No. 24-1875

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HAMDI A. MOHAMUD,

Plaintiff-Appellant,

v.

HEATHER WEYKER, IN HER INDIVIDUAL CAPACITY AS A ST. PAUL POLICE OFFICER,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Minnesota, No. 17-cv-02069
Before the Honorable Judge Joan N. Ericksen

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

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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 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

The practice of holding officials accountable is a bedrock of the country's constitutional system. In the vast majority of cases, determining the source of officer liability is straightforward: local and state officers acting under color of state law can be sued under 42 U.S.C. § 1983, whereas federal officers acting under color of federal authority are subject to "*Bivens* actions," pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Local and state officers that are cross-deputized as federal officials fall within a gray area of liability. The district court's decision in this case essentially amounts to a blanket rule that

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), 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.

cross-deputized officials are not acting under color of state law and are therefore not liable under Section 1983. The decision allows Officer Weyker and hundreds of other similarly situated law enforcement officers to escape liability for constitutional violations by arguing that neither *Bivens* nor Section 1983 are available. First, the government can argue that a local officer cross-deputized as a federal agent is only liable for suit under *Bivens*—not Section 1983—because the officer is operating under color of federal law. Then, the government can argue that *Bivens* has been cut back and is unavailable as a remedy against the officer. That two-step argument creates a loophole, allowing cross-deputized officers to evade all liability and leaving the harmed plaintiff without a path to a remedy. The Court must close this loophole to ensure that cross-deputized officers acting under color of state law, like any other officer, are held accountable.

From the early Republic through the present day, federal officials have been held accountable under a broad system of damages actions in both federal and state courts. After Congress enacted 42 U.S.C. § 1983 in the Reconstruction Era, state officials have been held to a similarly strict standard of liability in the federal courts. Together, *Bivens* and Section 1983 work in tandem to vindicate the constitutional rights of individuals who are harmed as a result of wrongdoing by officials clothed in governmental authority. The claims' co-extensive and supplementary nature has

long ensured that government officials cannot evade the Constitution's strictures by altering their behavior or their legal defenses to exploit disparities in accountability.

In this case, Plaintiff Hamdi Mohamud alleges that Heather Weyker, an officer of the St. Paul Police Department cross-deputized as a Special Duty U.S. Marshal, violated Ms. Mohamud's Fourth Amendment rights when she knowingly provided false information, fabricated evidence, and withheld exculpatory evidence about Ms. Mohamud. As a result of Officer Weyker's actions, Ms. Mohamud was unlawfully seized, detained, arrested, and jailed for allegedly tampering with a witness and obstructing an investigation. All charges against Ms. Mohamud were dismissed, but only after she spent almost two years incarcerated based on a crime she did not commit.

This Court previously held that a *Bivens* remedy was unavailable to Ms. Mohamud because Officer Weyker's actions presented a new *Bivens* context, but the Court remanded the question of whether Ms. Mohamud's claim under Section 1983 could proceed. *Ahmed v. Weyker*, 984 F.3d 564, 571 (8th. Cir. 2020). On remand, the district court erred in holding that Ms. Mohamud could not proceed under Section 1983 because it determined that Officer Weyker was not acting under color of state law. But Section 1983 is meant to be applied broadly, and Officer Weyker was acting under color of state law as a cross-deputized officer when she wrongfully seized and detained Ms. Mohamud. The district court's decision perpetuates a

loophole allowing federally cross-deputized state officers to violate constitutional rights without accountability by escaping Section 1983 on the grounds that they are acting as federal, rather than state, officials and therefore are not subject to Section 1983. That practice is contrary to the country's long-standing tradition of official accountability. The need to close this loophole is all the more urgent as state-federal task forces become more prevalent. As the population of cross-deputized officers grows, the need for official accountability grows with it. The time to address the loophole presented by this situation is now.

ARGUMENT

I. DAMAGES ACTIONS AGAINST STATE AND FEDERAL OFFICERS HAVE A LONG HISTORY

A. Holding Government Officials Accountable for Violations of Constitutional Rights is a Fundamental Part of our Constitutional System

At the Founding, federal officials were regularly subjected to suits for money damages. The American practice tracked the English common-law where, "[f]rom time immemorial many claims affecting the Crown could be pursued in the regular courts." Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 1 (1963). Indeed, the system of administrative law that the founding era generation "inherited" from the British "ensured government accountability through judicial processes." Pfander & Hunt, *Public Wrongs and Private Bills:*

Indemnification and Government Accountability in the Early Republic, 85 N.Y.U. L. Rev. 1862, 1871 (2010).

