No. 24-182

IN THE

# Supreme Court of the United States

**ROY SARGEANT,**

*Petitioner*,

v.

**ARACELIE BARFIELD,**

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF OF THE CATO INSTITUTE AND THE LAW ENFORCEMENT ACTION PARTNERSHIP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

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

The Law Enforcement Action Partnership ("LEAP") is a nonprofit composed of police, prosecutors, judges, corrections officials, and other criminal justice professionals who seek to improve public safety, promote alternatives to arrest and incarceration, address the root causes of crime, and heal police–community relations through sensible changes to our criminal justice system.

*Amici* share a steadfast belief that the Eighth Amendment's prohibition against cruel and unusual punishment lies at the heart of American justice, and that the rigorous enforcement of this prohibition is

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[1] *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of *amici*'s intent to file this brief.

imperative to preserving our system of limited government and promoting accountability.

## INTRODUCTION AND SUMMARY OF ARGUMENT

When this Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), more than 50 years ago, it recognized that earlier judge-made rules designed to deter the violation of constitutional rights—namely, the exclusionary rule—had proven woefully inadequate. In response, the Court built upon longstanding common-law traditions to authorize private parties whose rights had been violated by federal officials to sue for damages.

More than half a century of experience with *Bivens* confirms that its private cause of action provides a potentially highly effective means of enforcing constitutional rights, exposing individual and systemic misconduct, and incentivizing policymakers to adopt needed reforms. And contrary to the Seventh Circuit's decision here, allowing federal prisoners a monetary remedy under *Bivens* when a rank-and-file prison official deliberately subjects them to the risk of inmate-on-inmate violence will not present "separation-of-powers concerns" by inviting courts to "interfere with" issues such as prison "housing policies." Pet. App. 14a–15a. That is because the Prison Litigation Reform Act ("PLRA") and its exhaustion requirement ensure that the Bureau of Prisons ("BOP") will have the first opportunity to resolve any complaints raised by prisoners about their conditions. Indeed, a number of LEAP's members who have worked in the prison system have emphasized

the salutary effect constitutional tort actions have in maintaining harmonious relations between prisoners and their custodians. The risk of undue intrusion is especially low given the broad protection federal officers currently enjoy under the judicially created qualified-immunity doctrine.

These facts distinguish Eighth Amendment failure-to-protect claims from the other contexts in which this Court has recently declined to apply *Bivens*. Each of those contexts involved foreign policy and national security concerns, where Congress is especially likely to be "better suited to 'weigh the costs and benefits'" of private damages actions. *E.g.*, *Egbert v. Boule*, 596 U.S. 482, 494, 496 (2022) ("[W]e reaffirm that a *Bivens* cause of action may not lie where, as here, national security is at issue."); *Hernandez v. Mesa*, 589 U.S. 93, 108 (2020) ("Since regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field."). That is not necessarily the case in entirely domestic settings—and especially settings such as federal prisons, where the judiciary has extensive experience and unique insight.

It is therefore no surprise that, even when it has declined to apply *Bivens*, this Court has been quick to reaffirm "the continued force, or even the necessity, of *Bivens*." *Ziglar v. Abbasi*, 582 U.S. 120, 134 (2017). *Bivens* "vindicate[s] the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward." *Id.* For this reason, the Court has unambiguously refused to "reconsider *Bivens* itself."

*Egbert*, 596 U.S. at 502.

*Bivens* actions are essential where federal inmates allege that rank-and-file prison officials have violated their Eighth Amendment rights by deliberately subjecting them to the risk of inmate-on-inmate violence. Federal prisoners are among our Nation's most vulnerable populations. It is precisely these people—who generally cannot vote, protest, or garner attention from the media—who are most dependent on the judicial system to vindicate their constitutional rights. Congress recognized as much. As this Court observed, it is "crystal clear" that Congress intended constitutional torts to operate as "parallel, complementary causes of action" to statutory causes of action for federal inmates. *Carlson v. Green*, 446 U.S. 14, 18–20 (1980). This Court should therefore grant the petition for certiorari and reverse the Seventh Circuit's judgment.

## ARGUMENT

### I. *BIVENS* IS AN ESSENTIAL AND EFFICIENT TOOL FOR VINDICATING CONSTITUTIONAL RIGHTS.

More than 50 years into the *Bivens* era, the evidence is unequivocal: The private right of action for constitutional violations authorized by that decision is one of the most effective mechanisms available for policing and preventing government misconduct. That private right of action is especially important for prisoners in federal custody, who do not have meaningful access to the political system.

