

No. 20-1060

IN THE
Supreme Court of the United States

JOSÉ L. OLIVA,

Petitioner,

v.

MARIO J. NIVAR, ET AL.,

Respondents.

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

**BRIEF OF PROFESSOR
SETH W. STOUGHTON AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

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| <i>Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics</i> , 403 U.S. 388 (1971)..... | 1, 2, 18 |
| <i>Carlson v. Green</i> , 446 U.S. 14 (1980)..... | 18, 19, 22 |
| <i>Corr. Serv. Corp. v. Malesko</i> , 534 U.S. 61 (2001)..... | 18, 19 |
| <i>FDIC v. Meyer</i> , 510 U.S. 471 (1994)..... | 18, 19 |
| <i>Gamble v. United States</i> , 139 S. Ct. 1960 (2019)..... | 11 |
| <i>Guerrero v. Scarazzini</i> , 274 F. App'x 11 (2d Cir. 2008)..... | 20 |
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| <i>Hicks v. Ferreyra</i> , 965 F.3d 302 (4th Cir. 2020)..... | 22 |
| <i>Hui v. Castaneda</i> , 559 U.S. 799 (2010)..... | 19 |

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|---|---------------------------|
| <i>Jacobs v. Alam</i> , 915 F.3d 1028 (6th Cir. 2019)..... | 22 |
| <i>King v. United States</i> , 917 F.3d 409 (6th Cir. 2019)..... | 20 |
| <i>Minneeci v. Pollard</i> , 565 U.S. 118 (2012)..... | 18, 19 |
| <i>Smith v. Clark</i> , No. 5:19-CV-00675-JKP, 2020 WL 5820534 (W.D. Tex. Sept. 29, 2020) | 7, 8 |
| <i>Whren v. United States</i> , 517 U.S. 806 (1996)..... | 22 |
| <i>Ziglar v. Abbasi</i> , 137 S. Ct. 1843 (2017)..... | 2, 4, 5, 6, 7, 18, 21, 22 |
| Constitution and Statutes | |
| 28 U.S.C. § 2679(b)(1) | 19 |
| 28 U.S.C. § 2679(b)(2)(A) | 19 |
| 42 U.S.C. § 1983 | 20 |
| Jaime Zapata Border Enf't Sec. Task Force Act, Pub. L. No. 112-205, § 2, 126 Stat. 1487 (2012)..... | 16 |
| Nat'l Prohibition Act, Pub. L. No. 66-66, § 4, 41 Stat. 305 (1919) | 12 |
| U.S. Const. amend. XVIII | 12 |

Other Authorities

- ACLU, *The Constitution in the 100-Mile Border Zone*,
<https://tinyurl.com/243ybkw9> (last visited Feb. 9, 2021)23
- T.A. Badger, *Teen killed by DEA agent buried in San Antonio*, Midland Reporter-Telegram (Feb. 13, 2003)25
- Radley Balko, Opinion, *State-Federal Task Forces Are Out of Control*, Wash. Post (Feb. 14, 2020)20
- Radley Balko, *South Carolina police shot a man to pieces over \$100 worth of pot, then lied about it*, Wash. Post (Mar. 17, 2017).....21
- Jerome P. Bjelopera, Cong. Rsch. Serv., R41780, *The Federal Bureau of Investigation and Terrorism Investigations* (2013), <https://tinyurl.com/y4sbhfbe>.....15
- Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135 (1995).....11, 12, 14
- The Brownwatch, *Father can't file suit over DEA slaying – 14 Year Old Latina Killed by Police* (Feb. 7, 2005), <https://tinyurl.com/yxde2nvh>25

- Philip Bump, *How the federal police in Portland are avoiding accountability*, Wash. Post (July 23, 2020).....16
- GianCarlo Canaparo & Zack Smith, *Count the Crimes on the Federal Law Books. Then Cut Them.*, The Daily Signal (June 23, 2020), <https://tinyurl.com/yyf5r794>.....13
- Kade Crockford, *Beyond Sanctuary: Local Strategies for Defending Civil Liberties*, The Century Foundation (Mar. 21, 2018), <https://tinyurl.com/y22pbatl>.....20
- DEA, Houston High Intensity Drug Trafficking Area along with the DEA announce the establishment of a new HIDTA initiative in Beaumont, Texas (Jan. 27, 2020), <https://tinyurl.com/yxapeegl>.....24
- DEA, *Task Forces*, <https://tinyurl.com/yxpx8qj2> (last visited Jan. 28, 2021).....15
- Dep't of Just., Bureau of Just. Stat., No. NCJ 187231, *Federal Law Enforcement Officers, 2000* (July 2001), <https://tinyurl.com/y3tdz5lb>10

- Dep't of Just., Bureau of Just. Stat., No.
 NCJ 238250, *Federal Law
 Enforcement Officers, 2008 –
 Statistical Tables* (June 2012),
<https://tinyurl.com/yxnfncxr>23
- Dep't of Just., Bureau of Just. Stat., No.
 NCJ 251922, *Federal Law
 Enforcement Officers, 2016 –
 Statistical Tables* (Oct. 2019),
<https://tinyurl.com/yyj8ketl>9, 10
- Dep't of Just., U.S. Att'y's Off. E. Dist.
 of Tex., Statement of the United
 States Attorney for the Eastern
 District of Texas Regarding
 Prosecution of Matin Azizi-Yarand
 (May 2, 2018),
<https://tinyurl.com/ycl4cxg2>24
- Susan A. Ehrlich, *The Increasing
 Federalization of Crime*, 32 *Ariz. St.
 L.J.* 825 (2000)11
- FBI, *Violent Gang Task Forces*,
<https://tinyurl.com/y4br6dkv> (last
 visited Jan. 28, 2021).....15, 24
- Trevor George Gardner, *Immigrant
 Sanctuary as the “Old Normal”: A
 Brief History of Police Federalism*,
 119 *Colum. L. Rev.* 1 (2019)12, 13, 14