Judicially applied remedies were a bedrock of our Constitutional system as courts in the early Republic "seized th[e] principle of personal official liability" from the English common-law tradition "and applied it with unprecedented vigor." Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14 (1972). After Chief Justice John Marshall set forth the foundational principle in *Marbury v. Madison* that "'every right, when withheld, must have a remedy, and every injury its proper redress[,]'" courts recognized that remedies must be enforceable against individual government officers because sovereign immunity prevented suits against the United States itself. 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 Blackstone, *Commentaries on the Laws of England* 23, 109 (1768)); *see also* Kent, *Lessons for* Bivens *and Qualified Immunity Debates from Nineteenth Century Damages Litigation Against Federal Officers*, 96 Notre Dame L. Rev. 1755, 1759 (2021) (noting that individual officer suits "were a crucial work-around" to sovereign immunity at the Founding). Courts in the early Republic took up *Marbury*'s maxim and saw it as their "positive obligation to adjudicate common-law claims against government officials," across various forms of "proper redress." Pfander, *Constitutional Torts and the War on Terror* 16 (2017); *Marbury*, 5 U.S. (1 Cranch) at 163.

Founding Era courts, therefore, opened their doors for individuals to bring "an array of [common law] writs … to test the legality of government conduct." Pfander & Hunt, 85 N.Y.U. L. Rev. at 1871. Writs such as habeas corpus, mandamus, and trespass, for example, allowed individuals in the early Republic to sue to challenge the legality of their detention, to compel government action, or to claim damages for harm. *Id.* In each of those cases, "the action went forward against the government officer" in their individual capacity. *Id.* at 1872. And especially in cases for damages involving "invasions of rights to person and property[,]" federal and state courts "applied a fairly unyielding" rule of personal liability. Pfander, *Constitutional Torts and the War on Terror* 3.

The Supreme Court approved such damages. For example, in *Little v. Barreme*, a U.S. Navy Captain unlawfully seized a neutral vessel in wartime while following the invalid instructions of President Adams. 6 U.S. (2 Cranch) 170 (1804). Chief Justice Marshall acknowledged that the "first bias of [his] mind" was to find that because Little received an unlawful order from the head of the executive branch, he was "excuse[d] from damages." *Id.* at 179. But the Court ultimately recognized that it was initially "mistaken," because even Presidential orders could not "change the nature of the transaction or legalize [the] act." *Id.* "The law must take its course" and, thus, Captain Little "must be answerable in damages to the owner of the neutral vessel." *Id*. at 178-179.

Likewise, in *Wise v. Withers*, the Court held a federal collector of militia fines liable for judge-applied damages after he attempted to collect a fine from an individual who was "not liable to [be enrolled] in the militia." 7 U.S. (3 Cranch) 331, 331 (1806). Even though the collector acted pursuant to a court-martial's orders Chief Justice Marshall reasoned that "[t]he court and the officers," including the fines collector, "[were] all trespassers." *Id.* at 337. The fact that the court-martial acted "clearly without … jurisdiction" in issuing the fine could not "protect the officer who execute[d] it" from liability. *Id.* The Marshall Court's "unyielding" approach to personal liability extended even to cases where national security consequences were at stake. *See* Vladeck, *The Inconsistent Originalism of Judge Made Remedies Against Federal Officers*, 96 Notre Dame L. Rev. 1869, 1881 (2021) (noting that the Court applied common-law damages even in the face of "significant foreign policy and diplomatic implications"). In *The Apollon*, the Court held a revenue officer "liable to a suit for damages" after he unlawfully seized a French vessel in Spanish waters. 22 U.S. (9 Wheat.) 362, 374 (1824). Justice Story explained that unlike the legislature, which can take "measures" that "are not found in the text of the laws[,]" the federal courts have "a plain path of duty marked out" which is "to administer the law as [courts] find[] it." *Id.* at 366-367. When "the laws have been violated," the Court concluded, "justice demands that the injured party should receive a suitable redress." *Id.* at 367.

