ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5288

TOBIAS JONES,
Appellant,

v.

UNITED STATES SECRET SERVICE,
OF THE U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Appellees.

On Appeal from the U.S. District Court for the District of Columbia
No. 1:22-cv-00962-TSC, Judge Tanya S. Chutkan

BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

MICHAEL K. KELLOGG
MATTHEW J. WILKINS
DUSTIN G. GRABER
KELLOGG, HANSEN, TODD, FIGEL
& FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
mkellogg@kellogghansen.com
mwilkins@kellogghansen.com
dgraber@kellogghansen.com

Counsel for Amicus Curiae
Cato Institute

May 13, 2024

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Cato Institute certifies as follows:

A. Parties and *Amici*

Except as stated below, all parties, intervenors, and *amici* appearing before the U.S. District Court for the District of Columbia and in this Court are listed in the brief for appellant.

Amicus curiae Cato Institute is a non-profit entity organized under § 501(c)(3) of the Internal Revenue Code.

B. Ruling Under Review

The ruling under review is the final order dismissing plaintiff's complaint entered on November 10, 2023 (Chutkan, J.), Dist. Ct. ECF No. 25 (JA34). The order is not published; the Memorandum Opinion is not yet reported (but is available at 2023 WL 8634586 and reproduced at JA18-33).

C. Related Cases

This case has not previously come before this Court or any other court. There are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* Cato Institute submits the following corporate disclosure statement:

Cato Institute has no parent company, and no publicly held company has a 10% or greater ownership interest in Cato Institute. Cato Institute is a non-profit entity organized under § 501(c)(3) of the Internal Revenue Code. Cato Institute is a public-policy research organization – a think tank – dedicated to the principles of individual liberty, limited government, free markets, and peace. Its scholars and analysts conduct independent, nonpartisan research on a wide range of policy issues.

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Page

CASES

* Authorities principally relied upon are marked with an asterisk (*).

CONSTITUTION, STATUTES, AND RULES

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

OTHER MATERIALS

GLOSSARY

AFGE	American Federation of Government Employees
FBI	Federal Bureau of Investigation
FLEOA	Federal Law Enforcement Officers Association

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

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

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a straightforward application of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). As the complaint alleges — and as this Court must accept as true, *see Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) — Tobias Jones was peacefully exercising his First Amendment rights by filming the open hangar door of a building from a public sidewalk. The inside of the building was visible from the sidewalk, yet law-enforcement officers prohibited Jones from filming without offering legal justification for doing so, used excessive

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and D.C. Circuit Rule 29(b), counsel for *amicus* represents that no counsel for any of the parties authored any portion of this brief and that no entity, other than *amicus* or its counsel, monetarily contributed to the preparation or submission of this brief. Counsel for *amicus* represents that all parties have consented to the filing of this brief.

force to prevent him from continuing to film, and unlawfully seized and searched him.

These Fourth Amendment violations are actionable under *Bivens*. Indeed, as the district court recognized, "[t]he facts" here "do not meaningfully differ from the facts of *Bivens* itself." JA23. Despite this, the court departed from *Bivens* just because the law-enforcement officers in question were Secret Service agents. Indeed, the court's reasoning categorically exempts Secret Service agents from liability for constitutional violations. That was an error with far-reaching implications.

First, the district court concluded that Jones's *Bivens* claims were foreclosed because part of the Secret Service's statutory mandate includes protecting high-ranking government officials. But the court's analysis overlooked the fact that the Secret Service's statutory mandate extends far beyond such protective work and includes many garden-variety law-enforcement activities. Accordingly, that mandate does not justify granting categorical immunity to the entire agency, regardless of a particular agent's activities. Indeed, this Court already has found that the Secret Service's protective mandate does not justify extending special exemptions to its agents from other legal proceedings.

Further, categorically exempting all Secret Service agents from liability undermines foundational principles of our civil justice system. Civil-rights litigation exposes government misconduct and spurs institutional reform. When citizens

believe their constitutional rights meaningfully can be vindicated in court, public trust in our institutions increases. The district court's decision undercuts these virtues by effectively permitting Secret Service agents to disregard the Constitution with impunity.

Second, the district court's "special factors" analysis (JA22-23) defies Supreme Court precedent. The Supreme Court has warned that "national security" is not "a talisman" "to ward off inconvenient claims." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017). But the district court did not find this case actually implicates national security. Instead, it reasoned that federal agents employed by an agency with a connection to national security can escape *Bivens* liability, irrespective of the particular facts of the case. That analysis is particularly alarming because it extends national security to the secreting of law-enforcement techniques and practices, opening the door for future rights abuses.

