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No. 08-1595

IN THE

Supreme Court of the Unit[illegible]

STEVEN MANNING,
Petitioner,

v.

UNITED STATES OF AMERICA, ROBERT BUCHAN, AND GARY MILLER,
Respondents.

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

BRIEF OF THE RODERICK MACARTHUR JUSTICE CENTER, PROFESSOR JAMES ALEXANDER TANFORD, THE SETON HALL LAW SCHOOL CENTER FOR SOCIAL JUSTICE, THE KING HALL CIVIL RIGHTS CLINIC, AND THE EDWIN F. MANDEL LEGAL AID CLINIC AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The Roderick MacArthur Justice Center (the Justice Center) operates as a nonprofit public-interest law firm at Northwestern University School of Law. The Justice Center litigates issues of significance for the criminal justice system, including the representation of wrongfully convicted persons in civil rights actions seeking monetary compensation for time unjustly served in prison.

Professor James Alexander Tanford, Professor of Law at Indiana University Maurer School of Law, has extensive experience in civil rights torts litigation. Admitted to the U.S. Supreme Court and the Fourth, Sixth, Seventh and Eleventh Circuits, he has been working with the ACLU on civil rights cases since 1992.

Both the Seton Hall Law School Center for Social Justice and the King Hall Civil Rights Clinic at the U.C. Davis School of Law provide pro bono representation to indigent clients in a wide variety of substantive areas. The Center for Social Justice's Impact Litigation Clinic takes on federal in forma pauperis appeals and regularly represents clients with FTCA claims and/or *Bivens* claims.

The Edwin F. Mandel Legal Aid Clinic at the University of Chicago Law School renders assistance

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

to indigent clients. The Clinic's mission is to examine the effect of legal institutions on the poor, serve as advocates for people typically denied access to justice, and reform legal education and the legal system to be more responsive to the interests of the poor.

All *amici* have a keen interest in protecting the rights of individuals seeking remedies for unconstitutional official misconduct. Based on our extensive experience, the Seventh Circuit's decision below compromises the remedial and deterrent function of our criminal justice system. The deepening Circuit split will also result in unfair and inefficient administration of justice.

SUMMARY OF ARGUMENT

The undersigned *amici*, having extensively represented the wrongfully accused or convicted both in the underlying criminal actions and in subsequent civil rights actions, recognize that there is a heavy burden on those who seek remedies for the harm caused by unconstitutional police and prosecutorial misconduct. *Bivens* actions and FTCA claims, which the Court has recognized as "parallel, complementary causes of action," *Carlson v. Green*, 446 U.S. 14, 20 (1980), complement each others' inadequacy in their remedial power. Allowing 28 U.S.C. § 2676 (2006) of the Federal Tort Claims Act (the FTCA) to nullify an earlier successful *Bivens* judgment will significantly diminish the remedies for these aggrieved individuals. Furthermore, these aggrieved individuals should be able to bring both *Bivens* claims and FTCA claims in a single lawsuit, because both claims are indispensible to effectively deter unconstitutional official misconduct. Finally, the Seventh Circuit rule, along with conflicting holdings in the Courts of Appeals, has presented an important unresolved

federal question. If left intact, this split on how § 2676 affects a prior judgment will continue to cause unfairness and inefficiency in the vindication of constitutional rights.

In sum, this Court should grant certiorari to resolve the split in the Courts of Appeals, which has an over-reaching negative impact on victims of unconstitutional official misconduct across the nation.

ARGUMENT

I. IN ORDER TO PROVIDE A COMPREHENSIVE REMEDIAL SCHEME FOR VICTIMS OF UNCONSTITUTIONAL MISCONDUCT, BOTH *BIVENS* CLAIMS AND FTCA CLAIMS SHOULD BE RAISED IN A SINGLE SUIT.

Unconstitutional official misconduct has presented a serious social problem. For example, a 2002 Department of Justice report showed that more than 2,000 complaints about excessive use of police force were found to have merits.[2] In addition, one observer estimates that there could have been tens of thousands of wrongful convictions from 1989 to 2003.[3] Our experience suggests that these aggrieved individuals have to overcome substantial hurdles to obtain legitimate relief.

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[2] MATTHEW J. HICKMAN, PH.D., CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 6 (June 2006), http:// www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf.

[3] Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 551 (2005) (stating that "[a]ny plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands.").

As an effort to rectify this deficiency in our legal system, the Court established a federal common law cause of action for damages against individual officials in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971). Congress, also noticing the insufficient remedies available to victims of constitutional wrongs, amended the FTCA to cover cases of law-enforcement-related torts by federal officials. Reorganization Plan No. 2 of 1973, Pub. L. 93-253, § 2, 88 Stat. 50, 50 (1974).