In early officer suits like *Little*, *Wise*, and *The Apollon*, the Court remained steadfast that officers who caused harm to others by violating the law should be held to account. Even if damages seemed inapposite or burdensome as a matter of policy, judges were required to levy damages against officers who "botched official investigations" or otherwise exceeded legal boundaries. Pfander, *Constitutional Torts and the War on Terror* 4. In doing so, the Court and lower federal courts throughout the early Republic brought a "matter-of-fact assessment of government liability that contrasts sharply with modern judicial hesitation." *Id.*

Notably, federal officers were also subject to suits for damages in *state* court in the early Republic. For example, in *Slocum v. Mayberry*, Chief Justice Marshall held for a unanimous Court that a United States customs officer who unlawfully seized and detained cargo could be sued "for damages for the illegal act" in Rhode Island state court because "the act of [C]ongress neither expressly, nor by implication, forbids the state courts to take cognizance of suits instituted for property in possession of an officer of the United States." 15 U.S. (2 Wheat.) 1, 10, 12 (1817). The Supreme Court reiterated this principle throughout the 19th Century. In *Buck v. Colbath*, for example, a U.S. Marshal who was held liable for trespass in Minnesota state court "pleaded in defense[] that he was *marshal of the United States* for the district of Minnesota." 70 U.S. (3 Wall.) 334, 335 (1866). The Supreme Court dismissed his defense, noting that his plea "contains no denial that the property

seized was the property of the plaintiff." *Id.* at 344. The Court held definitively that there was "nothing... to prevent [a federal] marshal from being sued in the State court, in trespass for his own tort." *Id.* at 347.

Judicially applied damages remedies against rogue federal officials remained available well "into the 20th [Century]." *Tanzin v. Tanvir*, 592 U.S. 43, 49 (2020). In *Philadelphia Co v. Stimson*, for example, the Court held that "[t]he exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded." 223 U.S. 605, 619-620 (1912). And in *Larson v. Domestic & Foreign Commerce Corp.*, the Court reviewed the common law history of judicially applied damages and sovereign immunity and concluded that "the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him." 337 U.S. 682, 686 (1949). Chief Justice Vinson emphasized that the "ancient" principle that "an agent is liable for his own torts" applies equally and in full force to government officers. *Id.* at 687.

B. Drawing on That Historical Tradition, *Bivens* and Section 1983 Provide the Current Framework for Remedying Constitutional Violations by State and Federal Officials

Based on the foundation of this common law history, Congress and the federal courts have fashioned an interlocking system of liability to redress unconstitutional actions taken under color of both state and federal law. In *Bivens v. Six Unknown*

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court authorized a damages action against federal officials for alleged violations of the Fourth Amendment. *Bivens* did not come out of the blue. Instead, it was "decided against a rich doctrinal background in which state tort law provided the principal mechanism for holding federal officers accountable, even for constitutional violations." Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019–2020 Cato Sup. Ct. Rev. 263, 271 (2020). Though the Court in *Bivens* applied the remedy under the Fourth Amendment, it established more broadly "that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official." *Butz v. Economou*, 438 U.S. 478, 504 (1978). *Bivens* continued the tradition of common-law suits for damages at and after the Founding to provide damages against federal officials who committed constitutional torts.

Against that backdrop, Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), Pub. L. No. 100-694, 102 Stat. 4563. While that statute precluded most remedies against federal officials in state courts, it preserved *Bivens* as a broadly available remedy against federal officials in federal courts for constitutional violations. 28 U.S.C. 2679(b)(2)(A*)*; *see also Hernandez v. Mesa*, 589 U.S. 93, 111 n.9 (2020) (affirming

that the Westfall Act "left *Bivens* where it found it"). Indeed, though the Westfall Act foreclosed "the common-law remedies that were routinely available to litigants in the pre-*Bivens* world," Congress "took pains to preserve the *Bivens* action" as an avenue to maintain damages suits against federal government officials for "violations of the Constitution." Pfander, Iqbal*,* Bivens*, and the Role of Judge-Made Law in Constitutional Litigation*, 114 Penn. St. L. Rev. 1387, 1406-1407 (2010).

