No. 23-384

IN THE

Supreme Court of the United States

MICHAEL BORESKY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS A SPECIAL AGENT FOR THE U.S. SECRET SERVICES,

Petitioner,

v.

JEREMY GRABER,

Respondent.

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

BRIEF OF THE UNITED STATES CAPITOL POLICE LABOR COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The United States Capitol Police (USCP) "safeguards the Congress, Members of Congress, employees, visitors, and Congressional buildings and grounds from crime, disruption, and terrorism."[2] The United States Capitol Police Labor Committee (USCPLC) represents rank and file non-supervisory Capitol Police Officers.

The decision of the court of appeals in *Graber v. Boresky*, 59 F.4th 603 (3d Cir. 2023), should be reversed because a lack of interlocutory appeal right from a decision on whether there are remedies available pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), will interfere with the duties of the Capitol Police and undermine national security, as set forth below.

SUMMARY OF ARGUMENT

In *Bivens v. Six Unknown Fed. Narcotics Agents*, the Supreme Court authorized a cause of action against federal officials for violations of the Fourth Amendment. 403 U.S. 388 (1971). The Supreme Court has since extended *Bivens* twice, finding a new cause of action for Fifth Amendment sex-discrimination claims, *Davis v. Passman*, 442 U.S. 288 (1979), and for a federal prison's inadequate-care claim under the Eighth

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus* or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, all parties received timely notice of the intent of the USCPLC to file this brief.

[2] The Department, United States Capitol Police, https://www.uscp.gov/the-department (last accessed Oct. 27, 2023).

Amendment, *Carlson v. Green*, 446 U.S. 14 (1980). However, since then, the Court has made it clear that expanding the *Bivens* remedy is a disfavored judicial activity. *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017).

The Third Circuit's finding that a decision extending *Bivens* does not meet the collateral order doctrine for immediate appeal failed to consider the burdens and costs that make such a decision effectively unreviewable on final judgment.

Even though this Court has clearly found an implied remedy under the Constitution only in the instances enumerated in *Bivens, Davis,* and *Carlson*, *see Abbasi*, 582 U.S. at 131, district courts are still extending *Bivens* to new areas, subverting this Court's clear precedent and case law. When a district court takes such an erroneous action, the defendant must have the right to immediately appeal that decision under the collateral order doctrine or the defendants, the vast majority of whom are law enforcement employees, suffer severe personal consequences.

United States Capitol Police (USCP) Officers are responsible for maintaining the security of Congress and its visitors as well as the grounds of the Capitol, and thus, have a key role in safeguarding national security. USCP Officers have been the subject of *Bivens* lawsuits after making quick decisions when performing their job duties in dangerous conditions. If a court decision extending *Bivens* remedies is not immediately appealable, USCP Officers, including those represented by USCPLC, face a myriad of potential serious consequences. The threat of having to defend a lengthy lawsuit through discovery and trial will necessarily affect Officers' decision-making abilities, which can lead to serious national security

concerns, as evidenced by the events that took place on January 6th.

The potential burdens, costs, and serious consequences that result from defending a *Bivens* action without an immediate appeal right have serious consequences for the individual law enforcement officer and for the USCP. Therefore, when a district court issues a decision extending *Bivens*, it is imperative that these decisions are subject to immediate appeal.

ARGUMENT

Generally, a Court of Appeals only has jurisdiction over appeals "from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. However, a "small class" of collateral rulings that do not end the litigation are deemed "final" and can be immediately appealed. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545–46 (1949). Under the collateral order doctrine, decisions that are conclusive, resolve important questions on the merits, and are effectively unreviewable on appeal from the final judgment can be immediately appealed. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995); *see also Cohen*, 337 U.S. at 546 (such claims are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated").

The third factor — whether a decision is effectively unreviewable — "cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878–79 (1994). Courts have held that decisions that "would imperil a substantial public interest" or "some particular value of high

order" are effectively unreviewable and merit immediate appeal. *Will v. Hallock*, 546 U.S. 345, 352–53 (2006). For example, when finding that a decision regarding absolute immunity met the collateral order doctrine, this Court stressed that "compelling public ends" that would be compromised helped meet the third *Cohen* prong. *Nixon v. Fitzgerald*, 457 U.S. 731, 758 (1983). In finding that a decision denying qualified immunity was immediately appealable, this Court stated that not allowing an appeal would threaten the disruption of governmental functions, and "fear of inhibiting able people from exercising discretion in public service if a full trial were threatened." *Will*, 546 U.S. at 352 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Thus, the "avoidance of a trial that would imperil a substantial public interest" renders a decision effectively unreviewable. *Will*, 546 U.S. at 353.