Neither *Bivens* nor the FTCA, standing alone, provides an adequate remedy to those injured at the hands of Federal officials in cases involving the violation of constitutional rights. Retroactively applying 28 U.S.C. § 2676 (2006) of the FTCA to an earlier successful *Bivens* judgment will significantly diminish the already limited remedies for these aggrieved individuals.

A. Our Legal System Heavily Burdens the Relief-Seeking Process for the Aggrieved Individuals of Unconstitutional Official Misconduct.

Our experience with wrongfully convicted individuals, among thousands of victims of egregious unconstitutional official misconduct each year, illustrates the tremendous hurdles faced by these individuals on their odyssey to seek relief. With official misconduct as a major cause for wrongful convictions,[4] "fewer than thirty-three percent of exonerated individuals receive relief." BARRY SCHECK ET AL.,

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[4] The Innocence Project, *Government Misconduct*, *available at* http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited July 22, 2009).

ACTUAL INNOCENCE 298. (New Am. Library 2003). This is true even though the exonerated have suffered significant harm:

> The agony of prison life and the complete loss of freedom are only compounded by the feelings of what might have been, but for the wrongful conviction. Deprived for years of family and friends and the ability to establish oneself professionally, the nightmare does not end upon release. With no money, housing, transportation, health services or insurance, and a criminal record that is rarely cleared despite innocence, the punishment lingers long after innocence has been proven.[5]

Our legal system imposes enormous burdens on these aggrieved. Their claims might well be barred by unfavorable statues of limitations. *See, e.g., Wallace v. Kato*, 549 U.S. 384, 397 (2007) (deciding a 42 U.S.C. § 1983 claimant for a false arrest was subject to the statute of limitation running from the time of the detention pursuant to legal process rather than when the conviction was set aside). Moreover, as defendants, the officials are likely shielded from personal liability under the doctrines of absolute or qualified immunity. Jessica R. Lonergan, *Note: Protecting the Innocent: a Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 409 (2008). An option to sue the government might also be foreclosed because "the barrier of sovereign immunity is

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[5] The Innocence Project, *Fact Sheets - Compensating the Wrongly Convicted, available at* http://www.innocenceproject.org/Content/309PRINT.php (last visited July 18, 2009).

frequently impenetrable." *Butz v. Economou*, 438 U.S. 478, 504-05 (1978). As a result, between 1971 and 1985, plaintiffs of federal unconstitutional misconduct obtained a judgment that was not reversed on appeal in only four cases out of approximately 12,000 damages claims. Cornelia T.L. Pillard, *Taking Fiction Seriously: the Strange Results of Public Officials' Individual Liability under* Bivens, 88 GEO. L.J. 65, 66 (1999).

The identity of these victims and the nature of constitutional violations by federal officials also account for the very low success rates of damages suits. The plaintiffs are usually racially underrepresented and frequently described as "unattractive." *Project: Suing the Police in Federal Court*, 88 YALE L.J. 781, 791-92. (1979). Some plaintiffs might also have criminal records. *Id.* at 798. None of these characteristics are appealing in a jury trial. Even worse, the plaintiffs might have difficulty identifying the responsible individual officials to sue because the event at issue can take place when the officials act in anonymity. Note, *"Damages or Nothing"-The Efficacy of the Bivens-Type Remedy*, 64 CORNELL L. REV. 667, 674 (1979).

B. *Bivens* Actions and FTCA Claims Complement Each Other to Provide a Comprehensive Remedial Scheme for Victims of Federal Official Misconduct

Because "[i]njunctive or declaratory relief is useless" when measured against the sufferings of these individuals, their relief is "damages or nothing." *Butz,* 438 U.S. at 504-05. In *Bivens*, 403 U.S. at 397, this Court held that violation of certain federal unconstitutional rights, such as illegal arrest, search and seizure by federal law enforcement agents, gave rise

to a federal common law cause of action for damages against the agents.

Despite the efforts by this Court, plaintiffs currently have little chance of recouping actual damages through *Bivens* actions. *Bivens* plaintiffs are estimated to obtain a judgment awarding damages in less than one percent of *Bivens* cases filed. Pillard, 88 GEO. L.J. at 66. Juries and judges are reluctant to award damages against individual federal employees, because of the "aura of authority and honesty surrounding their office." 88 YALE L.J. at 800. Even if a judgment has been entered for the plaintiff on the *Bivens* claim, the defendant individual official is often judgment proof, 64 CORNELL L. REV. at 692, not to mention that *Bivens* claims have only been allowed in very limited scenarios of constitutional violations.[6]

Pursuing a parallel FTCA claim improves the likelihood for *Bivens* plaintiffs to get compensated. For one thing, the government does not possess a personal identity. Therefore, an FTCA claim is less likely than a *Bivens* claim to be dismissed merely because of the plaintiff's failure to identify an anonymous federal agent. Furthermore, the government will likely serve as an alternative source for plaintiffs to collect damages from.

