No. 19-546

IN THE

Supreme Court of the United States

DOUGLAS BROWNBACK, ET AL.,

Petitioners,

v.

JAMES KING,

Respondent.

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

BRIEF OF CATO INSTITUTE AND NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law enforcement and detention facility officials through coordinating and assisting civil-rights lawyers representing their victims. NPAP has approximately six hundred attorney members practicing in every region of the United States. NPAP provides training and support for these attorneys and other legal workers, public education and information on issues related to law enforcement and detention misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of such misconduct. NPAP supports legislative efforts aimed at increasing accountability for law enforcement and detention facilities and appears regularly as amicus curiae in cases such as this one presenting issues of particular importance for its member lawyers and their clients, who include protestors and victims of police misconduct. NPAP's members also regularly represent prisoners and detainees in civil rights litigation.

The Cato Institute is a nonpartisan public-policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

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 claims under the Federal Tort Claims Act (FTCA). As this Court has observed, it is "crystal clear that Congress views [the] FTCA and *Bivens* as *parallel*, *complementary* causes of action." *Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (emphasis added). As Respondent's brief persuasively explains, both the FTCA'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.

Amici file this brief to emphasize the untenable consequences of the Government's contrary rule. As a practical matter, its rule will prevent many plaintiffs 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. Gov't Br. 45-46. 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 accept that bringing them with *Bivens* claims may leave them with only FTCA claims. In other words, most plaintiffs will have to decide whether to pursue one set of claims 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 remedy providing distinct relief. 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. And 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 also deprives plaintiffs of the unique benefits of FTCA claims, which include 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.

The Government's rule 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, so plaintiffs can sue them under *Bivens* (and the United States under the FTCA) rather than § 1983 and state law. Suits against JTF members, then, are also vulnerable to the judgment bar. Decades of experience with

JTFs show 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 [the] FTCA and *Bivens* as *parallel*, *complementary* causes of action." *Id.* at 19-20 (emphasis added); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 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 stat[e] 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 20-21; *see* 28 U.S.C. § 2679(b)(2) (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 ex-

pression from Congress, … victims … shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." *Carlson*, 446 U.S. at 20.

As Respondent persuasively lays out, the FTCA's judgment bar is not a contrary expression from Congress. *See* Resp. Br. 14-24, 26-34. 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 apple" 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.

The Government asserts 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*." Gov't Br. 20 (emphasis added). But the Government concedes that choice is 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*." Gov't Br. 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.'" Gov't Br. 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 plaintiffs bringing *only* FTCA claims, 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 after the plaintiff has lost on his *Bivens* claims) or to abandon any

FTCA claims altogether. As we have explained (*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.

It will be extremely difficult for plaintiffs who wish to bring both *Bivens* and FTCA claims to avoid the judgment bar by keeping the claims "'pending simultaneously.'" Gov't Br. 45-46. There are many points in the span of litigation at which an FTCA claim can fail and trigger the judgment bar 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. And often, the FTCA claim will fail for reasons that would not have defeated a related *Bivens* claim. *See infra* § II.B.1. 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). Plaintiffs who fear the court will rule against them—a reasonable fear, even for plaintiffs with strong claims but no guarantee of success, given the many obstacles to prevailing—may withdraw the FTCA claims immediately to spare their *Bivens* claims from the judgment bar. *See* Fed. R. Civ. P. 15(a)(1)(B). If they persist and receive an adverse decision, they could try to avoid entry of judgment—and therefore the judgment bar—by dropping the FTCA claims. But that is risky, for it requires leave of the court. *See* Fed. R. Civ. P. 15(a)(2).

