B.Y.U. L. Rev. 1443, 1446 (2000).

<sup>6</sup> James E. Pfander et al., *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 Stan. L. Rev. 561, 606 (2020).

<sup>7</sup> *Id.* at 600 & nn. 164-65.

<sup>8</sup> Pfander, *supra* note 6, at 600 n.164. Private insurers also work to deter law enforcement officers’ constitutional violations. See John Rappaport, *How Private Insurers Regulate Public Police*, 130 Harv. L. Rev. 1539, 1544-47 (2017) (detailing how private insurers “enforce the Constitution” by “transform[ing] vague, uncertain liability exposure into finely grained policies backed by differentiated premiums and the threat of coverage denial” (emphasis omitted)).

repercussions for officers found liable for unconstitutional wrongdoing.<sup>9</sup>

*Bivens*'s twin role as a deterrent and compensatory remedy has become more central over time. When this Court decided *Bivens*, it was undisputed that Webster Bivens could have "obtain[ed] money damages to redress invasion" of his Fourth Amendment rights "by an action in tort, under state law, in the state courts." 403 U.S. at 390. In 1988, however, Congress eliminated that remedy with the passage of the Westfall Act. See *Minneeci*, 565 U.S. at 126 (explaining that, under the Westfall Act, plaintiffs "ordinarily *cannot* bring state-law tort actions against employees of the Federal Government"). Now, the exclusive remedy for torts committed by federal employees is a suit against the United States under the Federal Tort Claims Act (FTCA). See 28 U.S.C. § 2679(b)(1). But the FTCA "does not extend or apply to a civil action against an employee of the Government ... brought for a violation of the Constitution of the United States." *Id.* § 2679(b)(2)(A); see *Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (describing "[t]he Westfall Act's explicit exception for *Bivens* claims"). Thus, *Bivens* is now the sole remedy for federal officers' constitutional violations.

The FTCA does allow suits against the United States for certain intentional torts committed by federal law enforcement officers, see 28 U.S.C. § 2680(h), but the *Bivens* remedy "is more effective than the FTCA remedy" for several reasons. *Carlson*, 446 U.S.

---

<sup>9</sup> Reinert, *supra* note 2, at 848-49 (footnotes omitted).

at 20. Importantly, not all federal officers' constitutional violations fit the narrow list of torts that may proceed under the FTCA, and "courts continue to read the [law enforcement] proviso narrowly to limit the federal government's liability."<sup>10</sup> Even when the FTCA applies, *Bivens* "is a more effective deterrent" because "the *Bivens* remedy is recoverable against individuals." *Carlson*, 446 U.S. at 21. This matters because "the threat of suit against the United States" is alone "insufficient to deter the unconstitutional acts of individuals." *Malesko*, 534 U.S. at 68; *see also FDIC v. Meyer*, 510 U.S. 471, 485 (1994) ("If we were to imply a damages action directly against federal agencies, ... the deterrent effects of the *Bivens* remedy would be lost."). Thus, the FTCA is not an adequate tool to redress federal law officers' constitutional violations.

The recent proliferation of joint federal-local law enforcement task forces, *see infra* § II.B., has further increased the importance of the *Bivens* remedy. Ordinarily, state and local officers may be sued under either 42 U.S.C. § 1983 or state tort law when they deprive individuals of their constitutional rights. However, because state and local officers participating in joint task forces with the federal government are typically deputized as federal officers,<sup>11</sup> § 1983

---

<sup>10</sup> Eric Wang, Note, *Tortious Constructions: Holding Federal Law Enforcement Accountable by Applying the FTCA's Law Enforcement Proviso over the Discretionary Function Exception*, 95 N.Y.U. L. Rev. 1943, 1948 (2020).

<sup>11</sup> Simone Weichselbaum, *Why Some Police Departments Are Leaving Federal Task Forces*, The Marshall Project (Oct. 31, 2019), <https://tinyurl.com/y2dphwnx>.



does not apply to them and the Westfall Act immunizes them from state-law tort claims. *See, e.g., King v. United States*, 917 F.3d 409, 433 (6th Cir. 2019), *rev'd on other grounds sub nom. Brownback v. King*, 141 S. Ct. 740 (2021); *Guerrero v. Scarazzini*, 274 F. App'x 11, 12 n.1 (2d Cir. 2008).