Although the Westfall Act left *Bivens* itself intact, the Court has repeatedly declined to extend the *Bivens* action to new contexts. Drawing on Justice Harlan's observation that it was "damages or nothing" for "people in Bivens' shoes," the Court has treated the availability of alternative remedies as sufficient to foreclose relief. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment); *see, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 385-390 (1983) (the Civil Service Commission's appeals process for wrongful termination claims); *Schweiker v. Chilicky*, 487 U.S. 412, 424-25 (1988) (the continuing disability review process for Social Security Disability Act claims); *Correctional Servs. Corp v. Malesko*, 534 U.S. 61, 72 (2001) (tort law damages actions). Most recently, the Court declined to extend *Bivens* to a Fourth Amendment excessive-force claim and a First Amendment retaliation claim in *Egbert v. Boule*. *See* 596 U.S. 482, 501-502 (2022). Though the Court did not extinguish the relief available under *Bivens* or its progeny, *Egbert* "confirms the Court's reluctance to expand the rights of individuals to pursue constitutional tort

claims against federal officials." Pfander & Alley, *Federal Tort Liability after* Egbert v. Boule*: A Textual Case for Restoring the Officer Suit at Common Law*, 138 Harv. L. Rev. (forthcoming 2025), Northwestern Public Law Research Paper No. 23-32 (manuscript p.3). Thus, while *Bivens* carries forward the federal courts' longstanding regime of federal officer liability in name, in practice judge-made damages against federal officers have increasingly proven elusive.

The federal courts' framework for implied constitutional causes of action against federal officers supplements Congress' codification of robust federal statutory protections against unconstitutional state official action. In the aftermath of the Civil War, it enacted 42 U.S.C. § 1983, which provides a federal cause of action against persons acting under color of *state law* to deprive others of federal constitutional rights. Responding to the failure of state officials and state courts to effectively curtail civil rights violations during Reconstruction, Congress enacted the statute to "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

Because police power had been traditionally reserved to the states, Congress designed Section 1983 to avoid displacing state officers through wholesale regulation of intrastate and interstate affairs. Instead, Congress, much like the Supreme Court in the Founding Era, looked to individuals to vindicate their own

constitutional rights. To facilitate that end, Congress "create[d] in the federal courts opportunities for litigants … to invoke the power of the national government to safeguard nationally secured liberties threatened by the action or inaction of the states." Briffault, *Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1150 (1977).

Both Congress and the federal judiciary understood that to effectively empower individuals to redress the harm caused by powerful state governments acting through their officers, Section 1983's mandate must be broad. During Section 1983's drafting process, Congress repeatedly modified the statutory scheme to expand the availability of relief to plaintiffs. *See* Baude, *Is Qualified Immunity Unlawful?* 106 Calif. L. Rev. 45, 65 (2018). For example, Congress ensured that the statute would cover conduct under any form of state or local law (from statutes to ordinances) and expanded an earlier draft of the bill to "include all constitutional rights rather than just those protected by … the Fourteenth Amendment." Achtenberg, *"A Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 Utah L. Rev. 1, 58 (1999). Thus, it is no surprise that the Supreme Court has regularly held that "[it] is well settled that [Section] 1983 must be given a liberal construction." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 399-400 (1979).

The text of Section 1983 makes clear that the statute covers *any* individual who acts under color of a "statute, ordinance, regulation, custom" or any other source of state law—regardless of whether the individual is a state official. *See* 42 U.S.C. § 1983. And in a series of landmark cases the Court also recognized that the statute regulates officials who act merely under the pretense of the state's authority. In *United States v. Classic*, state election officials fraudulently counted primary ballots in violation of, not pursuant to, state election law. 313 U.S. 299, 326 (1941). But the fact that they went rogue did not shield them from Section 1983's mandate: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is *clothed with the authority of state law*, is action taken 'under color of' state law." *Id*. (emphasis added). And four years later in *Screws v. United States*, the Court reaffirmed that a sheriff who acted pursuant to a personal "grudge" instead of his duties as a state officer was not sheltered from liability. 325 U.S. 91, 93 (1945). The Court's twin holdings in *Classic* and *Screws* confirmed the principle that courts interpreting Section 1983 should find state officers liable for wrongdoing committed while wielding the state's authority. *See Lindke v. Freed,* 601 U.S. 187, 199-200 (2024) (citing both *Classic* and *Screws* for the proposition that misuse of state power falls squarely within Section 1983).