- Garrett M. Graff, *The Story Behind Bill Barr's Unmarked Federal Agents*, Politico (June 5, 2020), <https://tinyurl.com/ycdpc7l6>16, 17
- ICE, *Border Enforcement Security Task Force (BEST)*, <https://tinyurl.com/yxzrgw8v> (last visited Jan. 28, 2021).....16
- Tom Jackman, *Justice Department to allow local police to wear body cameras on federal task forces*, Wash. Post (Oct. 29, 2020)20
- John C. Jeffries, Jr. & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hasting L.J. 1095 (1995).....12
- Jason McCammack, U.S. Cust. & Border Prot., *A New Way Forward*, <http://tinyurl.com/4ucf9zkg>24
- NYPD, *Feds Working Together In Attempt To Stop Rash Of Cellphone Store Robberies*, CBS N.Y. (Mar. 5, 2019), <https://tinyurl.com/y344n3cj>.....16
- Cynthia Pompa, *President Trump Is Accelerating the Militarization of the Southwest Border*, ACLU (Dec. 5, 2018), <https://tinyurl.com/yckug8d>.....24

Remarks by President Trump on
Operation LeGend: Combatting
Violent Crime in American Cities
(July 22, 2020),
<https://tinyurl.com/y6xesrts>17

Malcolm Russell-Einhorn, et al., Nat'l
Inst. of Just., NCJ 201782, *Federal-
Local Law Enforcement
Collaboration in Investigating and
Prosecuting Urban Crime, 1982-
1999: Drugs, Weapons, and Gangs*
(May 2000),
<https://tinyurl.com/y2z9p79u>.....14

Nick Sibilla, *After Almost Beating
Student To Death, Cops Demand
Legal Immunity*, Forbes (Mar. 16,
2020), <https://tinyurl.com/yykdfv3h>.....21

Statement by the President on the
Passage of the Southwest Border
Security Bill (Aug. 12, 2010),
<https://tinyurl.com/y4dor9nw>24

U.S. Att’y’s Off., Central Texas Joint
Terrorism Task Force Arrests Two
for Allegedly Providing Material
Support to Terrorists (June 18,
2014), <https://tinyurl.com/y6qfz2gh>24

U.S. Att’y’s Off., N. Dist. Of Tex., *North
Texas OCDETF Strike Force*,
<https://tinyurl.com/yy78gxkg> (last
visited Feb. 1, 2021).....24

- U.S. Border Patrol, *Border Patrol Agent Nationwide Staffing by Fiscal Year*, <https://tinyurl.com/y3dbwves>23
- U.S. Census Bureau, *Population Distribution and Change: 2000 to 2010* (Mar. 2011), <https://tinyurl.com/ybl5ouj5>23
- U.S. Marshals Serv., *Fugitive Task Forces*, <https://tinyurl.com/y4tkb2th> (last visited Jan. 28, 2021)15
- U.S. Marshals Serv., *Fugitive Task Forces*, <https://tinyurl.com/yykzwdxg> (last visited Feb. 1, 2021)24
- Simone Weichselbaum, *Some big cities pulling their police officers out of federal joint task forces*, *Statesman* (Nov. 29, 2020), <https://tinyurl.com/y3uwknow>.....25
- Simone Weichselbaum, *Why Some Police Departments Are Leaving Federal Task Forces*, *The Marshall Project* (Oct. 31, 2019), <https://tinyurl.com/y2dphwnx>15, 21

INTEREST OF AMICUS CURIAE¹

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

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

¹ Counsel of record for all parties received timely notice of the intention to file this brief and have consented to the filing of the 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 amicus curiae and his counsel made a monetary contribution intended to fund the preparation or submission of the brief.

routinely engaged in ordinary policing activities. By effectively limiting *Bivens* to its facts, the Fifth Circuit decision at issue here eliminates any mechanism of accountability for constitutional violations committed by federal law enforcement officers. Professor Stoughton accordingly urges this Court to grant certiorari to reaffirm that *Bivens* remains settled law for searches and seizures occurring in the context of ordinary law enforcement operations.

SUMMARY OF ARGUMENT

I. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971), this Court held that an individual could bring a damages suit against a federal officer for a violation of the Fourth Amendment right against unreasonable searches and seizures. Though this Court subsequently declared that “expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity,” it emphasized “the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose” and that *Bivens* remains “settled law ... in this common and recurrent sphere of law enforcement.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

The Fifth Circuit’s decision here contravenes that holding. The Fifth Circuit adopted an approach that treats any factual distinction between a plaintiff’s claims and *Bivens* as invariably sufficient to give rise to a “new context” for *Bivens* purposes. The result effectively confines *Bivens* to its facts, eliminating any cause of action for constitutional violations committed by federal agents within the Fifth Circuit.

II. The Fifth Circuit’s violation of this Court’s precedents warrants certiorari because the *Bivens* remedy has never been more important than it is now. The ranks of federal law enforcement have grown significantly since *Bivens* was decided and are now greater than they have ever been in the United States’ history. Additionally, due to the pervasive federalization of criminal law and routine collaboration between federal law enforcement officers and their state and local counterparts, federal officers are more likely to be engaged in routine law enforcement activities than at any time in the past. Yet, the Fifth Circuit’s decision abolishes the best (and in many cases the sole) means to remedy and deter constitutional violations committed by federal law enforcement.

