No. 22-912

IN THE

Supreme Court of the United States

JAMES KING,

Petitioner,

v.

DOUGLAS BROWNBACK, ET AL,

Respondents.

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

BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

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

SUMMARY OF ARGUMENT

I. Congress acted deliberately when it chose to allow victims of government misconduct to pursue *Bivens* claims alongside FTCA claims. As this Court has observed, it is "crystal clear that Congress views FTCA and *Bivens* as *parallel*, *complementary* causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980) (emphasis added). As the Petition persuasively explains, both the statute's text and this Court's precedents confirm that the FTCA's judgment bar does not block *Bivens* claims brought in the same suit as FTCA claims.

Amicus files this brief to emphasize the untenable consequences of the Government's contrary rule. As a practical matter, its rule will prevent many plaintiffs

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[1] Rule 37 statement: All parties were timely notified to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

from pursuing both FTCA and *Bivens* claims, depriving them of important remedies and making it harder to hold law enforcement accountable at a time when more federal officers are engaged in local policing efforts and more state and local officers are being treated as federal officers for purposes of litigation.

II. The Government's suggestion that plaintiffs can pursue both *Bivens* and FTCA claims notwithstanding its expansive reading of the judgment bar sets a trap for litigants, wary and unwary alike. As a practical matter, it will be very hard for plaintiffs to pursue that course without triggering the judgment bar. Simply put, though they may try, plaintiffs cannot guarantee that their *Bivens* and FTCA claims remain "pending simultaneously," which, according to the Government, is the only way they could bring both FTCA and *Bivens* claims while avoiding the judgment bar. As a result, only the most risk-tolerant plaintiffs or those who are highly confident that their FTCA claims will prevail can risk bringing them together with *Bivens* claims. Everyone else will have to choose whether to bring only *Bivens* claims or, if they prefer their FTCA claims, to keep their FTCA claims in the case, accepting the risk that those might end up being their only claims. In other words, most plaintiffs will have to decide whether to pursue one claim to the exclusion of the other.

Plaintiffs whose strong *Bivens* claims are precluded by the judgment bar or who elect to bring only FTCA claims will miss out on an important remedies providing distinct relief. For one, the FTCA does not remedy *constitutional* misconduct and does not award damages against individual officers; it therefore does

not deter constitutional violations as effectively as *Bivens* claims do. For another, the FTCA does not allow punitive damages awards or the right to a jury trial, both of which are available in *Bivens* suits. FTCA-only relief, then, is not an adequate substitute for a suit that also includes *Bivens* claims.

Being forced to bring only a *Bivens* claim is no better. Not only does that result run contrary to Congress's intent to channel liability through the FTCA, it deprives plaintiffs of the unique benefits of FTCA claims, which includes the FTCA's broader scope of liability, the absence of qualified immunity, and the availability of the Judgment Fund to satisfy judgments.

III. By forcing plaintiffs to choose one avenue of relief but not both—*Bivens or* the FTCA—the Government's rule makes it harder to hold law enforcement accountable. The stakes of cutting back on accountability are especially high now, when federal officers—and state and local officers who are treated for these purposes as federal officers—are increasingly policing ordinary Americans and in troubling ways.

Now more than ever, federal officers find themselves engaged in front-line community policing. The use of federal officers to police recent racial justice protests puts into stark relief the increased role of federal law enforcement in our society, and the risks of reducing accountability.

Making it harder to hold federal law enforcement accountable, as the Government's rule does, also makes it harder to hold state and local officers to

account. State and local officers increasingly work with federal agents in joint state-federal task forces (JTFs). When they do, they often are treated as federal officers subject to suit under *Bivens* rather than Section 1983. The Government's rule, then, affects victims of their misconduct. Decades of experience with JTFs shows that JTFs are particularly likely to engage in abusive practices, and their multi-jurisdictional character often means that other accountability mechanisms are ineffective.

ARGUMENT

I. Congress Intended For Victims Of Misconduct By Federal Law Enforcement To Seek Redress Under Both *Bivens* and The FTCA.

Congress deliberately chose to allow victims of law enforcement misconduct to pursue *Bivens* claims alongside FTCA claims. In doing so, Congress made clear that the FTCA should not supplant *Bivens* claims. Nor should it encourage plaintiffs to pursue *Bivens* claims alone.