Furthermore, state and local officers participating in federal task forces are often exempt from traditional oversight mechanisms. For instance, joint task force officers are permitted to ignore otherwise applicable state laws requiring law enforcement to obtain warrants to track cell phones<sup>12</sup> and can “use[] their federal jurisdiction to escape state open-records laws.”<sup>13</sup> They are not always required to wear uniforms, often causing individuals to think they are “being mugged” rather than arrested.<sup>14</sup> And when a shooting involving a joint task force member occurs, a

---

<sup>12</sup> Kade Crockford, *Beyond Sanctuary: Local Strategies for Defending Civil Liberties*, The Century Foundation (Mar. 21, 2018), <https://tinyurl.com/y22pbatl>.

<sup>13</sup> Radley Balko, Opinion, *State-Federal Task Forces Are Out of Control*, Wash. Post (Feb. 14, 2020), <https://tinyurl.com/to55y68>.

<sup>14</sup> *See, e.g.,* Nick Sibilla, *After Almost Beating Student To Death, Cops Demand Legal Immunity*, Forbes (Mar. 16, 2020), <https://tinyurl.com/yykdfv3h> (detailing the story of James King, who was “tackled, put in a chokehold, and beaten into submission” by plain-clothes joint task force officers after fleeing what he thought was a mugging); Radley Balko, *South Carolina police shot a man to pieces over \$100 worth of pot, then lied about it*, Wash. Post (Mar. 17, 2017), <https://tinyurl.com/lr6o2zd> (man was shot nine times by joint task force officers who “had no insignia on their clothes indicating they were law enforcement,” after he allegedly pointed a gun at the unidentified officers when they used a battering ram to force his door open).

federal rule forbids officers from speaking to local police immediately thereafter.<sup>15</sup> Some police departments have even begun leaving joint task forces due to this lack of accountability and oversight.<sup>16</sup>

“[I]ndividual instances” of these officers’ “overreach” are “difficult to address except by way of damages actions after the fact.” *Abbasi*, 137 S. Ct. at 1862. The “settled law of *Bivens*” is, therefore, the best and often only tool to deter and remedy these officers’ unconstitutional abuses. *Id.* at 1857.

## **II. The Number Of Federal Law Enforcement Officers Engaged In Ordinary Policing Activities Has Grown Dramatically.**

The consequences of the Fifth and Eighth Circuits’ position—that *Bivens* is “technically on the books but practically a dead letter,” Pet. App. 10 (Willett, J., concurring)—are especially grave due to historical developments over the half a century since *Bivens* was decided. The ranks of federal law enforcement have never been larger, and these officers have never been more likely to engage in ordinary policing activities than they are now. The likelihood that Americans’ constitutional rights will be violated by federal law enforcement officers is therefore higher than ever before.

---

<sup>15</sup> Weichselbaum, *supra* note 11.

<sup>16</sup> *Id.*

**A. The ranks of federal law enforcement are significant and growing rapidly.**

The federal government employs an astounding number of law enforcement officers. As of 2016, the last year for which comprehensive data is available, the total number of federal law enforcement officers stood at more than 132,000.<sup>17</sup>

Most federal law enforcement officers work for either the Customs and Border Protection (more than 43,000 officers), the Federal Bureau of Prisons (more than 19,000 officers), or the Federal Bureau of Investigation (more than 13,000 officers).<sup>18</sup> However, thousands of law enforcement officers are employed at agencies that few in the public would likely expect to have their own police forces. For instance, the Smithsonian Institution's Office of Protective Services employs over six hundred officers.<sup>19</sup> The Environmental Protection Agency's Criminal Investigation Division employs over two hundred full-time law enforcement officers.<sup>20</sup> And the Office of Law Enforcement for the National Oceanic and Atmospheric Administration employs over one hundred officers.<sup>21</sup>

---

<sup>17</sup> Dep't of Just., Bureau of Just. Stats., No. NCJ 251922, *Federal Law Enforcement Officers, 2016 – Statistical Tables*, at 1 (Oct. 2019), <https://tinyurl.com/yyj8ketl>.

<sup>18</sup> *Id.* at 3-4.

<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 3.