Plaintiffs who make it to trial with both sets of claims intact are still vulnerable to an adverse decision from a factfinder on their FTCA claims and so are in the same tough spot as before: They could drop the FTCA claims before the factfinder rules against them, or they could roll the dice at trial and, if they lose on the FTCA claims, try to drop them 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 judgments on their *Bivens* claims before their FTCA claims are resolved are at risk. To have even a chance at that, plaintiffs may need to speed up reso-

lution of the *Bivens* claims by surrendering their Seventh Amendment right to a jury trial on those claims. *See Carlson*, 446 U.S. at 22. Plaintiffs who don't want to give up that right could ask for a "combined, though bifurcated, trial," where the trial judge resolves the FTCA claims and the jury addresses the *Bivens* claims, *and* ask the judge to enter judgment on the *Bivens* claims before the FTCA claims. *Manning v. United States*, 546 F.3d 430, 432 (7th Cir. 2008). But even if the judge agrees to both, 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.*, *id.* at 437; *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 claims.

Given all this, only plaintiffs who start out convinced that their FTCA claims will prevail (or otherwise prefer their FTCA claims to their *Bivens* claims) will risk bringing both FTCA and *Bivens* claims 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 sequence the two sets of claims in two suits than in 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. And no doubt the Government will argue that the FTCA claims are 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) (quotation marks and citations omitted); *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 find even strong constitutional claims blocked by the judgment bar. The alternative—and only safe bet for a plaintiff wishing to bring a *Bivens* claim—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 state law, which the FTCA incorporates via 28 U.S.C. § 1346(b)(1)'s private analogue provision. Those same reasons often will not sink a *Bivens* claim arising from the same circumstances.

Here, for example, Respondent's FTCA claims failed because they were barred by Michigan's expansive government immunity defense. Pet. App. 78a-80a. Under Michigan law, 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. Pet. App. 77a-79a. Respondent, 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. Pet. App. 14a-15a.

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, 332 n.3 (8th Cir. 2020) (noting that district court denied FTCA claim on this alternative basis). That defense would not also apply to a *Bivens* claim arising from the same circumstances, but the Government's reading of the judgment bar would nevertheless knock out that *Bivens* claim.

This point belies the Government's assertion that, "[i]n the face of an FTCA judgment on the merits of the torts that respondent alleged, there is no apparent reason why he should be permitted to continue litigating *Bivens* claims simply because of the manner in which he initially brought them." Gov't Br. 45. 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—another one of the Government's options, Gov't Br. 20-21—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. *Contra* Gov't Br. 27 ("Respondent had a fair chance to recover damages for the wrongdoing that he alleged."). 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 21, 23; *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 or afford the right to a jury trial, both of which are available in *Bivens* suits. *Carlson*, 446 U.S. at 21-23.[2]

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) (district court required plaintiff to elect whether to enter judgment on winning FTCA or *Bivens* claim).

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[2] This Court's recent cases declining to expand *Bivens* to new contexts, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), and *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), do not undermine the importance of *Bivens* remedies in the already familiar contexts, and certainly not in the "search-and-seizure context in which [*Bivens*] arose." *Ziglar*, 137 S. Ct. at 1856. Search-and-seizure cases are among the case the judgment bar is most likely to affect. *See infra* § III (describing Fourth Amendment violations in the course of ordinary, domestic policing). *Bivens* provides necessary "instruction and guidance to federal law enforcement officers" in "this common and recurrent sphere of law enforcement." *Ziglar*, 137 S. Ct. at 1857.

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 individual employees and toward the United States." 136 S. Ct. at 1850.

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, 378-79 (D.C. Cir. 2020), *cert. denied*, No. 19-1259, 2020 WL 3492762 (U.S. June 29, 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 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.

Individual law enforcement officers likewise have an interest in avoiding the *Bivens*-first liability regime the Government's rule encourages. They, like

many civil rights plaintiffs interested in financial recovery, would prefer plaintiffs to bring suits against the United States under the FTCA rather than *Bivens* suits against individual officers. *See Simmons*, 136 S. Ct. at 1850.

In sum, FTCA and *Bivens* claims serve different and 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—Both Federal And State—To Evade Accountability.

The Government's rule will lead to less accountability for a large swath of law enforcement—federal, state, and local—that police Americans every day. As we have explained (§ 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. More and more, federal officers are engaging in front-line policing, as are state and local officers who participate in increasingly prevalent federal-state joint task forces and are treated as federal officers, subject to accountability

under *Bivens* (and the United States under the FTCA) instead of § 1983 and state law. When they overstep—and they do—victims of their abuse are entitled to the full range of relief Congress intended them to have.