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[6] The Court has allowed a *Bivens* action against federal officers in two other contexts. *Carlson v. Green*, 446 U.S. 14, 18 (1980) (*Bivens* action allowed for violations of the Eighth Amendment); *Davis v. Passman*, 442 U.S. 228, 243-44 (1979) (*Bivens* action allowed for violations of the Due Process Clause of the Fifth Amendment). *Bivens* actions have been barred in many other contexts. *See, e.g., Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (barring *Bivens* actions against private corporations operating federal correctional facility).

Indeed, when Congress amended the FTCA to waive sovereign immunity for certain intentional torts, its purpose was primarily remedial. Congress was aware that *Bivens* plaintiffs were usually undercompensated, and especially that "[f]ederal agents are usually judgment proof." S. REP. NO. 93-588 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2790. Specifically, Congress's goal was to provide "innocent individuals . . . [with] a cause of action against the individual Federal agents *and* the Federal government." S. REP. NO. 93-588, *as reprinted in* 1974 U.S.C.C.A.N. at 2791 (emphasis added). In fact, Congress adopted the view that the FTCA should "be viewed as a counterpart to the *Bivens* case and its progeny, in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*." *Id.* A "counterpart" is not a substitute. Congress has specifically refused to make FTCA claims the exclusive remedy for constitutional violations by federal employees. *See, e.g.*, S. 2558, 93d Cong., 1st Sess. (1973) (Congress's rejection of the Justice Department's proposal to make the FTCA the exclusive remedy in all cases of federal constitutional violations).

In fact, Congress never intended the FTCA to fulfill a comprehensive remedial purpose. For example, while *Bivens* jurisprudence is built on a coherent body of federal common law, the weakest aspect of the FTCA remedy lies in that it subjects the plaintiff to "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (2006). It is highly doubtful, however, that state law alone will be sufficient to provide remedies for constitutional violations. As Justice Harlan said in *Bivens*, the interests

protected by state tort law and by constitutional provisions "may be inconsistent or even hostile [to each other]." 403 U.S. at 394 (Harlan, J., concurring). To illustrate, it is possible the state law provides defenses to certain torts which would otherwise be prohibited under the Constitution. Moreover, the FTCA has a restrictive statute of limitations, 28 U.S.C. § 2401(b) (2006), and a prerequisite of final administrative disposition of the claim, 28 U.S.C. § 2675(a) (2006), which is not required in a *Bivens* action. In this sense, *Bivens* claims are necessary to make up for the limitations of the FTCA.

Now, under the Seventh Circuit rule, even if victims of unconstitutional official misconduct have cleared all of the hurdles and won on a *Bivens* claim, their recovery will be barred by a subsequent or simultaneous FTCA judgment under 28 U.S.C. § 2676. This effectively forces plaintiffs with viable *Bivens* and FTCA claims to choose which claim to pursue—and which to abandon—before even stepping into court. Because fair redress for victims of federal law-enforcement misconduct is only possible if the FTCA and *Bivens* can work together "as parallel, complementary causes of action," *Carlson*, 446 U.S. at 20, the interests of the aggrieved victims of unconstitutional official misconduct are harmed if either FTCA or *Bivens* claims are discouraged by an inconsistent interpretation of 28 U.S.C. § 2676.

II. THE SEVENTH CIRCUIT RULE INSUFFICIENTLY DETERS ABUSES OF CONSTITUTIONAL AUTHORITY BY FEDERAL OFFICERS.

A basic tenet of our legal system is that individuals are responsible and accountable for their acts of

misconduct—this can only be achieved when *Bivens* claims are raised along with FTCA claims. In fact, this Court has made clear that the threat of suit against the United States is insufficient to deter the unconstitutional acts of federal officers. *Carlson*, 446 U.S. at 21 ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy."). "It must be remembered," this Court stated later, "that the purpose of *Bivens* is to deter the officer." *FDIC v. Meyer*, 510 U.S. 471, 485 (1994). In this sense, the decision below defeats an effective deterrent mechanism made possible only through cooperation between *Bivens* claims and FTCA claims.