The total number of federal law enforcement officers has grown rapidly over the past few decades. In 1993, there were 69,000 federal law enforcement officers.<sup>22</sup> That number had grown to 88,000 by the turn of the millennium,<sup>23</sup> 120,000 by 2008,<sup>24</sup> and 132,000 by 2016. The nearly 100 percent increase of federal police in the span of 23 years reflects an average annual growth rate of 2,739 officers per year—the equivalent of adding almost twice the entire workforce of the Federal Communications Commission each year.<sup>25</sup> By comparison, the number of full-time sworn state and local officers increased by only by about one third from 1992 to 2012.<sup>26</sup>

---

<sup>22</sup> Dep't of Just., Bureau of Just. Stats., No. NCJ-151166, *Federal Law Enforcement Officers, 1993*, at 1 (Dec. 1994), <https://tinyurl.com/s2vnmzr>.

<sup>23</sup> Dep't of Just., Bureau of Just. Stats., No. NCJ 187231, *Federal Law Enforcement Officers, 2000*, at 1 (July 2001), <https://tinyurl.com/y3tdz5lb>.

<sup>24</sup> Dep't of Just., Bureau of Just. Stats., No. NCJ 238250, *Federal Law Enforcement Officers, 2008*, at 1 (June 2012), <https://tinyurl.com/4fhm333c>.

<sup>25</sup> Fed. Comm. Comm'n, *Employee Profile at the FCC* (July 30, 2019), <https://tinyurl.com/2twjmhzx> (noting that there were 1,454 employees at the FCC as of July 2019).

<sup>26</sup> Dep't of Just., Bureau of Just. Stats., No. NCJ 249681, *National Sources of Law Enforcement Employment Data 10* (April 2016), <https://tinyurl.com/wyvtnzkk>.

**B. Federal law enforcement officers increasingly engage in ordinary policing activities.**

Not only have the ranks of federal law enforcement officers increased dramatically in recent decades, but federal officers are increasingly involved in ordinary policing activities—significantly upping the chances that federal officers will violate Americans’ constitutional rights. As one example, federal law enforcement officers made 195,771 arrests in 2018—up 38% from 2017 and the highest level in 25 years of data collection.<sup>27</sup>

Central to this dramatic expansion is the “expansion of the reach of federal criminal law.” *Gamble v. United States*, 139 S. Ct. 1960, 1980 (2019). Early federal criminal laws were few in number and limited to issues of special federal interest, such as piracy, forgery of a United States certificate, or treason.<sup>28</sup> Beginning in the late 19th Century, however, successive waves of “federalization” eroded the idea that the “general police power” belongs only to the states, with the federal criminal law confined to distinct areas of federal concern.<sup>29</sup> This trend accelerated rapidly in

---

<sup>27</sup> Dep’t of Just., Bureau of Just. Stats., No. NCJ 254958, *Federal Justice Statistics*, 2017-2018, at 1 (April 2021), <https://tinyurl.com/r2duy6up>.

<sup>28</sup> See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *Hastings L.J.* 1135, 1138 (1995).

<sup>29</sup> See Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 *Ariz. St. L.J.* 825, 837 (2000); Brickey, *supra* note 28, at 1137-

the latter half of the 20th Century. “More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.”<sup>30</sup>

This torrent of federalization largely erased the distinction between the exercise of police power by the federal government and the states. By the 1990s, “federal law reached virtually all robberies, most schemes to defraud, many firearms offenses, all loan sharking, most illegal gambling operations, most bribes, and every drug deal, no matter how small.”<sup>31</sup> Federal criminal laws are now so numerous and widespread that it is impossible even to reach a reliable count of them, though scholars agree that there are upwards of 4,500 crimes in the United States Code, along with more than 300,000 regulatory crimes.<sup>32</sup> So pervasive are federal crimes that people often unknowingly and unintentionally violate them. As one scholar put it,

---

46; Trevor George Gardner, *Immigrant Sanctuary as the “Old Normal”: A Brief History of Police Federalism*, 119 Colum. L. Rev. 1, 28-55 (2019).

<sup>30</sup> *The Federalization of Criminal Law*, Am. Bar Ass’n 7, <https://tinyurl.com/ra3ztztx> (emphasis omitted).

<sup>31</sup> John C. Jeffries, Jr. & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 *Hastings L.J.* 1095, 1095-97 (1995) (footnotes omitted).

<sup>32</sup> GianCarlo Canaparo & Zack Smith, *Count the Crimes on the Federal Law Books. Then Cut Them.*, *The Daily Signal* (June 23, 2020), <https://tinyurl.com/yyf5r794>; Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 *Am. U. L. Rev.* 1061, 1082 (2021).