Further, the Court has made clear that a state officer may be sued under Section 1983 to vindicate constitutional rights even if the officer's actions violated

state law and thus there is an existing state remedy. In *Monroe v. Pape*, Chicago Police Department officers ransacked Mr. Monroe's home, used excessive force against him and his family, and committed numerous violations of the Fourth Amendment. 365 U.S. 167, 169 (1961). Even though Illinois statutory and constitutional law provided a remedy, the Court held that the United States Constitution provides an independent cause of action. *Id.* at 183 (explaining that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked"). Writing for the Court in *Monroe*, Justice Douglas emphasized that Section 1983 was passed by the Reconstruction-Era Congress to override discriminatory state laws and provide a remedy when states were unable or, more frequently, unwilling to vindicate individuals' constitutional rights. In so doing, he "derived [an] expansive interpretation" of the statute which stands today. Briffault, 90 Harv. L. Rev. at 1170.

C. Together, *Bivens* and Section 1983 Are Crucial Checks on Official Misconduct

Taken together, *Bivens* actions and Section 1983 claims provide a co-extensive framework for individuals to sue state and federal officials for violations of their civil rights. In reaching its holding in *Bivens*, for example, the Court relied on the Section 1983 jurisprudence in *Monroe* to highlight both the distinctiveness of "injuries inflicted by officials acting under color of law" and that these injuries should "be compensable according to uniform rules of federal law." *Bivens*, 403

U.S. at 409 (Harlan, J., concurring in the judgment). More recently, the Court has continued to characterize the *Bivens* action as the "federal analog to actions brought against state officials" under Section 1983. *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006). As two sides of the same accountability coin, *Bivens* and Section 1983 work together to "provide … liability for abuse of office" in cases "where damages provide the only realistic avenue for vindication of constitutional guarantees." Pfander & Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 140 (2009).

Further, for purposes of immunity law, the Court has repeatedly declined to draw a distinction between *Bivens* and Section 1983. *See Butz*, 438 U.S. at 504 ("Without congressional directions to the contrary, we deem it untenable to draw a distinction for the purposes of immunity law between suits brought against state officials under [Section] 1983 and suits brought directly under the Constitution against federal officials."); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982) (same). The Court has done so for good reason: "Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers." *Butz*, 438 U.S. at 501. Because state and federal officers "often work together … in a world of cooperative federalism," *see infra* part II.C, the law of government accountability should not "vary depending on whether the state or federal government's officials were named as defendants." Pfander &

Baltmanis, 98 Geo. L.J. at 140. Indeed, "both plaintiffs and defendants would have incentives to adjust their behavior and their claims and defenses to take advantage of any disparities." *Id.* Section 1983 and *Bivens* together stand as a bulwark to prevent government officials from escaping liability for the injuries they have caused. After all, the Constitution's myriad protections of individual liberty "'when withheld, must have a remedy.'" *Marbury*, 5 U.S. (1 Cranch) at 163.

II. JOINT STATE-FEDERAL POLICE TASK FORCES ALLOW OFFICERS TO CIRCUMVENT ACCOUNTABILITY

A. Cross-Deputized Officers Can Be Held Liable Under Section 1983

Heather Weyker, a St. Paul police officer, has evaded any repercussions for her actions. Twenty-one people Weyker encountered during the course of her investigation have filed civil rights suits against her—yet she has not yet been held liable in a single case. *Yassin v. Weyker*, 39 F.4th 1086, 1087 (8th. Cir. 2022); *Ahmed v. Weyker*, 984 F.3d 564, 565 (8th. Cir. 2020); *Farah v. Weyker*, 926 F.3d 492, 496-497 (8th. Cir. 2019).

Weyker was cross-deputized as a Special Duty U.S. Marshal on an "ad hoc" State-Federal task force. App. 45-46, R. Doc. 76 ¶¶ 43-46. Weyker's investigation on this task force ultimately led to the indictment of thirty people, of whom only nine were ultimately tried. *Ahmed*, 984 F.3d at 565. Judges of the Sixth Circuit, which heard the appeals resulting from the indictment and subsequent trials, noted their "acute concern, based on [their] painstaking review of the record, that this story

of sex trafficking and prostitution may be fictitious." *United States v. Fahra*, 643 F. App'x 480, 484 (6th Cir. 2016). The lower court in *Fahra* noted that "Officer Weyker likely exaggerated or fabricated important aspects" of the story and was caught "lying to the grand jury and, later, lying during a detention hearing." *Id.* at 482.