As this Court announced in *Carlson v. Green*, 446 U.S. 14 (1980), it is "crystal clear that Congress views FTCA and *Bivens* as *parallel*, *complementary* causes of action." *Id.* at 20 (emphasis added); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67-68 (2001) ("Congress intended the FTCA and Bivens to serve as 'parallel' and 'complementary' sources of liability." (quoting *Carlson*, 446 U.S. at 19-20)). Congress, *Carlson* explained, knows how to "explicitly state[] when it means to make the FTCA an exclusive remedy," and

it did not make the FTCA exclusive of *Bivens* claims. 446 U.S. at 20; *see* 28 U.S.C. § 2679(b) (Westfall Act's exception to the FTCA's exclusivity requirement for actions "brought for a violation of the Constitution of the United States"). Thus, "[i]n the absence of a contrary expression from Congress … victims … shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials." *Carlson*, 446 U.S. at 20 (citations omitted).

As Petitioner persuasively lays out, the FTCA's judgment bar is not a contrary expression from Congress. *See* Pet. at 14-19. The text of the statute makes clear that the judgment in one action involving the FTCA is a bar to a different action, not to non-FTCA claims brought alongside FTCA claims in a single action: "The judgment in *an action* under section 1346(b) of this title shall constitute a complete bar to *any action* by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676 (emphasis added). This Court has confirmed as much, explaining that "there will be no possibility of a judgment bar … so long as a *Bivens* action against officials and a Tort Claims Act against the Government are *pending simultaneously*." *Will v. Hallock*, 546 U.S. 345, 354 (2006) (emphasis added).

It makes sense that the judgment bar would not apply to claims in the same suit, for such suits do not implicate the judgment bar's central purpose: "prevent[ing] unnecessarily duplicative litigation." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1849 (2016); *id.* (judgment bar blocks plaintiff from getting "a second bite at the money-damages action" when "first suit"

provides "a fair chance to recover damages for his" injuries"). Accordingly, the "judgment bar provision applies"—and *only* applies—"where a plaintiff first sues the United States *and then* sues an employee" in a second suit. *Id.* at 1849 n.5 (emphasis added).

II. The Government's Reading Of The Judgment Bar Prevents Plaintiffs From Pursuing Both *Bivens* and FTCA Claims.

When this case was previously before this Court, the Government asserted that the "FTCA permits the plaintiff to choose whether to plead an FTCA claim against the United States, *Bivens* claims against the agents individually, *or both*." *Brownback v. King*, No. 19-546, Gov't Br. 20 (June 19, 2020) (emphasis added). But the Government conceded that this choice was illusory. Under its rule, "[i]f the plaintiff elects to bring an FTCA claim, either by itself or in combination with *Bivens* claims, and the FTCA claim ends in a judgment resolving the liability of the United States, then the judgment bar precludes the plaintiff from … pursuing claims against the individual officers under *Bivens*." *Id.* at 20-21.

In other words, the Government's rule is that plaintiffs can pursue both *Bivens* and FTCA claims only if they manage to "keep" the claims "pending simultaneously." *Id.* at 45-46. But plaintiffs cannot control the course of litigation and many will see their meritorious *Bivens* claims wiped out by the judgment bar if their FTCA claims are resolved first. This is no different from the plaintiff bringing *only* an FTCA claim, and it deprives them of an adequate remedy for the deprivation of their constitutional rights. The only

way to (possibly) avoid that consequence is to first bring the *Bivens* claims (with FTCA claims to follow in a separate suit only after the plaintiff has lost on his *Bivens* claims) or to abandon any FTCA claims altogether. As explained above (*supra* § I), that is not what Congress intended. It also has significant practical consequences, above all, depriving plaintiffs of important and distinct remedies.

A. The Government's suggestion that plaintiffs can bring *Bivens* and FTCA claims together ignores the practical realities of litigating the claims.

The Government has suggested that plaintiffs need not choose between *Bivens* and FTCA claims; they can bring both—and avoid the judgment bar—if they can keep the claims "pending simultaneously." But it will be extremely difficult for plaintiffs to do that. There are many points in the span of litigation at which an FTCA claim can fail and trigger the judgment bar for reasons having nothing to do with the merits of a related *Bivens* claim, despite the plaintiff's best effort to avoid that result. This is true not just for weak FTCA claims, but also for strong claims that might fail simply because the court disagrees with the plaintiff on a close question of law or fact. As a result, all but the most risk-tolerant plaintiffs or those with slam-dunk FTCA claims will opt not to bring the claims together in the same suit. They could try to bring the claims in separate suits—with the *Bivens* suit coming first—but that is risky, too. And so rational plaintiffs will end up prioritizing one over the other—bringing only *Bivens* claims *or* bringing FTCA claims knowing that may doom their *Bivens* claims.