Third, the decision below implicates serious separation-of-powers concerns. The Westfall Act provides an explicit and broadly worded exception for *Bivens* claims, thus demonstrating Congress's acceptance of the *Bivens* cause of action. That text is the sole indicator of Congress's position regarding *Bivens* claims. Relying on congressional inaction since the Westfall Act — even in the face of the repeated narrowing of *Bivens* claims — is both atextual and anti-democratic.

Fourth, the district court's decision exemplifies the risk that narrowly construing *Bivens* poses to other invaluable rights. The court vitiated Jones's core procedural protections in an effort to dismiss his claims. It repeatedly read the complaint in favor of the agents, drew all inferences in their favor, and made impermissible factual findings on a motion to dismiss. This chain of errors ostensibly arose from a misguided suspicion towards *Bivens* claims. But duly enacted procedural guarantees exist even in *Bivens* cases.

Finally, the decision below will significantly chill the First Amendment right to record. Permitting law-enforcement officers to violate the Fourth Amendment rights of citizens engaged in journalistic activity reduces the public's incentive to record police activity. Doing so gives individual officers a unilateral veto over the First Amendment; officers can forcibly prevent the exercise of such rights with no fear of liability. That result is antithetical to our civil justice system because it renders foundational constitutional rights "merely precatory." *Davis v. Passman*, 442 U.S. 228, 242 (1979).

The district court's judgment should be reversed.

ARGUMENT

I. The District Court Erred in Deciding That This Case Meaningfully Differs from *Bivens* Just Because It Involves Secret Service Agents

This case falls well within the bounds of recognized *Bivens* claims. The district court acknowledged that the facts here "do not meaningfully differ from the

facts of *Bivens* itself." JA23. But it concluded that "[t]his case differs in a meaningful way from *Bivens*" because the law-enforcement officers involved are Secret Service agents rather than Federal Bureau of Narcotics agents, and Secret Service agents operate under a unique statutory mandate. JA24.

The district court's conclusion is incorrect. The Secret Service's statutory mandate includes many garden-variety law-enforcement responsibilities. The Secret Service's unique mandate has not justified granting special privileges to its agents in other contexts. And categorical immunity erodes governmental accountability and public trust.

A. Nothing About the Secret Service's Statutory Mandate Suggests Its Agents Should Be Categorically Immune from *Bivens* Claims

The Secret Service's statutory mandate does not support immunizing its agents from *Bivens* claims. The district court reasoned that Jones's *Bivens* claim must fail because the Secret Service has a unique statutory mandate to protect high-ranking government officials. *See* 18 U.S.C. § 3056(a) ("the United States Secret Service is authorized to protect the following persons . . ."). But the Secret Service is not a one-trick pony. Historically and statutorily, its agents have performed and still perform many law-enforcement activities aside from protecting high-ranking government officials.

Protecting high-ranking government officials was not even the original purpose of the Secret Service. The Secret Service's original purpose was "to stamp

out rampant counterfeiting" following the Civil War, when "nearly one-third of all currency in circulation was counterfeit." U.S. Secret Serv., *150+ Years of History*, https://www.secretservice.gov/about/history/150-years (accessed May 9, 2024). It also was responsible for "detecting persons perpetrating frauds against the government" and for investigating "nonconforming distillers, smugglers, mail robbers, land frauds and a number of other infractions against federal laws" having nothing to do with protecting high-ranking government officials. U.S. Secret Serv., *Timeline of Our History*, https://www.secretservice.gov/about/history/timeline (accessed May 9, 2024).

The Secret Service continues to investigate such financial crimes and frauds. "Today, . . . much of the Secret Service['s] investigative work" focuses on "credit card fraud, wire and bank fraud, computer network breaches, ransomware, and other cyber-enabled financial crimes," as well as "counterfeiting," "identity theft," and "internet crimes against children." U.S. Secret Serv., *Our Investigative Mission*, https://www.secretservice.gov/investigations (capitalization omitted) (accessed May 9, 2024). Indeed, *all* Secret Service "Special Agents are assigned to a field office" for at least three years to perform investigative work before being placed on a protective assignment. U.S. Secret Serv., *Become a Special Agent: Be Tomorrow's US Secret Service* 23 (July 2023), https://www.secretservice.gov/sites/default/files/reports/2023-07/sa-brochure-

print.pdf.[2] And many Special Agents return to investigatory work in field offices, or go to work in the Secret Service's headquarters (in Washington, D.C.), after their protective assignments.