III. This case also warrants certiorari because the Fifth Circuit’s decision opens up an untenable circuit split. Due in part to its status as a border circuit, the Fifth Circuit is home to an especially large concentration of federal law enforcement agents, who frequently engage in activities implicating the Fourth Amendment’s protections against impermissible searches and seizures. Yet, under the decision below, the *Bivens* remedy for constitutional violations committed by those officers is eliminated, even as it remains available in the same context in other circuits. This situation—where the ability to vindicate a constitutional right turns on geography and is absent in the very circuit where such violations are particularly likely to occur—is inappropriate and warrants this Court’s review.

ARGUMENT

I. The Fifth Circuit’s Decision Eliminates The Private Right Of Action For Constitutional Violations Committed By Federal Law Enforcement Officers.

For nearly half a century since it decided *Bivens*, this Court has permitted individuals to seek money damages from federal officers for Fourth Amendment violations that occur in the context of normal law enforcement activities. In *Abbasi*, this Court held that due to “the notable change in the Court’s approach to recognizing implied causes of action, ... expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity.” 137 S. Ct. at 1857 (quoting *Iqbal*, 556 U.S. at 675). The Court accordingly determined that, before extending *Bivens* to a “new context,” a court must determine whether there are any “special factors” counseling against extending *Bivens*. *Id.* at 1857-58 (citations omitted). In reaching that conclusion, however, this Court explained that it did “not intend[] to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose.” *Id.* at 1856. This Court emphasized that “[t]he settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.” *Id.* at 1857.

The decision below contravenes that holding. This case presents a quintessential instance of a search-and-seizure claim arising in the context of ordinary

law enforcement operations: Petitioner José Oliva asserts that he was improperly seized, in violation of the Fourth Amendment, by federal officers conducting routine screening at the entrance to a Veterans Affairs hospital in El Paso, Texas. Pet. App. 2a-4a. The Fifth Circuit’s holding that Oliva could not bring a *Bivens* claim rests on the determination that “[v]irtually everything” that does not involve a precise factual match to one of this Court’s prior *Bivens* cases involves a new context. Pet. App. 5a. Hence, unless a plaintiff’s Fourth Amendment claim involves officers “manacled the plaintiff in front of his family in his home and strip-searching him,” the plaintiff has no constitutional remedy. Pet. App. 5a. Such a narrow approach to the “new context” test effectively limits *Bivens* to its facts, disdaining this Court’s directive that the *Bivens* remedy remains available in the context of ordinary law enforcement operations.

This Court’s decisions in *Abbasi* and *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), provide no support for the Fifth Circuit’s artificially rigid approach to the “new context” test. In both of those decisions, this Court made clear that a case must be “different in a meaningful way from previous *Bivens* cases decided by this Court” for the context to be new. *Abbasi*, 137 S. Ct. at 1859; *Hernandez*, 140 S. Ct. at 743. “[T]rivial” differences are not sufficient. *Abbasi*, 137 S. Ct. at 1865. Notably, both cases involved contexts that were fundamentally different from prior *Bivens* claims. In *Abbasi*, the plaintiffs were foreign nationals who asserted “detention policy claims” that “challenge[d] the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil.”

137 S. Ct. at 1860. And in *Hernandez*, this Court held that the claims arose in a new context because “[t]here is a world of difference” between “petitioners’ cross-border shooting claims, where ‘the risk of disruptive intrusion by the Judiciary into the functioning of other branches’ is significant,” and claims based on “an allegedly unconstitutional arrest and search.” 140 S. Ct. at 744 (quoting *Abbasi*, 137 S. Ct. at 1860).

Here, by contrast, none of those factors are present. Oliva’s claims do not challenge “large-scale policy decisions,” as in *Abbasi*; rather, like *Bivens* itself, they challenge “individual instances of ... law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact.” 137 S. Ct. at 1862. Additionally, the conduct that Oliva challenges is entirely domestic, involving the use of force by federal officers against a U.S. citizen on U.S. soil. His claims, then, have none of the foreign relations and separation of powers implications that led this Court to recognize that a cross-border shooting constitutes a “new context” for a *Bivens* claim. *Hernandez*, 140 S. Ct. at 743-44.

The Fifth Circuit offered a hodgepodge of factual differences in support of its conclusion that the case involves a “new context”: “This case arose in a government hospital, not a private home”; “The VA officers were manning a metal detector, not making a warrantless search for narcotics”; “The dispute that gave rise to Oliva’s altercation involved the hospital’s ID policy, not a narcotics investigation”; “The VA officers did not manacle Oliva in front of his family or strip-search him”; “[T]he narcotics officers did not place Webster Bivens in a chokehold.” Pet. App. 6a-7a. The

court offered no explanation for why these differences are “meaningful” to the *Bivens* inquiry. Its apparent assumption that *any* factual distinction must be a *meaningful* one contravenes this Court’s caution that “[s]ome differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context.” *Abbasi*, 137 S. Ct. at 1865.