A decision extending *Bivens*, like a decision on absolute and qualified immunity, is effectively unreviewable because it significantly impacts a substantial public interest — namely, national security through impeding United States Capitol Police Officers. *See id.* at 352 (stating that an important public value includes the inhibition of federal officers "from exercising discretion in public service" (quotation marks omitted)).

I. United States Capitol Police Officers are Routine Subjects of *Bivens* Litigation.

United States Capitol Police Officers, like other federal law enforcement officials, are often subject to *Bivens* lawsuits. Capitol Police Officers are tasked with maintaining the security of the Congress, the public, and Capitol grounds, and that necessarily entails arresting and searching individuals who pose a threat to that safety. *Bivens* actions brought against

Capitol Police Officers vary widely and run the gamut from more common Fourth Amendment violations relating to search, seizure, and arrest, to First, Fifth, Sixth, and Fourteenth Amendment claims. While many claims do not survive motions to dismiss because they are not cognizable *Bivens* actions, claims that do survive usually do so on purportedly novel or new grounds and then proceed through discovery. Claims that survive a motion to dismiss can then drag on for years throughout discovery and motions practice.

A. Cohen v. Busch

In *Cohen v. Busch*, Plaintiff Solomon Ben-Tov Cohen traveled to a Congressmen's office in Washington D.C, to complain about his treatment at the hands of local officials in West Hollywood, California. Case No. 08-cv-02188-LTB-CBS, 2020 WL 2593937, at *1 (D. Col. May 20, 2010). Cohen intended to hand deliver a letter to Congressman Waxman asking for his support in becoming a U.S. citizen. *Id.* While Cohen was in the Congressman's office, United States Capitol Police Officer Fred Busch arrested him for making threats against a Congressman. *Id.*

Cohen brought a *Bivens* action against Officer Busch, alleging in relevant part violations of the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. *Id.* at *2. In recommending dismissal of Cohen's First Amendment claim, the magistrate judge summarily found that the Supreme Court has not extended *Bivens* into First Amendment liability. *Id.* at *7–8. The court recommended his Sixth and Fourteenth Amendment claims be dismissed for the same reasons. *Id.* at *9–10.

Regarding his Fourth Amendment claim, the Supreme Court has recognized *Bivens* liability of federal officers

for such violations. *Id.* at *8. The court concluded that Cohen adequately alleged that he was wrongfully arrested in violation of the Fourth Amendment and recommended that the claim survive the motion to dismiss. *Id.*

On Cohen's Fifth Amendment claim, even though there is a recognized *Bivens* claim for such violations, the court found that Cohen failed to allege sufficient facts or provide specific allegations to support the violation. Therefore, the court recommended dismissing this claim. *Id.* at *9. Following the recommendation and report from the magistrate judge, the district court judge dismissed the entire action for lack of personal jurisdiction. *Cohen v. Busch*, Case No. 08-cv-02188-LTB-CBS, 2020 WL 2585345 (D. Col. Jun. 23, 2010).

B. Smith v. United States

In *Smith v. United States*, Plaintiff Ronald Smith brought a *Bivens* action against United States Capitol Police Officers Corey Rogers and Lawrence Anyaso. 121 F. Supp. 3d 112 (D.D.C. 2015). In 2009, Smith was dropping off passengers near the Capitol in his capacity as a driver for a federal agency. *Id.* at 116. United States Capitol Police Officer Rogers approached the vehicle and chastised Smith for dropping off passengers at that location. Smith then drove off, allegedly towards Officer Rogers. Officer Rogers reported that Smith had intentionally almost hit him, which caused Officer Anyaso to arrest Smith. *Id.* at 115–16. Smith brought a *Bivens* claim against the officers for violating his Fourth Amendment rights in connection with his arrest. *Id.* at 116. The Court found that there was probable cause to arrest and prosecute Smith, and thereby dismissed his Fourth Amendment *Bivens* claim. *Id.* at 119.

C. Olaniyi v. District of Columbia

Plaintiff David Olaniyi visited the Capitol while wearing an elaborate costume and carrying a small-hand carved mask. *Olaniyi v. District of Columbia*, 416 F. Supp. 2d 43, 46 (D.D.C. 2006). After gaining entrance to the Capitol through the security checkpoints, United States Capitol Officer Preston Nutwell approached Plaintiff, asked him to drop the mask, and allegedly grabbed it and shattered it on the ground. *Id.* at 47. Nutwell then handcuffed Plaintiff. Subsequently, dozens more officers arrived, inquiring of Plaintiff as to whether his costume had explosives. *Id.* Officers took Plaintiff's keys and searched his van without a warrant or consent. *Id.* Plaintiff was arrested, questioned, and spent three nights in the Mental Health Unit of the District of Columbia jail. *Id.* at 48.