1. Plaintiffs trying to keep FTCA and *Bivens* claims pending simultaneously may be thwarted as soon as motions practice begins. The Government, for instance, could move to dismiss the FTCA claims (alone or in addition to the *Bivens* claims). A plaintiff who fears the court will rule against him—a reasonable fear, even for plaintiffs with strong claims but no guarantee of success, given the many obstacles to prevailing—may withdraw the claim immediately to spare his *Bivens* claims from the judgment bar. If he persists and receives an adverse decision, he could try to avoid entry of judgment—and therefore the judgment bar—by dropping the FTCA claim. But that is risky, for it requires leave of the court. *See* Fed. R. Civ. P. 15(a)(1)(B), (2).

A plaintiff who makes it to trial with both claims intact is still vulnerable to an adverse decision from a factfinder on his FTCA claim and so is in the same tough spot as before: He could drop the FTCA claims before the factfinder rules against him, or he could roll the dice at trial and if he loses on the FTCA claim, try to drop the claim before judgment is entered. But as before, that attempt may fail, either because the court will rebuff it, *see* Fed. R. Civ. P. 15(b) (requiring leave of court for amendments during or after trial); Fed. R. Civ. P. 41(a) (requiring agreement of defendant or order of court to dismiss actions, if after summary judgment), or because the court might regard such a dismissal as triggering the judgment bar anyway, making the move pointless.

Even plaintiffs who manage to obtain favorable verdicts on their *Bivens* claims before their FTCA claims are resolved are at risk. To have even a chance

at that, a plaintiff will likely have to speed up resolution of the *Bivens* claim by surrendering his Seventh Amendment right to a jury trial on that claim. *See Carlson*, 446 U.S. at 22. Even if that works and a favorable judgment on the *Bivens* claims is entered before an adverse judgment on the FTCA claim, the judgment bar might still knock out the *Bivens* verdict. That is because several circuits retroactively bar even successful *Bivens* claims when judgment is later entered on the FTCA claims. *E.g.*, *Manning v. United States*, 546 F.3d 430 (7th Cir. 2008); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 859 (10th Cir. 2005). And so plaintiffs also may have to ensure that judgment is *never* entered on the FTCA claim.

Given all this, only a plaintiff who starts out convinced that his FTCA claims will prevail (or otherwise prefers his FTCA claims to his *Bivens* claims) will risk bringing both FTCA and *Bivens* in the same suit. A wrong guess gets punished by the judgment bar. Everyone else who wants to safeguard their *Bivens* claims will end up either dropping FTCA claims along the way to avoid the judgment bar or, to be safest, will not bring FTCA and *Bivens* claims in the same suit at all.

2. Plaintiffs who wish to pursue both *Bivens* and FTCA claims could instead attempt to bring them in separate suits, with the *Bivens* suit coming first and the FTCA suit following later. Of course, if the two suits overlap at all, then the plaintiff will face the same coordination problems just discussed. In fact, it may be even more difficult to control the sequencing of the two suits than it is to control the sequencing of claims within a single suit.

Plaintiffs could try to wait until an adverse judgment is entered in the *Bivens* suit to bring the FTCA suit. But that may not work, either. FTCA claims must be exhausted within two years and suit brought within six months of the agency's denial of a claim. 28 U.S.C. § 2401(b). There is no guarantee that the *Bivens* claims will be resolved within that window. The FTCA claims may also be foreclosed by common-law claim preclusion, which applies when a second action "'aris[es] from the same transaction'" as the first action or "involve[s] a 'common nucleus of operative facts.'" *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594-95 (2020); *see also Harris v. United States*, 422 F.3d 322, 333 (6th Cir. 2005) ("customary rules of preclusion and the terms of the settlement govern whether an additional lawsuit may be filed" following a separate *Bivens* suit). Bringing the suits separately may also be considerably more expensive.

As this discussion illustrates, the Government's rule makes it very hard—and sometimes impossible—for plaintiffs to pursue both *Bivens* and FTCA claims without triggering the judgment bar. Those that try will likely fail and many others will not attempt it at all. That is directly contrary to Congress's deliberate decision to allow plaintiffs to pursue both *Bivens* and FTCA relief.

