No. 21-187

IN THE
Supreme Court of the United States

HAMDI MOHAMUD,

Petitioner,

v.

HEATHER WEYKER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, CATO INSTITUTE, DKT LIBERTY PROJECT, GOLDWATER INSTITUTE, LAW ENFORCEMENT ACTION PARTNERSHIP, AND NEW CIVIL LIBERTIES ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

THEANE EVANGELIS
Counsel of Record
SAMUEL ECKMAN
JAMES TSOUVALAS
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7804
tevangelis@gibsondunn.com

Counsel for Amici Curiae

QUESTION PRESENTED

Whether a constitutional remedy is available against federal officers for individual instances of law enforcement overreach in violation of the Fourth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES *(continued)*

TABLE OF AUTHORITIES *(continued)*

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

TABLE OF AUTHORITIES *(continued)*

Page(s)

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil-rights laws. Since its founding more than 100 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and—of particular relevance in this case—accountability for law enforcement officers.

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The not-for-profit Liberty

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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 its counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel for *amici curiae* states that counsel for Petitioner and Respondents received timely notice of intent to file this brief, and each has consented in writing to the filing of this brief.

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 Goldwater Institute was established in 1988 as a nonpartisan public policy foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, and policy briefing. Through its Scharf–Norton Center for Constitutional Litigation, the Goldwater Institute litigates cases and files amicus briefs when its or its clients' objectives are directly implicated.

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.

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the right to be free from unreasonable searches and seizures. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have neglected them for so long. *Bivens* helps constrain unconstitutional behavior by

federal officers. Abolishing it before it has been replaced with a superior means to ensure accountability would exacerbate the administrative state's lack of respect for civil liberties.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici comprise a diverse group of educational, civic, and law-enforcement organizations that span the ideological spectrum. But there is at least one thing they share in common: 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 prohibition is imperative to preserving our system of limited government.[2]

The Eighth Circuit's decision in this case undermines the enforcement of the fundamental rights embodied in the Fourth Amendment by effectively abolishing citizens' ability to bring damages actions against federal officers who violate those rights. When this Court first authorized citizens to bring such actions 50 years ago in *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), it recognized that earlier judge-made rules designed to constrain Fourth Amendment violations (namely, the exclusionary rule) had proven woefully

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[2] Several *amici* submitted a brief as *amici curiae* in support of a petition for writ of certiorari in *Oliva v. Nivar*, No. 20-1060 (S. Ct. June 17, 2021), cert. denied ___ S. Ct. ___ (2021), reh'g denied (Aug. 2, 2021), which presented a materially identical question as the petition in this case. *Amici* are also submitting a similar brief as *amici curiae* in *Byrd v. Lamb*, No. 21-184 (S. Ct. Aug. 6, 2021), which presents the same question as *Oliva*.

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.

Despite the erosion of its scope in the intervening half century, *Bivens* has proven a powerful tool for policing the Fourth Amendment's bounds on federal power where it is available. 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. Indeed, *Bivens* actions serve a wide array of systemic interests, from exposing individual misconduct and institutional deficiencies in government agencies to incenting policymakers to adopt reforms to prevent future abuses.

Effectively abandoning *Bivens* in the search-and-seizure context in which it arose is 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.

This Court should grant certiorari to reaffirm the continuing importance of *Bivens* in our constitutional framework.

ARGUMENT

I. *BIVENS* REFLECTS A NATURAL DEVELOPMENT IN THE LAW DESIGNED TO PROTECT CITIZENS' FOURTH AMENDMENT RIGHTS.

More than a century ago, this Court recognized that the Fourth Amendment's guarantee against unreasonable searches and seizures would be little more than a parchment promise without a powerful enforcement mechanism. The mechanism developed by the Court has since become a cornerstone of criminal procedure: the exclusionary rule. Reasoning that "[i]f letters and private documents can . . . be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment . . . is of no value," the Court announced that evidence ob-

tained in violation of the Fourth Amendment is inadmissible in criminal prosecutions. *Weeks v. United States*, 232 U.S. 383, 393 (1914).

Although the exclusionary rule was an important first step in enforcing the Fourth Amendment's constraints on government conduct, it has a very narrow scope. In particular, because the rule operates only by "removing an *inducement* to violate Fourth Amendment rights," *United States v. Peltier*, 422 U.S. 531, 557 (1975) (emphasis added)—namely, obtaining evidence for a criminal prosecution—it has no role to play where Fourth Amendment violations are induced by other concerns. Among other things, the exclusionary rule does not deter unlawful searches and seizures committed against individuals who are not themselves the target of a criminal investigation, nor does it address Fourth Amendment violations intended simply to harass, coerce, or annoy.

By the 1960s, the exclusionary rule's shortcomings were becoming increasingly apparent. For example, in one 19-day period in December 1964 and January 1965, law enforcement in Baltimore conducted warrantless raids of more than 300 homes, most occupied by Black families, in a search for two brothers suspected of shooting police officers. *See Lankford v. Gelson*, 364 F.2d 197, 198 (4th Cir. 1966). Despite the gross constitutional violations, the exclusionary rule provided no avenue for relief. *See* Brief for Petitioner 11, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (No. 301), 1970 WL 136798 (citing the situation in *Lankford* as an example of the exclusionary rule's complete failure to protect "the innocent victim of a fruitless search" or

compensate "either the guilty or innocent for invasion of their Fourth Amendment rights").