The Secret Service's statutory mandate reflects this mix of protection duties and run-of-the-mill law-enforcement powers. Section 3056 of Title 18 spells out the powers, authorities, and duties of the Secret Service. Subsection (a) authorizes the Secret Service to protect certain categories of individuals. 18 U.S.C. § 3056(a). But Section 3056 contains six more subsections, most of which are unrelated to protective functions. For example, subsection (b) empowers Secret Service agents "to detect and arrest any person who" engages in "any fraud or other criminal or unlawful activity in or against any federally insured financial institution." *Id.* § 3056(b)(3). Subsection (c) authorizes them to "make arrests without warrant for *any* offense against the United States committed in their presence, or for *any* felony cognizable under the law of the United States if they have reasonable grounds to believe that the person to be arrested has committed" the felony. *Id.* § 3056(c)(1)(C) (emphases added). And subsection (f) empowers the Secret Service "to provide forensic and investigative assistance" to "any State or local law enforcement agency in conjunction with an investigation." *Id.* § 3056(f).

[2] There are more than three dozen field offices around the country. *See* U.S. Secret Serv., *Field Offices*, https://www.secretservice.gov/contact/field-offices (accessed May 9, 2024).

Likewise, 18 U.S.C. § 3056A prescribes the "[p]owers, authorities, and duties of [the] United States Secret Service Uniformed Division" (heading) to which Sergeant Holland belongs. Section 3056A authorizes the division to protect various locations, including the "Treasury Building and grounds." *Id.* § 3056A(a)(3); *see also* U.S. Dep't of Homeland Sec., *FY 2022 Budget in Brief* 50 (2022) (Secret Service "protects the White House Complex, the Vice President's Residence, foreign diplomatic missions, *and other designated buildings*") (emphasis added), https://www.dhs.gov/sites/default/files/publications/dhs_bib_-_web_version_-_final_508.pdf. Further, the statute explains that "Members of the United States Secret Service Uniformed Division shall possess privileges and powers similar to those of the members of the Metropolitan Police of the District of Columbia." 18 U.S.C. § 3056A(b)(2).

Because the Secret Service's statutory mandate — including the mandate for the Uniformed Division — involves garden-variety law enforcement, no reason exists to categorically immunize its agents from *Bivens* claims. Invoking one portion of an agency's statutory mandate should not shield officers operating under a different part of that mandate. Here, the complaint does not allege — and the court could not reasonably infer, *see infra* pp. 23-26 — that the defendants were engaged in protective functions when they harassed, detained, and searched Jones. The court erred when it dismissed this case based on the Secret Service's protective mandate.

B. The Secret Service's Unique Statutory Duties Do Not Immunize It from Other Established Legal Principles

Finding that the Secret Service's protective functions do not immunize its agents from *Bivens* accords with this Court's treatment of Secret Service agents in other legal contexts. For example, this Court has concluded that the Secret Service's protective functions do not confer upon its agents a special privilege not to testify about what they heard the President say while protecting him. *See In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (per curiam).

In *Sealed Case*, Secret Service agents "refused to answer certain questions" in "grand jury proceedings" involving President Clinton "on the ground that the information sought was protected from disclosure by a 'protective function privilege.'" *Id.* at 1074. The agents argued that compelling testimony about the President's statements would "jeopardize the ability of the Secret Service effectively to protect the President" by discouraging the President from keeping his agents close to him. *Id.* at 1075-76. This Court recognized "the universally shared understanding that the nation has a profound interest in the security of the President," but found that the Secret Service's arguments were "'speculation—thoughtful speculation, but speculation nonetheless.'" *Id.* at 1076 (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998)). That the agents were engaged in protective functions did not overcome the "'general duty to give what testimony one is capable of giving.'" *Id.* at 1075 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996)).

The same reasoning applies here. Secret Service agents have a general duty not to violate the public's Fourth Amendment rights. That they engage in protective functions does not detract from that duty. And the *Bivens* remedy exists to enforce that duty. Any suggestion that the *Bivens* remedy will impair the Secret Service's protective capabilities is "speculation—thoughtful speculation, but speculation nonetheless." *Id.* at 1076.

C. Categorically Immunizing Any Group of Federal Actors from *Bivens* Claims Erodes Governmental Accountability and Public Trust

Foundational to our justice system are the ideas that "no one is above the law," *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 478 (1867), and that victims can seek appropriate recompense when other actors violate the law, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress."). *Bivens* promotes these principles by providing a path for private citizens to recover damages when federal actors violate their constitutional rights. *See Davis*, 442 U.S. at 242-44. Accordingly, *Bivens* promotes public confidence in the social contract underlying our system of governance by giving individuals a mechanism to hold rights-violators accountable. *See Marbury*, 5 U.S. (1 Cranch) at 163 ("The very essence of civil liberty certainly consists in the right of every individual to claim the

protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

Bivens also enhances public trust in our institutions by providing all citizens — not just victims — awareness of government action. *Cf.* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1681 (2003) (explaining that "news organizations . . . can use filed complaints to expose" government misconduct). "Sunlight" is "the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam). *Bivens* enables victims to bring government actors' constitutional malfeasance to light through public proceedings in federal court. *See* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 859 (2001) ("When constitutional tort victims pursue litigation, motivated by the availability of compensatory damages, valuable information is unearthed and exposed."). Such litigation encourages other victims of government misconduct to come forward, exposing patterns of abuse in a virtuous cycle, and the crucible of discovery can fix attention on problem actors and institutional deficiencies within law-enforcement agencies. *Cf.* Timothy D. Lytton, *Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 CONN. L. REV. 809, 814 (2007) (news coverage of litigation "encouraged increasing numbers of victims to come forward and seek legal redress").