Empirical analyses confirm that *Bivens* has provided an important pathway for citizens to obtain redress for the violation of their constitutional rights. A survey of five federal district courts across the

country found that 38.9 percent of counseled *Bivens* actions—and 9.5 percent of pro se *Bivens* actions—resulted in a victory for the plaintiffs. Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 Stan. L. Rev. 809, 839 (2010). Notably, *Bivens* actions alleging prison-condition violations had an overall success rate of 15.3 percent, *id.* at 836 n.138—despite the fact that the vast majority of these actions were brought pro se, with the "difference in success between pro se and represented plaintiffs . . . statistically significant in most districts and within the sample as a whole," *id.* at 838.

But *Bivens* actions are not limited to remedying individual violations of particular citizens' rights. On the contrary, one of the most important effects of *Bivens* has been to achieve systemic reforms by incentivizing government agencies to adopt policies that minimize the risk that constitutional constraints are violated in the first place. It has done so through its "informational" and "fault-fixing" functions. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845, 858–65 (2001).

In their informational function, *Bivens* actions bring to light individual and systemic abuses that might otherwise go unnoticed by policymakers. "When constitutional tort victims pursue litigation, motivated by the availability of compensatory damages, valuable information is unearthed and exposed." Gilles, 35 Ga. L. Rev. at 859. This litigation can encourage other victims of government misconduct to come forward, exposing patterns of abuse. And the crucible of discovery can fix attention

on problem actors and institutional deficiencies within law-enforcement agencies. It certainly does so more reliably than agencies' self-reporting, which is often infected by institutional conflicts and misaligned incentives. *See* U.S. Dep't of Just., Off. of the Inspector Gen., *DOJ OIG Releases Report on Issues Surrounding Inmate Deaths in Federal Bureau of Prisons Institutions* (Feb. 15, 2024), https://tinyurl.com/bdrnh592 ("*DOJ OIG Report*") (finding that the BOP did not require in-depth internal review of inmate homicides and "was unable to produce documents required by its own policies in the event of an inmate death").

Studies confirm that constitutional tort litigation has informed "officials of misconduct allegations that did not surface through . . . other reporting systems," such as civilian complaints and internal reporting systems. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841, 845 (2012). In fact, a growing number of law-enforcement agencies have begun to "mine lawsuits for data about misconduct allegations and the details of those allegations." *Id.* at 846–47. With the aid of this data, law-enforcement agencies were able to "explore personnel, training, and policy issues that may have led to the claims" and to "craft interventions aimed at remedying those underlying problems." *Id.* at 844–45.

With respect to their "fault-fixing" function, *Bivens* actions can encourage policymakers to proactively protect constitutional rights in two ways. *First*, "the damages a plaintiff recovers contribute[] significantly to the deterrence of civil rights violations in the future" by forcing government actors to internalize the costs of misconduct. *City of Riverside v. Rivera*,

477 U.S. 561, 575 (1986). Federal agencies naturally wish "to minimize the amount of their budget that is lost to paying damages," and *Bivens* actions "give[] [these agencies] a greater incentive to monitor, supervise, and control the acts of their employees" to ensure that they are hewing to constitutional strictures. Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 Wm. & Mary Bill Rts. J. 755, 796 (1999); *see also* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 240 (2013) ("[D]amages for constitutional violations . . . heighten the disincentives for governments to engage in conduct that might result in constitutional violations.").

*Second*, *Bivens* actions "can trigger bad publicity" that puts pressure on policymakers to prevent constitutional violations. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1681 (2003). "[E]ven for an agency that doesn't care about payouts (perhaps because those payouts come from some general fund rather than the agency's own budget), media coverage of abuses or administrative failures can trigger embarrassing political inquiry and even firings, resignations, or election losses." *Id.* Constitutional damages remedies from *Bivens* actions, even if "denominated in dollars," "clearly translate into the political currency"—such as "negative publicity"—that "moves political actors." Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144, 1151, 1153 (2016) (noting that *Bivens* actions can put critical "nonfinancial pressures" on policymakers "by generating publicity about

allegations of misconduct and by revealing previously unknown information about the details of that misconduct").

These informational and fault-fixing functions have incentivized law enforcement agencies to pursue policy changes. For example, according to interviews with BOP officials, several large verdicts relating to inmate suicides "prompted high-level policy review of suicide prevention policies and practices." Schlanger, 116 Harv. L. Rev. at 1682. In another case study, during a periodic review of suits brought against officers in the Los Angeles Sheriff's Department under 42 U.S.C. § 1983, officials discovered "clusters of improper vehicle pursuits, illegal searches, and warrantless home entries" for which no civilian complaint existed, and which "did not appear in officers' use-of-force reports." Schwartz, 33 Cardozo L. Rev. at 845. Once the Department's auditor identified the trend, he was able to recommend policy changes to prevent additional violations going forward, including "enhanced supervision to improve vehicle pursuits and accuracy when responding to calls." *Id.* at 854.