A. The Government's rule weakens accountability for federal officers, who increasingly perform routine police tasks.

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. I, § 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 2000, the U.S. government has added approximately 2,500 new civilian federal law enforcement officers to its ranks *each year*.[3] By 2016, the federal government employed over 132,000 civilian law enforcement officers.[4] Even the Department of Education has a

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

[4] *Id.*; Dep't of Justice, Bureau of Justice Stat., No. NCJ251922, *Federal Law Enforcement Officers, 2016 – Statistical Tables* 1 (Oct. 2019), https://tinyurl.com/yxey6bb5.

SWAT team—one that conducts early morning raids and holds kids in police cars for hours on end.[5]

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. And they are using that authority: This summer, for instance, the President announced a "surge [of] federal law enforcement" in Chicago, directing the Department of Justice to send the "FBI, ATF, DEA, U.S. Marshals Service, and Homeland Security … to help drive down violent crime."[6]

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. Border Patrol—an agency with nearly

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[5] Brian W. Walsh, Commentary, *Beware the U.S. Education Department SWAT Team*, Heritage Found. (June 14, 2011), https://tinyurl.com/ycgyx92f.

[6] White House, *Remarks by President Trump on Operation LeGend: Combatting Violent Crime in American Cities* (July 22, 2020), https://tinyurl.com/y3nngczh.

20,000 officers[7] and a history of abusing its authority[8]—exposes Americans to an enormous risk of intrusion: Border Patrol agents may operate within 100 miles from any "external boundary," a range that includes two-thirds of the U.S. population.[9]

2. Law enforcement responses to 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.[10] 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,[11] including throw-

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[7] 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.

[8] *See, e.g.*, ACLU, *Defending Civil Liberties at the Border*, https://tinyurl.com/y4p3q53e (last visited Aug. 28, 2020).

[9] ACLU, *The Constitution in the 100-Mile Border Zone*, https://tinyurl.com/y29z4txr (last visited Aug. 28, 2020).

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

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

ing protestors into unmarked vehicles without explaining why they were being detained[12] and conditioning release on detainees giving up their First Amendment rights to peacefully protest.[13] As one commentator put it, "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."[14]

Things were no better in Washington, D.C., where federal officers used "smoke canisters, pepper balls, riot shields, batons and officers on horseback to shove and chase people gathered" peacefully to protest police brutality.[15] 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

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[12] Peter Baker, Zolan Kanno-Youngs & Monica Davey, *Trump Threatens to Send Federal Law Enforcement Forces to More Cities*, N.Y. Times (July 24, 2020), https://tinyurl.com/y5hxjcbg.

[13] 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.

[14] 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.

[15] 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.

guards from the Bureau of Prisons.[16] The latter "normally operate in a controlled environment behind bars with sharply limited civil liberties and use-of-force policies that would never fly in a civilian environment."[17] It is hardly surprising, then, that federal officers were accused of violating protestors' First and Fourth Amendment rights.[18]

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.[19]

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

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

[17] *Graff*, *supra*.

[18] *See, e.g.*, Complaint, *Black Lives Matter D.C. v. Trump*, No. 1:20-cv-01469 (D.D.C June 4, 2020).

[19] 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.

aggressive tactics than are appropriate.[20] When they overstep, accountability is more important now than ever before.

B. The Government's rule weakens accountability for state and local officers participating in joint state-federal task forces.

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. Today many state and local officers work with federal law enforcement in joint state-federal task forces (JTFs). When they do, they often are considered by courts to be federal agents and therefore subject to suit under *Bivens* rather than § 1983 and state tort law, which are the typical mechanisms for holding state and local officers accountable. Indeed, that was the case here: The Sixth Circuit held that Petitioner Allen, a detective with the Grand Rapids, Michigan, police department, was not subject to suit under § 1983 because he was working with an FBI task force at the time. Pet. App. 36a; *see also* Conditional Cross-Petition, No. l9-718 (Nov. 27, 2019), *cert. denied*, Mar. 30, 2020.