By exposing governmental malfeasance, *Bivens* also can promote institutional reform and curb future rights abuses. *See City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (plurality) (civil-rights litigation benefits the public because "the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future"). A well-functioning system of public accountability and reform creates a positive feedback loop that builds public trust in our institutions because individuals believe that misconduct will be discovered, punished, and then prevented through either reform or the deterrent effect of litigation. *See* Avidan Y. Cover, *Revisionist Municipal Liability*, 52 GA. L. REV. 375, 410-11 (2018).

Categorically excluding swaths of federal actors from this system has the opposite effect. Private citizens lose faith that their enshrined rights have meaning and will be respected without a mechanism to enforce those rights. Indeed, the Supreme Court has observed that, without means to vindicate constitutional rights, those rights become "merely precatory." *Davis*, 442 U.S. at 242. Similarly, public confidence in our institutions is diminished because such violations are less frequently exposed and corrected. *See* Cover, 52 GA. L. REV. at 410. "[M]isconduct allegations" are less likely to "surface through . . . other reporting systems," such as civilian complaints and use-of-force reports. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 845 (2012). The district court's

sweeping grant of immunity is thus antithetical to our civil justice system and a free and well-functioning society.

II. The District Court Erred in Concluding That Any Special Factors Counsel Against Jones's *Bivens* Claim

The district court purported to identify just one "special factor" that counseled against Jones's *Bivens* claim — national security. JA25. But the court made no factual findings regarding whether any national-security concerns actually existed. Instead, the court cursorily concluded that "[r]estricting filming of a Secret Service hanger's interior . . . serves the interest of national security by ensuring that individuals are not able to capture, study, or attempt to evade the Secret Service's law enforcement techniques." *Id.* According to the court, this created "the necessary nexus to national security" and foreclosed *Bivens*. JA26-27. The court's fleeting analysis is contrary to Supreme Court precedent because it treats national security as an irrefutable trump card.

In *Ziglar v. Abbasi*, the Supreme Court warned that "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" 137 S. Ct. at 1862 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)). And the "danger of abuse is even more heightened given the difficulty of defining the security interest in domestic cases." *Id*. (cleaned up). Indeed, the Supreme Court has recognized the "real" "danger" that "federal officials will disregard constitutional rights in their zeal to protect the national security."

Mitchell, 472 U.S. at 523 (rejecting Attorney General's claim for national security-based absolute immunity).

This case squarely implicates the Supreme Court's concern. The district court acknowledged that "[n]ot every interaction involving Secret Service officers implicates national security." JA26. That is clearly correct. As discussed above, the Secret Service (including its Uniformed Division) engages in many run-of-the-mill law-enforcement activities in addition to protecting high-ranking government officials. *See supra* pp. 5-8. And yet the court reasoned that a case "'need not'" involve "'an ongoing or imminent threat to national security to invoke national security as a special factor.'" JA26 (quoting *Buchanan v. Barr*, 71 F.4th 1003, 1009 (D.C. Cir. 2023)). In other words, by invoking national-security concerns, Secret Service agents can defeat a *Bivens* claim even when interactions with them do not necessarily implicate national security and even when no actual national-security concern exists. Under the court's analysis, hypothetical national-security concerns officially have become a talisman for avoiding *Bivens* actions.

Heeding the Supreme Court's admonishment, though, requires assessing whether a given case *actually implicates* national-security concerns. *See Hicks v. Ferreyra*, 64 F.4th 156, 168 n.3 (4th Cir. 2023) (traffic stop "near the headquarters of the National Security Agency" had no national-security implications based on "purely coincidental proximity with no relevance to the facts or constitutional

violations at issue"), *cert. denied*, 144 S. Ct. 555 (2024). Indeed, this Court conducted that analysis in *Buchanan*. There, the Court explained that a protest *in Lafayette Park* "'presents some measure of hazard to the security of the President and the White House.'" *Buchanan*, 71 F.4th at 1009 (quoting *A Quaker Action Grp. v. Morton*, 516 F.2d 717, 731 (D.C. Cir. 1975)). That case implicated a real national-security concern in which "officers in the area surrounding the White House and the President [had to] be able to act without hesitation." *Id*. Thus, unlike the court below, the *Buchanan* Court tethered national-security concerns to the specific activity (a protest) and its proximity to protected places and persons.