Compared to these many benefits, the costs of *Bivens* actions are exceedingly low. Although courts do occasionally confront meritless *Bivens* actions, just as they occasionally confront meritless actions of all types, they have proven adept at screening such actions when they arise. For example, the same multidistrict survey cited above found that "almost 20% of the *Bivens* claims identified . . . were dismissed sua sponte because the district court screened them for frivolity and determined that they should be dismissed out of hand," thereby avoiding the "burdens

of *Bivens* litigation about which courts and commentators express concern—no defendant is subject to intrusive discovery or the potential of liability, and no attorney even has to review the complaint and prepare an answer or motion to dismiss." Reinert, 62 Stan. L. Rev. at 840. These findings "persuasively refute[]" the prior "assumption that *Bivens* claims typically lack merit" and "threaten[] to overwhelm the federal judiciary." James E. Pfander, Iqbal*,* Bivens*, and the Role of Judge-Made Law in Constitutional Litigation*, 114 Penn St. L. Rev. 1387, 1407 (2010).

Furthermore, *Bivens* cases make up a small fraction of federal courts' dockets. "As a percentage of total civil filings involving federal questions, *Bivens* suits filed between 2001 and 2003 ranged anywhere from 0.7% to 2.5% of the work of" surveyed district courts, "and 1.2% of the total federal question filings." Reinert, 62 Stan. L. Rev. at 835. And they comprise less than 0.17 percent of all cases filed in federal court. *Id.* at 837 (finding 243 *Bivens* filings out of 143,092 total civil filings in the districts surveyed).

Put simply, *Bivens* serves a critical function in not only righting individual wrongs but incentivizing the adoption of systemic reforms to ensure strict adherence to the Constitution. Many plaintiffs who assert claims under *Bivens* have in fact had their rights infringed by federal officials, and those who have not are unlikely to burden the judicial system because their claims are unlikely to advance beyond the very earliest stages of litigation. In other words, truncating *Bivens* will leave those Americans who have suffered a violation of their most fundamental rights without a remedy, while gaining next to

nothing in terms of easing federal dockets.

*Bivens* is especially important for inmates in federal custody. There are approximately 158,483 inmates in federal prisons across the country, all of whom interact with rank-and-file prison officials on a daily basis. Fed. Bureau of Prisons, *Population Statistics* (last updated Sept. 12, 2024), https://tinyurl.com/47nu8xe4. Many of these inmates experience abuse either at the hands of federal officials or other inmates, which is often overlooked or even acquiesced in by other officers. *See, e.g.*, Wash. Laws.' Comm. for C.R. & Urb. Affs., *Cruel and Unusual: An Investigation into Prison Abuse at USP Thomson*, at 2 (2023), https://tinyurl.com/2mab5xnd ("*USP Thomson Investigation*") ("Hundreds of people held in in the Federal Bureau of Prisons' (BOP) Special Management Unit (SMU) endured years of unconstitutional and abusive conditions."). In fact, the BOP's own data shows hundreds of violent incidents against inmates each month. *See* Fed. Bureau of Prisons, *Serious Assaults on Inmates from July 2024*, https://tinyurl.com/4swpeh2h (last visited Sept. 8, 2024); Fed. Bureau of Prisons, *Less Serious Assaults on Inmates from July 2024*, https://tinyurl.com/4jpanp2f (last visited Sept. 8, 2024).

In addition to assaults, murder is all too common in federal prison. According to an investigation by the DOJ's Inspector General, homicide was the second most prevalent cause of death in BOP institutions. *DOJ OIG Report*. Some inmates died after federal officials deliberately housed them with other inmates known for violence. For example, a 2023 investigation of the "Special Management Unit" at the U.S.

Penitentiary in Thomson, Illinois revealed that officials there had a practice of punishing inmates by "deliberately assign[ing] them a cellmate with whom they had known conflicts, or who posed a physical or sexual threat"—just like what Mr. Sargeant experienced here. *USP Thomson Investigation*, at 2. In one case, a Jewish inmate was locked with anti-Semitic gang members who beat him to death while prison officials looked on. *Id.* at 8. In another, an inmate was forced to live with another inmate known to be dangerous. *Id.* at 9. The inmate was stabbed multiple times and then raped while unconscious. *Id.*

*Bivens* is the most effective mechanism to prevent atrocities like these from occurring—and recurring—in federal prisons. In addition to holding individual officers who commit such acts accountable, *Bivens* incentivizes government agencies like the BOP to pursue systemic reforms to safeguard citizens' constitutional rights, without intruding on these agencies' autonomy.

## II. APPLYING *BIVENS* TO EIGHTH AMENDMENT FAILURE-TO-PROTECT CLAIMS WOULD NOT UNDULY INTRUDE ON THE FEDERAL PRISON SYSTEM.

