No. 21-2287

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Roy Patrick SARGEANT,

Plaintiff–Appellant,

v.

Aracelie BARFIELD,

Defendant–Appellee.

On Appeal from the
United States District Court for the Northern District of Illinois
Case No. 3:19-cv-50187, Hon. Iain D. Johnston

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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Counsel for Amicus Curiae *National Police Accountability Project*

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and 29(b)(3), the National Police Accountability Project (NPAP) moves for leave to file the attached *amicus curiae* brief (attached hereto as Exhibit A) in support of Plaintiff-Appellant's petition for rehearing *en banc* in this proceeding. Before filing this motion, NPAP sought the parties' permission to file an *amicus* brief, and both parties have consented to this filing.

Founded in 1999 by the National Lawyers Guild, *amicus* NPAP coordinates and assists civil rights attorneys focused on combatting law enforcement misconduct. NPAP has approximately 550 attorney members practicing in every region of the United States, including over 50 members in the Seventh Circuit. Every year, NPAP members litigate the thousands of egregious cases of law enforcement abuse that do not make news headlines, as well as the high-profile cases that capture national attention. NPAP provides training and support for these attorneys and regularly appears as *amicus curiae* in cases such as this one that present issues of particular importance for its members and their clients.

NPAP is interested in this case because it is invested in developing legal precedent that protects the constitutional rights of incarcerated individuals and holds corrections officers responsible for their misconduct. Improperly restrictive applications of the *Bivens* doctrine frustrate these goals by allowing officers who have committed abuses to escape accountability simply because they violated the Constitution while employed by a federal, rather than state, prison. It also strips

federal prisoners of any legal remedy for even the most gross and obvious violations of their constitutional rights.

Amicus is uniquely positioned to speak to the errors of the panel's decision in this case. With over 550 member attorneys representing incarcerated individuals in their civil suits against abusive corrections officers, in both federal and state prisons, NPAP is deeply familiar with the state of *Bivens* and Eighth Amendment case law in the Seventh Circuit, its sister circuits, and the United States Supreme Court. NPAP also has intimate knowledge of how this Court's decisions impact plaintiffs like Mr. Sargeant, who may very well be able to prove a corrections officer deliberately placed them in grave danger but are nevertheless denied justice because they happened to be housed in a federal, rather than state, prison. NPAP's brief draws from this knowledge to identify the ways the panel misinterpreted settled case law so severely as to effectively eviscerate the Eighth Amendment rights of federal prisoners.

Amicus hereby respectfully requests the Court grant them leave to file their brief in support of Petitioner.

Dated: February 21, 2024.

Respectfully submitted,

/s/ Lauren Bonds
Lauren Bonds
Eliana Machefsky

NATIONAL POLICE ACOUNTABILITY PROJECT

Attorneys for *Amicus Curiae* NPAP

CERTIFICATE OF A FILING AND SERVICE

I certify that on February 21, 2024, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Lauren Bonds

Lauren Bonds

EXHIBIT A

No. 21-2287

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Roy Sargeant (Federal Prisoner No. #11709-171)

Plaintiff–Appellant,

v.

ARACELIE BARFIELD

Defendant–Appellee.

On Appeal from the
United States District Court
for the Northern District of Illinois
Case No. 3:19-cv-50187
The Honorable Iain D. Johnston, United States District Judge

[PROPOSED] BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR *EN BANC* REVIEW

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2287

Short Caption: Roy Patrick Sargeant v. Arcelie Barfield

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
National Police Accountability Project

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
National Police Accountability Project

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

None

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

None

Attorney's Signature: /s/ Lauren Bonds Date: 2/19/2024

Attorney's Printed Name: Lauren Bonds

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address misconduct by law-enforcement and detention-facility officers through coordinating and assisting civil-rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including over fifty attorneys in the Seventh Circuit. Every year, NPAP members litigate the thousands of cases of law enforcement and detention facility abuse that do not make news headlines as well as many of the high-profile cases that capture national attention. NPAP provides training and support for its member attorneys and resources for non-profit organizations and community groups working on law-enforcement and detention-facility accountability issues. NPAP also advocates for legislation to increase accountability and appears regularly as *amicus curiae* in cases, such as this one, presenting issues of particular importance for its members and their clients.

[1] All parties consented to the National Police Accountability Project's participation as amicus curiae in this case.