Here, the district court answered the national-security question in the abstract, preventing any discovery into the specifics of this case and relieving the government of its burden to demonstrate that national security was actually implicated. That approach runs roughshod over *Ziglar*'s warning. Instead, if the court thought that this case presented national-security concerns (which are not present on the face of the complaint), it could have ordered limited, expedited discovery to determine whether the officers were engaged in sensitive protective work or whether the building in question implicated unique national-security concerns.

The court was well-equipped to manage such discovery. The U.S. District Court for the District of Columbia frequently encounters cases implicating national security. Its courthouse has a sensitive compartmented information facility (SCIF).

Its capabilities are proven, having handled the cases of the Guantanamo Bay detainees. The court easily could manage discovery in a way that appropriately balances Jones's rights with the Secret Service's interests.[3] Therefore, the appropriate course here was to provide due process — not to dismiss Jones's complaint based on abstract justifications at the pleadings stage.

Broadly defining national security has wide-reaching implications. A generic and abstract application of national security could plausibly insulate much of the federal government. For example, while national security falls within the FBI's mandate, the FBI also investigates matters with no connection to national security. *See* FBI, *What We Investigate* (explaining that FBI investigates civil-rights violations, public corruption, violent crime, and white-collar crime), https://www.fbi.gov/investigate (accessed May 9, 2024). The same could be said of many other law-enforcement agencies. The only way to prevent national-security concerns from becoming a talisman is to require courts to find actual national-security concerns in the case at hand. There was no such finding here.

The district court's opinion is especially concerning because it invokes national security to justify keeping law-enforcement techniques secret from the public. The court reasoned that "preventing the disclosure of law enforcement

[3] This is especially true considering the Secret Service possesses no "protective function privilege" against testifying about what they learn while protecting even the President. *Sealed Case*, 148 F.3d at 1079.

techniques and procedures" is an important government interest. JA25-26. Such reasoning is antithetical to a free and just society. *See Hamdan v. U.S. Dep't of Just.*, 797 F.3d 759, 769-70 (9th Cir. 2015) ("Government transparency is critical to maintaining a functional democratic polity, where the people have the information needed to check public corruption, hold government leaders accountable, and elect leaders who will carry out their preferred policies."). Practices that law enforcement characterizes as "techniques" can — and, more often than they should, actually do — violate the Constitution and harm citizens.[4] Exposing and punishing such abusive practices is necessary to vindicate the foundational values of our society.

The district court's reasoning also falters because the law-enforcement techniques and procedures that apparently needed to be kept secret were being conducted in plain view of the public. *Cf. Broward Bulldog, Inc. v. U.S. Dep't of Just.*, 939 F.3d 1164, 1191 (11th Cir. 2019) (explaining that "law enforcement techniques or procedures that are universally known to the public cannot be shielded from disclosure") (collecting cases). If what was happening in the hangar were so sensitive, then the agents should have shut the hangar door or blocked off the street

[4] *See, e.g.*, David A. Graham, *'Rough Rides' and the Challenges of Improving Police Culture*, THE ATLANTIC (Apr. 27, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-rough-ride-and-police-culture/391538/; Emily R. Siegel et al., *Minneapolis police rendered 44 people unconscious with neck restraints in five years*, NBC NEWS (June 1, 2020), https://www.nbcnews.com/news/us-news/minneapolis-police-rendered-44-people-unconscious-neck-restraints-five-years-n1220416.

(which any resident of the District of Columbia who has waited for the Presidential motorcade knows the Secret Service can do), not harassed an innocent member of the public standing on public property. Under the district court's reasoning, though, Secret Service agents (and many other law-enforcement officials) will have free reign to harass members of the public as long as they claim they are protecting the secrecy of their law-enforcement techniques.

III. The District Court's Holding Neglects That Congress Already Has Endorsed a Broad *Bivens* Remedy

The district court reasoned that it could not "alter the framework established by the political branches" by recognizing a *Bivens* action here. JA26. But this overlooks that Congress already has endorsed a broad *Bivens* action framework to remedy a wide range of constitutional injuries.

The Westfall Act codifies Congress's understanding and approval of a broad *Bivens* remedy. That Act preempts claims against employees of the federal government in most cases. 28 U.S.C. § 2679(b)(1). But that preemption "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." *Id.* § 2679(b)(2)(B).

That statutory text is an "explicit exception for *Bivens* claims." *Hui v. Castaneda*, 559 U.S. 799, 807 (2010). And Congress wrote the exception broadly. It applies to all "action[s] . . . brought for a violation of the Constitution," not just to

actions brought for violations of the Fourth Amendment by agents of the Federal Bureau of Narcotics. Had Congress wanted to limit the exception to certain contexts, it could have enumerated those contexts, but it did not.