Plaintiff brought a First Amendment claim for arresting him based on his costume and alleged speech, a Fourth Amendment claim for the detention and search of his person, the seizure of his mask, the lack of probable cause to arrest him, and the warrantless search of his van, and Fifth Amendment claims for failing to appraise him of his Miranda rights and denying a request for an attorney. *Id.* at 49.

The district court found that Nutwell had qualified immunity for Plaintiff's First Amendment claim, his Fourth Amendment claim for the initial detention and search, his Fourth Amendment claim for arrest, and his Fifth Amendment claims. *Id.* at 55–64. However, the court declined to dismiss Plaintiff's Fourth Amendment claim pertaining to the search of his van. *Id.* at 60.

The case proceeded to discovery, and then went through a winding and drawn-out procedural history, including a Second Amended Complaint and a variety

of motions. It was not until nearly six years later that the *Bivens* claims were finally dismissed, with the judge finding that the officers were entitled to qualified immunity on the Fourth Amendment violation. *Olaniyi v. District of Columbia*, 763 F. Supp. 2d 270 (D.D.C. 2011).

D. Kroll v. United States Capitol Police

On February 1, 1980, a ceremony was held at the Capitol to welcome the 1980 Winter Olympics Torch Relay Team. *Kroll v. U.S. Capitol Police*, 590 F. Supp. 1282, 1286 (D.D.C. 1983). Plaintiff Michael Kroll attended the event, and, without a permit, protested the planned conversion of Olympic housing facilities into a federal prison. *Id.* A United States Capitol Police Officer, Harry Grevey, approached Plaintiff and informed him he was demonstrating unlawfully. *Id.* When Plaintiff refused to leave, two other USCP Officers arrived and arrested Plaintiff. *Id.*

Plaintiff sued the Capitol Police Officers for false arrest, false imprisonment, negligence, gross negligence, and violation of constitutional rights. *Id.* Regarding his First Amendment claim, the court found that there is no recognized cause of action under *Bivens*. *Id.* at 1293. Regarding the *Bivens* claim for Fourth Amendment violations for unlawful arrest, the Court concluded that Plaintiff alleged sufficient facts for the claim to proceed. *Id.* at 1296.

Defendants immediately appealed the determination. After oral argument, the Court of Appeals remanded the case for a statement on the reason the court rejected the claim of qualified immunity. *Kroll v. U.S. Capitol Police*, 683 F. Supp. 824, 824 (D.D.C. 1987). The district court then found that the officers were not entitled to qualified immunity. *Id.* However, the Court

of Appeals reversed, and found that the officers were in fact entitled to qualified immunity. *Kroll v. U.S. Capitol Police*, 847 F.2d 899 (D.C. Cir. 1988).

These only represent a handful of examples with a variety of factual scenarios that illustrate the types of *Bivens* actions brought against U.S. Capitol Police Officers. As described in more detail below, upholding the Third Circuit's ruling that a *Bivens* decision cannot be immediately appealed would have significant effects on the USCP Officers, considering the nature of their job and the fact that they are routinely subject to *Bivens* actions.

II. Capitol Police Officers Subject to *Bivens* Litigation Face Serious Consequences.

The Supreme Court should grant certiorari because the threat of a lengthy *Bivens* litigation without recourse for appeal could have devasting effects on the U.S. Capitol Police Officers and their operations. Capitol Police Officers are responsible for protecting the Capitol and surrounding areas and have a key hand in safeguarding the national security of the country. If a court wrongly extends a *Bivens* remedy, and USCP Officers are not afforded the right of an interlocutory appeal, then there could be impacts on the officers' ability to perform their jobs, thereby impacting the security of the Capitol.

A. The Inability to Immediately Appeal a *Bivens* Decision Could Have Severe Impacts on National Security.

Litigation without the right to appeal could cause officers to hesitate in their performance of these crucial duties and distract them from their responsibilities. *See* Petition for Writ of Certiorari at 21 (stating that litigation "chills the initiative of other federal officers,

who see their fellow public servants mired in burdensome litigation"); *see also Abbasi*, 582 U.S. at 142 (stating that the "risk of personal damages liability" can "cause an official to second-guess difficult but necessary decisions concerning national security"). Capitol Police Officers, like other law enforcement officials, are "often forced to make split-second judgments – in circumstance that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). No situation demonstrates the decisions USCP Officers had to make in rapidly evolving and dangerous situations more so than January 6th.