More broadly, the Fifth Circuit’s approach is fundamentally incompatible with the two-part test for extending *Bivens* claims that this Court developed in *Abbasi* and *Hernandez*. Because “[v]irtually everything” that does not involve a precise factual match to one of this Court’s *Bivens* cases “is a ‘new context,’” Pet. App. 5a, the Fifth Circuit’s decision renders the first part of the test superfluous: The context will always be new. Meanwhile, because the “special factors” that the Fifth Circuit identified—the existence of “an alternative remedial structure” under the Federal Tort Claims Act and “separation of powers,” Pet. App. 8a-10a—are so generalized that they would seemingly apply to every case, the outcome of the second step is always the same: *Bivens* will not be extended to that “new context.” The Fifth Circuit’s decision, then, effectively limits *Bivens* to its facts, in contravention of this Court’s holding that *Bivens* remains “settled law” in the “search-and-seizure context in which it arose.” *Abbasi*, 137 S. Ct. at 1856-57.

Though the ink on the Fifth Circuit’s decision is scarcely dry, its application already confirms that it eliminates any recourse for constitutional violations committed by federal officers in the Fifth Circuit. In *Smith v. Clark*, a couple sought damages stemming from an incident in which, while attempting to submit

a complaint regarding their treatment in a prior encounter with the FBI, they were detained and had their cellphones searched by FBI agents. No. 5:19-CV-00675-JKP, 2020 WL 5820534, at *1-2 (W.D. Tex. Sept. 29, 2020). Following the Fifth Circuit’s decision here, the district court found that the case involved a “new context” on the basis of a catalog of factual distinctions, with no effort to explain why those differences qualify as meaningful: “*In Bivens*, Federal Narcotics officers made a warrantless search for narcotics. ... Here, FBI agent Clark made a warrantless search of the Smith’s cell phones, the reason unknown”; “The dispute that gave rise to the altercation in *Bivens* involved a narcotics investigation; the Smith’s phones were searched apparently due to their interference in an FBI investigation”; and “Webster Bivens’ home was searched ‘stem to stern’ and he was strip-searched; Agent Clark ‘searched through’ the Smith’s phones.” *Id.* at *4. Having concluded that the case presented a new context, the court declined to extend *Bivens* to that context, citing as a “special factor” (as in the decision below) the mere existence of the FTCA. *Id.* at *5.

As a result of the Fifth Circuit’s decision, therefore, the *Bivens* remedy is effectively gone in the Fifth Circuit.

II. The Fifth Circuit’s Decision Will Have Severe Consequences Given The Significant Growth In Federal Agents Engaged In Ordinary Policing Activities.

The consequences of the Fifth Circuit’s decision will be especially grave as a result of historical developments over the half a century since *Bivens* was decided. The ranks of federal law enforcement have never been larger. And federal officers have never been more likely to engage in ordinary policing activities than they are now. Because the decision below eliminates any mechanism of accountability for constitutional violations committed by federal officers, it warrants this Court’s review.

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

Statistics show the remarkable size of the federal law enforcement force. As of 2016, the last year for which complete data is available, the total number of federal law enforcement officers stood at more than 132,000.² The breakdown of that total shows the remarkable size of agencies like Customs and Border Protection (more than 43,000 officers), the Federal Bureau of Prisons (more than 19,000 officers), and the Federal Bureau of Investigation (more than 13,000 officers), which represent the three largest federal

² Dep’t of Just., Bureau of Just. Stat., No. NCJ 251922, *Federal Law Enforcement Officers, 2016 – Statistical Tables* 1 (Oct. 2019), <https://tinyurl.com/yyj8ketl>.

agencies in their employment of law enforcement officers.³ It also shows the employment of hundreds of law enforcement officers at agencies that few in the public would likely expect to have their own police forces. For instance, the Environmental Protection Agency's Criminal Investigation Division employs over two hundred full-time law enforcement officers.⁴ The Smithsonian Institution's Office of Protective Services employs over six hundred officers.⁵ And the Office of Law Enforcement for the National Oceanic and Atmospheric Administration employs over one hundred officers.⁶

The statistics also reflect a steady increase in the total number of federal law enforcement officers over the years. In 2000, for instance, there were approximately 88,000 full-time federal law enforcement officers.⁷ The increase of over 40,000 in the span of just sixteen years reflects an average annual growth rate of 2,500 per year—the equivalent of adding the entire Bureau of Alcohol, Tobacco, Firearms, and Explosives each year.⁸

³ *Id.* at 3-4.

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Id.* at 3.

⁷ Dep't of Just., Bureau of Just. Stat., No. NCJ 187231, *Federal Law Enforcement Officers, 2000*, 1 (July 2001), <https://tinyurl.com/y3tdz5lb>.

⁸ See Dep't of Just., Bureau of Just. Stat., *supra* note 2, at 4.

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

Not only have the ranks of federal law enforcement officers increased dramatically in recent decades, but federal officers are increasingly involved in ordinary policing activities. There are several reasons for this shift.

1. At the heart of the shift is the “expansion of the reach of federal criminal law.” *Gamble v. United States*, 139 S. Ct. 1960, 1980 (2019). Early federal criminal laws were limited to issues of special federal interest, such as crimes committed within a fort or other federal facility, forgery of a United States certificate, or violence against an ambassador.⁹ In the twentieth century, however, successive waves of “federalization” have eroded the idea that the “general police power” belongs only to the states, with the federal criminal law confined to distinct areas of federal concern.¹⁰

The first major wave in the federalization of criminal law came in the form of Prohibition, which was expressly designed to be concurrently enforced by

⁹ See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *Hastings L.J.* 1135, 1138 (1995).