B. Making plaintiffs choose between FTCA claims or *Bivens* claims deprives them of valuable complementary remedies.

If the Government's rule reigns, many unwary plaintiffs who attempt to bring both *Bivens* and FTCA

claims will fall from the Government's high wire and find even strong constitutional claims blocked by the judgment bar. The alternative—and only safe bet for a plaintiff wishing to bring a *Bivens* claims—will be to bring *only* a *Bivens* claim. Congress did not want that, and it also comes at substantial practical cost.

1. Many plaintiffs who attempt the Government's high-wire act and fail will trigger the judgment bar and lose strong *Bivens* claims. As this case shows, FTCA claims often fail for reasons specific to the FTCA and that would not sink a *Bivens* claim arising from the same circumstances. Here, Petitioner's FTCA claims failed because they were barred by Michigan's expansive government immunity defense. Under Michigan law, which the FTCA incorporates via 28 U.S.C. § 1346(b)(1)'s private analogue provision, officers are immune from liability for intentional torts if they act out of malice, a subjective standard that is more protective of officers than the objective standard that applies to constitutional claims. Petitioner, therefore, lost his FTCA claims even though he prevailed on his constitutional claims; indeed, even though the officers here violated his clearly established constitutional rights.

Or take a hypothetical example, arising from Missouri. Plaintiffs bringing FTCA claims for conduct that occurred there may fall afoul of that state's public duty doctrine, which holds that public employees may not be held civilly liable for breaches of duties they owe to the general public, as distinct from specific individuals. *See White v. United States*, 959 F.3d 328, 333 n.3 (8th Cir. 2020) (noting that district court denied FTCA claim on this alternative basis). An

FTCA claim that fails for that reason could bar a *Bivens* claims, say for unconstitutionally excessive force resulting in death. *Id*. The availability of an action against federal officers for constitutional violations should not "be left to the vagaries of the laws of the several States." *Carlson*, 446 U.S. at 23. But on the Government's reading, it would.

Bringing an FTCA claim alone is no better. An FTCA-only suit is not an adequate substitute for a suit that also includes *Bivens* claims. This Court has already recognized that an FTCA remedy against the United States is not an adequate remedy for a constitutional injury. As the Court made clear in *Carlson*, the "FTCA is not a sufficient protector of the citizens' constitutional rights": "Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States." 446 U.S. at 23, 21; *see FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (stressing "the deterrent effects of the *Bivens* remedy"). The FTCA remedy is inadequate in other ways as well, including that the FTCA does not allow punitive damages awards and the right to a jury trial, both of which are available in *Bivens* suits. *Carlson*, 446 U.S. at 21-23.

For some of these same reasons, even plaintiffs who *win* their FTCA claims and are unable to prevent a court from entering judgment on those claims, thereby triggering the judgment bar's application to their *Bivens* claims, lose out. *Cf. Sanchez v. Rowe*, 870 F.2d 291, 292 (5th Cir. 1989) (plaintiff given chance to elect whether to enter judgment on winning FTCA or *Bivens* claim).

2. If this Court adopts the Government's reading of the judgment bar, the only safe bet for a plaintiff wishing to bring a *Bivens* claim will be to bring *only* a *Bivens* claim.

That outcome is contrary to Congress's intent. Just as Congress did not intend for the FTCA to preclude simultaneously filed *Bivens* claims (*supra* § I), Congress did not want the FTCA to incentivize plaintiffs to bring *only Bivens* claims against federal officers. As the Court explained in *Simmons*, any reading of the FTCA's judgment bar that "would … encourage litigants to file suit against individual employees before suing the United States to avoid being foreclosed from recovery altogether … is at odds with one of the FTCA's purposes[:] channeling liability away from the individual employees toward the United States." 136 S. Ct. at 1850.

And like the FTCA-only approach, the *Bivens*-only approach comes with real costs, for both plaintiffs and defendants alike.

For one, plaintiffs who bring only *Bivens* claims lose out on the FTCA's broader coverage for misconduct that may not be redressable in a constitutional tort action but is still harmful. The FTCA, for instance, reaches instances of misconduct that either do not have a constitutional analogue, *e.g.*, negligence, or do have a constitutional analogue, but not one to which the *Bivens* remedy extends, *see, e.g.*, *Loumiet v. United States*, 948 F.3d 376, 378 (D.C. Cir. 2020) (finding no *Bivens* remedy for First Amendment claims where FTCA claims were still live).

FTCA claims are also valuable to plaintiffs because, unlike constitutional claims, the United States cannot claim qualified immunity.