In declining to recognize a *Bivens* claim here, the Seventh Circuit expressed concern that such a claim "would interfere with the functioning of another branch" because "failure-to-protect claims against prison officials responsible for cell assignments under *Bivens* will invariably implicate housing policies, which factor in a sensitive mixture of things [courts] are ill-positioned to assess—a prison's determinations about safety, discipline, and resources." Pet. App.

14a–15a (citing *Egbert*, 596 U.S. at 493). But this concern is unwarranted for at least three reasons.

*First*, by providing only a damages remedy, *Bivens* does not mandate any programmatic changes at all, much less does it require the courts to choose what those changes should look like. Indeed, "a damages award does not require discontinuation of such practices, [but] it exerts significant pressure on government and its officials to respect constitutional bounds." Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1788 (1991). For this reason, recognizing a *Bivens* claim here would leave the BOP free to determine housing policies however it likes—and in doing so, would not only facilitate institutional buy-in, but also encourage experimentation and adaptation. And because the Treasury Department's Judgment Fund covers the costs of judgments against federal prison officials, *Bivens* would accomplish these ends without even imposing meaningful financial burdens on the BOP. *See* James E. Pfander et al., *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 Stan. L. Rev. 561, 579 (2020) (finding, in a study of 171 successful *Bivens* cases, that the Judgment Fund covered the payments while the BOP did not pay a cent).

*Second*, a *Bivens* action against federal prison officials would reach the courts only *after* the BOP has had an opportunity to resolve the issue in the first instance. Under the PLRA, a prisoner cannot bring a claim regarding prison conditions until he or she has first exhausted administrative remedies available through the prison system. *See* 42 U.S.C. § 1997e(a)

("No action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted."). Thus, the BOP will have the opportunity to balance the "sensitive mixture" of concerns cited by the panel, and only if it fails to do so in a satisfactory manner will the court have occasion to address the question.

Far from intruding on the BOP's prerogatives, *Bivens* plays an important role in maintaining harmonious relations between prisoners and their custodians by ensuring that prisoners feel that their concerns will be heard and that abusive officers will be held to account. Richard Van Wickler, a former New Hampshire prison superintendent and member of LEAP's Board of Directors, extolls the benefits of constitutional tort actions for prison officials.[2] For Mr. Van Wickler, "[p]risoners who are heard, and reasonably responded to, contribute significantly to a peaceful environment that benefits inmates and staff alike." He asserts that "holding government officials accountable for conducting themselves professionally should never be considered an unreasonable burden on the government." On the contrary, Mr. Van Wickler believes that "heard claims contribute to a peaceful correctional environment by ensuring that unprofessional conduct is policed and corruption or bad faith curtailed."

*Third*, qualified immunity already provides substantial protection against undue interference

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[2] Counsel for *amici* interviewed Mr. Van Wickler on February 14, 2024 for *amici*'s brief in the Seventh Circuit. His quotations in this brief are from that interview.

with federal prison administration. Although *amici* believe qualified immunity has become an overly broad defense to all manner of misconduct by government officials, and that the Court should revisit its qualified immunity jurisprudence in an appropriate case (particularly in cases arising under 42 U.S.C. § 1983, the text of which *amici* believe provides no plausible basis for that judge-made defense), the continued vitality of this doctrine substantially mitigates any potential intrusion on agency action that might otherwise result from recognizing *Bivens* actions in cases like this one. *See Carlson*, 446 U.S. at 19 (recognizing a *Bivens* cause of action in an Eighth Amendment case and noting that even if doing so "might inhibit [federal officers'] efforts to perform their official duties, the qualified immunity accorded them . . . provides adequate protection"). Indeed, even when a plaintiff can plead a valid constitutional tort under *Bivens*, that claim will be rejected unless the federal officer's conduct amounts to a "clearly established" constitutional violation. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

As one commentator recently observed, "currently, both [the *Bivens* doctrine and qualified immunity] function as barriers to plaintiffs bringing claims against federal officers for violations of constitutional rights." Amelia G. Collins, *The* Bivens *"Special Factors" and Qualified Immunity: Duplicative Barriers to the Vindication of Constitutional Rights*, 55 U. Rich. L. Rev. 1, 16 (2021).[3] This belt-and-

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[3] *Bivens* cases often incorporate qualified immunity analyses: between *Ziglar* (decided June 19, 2017) and *Hernandez* (decided February 25, 2020), there have been 18 qualified immunity

suspenders approach is unnecessary to protect against unwarranted intrusion into federal operations.

## CONCLUSION

For the reasons stated above the Court should grant the petition for certiorari and reverse the Seventh Circuit's judgment.

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appeals involving *Bivens* claims in the federal circuit courts. Bryan Lammon, *Making* Wilkie *Worse: Qualified-Immunity Appeals and the* Bivens *Question after* Ziglar *and* Hernandez, 2020 U. Chi. L. Rev. Online 1, *7.

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September 19, 2024