¹⁰ See Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 *Ariz. St. L.J.* 825, 837 (2000).

state and federal governments.¹¹ A second wave of federalization began in the mid-1930s, spurred on by the rise in organized crime; it brought legislation such as the National Firearms Act, the National Stolen Property Act, the Federal Bank Robbery Act, and the Anti-Racketeering Act.¹² A third wave began in the 1960s, with a series of omnibus crime bills, each containing hundreds of pages defining new crimes.¹³

These waves of federalization largely erased the distinction between the exercise of police power by the federal government and the states. By the 1990s, “federal law reached virtually all robberies, most schemes to defraud, many firearms offenses, all loan sharking, most illegal gambling operations, most bribes, and every drug deal, no matter how small, even the simple possession of user-amounts of controlled substances.”¹⁴ Indeed, so numerous and dispersed are the federal criminal provisions that it is impossible even to reach a reliable count, though scholars agree that

¹¹ Brickey, *supra* note 9, at 1142; *see also* U.S. Const. amend. XVIII, § 2 (“The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.”); Nat’l Prohibition Act, Pub. L. No. 66-66, § 4, 41 Stat. 305, 306 (1919) (“The jurisdiction of the courts of the United States under this section shall be concurrent with that of the courts of the several States.”).

¹² Trevor George Gardner, *Immigrant Sanctuary as the “Old Normal”: A Brief History of Police Federalism*, 119 Colum. L. Rev. 1, 51 (2019).

¹³ Brickey, *supra* note 9, at 1144-45.

¹⁴ John C. Jeffries, Jr. & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hasting L.J. 1095, 1095-97 (1995) (footnotes omitted).

there are upwards of 4,500 crimes in the United States Code, along with more than 300,000 regulatory crimes.¹⁵

The federalization of criminal law fundamentally changed the role of the federal government in law enforcement. The Founders never contemplated a national police force.¹⁶ And because federal criminal law was confined to a narrow sphere throughout the nineteenth century, its enforcement required minimal resources: Early in our nation's history, the government employed a very limited number of full-time federal officers and relied primarily on bounty hunters and the privately owned Pinkerton Detective Agency to investigate and apprehend suspects.¹⁷

The federalization of criminal law in the twentieth century changed that, necessitating for the first time the employment of significant numbers of federal law enforcement officers. By 1930, for instance, the Prohibition Unit, a standalone federal agency, had approximately 4,000 employees and a budget of \$13 million, more than six times that of the FBI.¹⁸ Subsequent waves of federalization had the same effect. By the early 1990s, for instance, the "War on Drugs" commanded the attention of so many overlapping and competing agencies that Congress had to

¹⁵ GianCarlo Canaparo & Zack Smith, *Count the Crimes on the Federal Law Books. Then Cut Them.*, The Daily Signal (June 23, 2020), <https://tinyurl.com/yyf5r794>.

¹⁶ Gardner, *supra* note 12, at 29-30.

¹⁷ *Id.* at 31.

¹⁸ *Id.* at 37.

fund a task force to coordinate federal law enforcement operations.¹⁹

2. Alongside this pervasive federalization of criminal law was a shift in the relationship between the federal government and state and local police organizations. Whereas state and local police departments had been largely autonomous from federal criminal enforcement, President Lyndon Johnson's "War on Crime" prompted a new paradigm focused on collaboration between federal law enforcement officers and their state and local counterparts.²⁰

One manifestation of this new paradigm, in which federal officers increasingly engage in ordinary policing alongside state and local police officers, is the growth of joint task forces. The first joint federal-local task forces were established in the 1970s to target drug trafficking.²¹ Federal-local and federal-state collaboration increased through the 1980s and 1990s.²² Such collaboration was fueled by an "equitable sharing" program, which allowed state and local agencies to receive the lion's share of assets seized under federal asset forfeiture laws.²³ The 2000s saw another

¹⁹ Brickey, *supra* note 9, at 1151.

²⁰ Gardner, *supra* note 12, at 55-61.

²¹ Malcolm Russell-Einhorn, et al., Nat'l Inst. of Just., NCJ 201782, *Federal-Local Law Enforcement Collaboration in Investigating and Prosecuting Urban Crime, 1982-1999: Drugs, Weapons, and Gangs* 16-17 (May 2000), <https://tinyurl.com/y2z9p79u>.

²² *Id.* at 23.

²³ *Id.* at 30-32.

significant increase in joint task forces, this time focused on combatting terrorism. From 1999 to 2011, the number of joint terrorism task forces grew from 26 to over 100.²⁴

There are now upwards of a thousand joint law enforcement task forces nationwide.²⁵ They operate in a huge range of contexts. For instance: The FBI administers 160 violent gang task forces, which “[c]ombin[e] short term, street level enforcement activity with such sophisticated techniques as consensual monitoring, financial analysis, and Title III wire intercepts investigations.”²⁶ The DEA manages 271 state and local task forces, involving over 2,200 DEA agents and 2,500 state and local officers.²⁷ The U.S. Marshals Service leads seven regional fugitive task forces and sixty local fugitive task forces, tasked with arresting thousands of federal, state, and local fugitives.²⁸ ICE operates a Border Enforcement Security Task Force, under which federal agents from ICE, CBP, ATF, FBI, and other federal agencies work along with state and local law enforcement officers to

²⁴ Jerome P. Bjelopera, Cong. Rsch. Serv., R41780, *The Federal Bureau of Investigation and Terrorism Investigations 2* (2013), <https://tinyurl.com/y4sbhfbe>.

²⁵ Simone Weichselbaum, *Why Some Police Departments Are Leaving Federal Task Forces*, The Marshall Project (Oct. 31, 2019), <https://tinyurl.com/y2dphwnx>.