FTCA claims may also quite literally be more valuable to plaintiffs. Final money judgments under the FTCA are paid out by the Judgment Fund, a standing appropriation from the general treasury. *See* 31 U.S.C. § 1304. Because *Bivens* claims establish the personal liability of the officer, *Bivens* judgments cannot be paid out of the Judgment Fund. *See* James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417, 469 n.281 (2011). The Department of Justice may separately indemnify officers after entry of a *Bivens* judgment, but indemnification is not guaranteed—an authorized official must determine that indemnification must is in the best interests of the federal government, *see* 28 C.F.R. § 50.15(c)(1), and indemnification requests for more than $100,000 must be approved by the Attorney General. *See* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 Colum. L. Rev. 1601, 1612 n.46 (2011). FTCA claims, therefore, guarantee plaintiffs access to a deep-pocketed defendant should they prevail (or settle). The same is not true of *Bivens* claims.

In sum, FTCA and *Bivens* claims serve different but complementary functions, which is one reason Congress intended that plaintiffs be able to bring both in the same suit. This is not to say that plaintiffs should be entitled to a double *recovery*, of course. The common law rule of "single satisfaction"—limiting plaintiffs to a single recovery for a particular injury—

"ensure[s] judicial economy and fairness to litigants without the harshness of imposing a required election of remedies under the judgment bar." Pfander & Aggarwal, *supra*, at 465-66.

III. The Government's Rule Allows Large Swaths of Law Enforcement Conduct To Evade Constitutional Accountability.

The Government's rule will lead to less accountability for a large swath of law enforcement—both federal and state and local—that police Americans every day. As explained above (§ II), expanding the judgment bar effectively puts plaintiffs to the choice of *Bivens* or FTCA claims, depriving them of the chance to pursue both. But now is the time for more accountability, not less.

Nowadays, ordinary Americans are more likely to encounter federal officers than at any time in the past. Long gone are the days when federal law enforcement confined itself to counterfeiting, treason, and piracy. *See* U.S. Const. Art. 1, § 8; *id.* Art. III. The rapid growth of their ranks, the explosion of Title 18, and new federal-state partnerships mean that, now more than ever, federal officers are policing ordinary Americans—and often in deeply troubling ways.

1. The numbers alone tell the story of the dramatic growth of federal law enforcement. Since 2001, the U.S. government has added approximately 2,500 new civilian federal law enforcement officers to its

ranks *each year*.[2] By 2016, the federal government employed over 132,000 civilian law enforcement officers.[3] Even the Department of Education has a SWAT team—one that conducts early morning raids and holds kids in police cars for hours on end.[4]

The swelling ranks of federal law enforcement are increasingly being used in fundamentally local contexts. Although the states, not the federal government, are supposed to "retain[]" the "general police power," *United States v. Lopez*, 514 U.S. 549, 567 (1995), "the expansion of the reach of federal criminal law," *Gamble v. United States*, 139 S. Ct. 1960, 1980 (2019), means that the federal officers have authority to engage in what is essentially local policing.

Even when federal agents are protecting traditional and distinctly federal interests, that still brings them into primarily local operations. For instance, federal immigration agents will often join local police officers in garden-variety operations where the target may be a noncitizen. *See, e.g.*, *Muehler v. Mena*, 544 U.S. 93, 96 (2005). The broad jurisdiction of the U.S.

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[2] Garrett M. Graff, *The Story Behind Bill Barr's Unmarked Federal Agents*, Politico (June 5, 2020), https://tinyurl.com/ycdpc7l6.

[3] *Id.*; Connor Brooks, *Federal Law Enforcement Officers, 2016 – Statistical Tables* 1 (Dep't of Justice, Bureau of Justice Statistics Oct. 2019), https://tinyurl.com/yxey6bb5.

[4] Brian W. Walsh, *Beware the U.S. Education Department SWAT Team* (Heritage Found. 2011), https://tinyurl.com/ycgyx92f.

Border Patrol—an agency with 20,000 officers[5]—exposes Americans to an enormous risk of intrusion: Border Patrol agents may operate within 100 miles from any "external boundary," a range that reaches where two-thirds of the U.S. population lives.[6]

2. Recent protests cast in dramatic relief the role federal officers increasingly play in front-line policing, and the risks of letting them act with impunity.