INTRODUCTION

This case involves a matter of exceptional importance—whether a person that is targeted with unconstitutional retaliation by a federal corrections officer should be able to seek a remedy in federal court where there is a previously recognized *Bivens* action for First Amendment retaliation. *Amicus* submit that the panel's opinion ignored important factual realities in finding that the case presented a new context and erred in finding that special factors counseled against recognizing a *Bivens* right in this case. In particular, the majority panel reasoned that finding of liability would be at odds with existing Federal Bureau of Prison ("BOP") housing regulations and that the grievance system constituted an alternative remedial scheme. The brief also argues that the panel's opinion is premised on myths about how liability influences job performance. Improperly restrictive applications of the *Bivens* doctrine allow officers who have committed abuses to escape accountability simply because they violated the Constitution while employed by a federal, rather than state, prison. It also strips federal prisoners of any legal remedy for even the most gross and obvious violations of their constitutional rights. NPAP urges the Court to grant the petition for rehearing *en banc* and vacate the panel's decision.

ARGUMENT

A key consideration in this case is whether holding a correctional officer liable for individual acts of retaliation—acts which violated Bureau of Prison policies—will infringe on federal prison management. *Sargeant v. Barfield*, 87 F.4th 358, 367 (7th Cir. 2023) (analyzing whether case presented a new context given the distinct purview of housing and medical policies as well as implication of special factors). However, this consideration is premised on a misconception of Appellee-Respondent's alleged misconduct and a broader myth about the relationship between individual liability and law enforcement officer job performance. Individual officer accountability for retaliation will not interfere with federal prison management policies in either the abstract or on the specific facts of this case.

I. Mr. Sargeant's Claims Are Not in Tension with BOP's System of Managing Housing Assignments nor Do They Lend Themselves to the Alternative Remedial Scheme That the Panel Identified.

The availability of a *Bivens* action is a deeply fact-intensive inquiry that turns on the specific conduct of the federal employee in question. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 483-86 (1994). Facts matter. And here, the facts

cannot be reconciled with the doctrine's rationales behind limiting the availability of a claim. First, whether Mr. Sargeant's claims of retaliatory housing present a new context involves the question of whether liability will risk disruptive intrusion into the functioning of BOP prisons. Such an intrusion would only occur if liability would "chill" an officer's application of a BOP housing policy. As we discuss further below, the threat of civil liability is unlikely to chill an officer's performance of their duties. Even if such a chilling effect did exist, an important fact in this case is that the appellee-respondent was not acting in furtherance of any BOP policy or goal when she retaliated against Mr. Sargeant. Unlike in other misconduct cases, this is not a situation where the defendant caused an injury by overzealously exercising her expected duties (*see eg.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 740 (2020)(where defendant did not violate CBP policies and training in using force) or made a honest mistake in deviating from a federal departmental policy (*see eg.*, *Ortega v. Cloyd*, 2012 U.S. Dist. LEXIS 164077 at *11 (W.D. Ky. 2012)(where defendant made a reasonable mistake about the policy). She acted in direct contravention of her duties and violated BOP's established housing regulation system to retaliate against Mr. Sargeant. A finding of liability in this case would not disrupt BOP's housing management system since appellee-respondent's unconstitutional actions violated the system's established policies.

The alternative remedies purportedly available to the plaintiff are equally at odds with the facts. The panel found that the availability of the BOP grievance system counseled against the recognition of a *Bivens* remedy without acknowledging that Mr. Sargeant's use of that very system is what led to his injuries. The BOP grievance process is clearly not able to protect the constitutional interest at stake for Mr. Sargeant as it has been a catalyst for the retaliation giving rise to his injuries in the first instance.

II. Recognizing A *Bivens* Remedy in This Case Will Not Lead to An Underenforcement of Security in Federal Carceral Facilities.

Concerns that *Bivens* liability will lead to under-enforcement are similarly misplaced. Although courts previously assumed that damages remedies may affect federal officers' willingness and ability to perform enforcement duties, *see, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863 (2017), the realities of indemnification arrangements mean that officers virtually never pay damages themselves.

The court's mistaken assumption is understandable, as attorneys for the Government have long argued that imposing damages will chill the performance of officer's duties. *See* U.S. Br. at 32, *Hernandez v. Mesa*, 140 S. Ct. 735, (17-1678 (2019)(17-1678)("[i]mposing damages liability on individual agents executing … essential national-security functions at the border could chill the performance of their duties."). But the Government's rhetoric has little basis in reality and is even

contradicted by the Government's own practices when defending *Bivens* claims, as explained below. Principally, individual officers almost never bear any of the financial costs of a lawsuit. As one recent empirical study found, "Government attorneys persist in describing *Bivens* as potentially ruinous even though individual defendants almost never pay judgments or settlements in successful *Bivens* cases." James E. Pfander, et al., *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 Stan. L. Rev. 561, 606 (2020).[2]

Nor is this empirical study alone in concluding that individual *Bivens* defendants face little risk of personal financial liability. Earlier scholarship confirms that, "virtually without exception, the government represents or pays for representation of federal officials accused of constitutional violations and pays the costs of judgments or settlements." Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 67 (1999).