²⁶ FBI, *Violent Gang Task Forces*, <https://tinyurl.com/y4br6dkv> (last visited Jan. 28, 2021).

²⁷ DEA, *Task Forces*, <https://tinyurl.com/yxpx8qj2> (last visited Jan. 28, 2021).

²⁸ U.S. Marshals Serv., *Fugitive Task Forces*, <https://tinyurl.com/y4tkb2th> (last visited Jan. 28, 2021).

secure the border and combat criminal smuggling.²⁹ The task force includes over 1,200 members, including agents from more than 100 state, local, and tribal law enforcement agencies.³⁰ There is even a joint task force between the ATF and the NYPD combatting robberies of cellphone stores in New York City.³¹

3. Recent events have demonstrated the extent to which federal agents have become involved in ordinary policing activities. In response to political protests during the summer of 2020, thousands of federal officers were deployed to cities throughout the country.³² Even when these deployments were ostensibly intended to protect some distinct federal interest, they led to federal agents being involved in ordinary policing. In Portland, Oregon, for instance, federal officers sent to protect a courthouse were seen patrolling streets far from the building, arresting individuals, and putting them in unmarked vans.³³ And in Washington, D.C., federal officers from several

²⁹ Jaime Zapata Border Enf't Sec. Task Force Act, Pub. L. No. 112-205, § 2, 126 Stat. 1487, 1487 (2012).

³⁰ ICE, *Border Enforcement Security Task Force (BEST)*, <https://tinyurl.com/yxzrgw8v> (last visited Jan. 28, 2021).

³¹ *NYPD, Feds Working Together In Attempt To Stop Rash Of Cellphone Store Robberies*, CBS N.Y. (Mar. 5, 2019), <https://tinyurl.com/y344n3cj>.

³² Garrett M. Graff, *The Story Behind Bill Barr's Unmarked Federal Agents*, Politico (June 5, 2020), <https://tinyurl.com/ycdpc716>.

³³ Philip Bump, *How the federal police in Portland are avoiding accountability*, Wash. Post (July 23, 2020), <https://tinyurl.com/yyrng2ud>.

agencies—including the Bureau of Prisons, the Department of the Interior, and the Secret Service—were on the front lines of policing protests in Lafayette Square, outside the White House.³⁴

In some cases, moreover, the deployment of federal law enforcement was not linked to any specific area of federal interest. In late July 2020, for instance, President Trump announced that, as part of “Operation LeGend,” the “Department of Justice will immediately surge federal law enforcement to the city of Chicago,” with agents from “[t]he FBI, ATF, DEA, U.S. Marshals Service, and Homeland Security” sent “to help drive down violent crime.”³⁵ Attorney General Barr declared that the operation was “classic crime fighting.”³⁶

C. The Fifth Circuit’s decision eliminates a key tool to vindicate constitutional rights and hold federal police accountable for misconduct.

With the burgeoning ranks of federal law enforcement and their increasing involvement in ordinary policing, the need for a means of accountability for those officers has never been greater. Yet the Fifth Circuit’s decision effectively forecloses *Bivens*’s availability as a remedy, eliminating the best—and in many cases the only—tool to vindicate constitutional

³⁴ Graff, *supra* note 32.

³⁵ Remarks by President Trump on Operation LeGend: Combatting Violent Crime in American Cities (July 22, 2020), <https://tinyurl.com/y6xesrts>.

³⁶ *Id.*

rights and hold federal officers who violate those rights accountable.

This Court in *Bivens* recognized the “great[] capacity for harm” posed by an “agent acting—albeit unconstitutionally—in the name of the United States.” 403 U.S. at 392. *Bivens* therefore accorded a damages remedy to “deter[] individual officers from engaging in unconstitutional wrongdoing,” *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 74 (2001), and to provide redress where the plaintiff lacks “any alternative remedy against individual officers,” *Minnecci v. Pollard*, 565 U.S. 118, 127 (2012). In the years since, the Court has repeatedly emphasized the vital role *Bivens* plays in deterring federal officers’ unconstitutional conduct. *See, e.g., Abbasi*, 137 S. Ct. at 1860 (“The purpose of *Bivens* is to deter the officer.” (emphasis omitted) (quoting *FDIC v. Meyer*, 510 U.S. 471, 485 (1994))); *Malesko*, 534 U.S. at 70 (“The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.”); *Carlson v. Green*, 446 U.S. 14, 21 (1980) (“[T]he *Bivens* remedy ... serves a deterrent purpose.”).

Bivens’s role as a deterrent has become more central over time. When this Court decided *Bivens*, it was undisputed that Webster Bivens could have “obtain[ed] money damages to redress invasion” of his Fourth Amendment rights “by an action in tort, under state law, in the state courts.” 403 U.S. at 390. In 1988, however, Congress eliminated that remedy with the passage of the Westfall Act. *See Minnecci*, 565 U.S. at 126 (explaining that, under the Westfall Act, plaintiffs “ordinarily *cannot* bring state-law tort actions

against employees of the Federal Government” (emphasis original)). Now, the exclusive remedy for torts committed by federal employees is a suit against the United States under the Federal Tort Claims Act (FTCA). *See* 28 U.S.C. § 2679(b)(1). But the FTCA “does not extend or apply to a civil action against an employee of the Government ... brought for a violation of the Constitution of the United States.” *Id.* § 2679(b)(2)(A); *see Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (describing “[t]he Westfall Act’s explicit exception for *Bivens* claims”). Thus, *Bivens* is now the sole remedy for federal officers’ constitutional violations.