On January 6th, 2021, armed and dangerous rioters descended on the Capitol, seeking to stop the certification of the 2020 Presidential election results. At the Capitol building, the rioters were met by United States Capitol Police Officers, as well as Metropolitan Police Officers and law enforcement officers from other federal agencies. During the assault, Capitol Police Officers worked in dangerous and quickly changing situations, doing everything they could to protect Congress and secure the Capitol. *See United States v. Grider*, Criminal Action No. 21-022 (CKK), 2022 WL 17829149, at *3 (D.D.C. Dec. 21, 2022) ("Capitol Police officers surged to support surviving police lines."); *Id.* (stating that Capitol Police engaged in combat with rioters to prevent them from breaking police lines, attempted to convince rioters to leave the Capitol, and worked to stem particularly severe acts of violence); *United States v. Nordean*, Criminal Action No. 21-175 (TJK), 2022 WL 17583799, at *16 (D.D.C. Dec. 11, 2022) (describing how a rioter ripped away a Capitol Police Officer's riot shield while the officer was physically engaging with individuals who had gathered unlawfully); *United States v. Trump*, Criminal Action

No. 23-257 (TSC), 2023 WL 6284898, at *1 (D.D.C. Sept. 27, 2023) (describing how a rioter "repeatedly and violently assaulted the U.S. Capitol Police and Metropolitan Police Department officers who were trying to defend the building").

The rioters

> [T]ook over the United States Capitol; caused the Vice President of the United States, the Congress, and their staffs to flee the Senate and House Chambers; engaged in violent attacks on law enforcement officers charged with protecting the Capitol; and delayed the solemn process of certifying a presidential election. This was a singular and chilling event in U.S. history, raising legitimate concerns about the security – not only of the Capitol building – but of our democracy itself.

United States v. Cua, Criminal Action No. 21-107 (RDM), 2021 WL 918255, at *3 (D.D.C. Mar. 10, 2021).

During the insurrection, the USCP Officers had to make quick decisions to safeguard the Capitol, Congress, the election process, national security, and their safety. They physically engaged with rioters, and used force when they believed it was necessary. While there are no known *Bivens* actions filed against Capitol Police Officers from January 6th rioters, the circumstances of that day could have very well led to such lawsuits.

If officers know that if they are sued in a *Bivens* action, and a court allows the claim to proceed, that they would have to endure the entirety of litigation before appealing, it could impact the way they perform their jobs, and the decisions they have to make in dangerous and unknown situations. That threat of litigation would constantly be hanging over their

heads. Such an impact on decision-making could have greatly increased the already disastrous consequences on January 6th. Protecting national security is of the utmost importance, and the federal officers who work to do that cannot be hampered by the threat of *Bivens* litigation.

B. Lengthy *Bivens* Litigation Can Also Have Serious Personal and Operational Effects.

In addition to the potential effects on USCP Officers' ability to do their jobs and safeguard the security of the Capitol, a lack of interlocutory appeal from an incorrect *Bivens* decision could have serious effects on the personal lives of the officers and the operations of the Capitol Police. Capitol Police Officers may be required to go on leave during the pendency of a *Bivens* action and may have to pay out of pocket for litigation expenses. Thus, it is an inescapable fact that a lengthy *Bivens* action due to the inability to appeal immediately can have serious impacts on the personal lives of Officers.

In addition, the lack of interlocutory appeal, leading to full-blown discovery in some cases, can lead to national security risks, or further mire the department in burdensome briefing. On occasion, the Capitol Police deal with sensitive national security risks in protecting the Capitol, and discovery in a *Bivens* case could potentially reveal sensitive information to the public. *See United States v. Bru*, Criminal Action No. 21-352 (JEB), 2023 WL 4174293, at *2 (D.D.C. June 26, 2023) ("The Government, moreover, raises significant national-security concerns with identifying camera locations, which would reveal areas *not* under video surveillance and could result in security breaches."). Such security concerns are a substantial public interest that should

be considered in analyzing the third prong of the collateral order doctrine. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982) (stating pretrial matters such as discovery should be avoided if possible as "inquiries of this kind can be peculiarly disruptive of effective government").

Maintaining the security of the Capitol and protecting the government from intrusive discovery is a substantial public interest that is affected and imperiled by the lack of right to immediately appeal, thus, making a *Bivens* decision effectively unreviewable. *Will*, 546 U.S. at 352–53.

CONCLUSION

For the foregoing reasons, the petition should be granted and this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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