But Officer Weyker has thus far evaded liability, and in fact any adjudication of the merits of the claims against her, based on her cross-deputization on a joint state-federal police task force. First, Officer Weyker argued that a *Bivens* cause of action was unavailable. In *Ahmed v. Weyker*, this Court agreed, declining to find a *Bivens* cause of action in light of the differences between Weyker's actions and the facts of *Bivens*. 984 F.3d at 570-571. In deciding that *Bivens* was unavailable, this Court made clear that "[j]ust because a *Bivens* remedy is off the table does not mean the plaintiffs' cases are over. If the district court determines on remand that Weyker was acting under color of state law, their Section 1983 claims may proceed[.]" *Id.* at 571.

Officer Weyker then pivoted to lean fully into her federal authority, arguing that she could not be held liable under Section 1983 because she was cross-deputized as a Special Deputy U.S. Marshal and therefore not acting under color of state law. The district court agreed with Officer Weyker—denying Ms. Mohamud leave to amend her complaint with new documentary evidence relevant to the color of law

question and denying Ms. Mohamud's motion for limited discovery under Federal Rule of Civil Procedure 56(d). App. 235-236, R. Doc. 90 at 24-25. The court granted summary judgment in Weyker's favor on the Section 1983 claim and concluded that Weyker had not acted under color of state law.

As described in detail in Ms. Mohamud's brief, *see* Brief for Appellant 47-65, the district court's decision is contrary to the Supreme Court's well-settled instruction that Section 1983 be given "a liberal construction." *Lake Country*, 440 U.S. at 399-400; *supra* Part I.B. Consistent with the broad remedial purposes of Section 1983, a state officer who is cross-deputized—and retains their status as a local law-enforcement officer—can be liable under Section 1983 if the nature and circumstances of the officer's conduct are sufficiently linked to the state. *Yassin*, 39 F.4th at 1090; *see* Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 227 (2023) (noting that "Section 1983 would appear to be secure in its status as a remedial statute, meant to be construed broadly") (quotation marks omitted).

B. The District Court's Decision Will Allow Cross-Deputized Officers to Evade Accountability

The district court's decision amounts to a blanket rule that cross-deputized officers are not acting under color of state law for purposes of Section 1983. The breadth of the district court's ruling makes it functionally impossible to hold cross-deputized agents to account for constitutional violations. Cross-deputized officers

need only argue (1) they are acting under color of federal law because they are cross-deputized, and (2) although they are functionally treated as federal officers, *Bivens* is unavailable.

In this context, deputization allows officers to evade Section 1983 by arguing that they are acting only under color of federal law given their deputization. If the officers are not liable under Section 1983, plaintiffs must pursue their violations through the implied *Bivens* cause of action. While Section 1983 is to be "liberally and beneficially construed," *Lake Country*, 440 U.S. at 400 n.17 (quotation marks omitted), *Bivens* remedies are "disfavored," particularly where "alternative methods of relief are available." *Ziglar v. Abbasi*, 582 U.S. 120, 135, 145 (2017) (citations omitted). And the Supreme Court has recently limited *Bivens* even further. *See Egbert*, 596 U.S. at 501.

Even before the Court's decisions in *Abbasi* and *Egbert*, plaintiffs enjoyed a much more limited chance of success on claims brought under *Bivens* versus Section 1983 claims. *Compare* Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 47 (2017) (finding that plaintiff prevailed in 57.7% of Section 1983 cases analyzed) *with* Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 Stan. L. Rev. 809, 837 (2010) (finding that the plaintiff prevailed in 16% of *Bivens* cases analyzed). *Egbert* only "confirm[ed] the

Court's reluctance to expand the rights of individuals to pursue constitutional tort claims against federal officials." Pfander & Alley (manuscript p.3), *supra*.