Indeed, that earlier research found that "[t]he federal government provides representation in about 98% of the cases for which representation is requested," *id.*

[2]The study also found that these realities are not exactly unknown to the Government: "[G]overnment attorneys play an active role in deliberately repackaging *Bivens* cases for settlement under the FTCA and Judgment Fund. Such repackaging belies any assertion that the Department harbors misconceptions about the ways its practices shift the ultimate incidence of *Bivens* liability to the U.S. Treasury." *Id.* In sum, as the study authors noted, "the payment practice we document here conflicts with the rhetorical position the government has long taken in representations made to the federal judiciary and to the legal profession in the course of defending *Bivens* claims." *Id.* at 605.

at 76 n.51, and "[i]n cases in which the United States has provided representation to the individual defendant, it has not once failed to reimburse a federal employee for the costs of a *Bivens* settlement or judgement," *id.* at 78 n.61.

In fact, even one scholar who emphasizes that indemnification is typically not guaranteed as a legal right to federal employees acknowledges that, "[i]n practice, federal officials have a tiny chance of ultimately paying a judgment out of pocket." Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. Cal. L. Rev. 1123, 1154 n.130 (2014).

The recent empirical study discussed above analyzed *Bivens* claims brought against officers of the Federal Bureau of Prisons (BOP) and concluded that "individual government officials almost never contribute any personal funds to resolve claims arising from allegations that they violated the constitutional rights of incarcerated people." *The Myth of Personal Liability*, 72 Stan. L. Rev. at 566.

Specifically, that study found that out of 171 successful *Bivens* claims—itself a small subset of all such claims that are brought—only eight resulted in a federal officer or an insurer being required to make "a compensating payment to the claimant." *Id.* And when looking at individual officer payments as a proportion of total payments as opposed to total claims for this dataset, "federal employees or their insurers" paid only "0.32% of the total" payments made to plaintiffs in the 171

successful cases. *Id.* When excluding amount paid by insurers, that figure is even lower. *See id.* at 581.

In all, the study authors found, "the federal government effectively held its officers harmless in over 95% of the successful cases brought against them, and paid well over 99% of the compensation received by plaintiffs in these cases." *Id.* at 566. "Extrapolating from the study data, and assuming that all employees engage in wrongdoing at the same rate, less than 0.1% of BOP employees will contribute to a settlement or judgment during a twenty-year career." *Id.* at 599.

Nor in many cases is the cost borne by the particular agency at issue. "[W]e found no case in which the BOP itself appears to have contributed agency funds to plaintiffs' settlements in successful *Bivens* claims. Instead, government attorneys arranged to have these matters resolved with payments from the Judgment Fund, which is funded by the Treasury of the United States." *Id.* at 579. "As a result, both individual officers and the BOP are spared the financial consequences of almost all successful claims." *Id.* at 596.

Finally, any gaps in indemnification can be, and are, addressed through government-subsidized "professional liability insurance for law-enforcement officers and supervisory or management officials." *See Taking Fiction Seriously*, 88 Geo. L.J. at 78.

A damages remedy for constitutional violations provides an essential deterrent to official wrongdoing regardless of indemnification, *see* Alexander Reinert, et al., *New Federalism & Civil Rights Enforcement*, 116 Nw. U. L. Rev. 737, 765 (2021), but there is simply no basis in fact for the assumption that *Bivens* liability is bankrupting or seriously financially burdening individual officers in any appreciable number of cases. If Government agencies are actually concerned that their officers will be chilled by the threat of personal *Bivens* liability, they could largely address any such concern by telling their employees the truth about indemnification. *Cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) (holding that "self-inflicted injuries are not fairly traceable to the" challenged conduct at issue and "subjective fear" of a possible event alone "does not give rise to standing").

CONCLUSION

The judgment of the panel should be vacated, and this case reheard *en banc*.

Dated: February 19, 2024

Respectfully submitted,

/s/ Lauren Bonds
Lauren Bonds
Eliana Machefsky

NATIONAL POLICE ACOUNTABILITY PROJECT

Attorneys for *Amicus Curiae* NPAP

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief: (i) complies with the type-volume limitations because it contains about 1,754 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 16.75, set in Times Roman 14 point type.

/s/ Lauren Bonds
Lauren Bonds

CERTIFICATE OF A FILING AND SERVICE

I certify that on February 19, 2024, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

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