The Government, therefore, can unilaterally choose to shield state and local officers from accountability under § 1983 and state tort law simply by recruiting them to carry out its missions. In theo-

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

ry, those officers could be held accountable as federal officers under *Bivens* (and the United States could be held accountable for their conduct under the FTCA). But adopting the Government's broad reading of the judgment bar would undercut those mechanisms of accountability, too. That risks emboldening officers who are already pushing the envelope—a consequence that will radiate far beyond this case.

1. JTFs are commonly and widely used.

JTFs date back to the early 1970s, when they were first used in the "war on drugs."[21] They expanded rapidly in in the 1980s and 1990s, and today, there are nearly a thousand JTFs operating nationwide, employing thousands of state and local officers in operations on behalf of the federal government.[22]

As of 2016, 271 JTFs—representing 2,200 federal DEA agents and over 2,500 state and local officers—share the same anti-drug mission of the original JTFs.[23] But hundreds of other JTFs operate

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[21] Radley Balko, Opinion, *State-Federal Task Forces Are Out of Control*, Wash. Post (Feb. 14, 2020), https://tinyurl.com/to55y68 [hereinafter *State-Federal Task Forces*]; *Task Forces*, DEA, https://tinyurl.com/yxpx8qj2 (last visited Aug. 27, 2020).

[22] Balko, *State-Federal Task Forces*, *supra*; Simone Weichselbaum, *Why Some Police Departments Are Leaving Federal Task Forces*, The Marshall Project (Oct. 31, 2019), https://tinyurl.com/y2dphwnx [hereinafter *Some Police Departments*].

[23] *Task Forces*, DEA, *supra*.

in other arenas, fighting terrorism (200 JTFs),[24] combatting violent gangs (160),[25] "creat[ing] and foster[ing] safer neighborhoods" (94),[26] securing the border (72),[27] and apprehending fugitives (60 local; 7 regional).[28] Several nationwide JTFs focus on detecting financial crimes,[29] rooting out financial fraud,[30] and stopping human trafficking.[31] There are even JTFs to combat "COVID-19 related fraud."[32]

JTFs reach all corners of the country. They were part of the federal forces sent this summer to Ameri-

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[24] *Joint Terrorism Task Forces*, FBI, https://tinyurl.com/y7nb8r8f (last visited Aug. 27, 2020).

[25] *Violent Gang Task Forces*, FBI, https://tinyurl.com/y4br6dkv (last visited Aug. 27, 2020).

[26] *Project Safe Neighborhoods*, BJA, https://tinyurl.com/y6axnadz (last visited Aug. 27, 2020).

[27] *Border Enforcement Security Task Force* (BEST), ICE, https://tinyurl.com/y4txo63n (last updated Apr. 29, 2020).

[28] *Fugitive Task Forces*, U.S. Marshals Service, https://tinyurl.com/y4tkb2th (last visited Aug. 27, 2020).

[29] *Money Laundering*, ICE, https://tinyurl.com/y3hcravc (last updated Jan. 3, 2018) (El Dorado Task Force).

[30] *Financial Fraud Enforcement Task Force (FFETF*), FinCEN, https://tinyurl.com/yxvevh9a (last visited Aug. 27, 2020).

[31] *Special Initiatives*, DOJ, https://tinyurl.com/yxnrruen (last updated May 26, 2017); *Human Trafficking*, FBI, https://tinyurl.com/y3des4ku (last visited Aug. 27, 2020).

[32] *E.g.*, *Connecticut Announces Joint Federal-State COVID-19 Fraud Task Force*, DOJ (May 6, 2020), https://tinyurl.com/yau69nb7; *The Virginia Coronavirus Fraud Task Force*, DOJ, https://tinyurl.com/yy5gyq6p (last updated June 10, 2020).

can cities to respond to homicides and other violent crime.[33] And even in "tiny Chicken, Alaska, locals complained about a heavy-handed water quality raid by an armed, armor-clad EPA-headed environmental crimes task force."[34]

2. Governments do not hold JTFs to adequate account.

The multi-jurisdictional nature of JTFs makes it harder to enforce limits on their authority.