Defendants understand the "persistent refusal" of courts to expand the *Bivens* remedy to new contexts, *see* Pfander & Alley (manuscript pp.3-5), *supra*, and cross-deputized officers will use that reluctance to evade liability completely by arguing that they acted under color of federal law, not state law. The district court's narrow interpretation of Section 1983 will push victims of constitutional violations committed by task force members toward disfavored implied causes of action under *Bivens*, making it much harder for those plaintiffs to hold rogue officers to account. That is inconsistent with the principles of Section 1983. *See supra* Part I.B. The need to correct the district court's decision is crucial to prevent that evasion of liability, especially given the restricted application of *Bivens*. Allowing state officers to evade liability under Section 1983 based on their cross-deputization as federal officers has the practical effect of allowing them to escape liability entirely for serious constitutional violations.

C. The Prevalence of State-Federal Task Forces Is Increasing, So Is the Need for Accountability

The stakes of the district court's ruling are even higher because joint state-federal task forces are becoming more prevalent and affecting more people. Each joint state-federal task force creates more members cross-authorized as state and federal police officers, a dual role allowing those officers to select the state or federal

laws that best suit their needs. In this context, those officers will be incentivized to appear reliant on their federal authority to avoid accountability for any alleged constitutional violation. As the use of such task forces grows, so does the need for accountability.

The first state-federal task forces were created in the early 1970s as part of President Richard Nixon's war on drugs, and in the past fifty years, they have become widespread. Drug Enforcement Administration, *The DEA Years* 30, 31 (2021) (reporting about the creation of the first state-federal task force, the New York Joint Task Force); Maharrey, *Local Cops Can Skirt State Limits on Surveillance by Joining Federal Task Forces*, Found. For Econ. Educ. (May 7, 2019) (describing how there are more than 180 Joint Terrorism Task Forces across the country). By some estimates, there are more than a thousand Federal-State task forces operating in all fifty states. Wimer, *If a Federal-State Task Force Violates Your Rights, Can Anyone Be Held Accountable?*, Forbes (Nov. 5, 2020).

State-federal task forces have grown not only in number, but in scope as well. While the original focus of such task forces was investigating drug crimes, their mandate has ballooned to include investigations of terrorism, gangs, cyber-crimes, white-collar crimes, kidnappings, motor vehicle thefts, fugitives and more. *Violent Gang Task Forces*, FBI.gov. Each focus area has multiple, sometimes hundreds of task forces dedicated to investigating that topic. For example, the FBI reports that

there are about 200 state-federal task forces focused on terrorism and 160 state-federal task forces focused on gang violence. *Id.*; *Joint Terrorism Task Forces*, FBI.gov. While their individual compositions may vary, each task force is made up of an assortment of local, state, and federal cross-deputized officers. By relying on their dual state-federal roles, task force members can pick and choose which state and federal laws best suit their purposes. *See e.g.*, Maharrey, *Local Cops Can Skirt State Limits on Surveillance by Joining Federal Task Forces* (describing danger that task force members can ignore local surveillance laws).

The lack of accountability for cross-deputized officers in the state-federal task forces will continue to undermine the integrity of these task forces. There is already public concern regarding issues of accountability for theses cross-deputized officers—so much so that the Government Accountability Office is conducting a review of the Department of Justice's policies and practices into running state-federal task forces. Weichselbaum, *Federal watchdog to examine DOJ law enforcement task forces after NBC News report,* NBC News (Mar. 27, 2024); Letter from Senator Jon Ossoff, *GAO Joint Task Forces Inquiry Letter* (Mar. 14, 2024) (seeking information about the accountability measures and mechanisms that apply to state and local law enforcement officers).

Further, some cities have decided to withdraw from joint task forces entirely out of concerns for accountability and transparency. Templeton, *Portland*

Withdraws From Federal Joint Terrorism Task Force, Again, Oregon Public Broadcasting (Feb. 13, 2019) (describing citizen concerns about cross-deputized officers abiding civil rights laws and mentioning San Franscisco also withdrawing from task forces). Allowing officers to evade liability under Section 1983 based on their federal deputized status will add to these concerns and has the potential to further undermine the integrity of these state-federal task forces.

CONCLUSION

Given the prevalence of state-federal task forces, it is critically important that this Court correct the district court's error in interpreting the scope of Section 1983. The district court's decision allows officers to evade accountability by relying on their federal authority; a state officer should not be permitted to opt out of Section 1983 by participating in an ad hoc task force. For the foregoing reasons and those described in Ms. Mohamud's brief, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 5,683 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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July 15, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eight Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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