Bivens is also “a more effective deterrent than the FTCA remedy against the United States,” because “the *Bivens* remedy is recoverable against individuals.” *Carlson*, 446 U.S. at 21. This is important because “the threat of suit against the United States” is alone “insufficient to deter the unconstitutional acts of individuals.” *Malesko*, 534 U.S. at 68; *see also Meyer*, 510 U.S. at 485 (“If we were to imply a damages action directly against federal agencies, ... the deterrent effects of the *Bivens* remedy would be lost.”). Furthermore, unlike the FTCA, *Bivens* actions allow punitive damages and do not depend on “the vagaries of the laws of the several States.” *Carlson*, 446 U.S. at 22-23. “Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts.” *Id.* at 22.

The proliferation of joint task forces has further increased the importance of the *Bivens* remedy. Ordinarily, state and local officers may be sued under either 42 U.S.C. § 1983 or state tort law when they

deprive individuals of their constitutional rights. State and local officers participating in joint task forces with the federal government, however, are typically deputized as federal officers, meaning that § 1983 does not apply to them and the Westfall Act immunizes them from state-law tort claims. *See, e.g., King v. United States*, 917 F.3d 409, 433 (6th Cir. 2019), *cert. granted sub nom. Brownback v. King*, 140 S. Ct. 2563 (2020); *Guerrero v. Scarazzini*, 274 F. App'x 11, 12 n.1 (2d Cir. 2008).

Furthermore, state and local officers participating in federal task forces are often exempt from traditional oversight mechanisms. Until recently, for instance, officers whose departments normally required that they wear body cameras were directed to take them off when they participated in federal task forces.³⁷ State and local officers participating in federal task forces are also permitted to ignore state laws requiring law enforcement to obtain warrants to track cell phones³⁸ and can “use[] their federal jurisdiction to escape state open-records laws.”³⁹ They are not always required to wear uniforms, often causing individuals to think they are “being mugged” by officers,

³⁷ Tom Jackman, *Justice Department to allow local police to wear body cameras on federal task forces*, Wash. Post (Oct. 29, 2020), <http://tinyurl.com/1xnoqdwX>.

³⁸ Kade Crockford, *Beyond Sanctuary: Local Strategies for Defending Civil Liberties*, The Century Foundation (Mar. 21, 2018), <https://tinyurl.com/y22pbatl>.

³⁹ Radley Balko, Opinion, *State-Federal Task Forces Are Out of Control*, Wash. Post (Feb. 14, 2020), <https://tinyurl.com/to55y68>.

not arrested.⁴⁰ And when a shooting involving a joint task force member occurs, a federal rule forbids officers from speaking to local police immediately thereafter.⁴¹ Indeed, because of this severe lack of accountability and oversight, some police departments have begun leaving joint task forces.⁴²

The “settled law of *Bivens*,” therefore, is now more important than ever. *Abbasi*, 137 S. Ct. at 1857. Because the Fifth Circuit’s decision effectively eliminates *Bivens*, it warrants this Court’s review.

III. The Fifth Circuit’s Decision Creates An Untenable Circuit Split.

The decision below further warrants this Court’s review because it creates an untenable conflict in authority.

Consistent with this Court’s holding that a case must be “different in a meaningful way from previous

⁴⁰ See, e.g., Nick Sibilla, *After Almost Beating Student To Death, Cops Demand Legal Immunity*, Forbes (Mar. 16, 2020), <https://tinyurl.com/yykdfv3h> (detailing the story of James King, who was “tackled, put in a chokehold, and beaten into submission” by plain-clothes joint task force officers after fleeing what he thought was a mugging); Radley Balko, *South Carolina police shot a man to pieces over \$100 worth of pot, then lied about it*, Wash. Post (Mar. 17, 2017), <https://tinyurl.com/lr6o2zd> (man was shot nine times by joint task force officers who “had no insignia on their clothes indicating they were law enforcement,” after he allegedly pointed a gun at the unidentified officers when they used a battering ram to force his door open).

⁴¹ Weichselbaum, *supra* note 25.

⁴² *Id.*

Bivens cases decided by this Court” for “the context” to be “new,” *Abbasi*, 137 S. Ct. at 1859, other circuits have rejected the sort of factual distinctions on which the Fifth Circuit relied as a basis for finding a new context. *See, e.g., Hicks v. Ferreyra*, 965 F.3d 302, 311 (4th Cir. 2020) (characterizing case as a “replay” of *Bivens* because plaintiff seeks to “hold accountable line-level agents of a federal criminal law enforcement agency, for violations of the Fourth Amendment, committed in the course of a routine law-enforcement action”); *Jacobs v. Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019) (rejecting argument that “factual differences” with *Bivens* create new context where case challenged officers’ “overreach in effectuating a standard law enforcement operation” (citations and quotation marks omitted)).

The Fifth Circuit’s contrary holding sets it at odds with its sister circuits. The resulting disparity contravenes the principles that “the search and seizure protections of the Fourth Amendment” do not “vary from place to place,” *Whren v. United States*, 517 U.S. 806, 815 (1996), and that “the liability of federal officials for violations of citizens’ constitutional rights should be governed by uniform rules,” *Carlson*, 446 U.S. at 23.