For starters, there is not just "one entity you can blame" when JTFs step out of line.[35] The very "organizational structure makes some task forces virtually unaccountable, and certainly not accountable to any public official in the region they cover,"[36] such as a police chief or an elected sheriff.[37] Even where

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[33] Simone Weichselbaum, *As More Federal Agents Enter American Cities, Local Leaders Can't Keep Them in Line*, The Marshall Project (July 31, 2020), https://tinyurl.com/yxjhylca [hereinafter *More Federal Agents*].

[34] Radley Balko, *SWATted: The Militarization of America's Police*, The American Interest (Oct. 10, 2013), https://tinyurl.com/yy2vf2uv [hereinafter *SWATted*].

[35] Lewis Beale, *Taking Drug Task Forces to Task*, Pacific Standard (May 3, 2017), https://tinyurl.com/y6jsmlrl.

[36] Radley Balko, Opinion, *Another Narcotics Task Force is in The Midst of a Corruption and Brutality Scandal*, Wash. Post (July 6, 2017), https://tinyurl.com/ycuzo254 [hereinafter *Another Narcotics Task Force*].

[37] Balko, *SWATted*, *supra*.

there is "a local official … technically in charge," JTFs still tend to have "free rein."[38]

The multi-jurisdictional nature of JTFs allows their members to avoid even the most basic accountability measures put in place by cities and states. As one journalist put it, "by sending federal … warriors (and money) to work with local cops, these task forces [can] pick whichever laws—state or federal—afford[] them the most power and the least accountability."[39] They often will choose federal law because it is typically laxer than state and local standards.[40] For example, JTF members can refuse to wear body cameras even if their local department requires them because federal rules generally prohibit their use.[41] They can ignore state laws requiring law enforcement to obtain warrants to track cell phones.[42] And when a JTF shooting occurs, there is a federal rule that prevents JTF members from speaking to local police about it right away.[43] JTF members feel free to ignore local rules even in the face of "legislation requiring that police abide by city and state

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[38] Balko, *State-Federal Task Forces*, *supra*.

[39] *Id.*

[40] Weichselbaum, *Some Police Departments, supra*; Kade Crockford, *Beyond Sanctuary: Local Strategies for Defending Civil Liberties*, The Century Foundation (Mar. 21, 2018), https://tinyurl.com/y6a8uj6y.

[41] Weichselbaum, *Some Police Departments, supra*.

[42] Crockford, *supra*.

[43] Weichselbaum, *Some Police Departments, supra*.

rules while working with the task force."[44] And so it is no surprise that "former Justice Department officials and civil rights lawyers say it's nearly impossible for cities to manage task forces."[45]

JTFs rely on their chameleon character not just to choose whether to follow federal *or* state rules, but to avoid either. For example, JTFs use their multijurisdictional status to thwart the public's efforts to monitor them via open record laws: They can "use[] their federal jurisdiction to escape state open-record laws" only to "claim[] they [are] state agencies when subjected to a records request under federal law."[46] Indeed, some JTF members avoid scrutiny by claiming "cover of federal law protecting 'classified information.'"[47] This assumes records are available in the first place. A 2009 study commissioned by the Department of Justice to assess the effectiveness of JTFs failed because "[n]ot only were data insufficient to estimate what task forces accomplished, data were inadequate to even tell what the task forces did as routine work."[48]

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[44] *Id.*

[45] Weichselbaum, *More Federal Agents*, *supra*.

[46] Balko, *State-Federal Task Forces*, *supra*.

[47] Crockford, *supra*.

[48] William Rhodes et al., *Evaluation of the Multijurisdictional Task Forces* 1 (Feb. 27, 2009), https://tinyurl.com/pjwzdpx; *see* Balko, *State-Federal Task Forces*, *supra* (reporting that the study "had to be stopped, because the task forces kept little to no records").