In short, Congress knew about and approved of *Bivens* when it passed the Westfall Act. In passing that Act, Congress recognized that the *Bivens* cause of action was broad in scope and condoned that breadth. And Congress never has passed another law narrowing it.

But many courts have overlooked this statutory clarity. Instead of crediting the broad vision of *Bivens* that Congress endorsed in the Westfall Act, they have reasoned that Congress's failure to reiterate that vision more recently somehow reflects its approval of courts' increasingly narrow perception. *See*, *e.g.*, *Buchanan*, 71 F.4th at 1008. That reasoning is deeply flawed. Inferring congressional intent from inaction is improper because it both offends basic principles of statutory interpretation and is profoundly anti-democratic.

Basic principles of statutory interpretation forbid using later congressional inaction to rewrite existing legislation. The text of a duly enacted statute is "the best evidence of Congress's intent," *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012), because it is "the *only* remnant of 'history' that bears the unanimous endorsement of the majority in each House," *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia,

J., concurring in part and concurring in the judgment). Without enacted statutory text, "it is utterly impossible to discern what the Members of Congress intended." *Id.*; *see also* Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012) ("[T]here is no way to tell what [Congress] intended *except* the text."). It is therefore "utterly impossible" — or at least utterly illogical — to infer anything from congressional inaction, which by definition produces no new statutory text from which to infer any intent.

Inferring intent from congressional inaction also ignores the realities of the political process. Congress may neglect to enact legislation for various reasons. For example, inaction may be "biased in favor of well-organized (and frequently wholly unrepresentative) groups." William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 104-05 (Oct. 1988). Such groups often have the motivation and resources "to monopolize the attention of legislators" and "skew public decisionmaking" in favor of policies that may benefit them at the expense of the American people at large. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 283, 287 (1988). Federal law-enforcement officers are such a group: they are

numerous,[5] well-organized in powerful unions and other associations,[6] well-funded,[7] and motivated to influence policy in this area.[8] Federal law-enforcement officers therefore have far more ability to influence legislative action than a disparate collection of persons injured by (or future victims of) constitutional violations — who lack the necessary coordination — or the American people as a whole — who are not focused on this particular issue. Congressional inaction is therefore a poor indicator of acquiescence to any judicial interpretation of the Westfall Act. Rather,

[5] In 2020, the federal government "employed 136,815 full-time federal law enforcement officers" across 90 agencies. Connor Brooks, Bureau of Just. Statistics, *Federal Law Enforcement Officers, 2020 – Statistical Tables* 1 (rev. Sept. 29, 2023), https://bjs.ojp.gov/document/fleo20st.pdf.

[6] The American Federation of Government Employees (a union) represents approximately 100,000 (nearly three-fourths) of federal law-enforcement officers, and the Federal Law Enforcement Officers Association (a professional association) represents more than 30,000. *See* AFGE, *Law Enforcement Officers*, https://www.afge.org/common-pages/law-enforcement-officers/ (accessed May 9, 2024); FLEOA, *Why Join FLEOA*, https://www.fleoa.org/why-join (accessed May 9, 2024).

[7] The AFGE conservatively collects more than $135 million in dues every year: it has 300,000 active members who pay $18-22 in dues every pay period. *See* AFGE, *Dues & Eligibility*, https://www.afge.org/member-benefits/join/dues-eligibility/ (accessed May 9, 2024); AFGE, *AFGE Facts* (Mar. 11, 2024), https://www.afge.org/globalassets/documents/flyers/2024/afge-facts_2024_march11.pdf.

[8] The FLEOA claims to be "the largest 'legislative voice' for the federal law enforcement community" and often "testif[ies] at congressional hearings and represent[s] the overall position of the federal law enforcement profession." FLEOA, *Why Join FLEOA*, https://www.fleoa.org/why-join (accessed May 9, 2024).

such inaction is often entirely unrelated to changes in case law and, instead, driven by congressional focus elsewhere.

Finally, if anything can be drawn from congressional inaction in this case, it is that Congress continues to approve of suing individual federal officers for constitutional torts. Congress has considered at least five bills that would have made the United States the sole defendant in all constitutional tort actions. *See* Jack Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 512, 514 (1976) (discussing early versions of the 1974 amendments to the Federal Tort Claims Act); S. 2117, 95th Cong., 1st Sess. (1977); H.R. 24, 97th Cong., 1st Sess. (1981); H.R. 595, 98th Cong., 1st Sess. (1983); S. 829, 98th Cong., 1st Sess. (1983). By removing liability for individual officers, these bills would have abrogated *Bivens* entirely. But Congress rejected them all.