“[t]here is no one in the United States over the age of 18 who cannot be indicted for some federal crime.”<sup>33</sup>

“[M]uch of the recent increase in federal criminal legislation significantly overlaps” with “crimes traditionally prosecuted by the states.”<sup>34</sup> As a consequence of these “overlapping, parallel, and essentially redundant sets of criminal prohibitions,” the rapidly growing numbers of federal law enforcement are increasingly tasked with policing “local conduct ... previously left to state regulation.”<sup>35</sup>

Federal law enforcement officers are also more likely to engage in ordinary policing due to the dramatic increase in the use of joint federal-local task forces. The first joint task forces were established in the 1970s to target drug trafficking.<sup>36</sup> Federal-local and federal-state collaboration increased through the 1980s and 1990s, fueled by arrangements to share federal asset forfeitures.<sup>37</sup> The 2000s saw another significant increase in joint task forces, this time focused on combatting terrorism. From 1999 to 2011, the

---

<sup>33</sup> Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Wall St. J. (July 23, 2011), <https://tinyurl.com/47ez8rwd>.

<sup>34</sup> Am. Bar Ass'n, *supra* note 30, at 2.

<sup>35</sup> *Id.* at 7, 55.

<sup>36</sup> Malcolm Russell-Einhorn, et al., Nat'l Inst. of Just., NCJ 201782, *Federal-Local Law Enforcement Collaboration in Investigating and Prosecuting Urban Crime, 1982-1999: Drugs, Weapons, and Gangs* 16-17 (May 2000), <https://tinyurl.com/y2z9p79u>.

<sup>37</sup> *Id.* at 23, 30-32.

number of joint terrorism task forces grew from 26 to over 100.<sup>38</sup>

There are now upwards of one thousand joint law enforcement task forces nationwide.<sup>39</sup> They operate in a huge range of contexts. For instance: The FBI administers 160 violent gang task forces, which “[c]ombin[e] short term, street level enforcement activity with such sophisticated techniques as consensual monitoring, financial analysis, and Title III wire intercepts investigations.”<sup>40</sup> The DEA manages 271 state and local task forces, involving over 2,200 DEA agents and 2,500 state and local officers.<sup>41</sup> The U.S. Marshals Service leads seven regional fugitive task forces and 60 local fugitive task forces, tasked with arresting thousands of federal, state, and local fugitives.<sup>42</sup> ICE operates a Border Enforcement Security Task Force, under which federal agents from ICE, CBP, ATF, FBI, and other federal agencies work alongside state and local law enforcement officers to secure the border and combat criminal smuggling.<sup>43</sup> The task force includes over 1,200 members, including agents from more than 100 state, local, and tribal

---

<sup>38</sup> Jerome P. Bjelopera, Cong. Rsch. Serv., R41780, *The Federal Bureau of Investigation and Terrorism Investigations 2* (2013), <https://tinyurl.com/y4sbhfbe>.

<sup>39</sup> Weichselbaum, *supra* note 11.

<sup>40</sup> FBI, *Violent Gang Task Forces*, <https://tinyurl.com/y4br6dkv>.

<sup>41</sup> DEA, *Task Forces*, <https://tinyurl.com/8upydy4r>.

<sup>42</sup> U.S. Marshals Serv., *Fugitive Task Forces*, <https://tinyurl.com/y4tkb2th>.

<sup>43</sup> Jaime Zapata Border Enf't Sec. Task Force Act, Pub. L. No. 112-205, § 2, 126 Stat. 1487, 1487 (2012).



law enforcement agencies.<sup>44</sup> There is even a joint task force between the ATF and the NYPD combatting robberies of cellphone stores in New York City.<sup>45</sup>

The total number of state and local officers participating in joint task force operations has never been tabulated, but there are likely thousands or tens of thousands. Because these officers are federally deputized, the number of functionally federal law enforcement officers is likely much greater than 132,000. Each of these officers is immune from state tort lawsuits. See *Minneeci*, 565 U.S. at 126. *Bivens* is therefore critical to remedy and deter their unconstitutional abuses. In the Fifth and Eighth Circuits, however, *Bivens* is “off the table,” *Ahmed*, 984 F.3d at 571, leaving these officers free to “commit one-off constitutional violations” with “little fear of liability,” Pet. App. 10a (Willett, J., concurring).

### **III. *Bivens*’s Unavailability In The Fifth And Eighth Circuits Is Especially Problematic Given The High Concentration Of Federal Law Enforcement Officers In These Circuits.**

Seven circuits recognize the validity of *Bivens* claims involving line-level federal officers’ Fourth Amendment violations. But in the Fifth and Eighth

---

<sup>44</sup> ICE, *Border Enforcement Security Task Force (BEST)*, <https://tinyurl.com/yxzrgw8v>.