These shortcomings were top of mind when *Bivens* came before this Court in 1971. As Chief Justice Burger noted, "the exclusionary rule's deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions—hence the rule has virtually no applicability and no effect in such situations." 403 U.S. at 417–18 (Burger, C.J., dissenting). *Bivens* itself presented precisely such a situation. As Justice Harlan explained, "assuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing." *Id.* at 410 (Harlan, J., concurring in the judgment).

As a result, the Court adopted a new enforcement mechanism to fill the gaps left by the exclusionary rule. In particular, the Court held that individuals whose Fourth Amendment rights were violated by federal officers could bring suit in federal court to obtain not only injunctive relief (which is often unavailable where it is unlikely that the violation will recur, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)), but also damages—concluding that such relief was appropriate to vindicate an individual's Fourth Amendment rights. *Bivens*, 403 U.S. at 396–97.

While *Bivens* marked a new direction in Fourth Amendment jurisprudence, it arose naturally from a long legal tradition stretching back to before the Founding. Borrowing from English common law, early American courts agreed that individuals could bring suit under state tort law seeking money damages from federal officials. *See* Carlos M. Vasquez & Stephen I.

Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 531–32 (2013); Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, CATO SUP. CT. REV. 2019–2020 263, 267 (2020) ("Not only did federal courts routinely provide such relief, but the Supreme Court repeatedly blessed the practice."). Although these federal officials could claim authority under the law as a defense to such a suit, that defense would necessarily fail if the official was found to have acted in violation of the Constitution. *See* Vasquez & Vladeck, 161 U. PA. L. REV. at 531–32; Vladeck, CATO SUP. CT. REV. 2019–2020 at 267–68.

Bivens supplemented this common law tradition by allowing private parties to bring an action for damages stemming from a Fourth Amendment violation even if the wrong committed was not actionable under state tort law. The Court acknowledged that conditioning relief for Fourth Amendment violations on a given state's tort regime would be nonsensical because "the Fourth Amendment operates as a limitation upon the exercise of federal power *regardless* of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." *Bivens*, 403 U.S. at 392 (emphasis added). And it would leave the conduct of federal officials to be policed not by the parameters laid down in the Constitution, but by those established in the common law of torts in each of the 50 states.

Thus, while *Bivens* itself is a fairly recent innovation, it is a natural outgrowth of a common law tradition that predates the Founding. And it is merely one part of this Court's multifaceted, century-old effort to

enforce the Fourth Amendment's substantive protections through private enforcement mechanisms. Yet, in the relatively short time it has been a part of our constitutional jurisprudence, *Bivens* has proven an effective mechanism for remedying government abuses.

II. WHERE IT IS AVAILABLE, *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 its availability has been sharply curtailed by intervening caselaw, it remains a powerful tool in the domain where it still governs. It should not be discarded lightly or unduly constrained.

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 9.5 percent of pro se *Bivens* actions that were litigated to final judgment—and 38.9 percent of counseled *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 remarkably 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." *Id.* 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 the Eighth Circuit has done, will leave those Americans who have suffered a violation of their most fundamental rights 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 incent 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." *Id.* 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 warrant-

less 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." *Id.* 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." *Id.* 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, it was discovered 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 act proactively to 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 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 allegations 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 comprise an exceedingly small fraction of federal courts' caseload. "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* continues to serve the vital Fourth Amendment interests identified by this Court when it adopted its private cause of action nearly half a century ago. Now is not the time to abandon it.

III. *BIVENS* IS AN ESPECIALLY IMPORTANT TOOL AT THIS MOMENT.

It is no secret that the relationship between law enforcement and the communities they police has become increasingly strained in recent years. High-profile incidents involving the excessive use of force, especially against members of marginalized communities, has caused public trust in law enforcement 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 citizens have a neutral forum in which their complaints

involving official misconduct can be heard and redressed.

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, "[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://civilrights.org/wp-content/uploads/Toolkit.pdf (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 Latinx, Indigenous, and Asian people than White people"). In fact, "between 2010 and 2012, Black men aged 15–19 were *21* more times 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 10 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.

Unsurprisingly, these abuses have led to widespread distrust of law enforcement among the Black community. One poll conducted just last year 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 is consistent across demographics. In fact, by last summer, "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, 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. The informational function such actions serve can help to cure misperceptions about police 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, 948 (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 unable 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. Abandoning it now would disserve the public, law enforcement, and the settled law of the land.

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

This Court's decisions restricting *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.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) ("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."). But this concern is overstated.

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 Stanford 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. *See* Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. Empirical Legal Stud. 4, 7 (2016) ("[I]t is clear that Section 1983 plaintiffs also fare poorly compared to non-civil-rights plaintiffs. Pretrial judgment rates for plaintiffs are lower than in other classes of cases, pretrial dismissal rights 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. Economu*, 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 Western District of Tennessee, *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).

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

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEANE EVANGELIS
Counsel of Record
SAMUEL ECKMAN
JAMES TSOUVALAS
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7804
tevangelis@gibsondunn.com

Counsel for Amici Curiae

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