For instance, at least 100 federal law enforcement officers were on the ground in Portland during protests following the killing of George Floyd.[7] Ostensibly there to guard federal buildings, media reports indicate that federal officers patrolled the streets far from federal sites and acted in ways that appear to violate the Constitution,[8] including throwing protestors into unmarked vans without explaining why they were being detained[9] and conditioning release on

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[5] GAO, *U.S. Customs and Border Protection: Progress and Challenges in Recruiting, Hiring, and Retaining Law Enforcement Personnel: Testimony Before the Subcomm. on Oversight, Management, and Accountability of the H. Comm. on Homeland Security* 1 (Mar. 7, 2019) (statement of Rebecca Gambler, Dir., Homeland Security & Justice), https://tinyurl.com/yyxxdrpn.

[6] ACLU, *The Constitution in the 100-Mile Border Zone*, https://tinyurl.com/y29z4txr (last visited Apr. 19, 2023).

[7] Hamed Aleaziz (@Haleaziz), Twitter (July 17, 2020, 2:57 PM), https://tinyurl.com/y4blung7.

[8] Philip Bump, *How the Federal Police in Portland Are Avoiding Accountability*, Wash. Post. (July 23, 2020), https://tinyurl.com/yyrng2ud.

[9] Peter Baker, Zolan Kanno-Youngs & Monica Davey, *Trump Threatens to Send Federal Law Enforcement Forces to*

detainees giving up their First Amendment rights to peacefully protest.[10] As one commentator put in, "In one dystopian scene, a Portland man was seized, blindfolded, transported, imprisoned and finally released—without once being told who had abducted him and why."[11]

Things were no better in Washington, D.C., where federal officers used "smoke canisters, pepper balls, riot shields, batons and officers on horseback to show and chase people gathered" peacefully to protest police brutality.[12] The federal contingent policing D.C.'s streets included officers who were not trained to deal with civilian protests; they were instead members of FBI hostage rescue teams and guards from the Bureau of Prisons.[13] The latter "normally operate in a controlled environment behind bars with sharply

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More Cities, N.Y. Times (July 20, 2020), https://tinyurl.com/y5hxjcbg.

[10] Dara Lind, *"Defendant Shall Not Attend Protests": In Portland, Getting Out of Jail Requires Relinquishing Constitutional Rights,* ProPublica (July 28, 2020), https://tinyurl.com/y5olgttk.

[11] Laurence Tribe, Commentary, *'A Profoundly Un-American Attack On Civil Society': Why Trump's Paramilitary Force Is Unconstitutional*, WBUR (July 23, 2020), https://tinyurl.com/yxvtwz7r.

[12] Carol D. Leonnig et al., *Barr Personally Ordered Removal of Protestors Near White House, Leading to Use of Force Against Largely Peaceful Crowd*, Wash. Post (June 2, 2020), https://tinyurl.com/y7vm8j9x.

[13] Ryan Lucas, *Attorney General Steps Up Federal Law Enforcement Response To Protests*, NPR (June 1, 2020), https://tinyurl.com/y3hffsjf.

limited civil liberties and use-of-force policies that would never fly in a civilian environment."[14] It is hardly surprising, then, that federal officers were accused of violating protestors First and Fourth Amendment rights.[15]

Likewise, in San Diego, there were reports of Border Patrol agents, decked out in full tactical gear, firing tear gas and rubber bullets into peaceful crowds of protestors.[16]

As these and other examples illustrate, the more federal agents on the ground, the more opportunity for abuse—especially when agents are not well trained for the task and are unfamiliar with the community they are policing. As former Attorney General Meese put it, "[f]ederal law-enforcement authorities are not as attuned to the priorities and customs of local communities as state and local law enforcement," and as a result may deploy far more aggressive tactics than appropriate.[17] When they overstep, accountability is more important now than ever before.

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[14] *Graff*, *supra*.

[15] *See, e.g.*, Complaint, *Black Lives Matter v. Trump*, 1:20-cv-01469 (D.D.C June 4, 2020).

[16] Southern Border Communities Coalition, *Border Patrol Deleted This Tweet of Heavily Armed Agents Posing at a George Floyd Vigil* (June 4, 2020), https://tinyurl.com/yyryr7c5.

[17] Edwin Meese III, *How Washington Subverts Your Local Sheriff* (Hoover Inst. 1996), https://tinyurl.com/y6gjqugv (quoting Sen. Joseph Biden).

CONCLUSION

For the foregoing reasons and those in the Petition, the Court should grant the petition for certiorari.

Respectfully submitted,

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April 19, 2023