IV. This Case Illustrates How a Narrow Conception of *Bivens* Threatens Procedural Protections and Chills Constitutionally Protected Activity

A. The District Court Undermined Jones's Procedural Rights in Its Attempt To Distinguish *Bivens*

A narrow understanding of *Bivens* also threatens fundamental procedural protections for *Bivens* plaintiffs. In their efforts to distinguish the case in front of them from *Bivens*, courts sometimes usurp the constitutional role of the jury and the protections of the Rules of Civil Procedure.

This case illustrates that risk. On a motion to dismiss, "the relevant facts are those alleged in the complaint, taken in the light most favorable to the plaintiff and with all reasonable inferences drawn in his favor." *Hurd v. District of Columbia*, 864 F.3d 671, 675 (D.C. Cir. 2017). And the district court does not "have the power to[ ] make factual findings in ruling on [a] motion to dismiss," as no evidentiary record exists. *Keefe v. Marquette Cnty.*, 31 F. App'x 334, 336 (7th Cir. 2002); *see also Cannon v. Wells Fargo Bank, N.A.*, 926 F. Supp. 2d 152, 175 (D.D.C. 2013). But the court flouted those basic standards by repeatedly and improperly reading the complaint in the light most favorable to the defendants, making all inferences in their favor, and ultimately making factual determinations in their favor.

In the most notable example, the district court said that it could "conclude" from the allegations in the complaint "that the agents were carrying out the Secret Service's protective functions" — as opposed to another law-enforcement function — "during the altercation." JA24. But the allegations in the complaint suggest no such conclusion. The complaint did not allege that the agents were engaged in a protective function. It did not allege that the agents were assigned to a protective detail. It did not allege that a person eligible for Secret Service protection was nearby. And it did not allege that the building in question was the White House, a foreign embassy, or another building housing a protectee. Instead, it alleged that the agents were inside "a large open hangar" of "a strange looking building" (JA6-7

(¶¶ 7-8)); that the agents told Jones he could not film the interior of the building (JA7 (¶¶ 9-13)); that the agents refused to answer Jones's questions (JA7-8 (¶¶ 14-15, 30-31)); and that the agents detained and searched him, ostensibly to make sure he was not a threat (JA10 (¶¶ 45-55)).

Those allegations support the plausible inference that the agents were engaged in run-of-the-mill law-enforcement functions, rather than protective functions. The district court reached the contrary conclusion only by reading each and every allegation in the light most favorable to the defendants:

- The court concluded that the "large open hangar" of the "strange looking building" "may house sensitive personnel, vehicles, and equipment." JA24-25. But those are the court's embellishments; it is plausible that the "hangar" was the loading dock of an administrative building and contained nothing sensitive at all.
- The court concluded that the agents told Jones he could not film or photograph the hangar (despite its being open for anyone to view from a public street) because they had "a concern for the secrecy and security of the people and equipment inside." JA24. But that too is the court's embellishment; the complaint alleged no such thing. It also is plausible

that the agents were wrong (i.e., that Jones was allowed to film the hangar[9]) and were simply uncomfortable being filmed and used their veneer of authority to stop him. *See* JA11 (¶ 62) (Sergeant Holland told Jones that he couldn't "care less" whether Jones's activities were lawful).

- The court concluded that the agents' "decision not to answer [Jones's] questions about the building's function also reflects discretion about its purpose." JA24. Again, that is the court's embellishment. It is equally plausible that the agents refused to answer because they did not know the answer, or because they were particularly ill-tempered that day, or because they were frustrated that a law-abiding member of the public would not unquestioningly obey their commands. Secret Service agents are humans, too, and can make irrational decisions and have emotional outbursts.[10]
- The court credited the explanation of the agent who detained Jones that he did so "because he needed to be sure [Jones] was not a threat." JA24. But

[9] Indeed, the Department of Homeland Security's own bulletins acknowledge that "no general security regulations prohibit[ ] the exterior photography of any federally owned or leased building." Opp. to Defs.' Mot. To Dismiss Individual Capacity Claims at 7, No. 1:22-cv-962-TSC, ECF #16; *see id.*, ECF #16-1, #16-2.

[10] *See* Tom Rogan, *Secret Service agent assigned to Kamala Harris detail involved in fight with other agents*, WASH. EXAMINER (Apr. 24, 2024), https://www.washingtonexaminer.com/news/white-house/2976729/secret-service-agent-protecting-kamala-harris-involved-in-fight-with-other-agents/.

the agent may have lied. He may have detained and searched Jones as revenge for annoying him.