Indeed, a *Bivens* claim supplements an FTCA claim's inadequate deterrent effect. Punitive damages are permitted under a *Bivens* claim, while the FTCA prohibits punitive damages, 28 U.S.C. § 2674 (2006), and has a discretionary act exception, 28 U.S.C. § 2680(a) (2006). Because of these FTCA limitations, a judgment on the FTCA claim commonly yields a smaller damages award than does the *Bivens* claim. *See, e.g., Engle v. Mecke*, 24 F.3d 133, 134 (10th Cir. 1994) (vacating a *Bivens* judgment because an FTCA action barred any other judgments, even though the plaintiff won $351,000 on the *Bivens* claim but only $28,000 on the FTCA claim). Based on our experience, victims of official misconduct, including most of our wrongfully convicted clients, usually receive only small awards against the government years after the violation of their rights occurred. This frequent delay in the administration of justice makes punitive damages, which are only available under a *Bivens* claim, an essential mechanism to deter unconstitutional behavior by individual federal agents.

Second, *Bivens* claims do not have the caveats of internal agency oversight, the only means to discipline federal officials if liability is imposed on the government alone under the FTCA. Extensive doubt exists as to the effectiveness of internal discipline, which is typically not subject to outside review.[7] In contrast, under a *Bivens* claim, individual officials, once held liable for the wrongs they have committed and bound by economic incentives, will be more effectively "disciplined" by courts.

Allowing a *Bivens* claim to be raised along with an FTCA claim is in keeping with Congress's approval of the idea that federal employees should be personally accountable for their wrongful conduct. *See, e.g.*, S. REP. NO. 469, 93d Cong. 1st Sess. 36 (1973) (noting "important deterrent value served by the threat of civil suits being brought against offending agents [means that federal] officers must realize that they will be held personally responsible for their intentional violation of constitutional rights.").

Unfortunately, the Seventh Circuit's holding will substantially frustrate the deterrence scheme created by the complement between *Bivens* claims and FTCA claims.

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[7] *See Federal Tort Claims Act: Hearings on S. 1775 Before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary*, 97th Cong., 1st & 2d Sess. pt. 2, at 4-7 (1982) (testimony of FBI Director William Webster explaining the FBI's disciplinary procedure); *Amendments to the Federal Tort Claims Act: S. 2117: Joint Hearing Before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. pt. 1 (1978) (stating that agencies have disciplined their employees for constitutional torts only after being subjected to intense outside pressure to do so).

III. THE SEVENTH CIRCUIT RULE WILL RESULT IN UNFAIR AND COSTLY ENFORCEMENT OF CONSTITUTIONAL RIGHTS.

Alexander Hamilton wrote that without the "uniform interpretation of the national laws" afforded by a centralized federal judiciary, "nothing but contradiction and confusion can proceed." THE FEDERALIST NO. 80 at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The issue of how § 2676 should be applied to a prior judgment in the same action, has been addressed differently in the Courts of Appeals[8] and therefore presents an important federal question that calls for a prompt resolution by this Court.

First, the reliance on the conflicting precedents in different Courts of Appeals in the application of § 2676 will result in some plaintiffs being treated differently from others similarly situated based on where their constitutional rights were violated by a federal official. The arbitrary and unjust aspect of our system reflected by this lack of uniformity will erode public confidence, particularly because important constitutional rights are at stake here.

In addition, the lack of uniformity introduces difficulties and inefficiencies for non-profit groups like the *amici* to serve as advocate for aggrieved individ-

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[8] For decisions that have held that an FTCA judgment did not bar a *Bivens* claim in the same suit, *see Kreines v. United States*, 959 F.2d 834, 838 (9th Cir.1992). For decisions that have decided that an FTCA judgment bar applied to a judgment on a *Bivens* claim in the same suit, *see Unus v. Kane*, 565 F.3d 103, 122 (4th Cir.2009); *Harris v. United States*, 422 F.3d 322, 333-35 (6th Cir.2005); *Estate of Trentadue ex. rel. Aguilar v. United States*, 397 F.3d 840, 858 (10th Cir.2005); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir.1989).

uals wronged by official misconduct. Our clients are often indigent and rely on non-profit organizations for representation. With an incoherent, inconsistent, and unpredictable body of laws governing our clients' right to seek damages, the *amici*, who take cases originating from various jurisdictions, will waste their precious resources. Eventually, dwindling funding will compromise the constitutional rights of our clients.

As a result, this Court should promptly re-evaluate the far-reaching negative effect of the current Circuit split, which will likely result in an unfair and costly system of enforcement of federal constitutional rights.

CONCLUSION

For these reasons, and for those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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