<sup>45</sup> *NYPD, Feds Working Together In Attempt To Stop Rash Of Cellphone Store Robberies*, CBS N.Y. (Mar. 5, 2019), <https://tinyurl.com/y344n3cj>.

Circuits, “redress for a federal officer’s unconstitutional acts is either extremely limited or wholly nonexistent, allowing federal officials to operate in something resembling a Constitution-free zone.” Pet. App. 10a (Willett, J., concurring). This disparity contravenes the long-held principle that “the search and seizure protections of the Fourth Amendment” do not “vary from place to place.” *Whren v. United States*, 517 U.S. 806, 815 (1996). And it is particularly problematic given the high number of federal law enforcement officers and federally deputized state and local task force officers stationed in the Fifth and Eighth Circuits.

As of 2008, the most recent date for which comprehensive data regarding the geographic distribution of federal law enforcement officers are available, there were 25,460 such officers in the Fifth and Eighth Circuits—approximately 20 percent of all the federal law enforcement officers in the continental United States.<sup>46</sup>

The Fifth Circuit, in particular, is home to a disproportionate number of federal law enforcement officers due to its location along the southwestern border. In 2008, 20,677 federal law enforcement officers were stationed within the Fifth Circuit, and more than 18,000 were in Texas alone—the highest of any state.<sup>47</sup> By comparison, the Eleventh Circuit, which

---

<sup>46</sup> U.S. Dep’t of Just., *Federal Law Enforcement Officers, 2008*, *supra* note at 24, at 11. This number includes the federal law enforcement officers employed by the Bureau of Prisons, which are not included in Petitioner’s estimate. *See* Pet. 31 & n.8.

<sup>47</sup> *Id.*

has a similar population size, had only 10,976 federal officers, barely nine percent of the nation's force.<sup>48</sup> The number of federal officers stationed in the Fifth Circuit has almost certainly increased since 2008, given the significant focus on immigration enforcement along the southwestern border under recent administrations.<sup>49</sup>

Along with the disproportionately high concentration of federal law enforcement along the southwestern border comes a disproportionately high number of interactions with federal law enforcement and the attendant risk of constitutional violations. In 2018, for instance, the five federal judicial districts along the U.S.-Mexico border (Arizona, California Southern, New Mexico, Texas Southern, and Texas Western) accounted for 65 percent of all federal arrests.<sup>50</sup> The two judicial districts in Texas alone accounted for 38 percent of all such arrests.<sup>51</sup>

---

<sup>48</sup> *Id.* The Fifth and Eleventh Circuits each have a population of approximately 37 million. U.S. Census Bureau, *Resident Population for the 50 States, the District of Columbia, and Puerto Rico: 2020 Census*, <https://tinyurl.com/5b6km64k>.

<sup>49</sup> See White House Office of the Press Secretary, *Statement by the President on the Passage of the Southwest Border Security Bill* (Aug. 12, 2010), <https://tinyurl.com/y4dor9nw>; Cynthia Pompa, *President Trump Is Accelerating the Militarization of the Southwest Border*, ACLU (Dec. 5, 2018), <https://tinyurl.com/yyckug8d>; Nicole Narea, *Biden's immigration policy isn't Trump's — but it's still a disappointment*, Vox (Aug. 4, 2021), <https://tinyurl.com/vxz4kusp>.

<sup>50</sup> Bureau of Just. Stats., *Federal Justice Statistics*, *supra* note 27, at 4.

<sup>51</sup> *Id.*

Border Patrol agents account for many of the arrests and other searches and seizures along the southwestern border. Eighty-five percent of all border patrol agents were concentrated along the southwestern border in 2019,<sup>52</sup> and that number has likely increased since.<sup>53</sup> Border Patrol agents stationed along the southwestern border have recorded a stunning *1.2 million* “enforcement encounters” (apprehensions and expulsions) in FY 2021 to date.<sup>54</sup> These agents “routinely ignore or misunderstand the limits of their legal authority in the course of individual stops, resulting in violations of the constitutional rights of innocent people.”<sup>55</sup>

The Fifth Circuit is also home to a high number of joint task forces. In Texas alone, for instance, there are 12 FBI-led violent gang task forces,<sup>56</sup> four U.S. Marshals-led fugitive capture task forces,<sup>57</sup> three immigration and smuggling task forces led by Customs

---

<sup>52</sup> U.S. Border Patrol, *Border Patrol Agent Nationwide Staffing by Fiscal Year*, <https://tinyurl.com/y3dbwves>.