The split is particularly untenable because of the distinctive character of the Fifth Circuit. The Fifth Circuit is second only to the far larger Ninth Circuit in the total number of federal law enforcement officers operating within its boundaries. As of 2008, the most recent date for which comprehensive data regarding the geographic distribution of federal law enforcement officers are available, there were 20,677

such officers in the Fifth Circuit, and more than 18,000 in Texas alone—the highest of any state.⁴³ These officers comprised more than 17 percent of the total federal agents in the United States and its territories.⁴⁴ By comparison, the Eleventh Circuit, which has a similar population size, had only 10,976 federal officers, barely nine percent of the nation’s force.⁴⁵

The Fifth Circuit’s status as a border circuit contributes to the significant concentration of federal law enforcement there. Under federal regulations, Customs and Border Protection may operate within 100 miles of any external border of the United States,⁴⁶ and nearly half of all United States Border Patrol officers are based in the circuit.⁴⁷ Indeed, the concentration of federal law enforcement officers in the Fifth Circuit has likely increased since the 2008 data, given

⁴³ Dep’t of Just., Bureau of Just. Stat., No. NCJ 238250, *Federal Law Enforcement Officers, 2008 – Statistical Tables*, App’x Table 1 (June 2012), <https://tinyurl.com/yxnfncxr>.

⁴⁴ *Id.* There were 120,348 federal officers in the United States and its territories in 2008.

⁴⁵ *Id.* In 2010, the Fifth and Eleventh Circuits each had a population of approximately 33 million. *See* U.S. Census Bureau, *Population Distribution and Change: 2000 to 2010*, Table 1, C2010BR-01 (Mar. 2011), <https://tinyurl.com/ybl5ouj5>.

⁴⁶ ACLU, *The Constitution in the 100-Mile Border Zone*, <http://tinyurl.com/243ybkw9> (last visited Feb. 9, 2021).

⁴⁷ U.S. Border Patrol, *Border Patrol Agent Nationwide Staffing by Fiscal Year*, <https://tinyurl.com/y3dbwves>.

the significant focus on immigration enforcement under both the Obama and Trump administrations.⁴⁸

The circuit is also home to a variety of joint task forces. In Texas alone, for instance, there are twelve FBI-led violent gang task forces,⁴⁹ four U.S. Marshals-led fugitive capture task forces,⁵⁰ three immigration and smuggling task forces led by Customs and Border Protection,⁵¹ and multiple terrorism⁵² and drug enforcement task forces.⁵³

⁴⁸ See Statement by the President on the Passage of the Southwest Border Security Bill (Aug. 12, 2010), <https://tinyurl.com/y4dor9nw>; Cynthia Pompa, *President Trump Is Accelerating the Militarization of the Southwest Border*, ACLU (Dec. 5, 2018), <https://tinyurl.com/yyckug8d>.

⁴⁹ FBI, *supra* note 26.

⁵⁰ U.S. Marshals Serv., *Fugitive Task Forces*, <https://tinyurl.com/yykzwdxg> (last visited Feb. 1, 2021).

⁵¹ Jason McCammack, U.S. Cust. & Border Prot., *A New Way Forward*, <http://tinyurl.com/4ucf9zkg>.

⁵² Dep't of Just., U.S. Att'y's Off. E. Dist. of Tex., Statement of the United States Attorney for the Eastern District of Texas Regarding Prosecution of Matin Azizi-Yarand (May 2, 2018), <https://tinyurl.com/ycl4cxg2>; U.S. Att'y's Off., Central Texas Joint Terrorism Task Force Arrests Two for Allegedly Providing Material Support to Terrorists (June 18, 2014), <https://tinyurl.com/y6qfz2gh>.

⁵³ *E.g.*, DEA, Houston High Intensity Drug Trafficking Area along with the DEA announce the establishment of a new HIDTA initiative in Beaumont, Texas (Jan. 27, 2020), <https://tinyurl.com/yxapeegl>; U.S. Att'y's Off., N. Dist. Of Tex., *North Texas OCDETF Strike Force*, <https://tinyurl.com/yy78gxkg> (last visited Feb. 1, 2021).

As it has elsewhere, this concentration of federal law enforcement officers has led to allegations of abuses. In one example, an Austin police detective serving on the Central Texas Violent Crimes Task Force—an FBI-led joint task force—shot and killed an unarmed bystander during a bank robbery investigation.⁵⁴ The shooting was bad enough that the district attorney sought to prosecute him, but the detective successfully claimed federal immunity as a task force member.⁵⁵ In another instance, DEA agents fatally shot a 14-year-old girl in San Antonio.⁵⁶ They claimed they opened fire only after the van that the girl was in started accelerating (in reverse) toward them, but a witness said the driver was simply trying to park.⁵⁷ The father was unable to recover under the FTCA because state law barred his claim.⁵⁸

The settled law of *Bivens* is critical to deter these types of abuses and provide redress to those who suffer them. But, unless this Court grants review, the availability of a remedy for a constitutional violation will continue to turn on geography, and *Bivens* will

⁵⁴ Simone Weichselbaum, *Some big cities pulling their police officers out of federal joint task forces*, Statesman (Nov. 29, 2020), <https://tinyurl.com/y3uwknow>.

⁵⁵ *Id.*

⁵⁶ T.A. Badger, *Teen killed by DEA agent buried in San Antonio*, Midland Reporter-Telegram (Feb. 13, 2003), <https://tinyurl.com/y2gszk2e>.

⁵⁷ *Id.*

⁵⁸ The Brownwatch, *Father can't file suit over DEA slaying – 14 Year Old Latina Killed by Police* (Feb. 7, 2005), <https://tinyurl.com/yxde2nvh>.

effectively be abolished exactly where it is most crucial—in the circuit with one of the highest concentrations of federal law enforcement officers in the country.

CONCLUSION

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

Respectfully submitted,

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