Non-compliance with records laws is not the only way law enforcement prevents public monitoring of JTFs. Members of the public often will be hard-pressed to determine what entity—whether federal, state, or local—a particular officer works for. There is no requirement under federal law that officers identify themselves or their agencies, and officers sometimes lack badges or other identifying insignia or uniforms.[49]

Finally, state and local governments cannot control JTFs through the power of the purse because JTFs don't rely on them for funding—JTFs are often funded with federal grants or with proceeds from civil asset forfeiture.[50] And when state and local governments try to directly regulate civil asset forfeiture—for instance, by raising the burden of proof to prevail on a forfeiture claim or prohibiting seized funds from going directly to law enforcement—JTFs insist that those limits don't apply to them, only federal rules do.[51] Under the federal

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[49] Rachel Brown & Coleman Saunders, *Can Law Enforcement Officers Refuse to Identify Themselves?* Lawfare (June 12, 2020), https://tinyurl.com/y57r54t3; 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 [hereinafter *South Carolina Police*].

[50] Balko, *State-Federal Task Forces*, *supra*; Beale, *supra*.

[51] Balko, *State-Federal Task Forces*, *supra*; Radley Balko, Opinion, *Study: Civil Asset Forfeiture Doesn't Discourage Drug Use or Help Police Solve Crimes*, Wash. Post (June 11, 2019), https://tinyurl.com/y23qtc9v [hereinafter *Study: Civil Asset Forfeiture*].

rules, members of JTFs are free to engage in civil forfeiture regularly.[52] (Of course, when federal guidelines on forfeiture are more restrictive than state and local guidelines, JTFs opt for the local laws.[53])

3. JTFs are primed to abuse their authority.

The way JTFs are funded and equipped encourages more aggressive policing.

As just mentioned, JTFs are funded primarily through federal grants and civil asset forfeiture. State and local forces receive more federal grant dollars if they make more arrests or seize more contraband.[54] Reliance on civil asset forfeiture further incentivizes aggressive policing, as that practice "allow[s] [the police] to take cash and property without proving a crime has occurred."[55] (In a large percentage of cases, no indictment will be filed.[56]) JTFs are

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[52] Balko, *Study: Civil Asset Forfeiture*, *supra.*

[53] Balko*, State-Federal Task Forces, supra.*

[54] Nicole Fortier & Inimai Chettiar, Brennan Center for Justice, *Success-Oriented Funding: Reforming Federal Criminal Justice Grants* 1-2 (2014), https://tinyurl.com/y2733yn9; Balko, *Another Narcotics Task Force, supra.*

[55] Robert O'Harrow, Jr., Steven Rich & Shelly Tan, *Asset Seizures Fuel Police Spending*, Wash. Post. (Oct. 11, 2014), https://tinyurl.com/yy9vr6fn; *Balko*, *Study: Civil Asset Forfeiture*, *supra.*

[56] O'Harrow et al., *supra* ("There have been 61,998 cash seizures on highways and elsewhere since 9/11 without search warrants or indictments … according to an analysis of Justice data."); *see id.* ("Of the nearly $2.5 billion in spending …, 81

thus incentivized to make more arrests, regardless of whether doing so has a meaningful positive impact on the crime rate.[57] Indeed, the effectiveness of JTFs is, to say the least, up for debate.[58]

Aggressive policing by JTFs is particularly concerning because JTFs are frequently outfitted with the most dangerous gear. For nearly as long as JTFs have existed, they have been supplied with "surplus military equipment."[59] They also use funds from federal grants or asset forfeiture to procure "armored personnel carriers, high-power weapons, aircraft and other military-grade gear."[60] Equipment like this often is "used as an investigative tool to search the homes of people only suspected of crimes, and not

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percent came from cash and property seizures in which no indictment was filed ….").

[57] Fortier & Chettiar, *supra,* at 1-2; Balko, *Another Narcotics Task Force, supra*; Balko, *Study: Civil Asset Forfeiture*, *supra* (detailing study casting doubt on claims that "civil forfeiture puts drug runners out of business" and helps provide funds for the "police solve other crimes, such as rapes, robberies and murders").