<sup>53</sup> Emilie Munson, *Biden administration shifts hundreds of agents from northern to southern border*, Times Union (April 16, 2021), <https://tinyurl.com/3utcs2sd>.

<sup>54</sup> U.S. Customs & Border Prot., *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions* (August 12, 2021), <https://tinyurl.com/ddsfbdwh>.

<sup>55</sup> *The Constitution in the 100-Mile Border Zone*, ACLU, <http://tinyurl.com/243ybkw9>.

<sup>56</sup> FBI, *supra* note 40.

<sup>57</sup> U.S. Marshals Serv., *Fugitive Task Forces*, <https://tinyurl.com/yykzwdxg>.

and Border Protection,<sup>58</sup> and multiple terrorism<sup>59</sup> and drug enforcement task forces.<sup>60</sup>

As it has elsewhere, this concentration of federal law enforcement officers has led to allegations of abuses. In one example, an Austin police detective serving on the Central Texas Violent Crimes Task Force—an FBI-led joint task force—shot and killed an unarmed bystander during a bank robbery investigation.<sup>61</sup> The shooting was bad enough that the district attorney sought to prosecute him, but the *city* detective successfully claimed federal immunity as a *federal* task force member.<sup>62</sup> In another instance, DEA

---

<sup>58</sup> Jason McCammack, U.S. Cust. & Border Prot., *A New Way Forward*, <http://tinyurl.com/4ucf9zkg>.

<sup>59</sup> U.S. Att’y’s Off., E. Dist. of Tex., *Statement of the United States Attorney for the Eastern District of Texas Regarding Prosecution of Matin Azizi-Yarand* (May 2, 2018), <https://tinyurl.com/ycl4cxg2>; U.S. Att’y’s Off., W. Dist. Of Tex., *Central Texas Joint Terrorism Task Force Arrests Two for Allegedly Providing Material Support to Terrorists* (June 18, 2014), <https://tinyurl.com/y6qfz2gh>.

<sup>60</sup> *E.g.*, U.S. Drug Enf’t Agency, *Houston High Intensity Drug Trafficking Area along with the DEA announce the establishment of a new HIDTA initiative in Beaumont, Texas* (Jan. 27, 2020), <https://tinyurl.com/yxapeegl>; U.S. Att’y’s Off., N. Dist. Of Tex., *North Texas OCDETF Strike Force*, <https://tinyurl.com/yy78gxkg>.

<sup>61</sup> Simone Weichselbaum, *Some big cities pulling their police officers out of federal joint task forces*, *Statesman* (Nov. 29, 2020), <https://tinyurl.com/y3uwknow>.

<sup>62</sup> *Id.*

agents fatally shot a 14-year-old girl in San Antonio.<sup>63</sup> They claimed they opened fire only after the van that the girl was in started accelerating (in reverse) toward them, but a witness said the driver was simply trying to park.<sup>64</sup> The father was unable to recover under the FTCA because state law barred his claim.<sup>65</sup>

Ninety-five million people live in the 10 states that comprise the Fifth and Eighth Circuits.<sup>66</sup> These Americans are both more likely to have their constitutional rights violated by federal law enforcement officers, and less likely to have any recourse when that happens. This Court should grant review to ensure that *Bivens* remains available to remedy federal officers' Fourth Amendment violations wherever those violations occur.

---

<sup>63</sup> T.A. Badger, *Teen killed by DEA agent buried in San Antonio*, Midland Reporter-Telegram (Feb. 13, 2003), <https://tinyurl.com/y2gszk2e>.

<sup>64</sup> *Id.*

<sup>65</sup> The Brownwatch, *Father can't file suit over DEA slaying – 14 Year Old Latina Killed by Police* (Feb. 7, 2005), <https://tinyurl.com/yxde2nvh>.

<sup>66</sup> U.S. Census Bureau, *supra* note 48.

**CONCLUSION**

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

*/s/ Melanie L. Bostwick*

Melanie L. Bostwick

*Counsel of Record*

Zachary Hennessee

ORRICK, HERRINGTON &

SUTCLIFFE LLP

1152 15th Street, N.W.

Washington, D.C. 20005

(202) 339-8400

mbostwick@orrick.com

September 7, 2021