Each of these examples poses a material question of fact: Were the agents engaged in protective work or investigative work or other work? What was the hangar and was there anything sensitive about it? Were the agents actually concerned for the safety and security of people and equipment in the building (and were there even people and equipment in there about which to be concerned)? Why did the agents refuse to answer Jones's questions before detaining and searching him? The Rules of Civil Procedure entitle Jones to discovery on these questions, and the Constitution guarantees him the right to a jury to answer them. But Jones never received discovery or a jury trial because the district court improperly made factual determinations after reading Jones's allegations in the light most favorable to the agents.

Perhaps the district court committed these elementary procedural errors in part from a sense that *Bivens* claims are out of vogue and should therefore be treated with exceptional suspicion. But a plaintiff's procedural and constitutional protections do not disappear just because he asserts a seemingly disfavored claim.

B. *Bivens* Is a Vital Protection for Citizen Journalists Exercising Their First Amendment Rights

The right to record the activities of law-enforcement officers in public is well-established. *See*, *e.g.*, *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir.

2017) ("[R]ecording police activity in public falls squarely within the First Amendment right of access to information."); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 594-95 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). And the importance of that right is unquestionable. *See Price v. Garland*, 45 F.4th 1059, 1070 (D.C. Cir. 2022) ("Filming a public official performing public duties on public property implicates unique first amendment interests."), *cert. denied*, 143 S. Ct. 2432 (2023); *Glik*, 655 F.3d at 82 ("Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'") (citation omitted).

Recordings by citizen journalists can bring to light instances of government misconduct that might otherwise escape scrutiny. *See Fields*, 862 F.3d at 360 (explaining that "the proliferation of bystander videos has 'spurred action at all levels of government to address police misconduct and to protect civil rights'") (citation omitted). The murder of George Floyd by a police officer, for example, became a national news story because a concerned citizen filmed it. *See*, *e.g.*, Alex Altman, *Why The Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020), https://time.com/5847967/george-floyd-protests-trump/. Without that film, Floyd's murder likely never would have made local news, much less national headlines, and his killer likely still would be working in law enforcement.

Restricting *Bivens*, however, has a chilling effect on the public's incentive to record police activity. *See Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."); *Irizarry v. Yehia*, 38 F.4th 1282, 1297 (10th Cir. 2022) (noting that "attempting to deter an individual from filming the police through physical interference and threats causes injury sufficient to chill the speech of a person of ordinary firmness"). Without a *Bivens* remedy, law-enforcement officers often can harass citizen journalists with impunity, thus discouraging future recording. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 366 (2011) (explaining that "the threat of arrest remains a potent deterrent to spontaneous photographers").

Beyond chilling future conduct, closing the courthouse to constitutional violations enables federal agents to unilaterally extinguish important constitutional rights. *See Davis*, 442 U.S. at 242 (explaining that, unless "litigants who allege that their own constitutional rights have been violated" are "able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights," "such rights . . . become merely precatory"). That is what happened here. According to the complaint, Jones was permissibly recording police activity — a prima facie example of protected conduct. While there may be instances where sufficient

government interest can overcome the public's right to record, no such determination occurred here. *See Fields*, 862 F.3d at 360 ("The right to record police is . . . subject to reasonable time, place, and manner restrictions.") (cleaned up). Rather, by holding that Jones lacked a cause of action, the district court prevented any evaluation of the merits. The result is a regime where law enforcement can effectively prohibit any recording without scrutiny, and the public's ability to record turns on the whims of any individual officer.

These concerns extend beyond just recording federal law enforcement; barring the courthouse impairs public scrutiny of countless types of government action. Beyond intentional misconduct, narrowly applying *Bivens* prevents discovery of even inadvertent mistakes that could otherwise be readily corrected. Without a viable cause of action, the right to procedural due process becomes little more than an empty promise. The ability to seek judicial intervention prevents foundational constitutional rights from becoming "merely precatory," subject to the whims and carelessness of federal actors. *Davis*, 442 U.S. at 242.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

/s/ *Michael K. Kellogg*

MICHAEL K. KELLOGG
MATTHEW J. WILKINS
DUSTIN G. GRABER
KELLOGG, HANSEN, TODD, FIGEL
& FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
mkellogg@kellogghansen.com
mwilkins@kellogghansen.com
dgraber@kellogghansen.com

Counsel for Amicus Curiae
Cato Institute

May 13, 2024

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6,497 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared using Microsoft Word 2016 in a proportionally spaced typeface (Times New Roman, 14 point).

/s/ *Michael K. Kellogg*
MICHAEL K. KELLOGG
Counsel for Amicus Curiae
Cato Institute

May 13, 2024

CERTIFICATE OF SERVICE

I hereby certify that, on May 13, 2024, I caused to be filed electronically the foregoing BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Michael K. Kellogg*

MICHAEL K. KELLOGG
Counsel for Amicus Curiae
Cato Institute