[58] Crockford, *supra* ("[D]espite the FBI's claim that the JTTFs are the nation's 'front line on terrorism,' the FBI doesn't have much to show, in terms of benefits to public safety, for the vast expenditures of public funds poured into them."); Balko, *State-Federal Task Forces*, *supra* (discussing Justice Department's failure to complete a "cost-benefit study" of task forces).

[59] Balko, *SWATted*, *supra*.

[60] *Id.*; O'Harrow et al., *supra* (noting that cash and property seizures have "helped some departments militarize their operations: Humvees, automatic weapons, gas grenades, night-vision scopes and sniper gear").

the particularly serious or violent crimes," which has the effect of transforming specialized forces like JTFs from a force that "once used violence to defuse already violent situations" to one that is "primarily used in a way that *creates* violence and confrontation where neither needs to exist."[61]

4. JTFs often abuse their authority.

Given this combination of widespread use of JTFs equipped with the most dangerous equipment, incentives to police aggressively, and the absence of governmental oversight, it is no surprise that stories of JTF abuse are commonplace. One journalist summarized the problem well: "[W]e have roving squads of drug cops loaded with SWAT gear who get more money if they conduct more raids, make more arrests and seize more property, and they are virtually immune to accountability if they get out of line."[62]

This case is just one example of JTF members overstepping: What should have been a routine policing matter—executing a local arrest warrant to apprehend a burglar suspected of stealing alcohol—turned into a severe attack on an innocent individual. *See* Resp. Br. 2-3.

Other examples abound,[63] like the killing of Jamarion Robinson, "a 26-year-old former college

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[61] Balko, *SWATted*, *supra*.

[62] Balko, *Another Narcotics Task Force*, *supra*.

[63] Balko, *State-Federal Task Forces*, *supra*.

football star with a recent history of psychotic episodes but no felony record," who was "shot 59 times" and killed by the "special fugitive task force" "[a]rmed with submachine guns and flash-bang grenades."[64]

A drug task force killed a Georgia pastor, Jonathan Ayers, in 2009.[65] Members of the force became suspicious of Ayers when he was "ministering to a young woman whom a Georgia drug task force was investigating."[66] They followed Ayers, and dressed only in "street clothes," rushed Ayers's car after he visited an ATM.[67] Believing he was being robbed, Ayers "put his car in reverse and attempted to escape."[68] In the process, he "nicked one agent," and the task force members killed him, leaving behind his pregnant wife.[69]

There was also the tragic case of 11-year-old Alberto Sepulveda, whom officers killed with "one

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[64] Weichselbaum, *Some Police Departments, supra.*

[65] Radley Balko, Opinion, *Jury Awards More Than $2 Million to Family of Pastor Killed by Narcotics Task Force*, Wash. Post (Feb. 23, 2014), https://tinyurl.com/y58bytdd.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

shotgun round to the back" during a "federal narcotics sweep" of his "parents' home."[70]

To take just one more example, a "multi-jurisdictional drug task force" paralyzed Julian Betton when they shot at him at least 57 times and hit him nine times during a raid of his home.[71] His crime: "making two $50 pot sales to a friend who, unbeknownst to him, also happened to be a police informant."[72] Making matters worse, the officers later lied about whether they had knocked-and-announced and about whether Betton had fired a gun at them.[73]

In short, JTFs need to be reined in. Because federal, state, and local government often fail to hold JTF officers accountable when they cross constitutional bounds, real accountability will come only through litigation. By threatening to limit even this way of holding JTFs accountable, the Government's rule risks further emboldening JTF abuse.

CONCLUSION

For the foregoing reasons and those in Respondent's brief, the Court should affirm the Sixth Circuit's decision.

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[70] Ty Phillips, *SWAT Officer Kills Boy*, The Police Policy Studies Council (Sept. 14, 2000), https://tinyurl.com/y5elnvxz.

[71] Balko, *South Carolina Police*, *supra*.

[72] *Id.*

[73] *Id.*

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