No. 12-574

IN THE
Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether due process permits a court to exercise personal jurisdiction over a defendant whose sole "contact" with the forum State is his knowledge that the plaintiff has connections to that State.

2. Whether the judicial district where the plaintiff suffered injury is a district "in which a substantial part of the events or omissions giving rise to the claim occurred" for purposes of establishing venue under 28 U.S.C. § 1391(b)(2), even if the defendant's alleged acts and omissions all occurred in another district.

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INTEREST OF THE AMICUS CURIAE[1]

The Federal Law Enforcement Officers Association (FLEOA), formed in 1977, is a nonpartisan and nonprofit professional association exclusively representing federal law enforcement officers. FLEOA was formed to represent the interests of its members in legislative, regulatory, and judicial forums. FLEOA serves as an advocate for its members on matters ranging from pay and benefits to the policies necessary for federal law enforcement officers to be most effective in their efforts to combat crime, terrorism, and other threats to the public.

FLEOA currently represents over 25,000 federal law enforcement officers from 65 federal agencies, including the U.S. Supreme Court Police; U.S. Marshals Office; U.S. Secret Service; Transportation Security Administration's Federal Air Marshals; U.S. Forest Service, Law Enforcement and Investigation Organization; Smithsonian Zoological Park Police; Bureau of Land Management, Law Enforcement; National Park Service, United States Park Police and Visitor and Resource Protection Division; Bureau of Alcohol, Tobacco, Firearms and Explosives; Bureau of Engraving and Printing Police; and U.S. Mint Police.

Investigating and thwarting security threats exposes federal law enforcement officers to suits for

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[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or party, other than *amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief. All parties consent to the filing of this brief by virtue of blanket consent letters filed on March 7 and 12, 2013 by Petitioner and Respondents, respectively.

constitutional torts, frivolous or otherwise. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The national focus of federal agencies' jurisdiction means that the vast majority of federal law enforcement officers encounter nonlocal citizens on a daily basis.

Requiring federal law enforcement officers to defend against lawsuits in a distant State based on little more than the knowledge that a particular citizen resides in or has "significant connections" to that State would not only violate FLEOA members' constitutionally guaranteed right to fairness in the litigation process, but would decrease the ability of these members to protect the safety and security of the United States and its citizens. Affirming the Ninth Circuit's decision would also increase the costs—monetary and otherwise—to FLEOA members, the agencies for which they work, and the public as a whole. Accordingly, FLEOA respectfully submits that this Court should reverse the decision below, and reaffirm that an intentional act taken with knowledge that a plaintiff has connections to the forum is not a sufficient basis for personal jurisdiction.

SUMMARY OF ARGUMENT

I. Contrary to this Court's established law, the Ninth Circuit erroneously held that Nevada may exercise personal jurisdiction over petitioner based on his alleged "'individual targeting' of forum residents." Pet. App. 17a; *id*. at 20a. If allowed to stand, this rule would burden federal law enforcement officers with unwelcome, unforeseen, and fundamentally unfair costs. The Ninth Circuit's decision trivializing these costs misunderstands government representation and indemnification of individual officer defend-

ants, and underestimates the significant personal and social costs of such litigation.

The consequences of the Ninth Circuit's ruling are especially severe for federal law enforcement officers who perform their essential missions by directing actions at people and property from across the country. The Ninth Circuit's boundless theory of personal jurisdiction would expose these officers to increased monetary and personal costs of defending suits in distant forums, as well as exact significant social costs by diverting federal resources from pressing matters of public concern, tainting the exercise of official discretion with calculations of personal risk, and hindering the recruiting and retention efforts of federal agencies across the country. The Constitution does not permit such a result for good reason: The costs to our nation's security and to those who ensure it are too great.

The repercussions are not limited to personal jurisdiction. The Ninth Circuit's ruling could diminish the value of other important protections afforded officers in litigation, including the qualified-immunity defense and statutory restrictions on venue.

II. Although the court of appeals wrongly decided that venue was proper in the District of Nevada, a reversal on personal-jurisdiction grounds is the only way to provide uniform relief from the decision below. Reversing the Ninth Circuit's erroneous interpretation of the general venue statute, 28 U.S.C. § 1391(b), would provide little help in cases originally filed in state court, but later removed to federal court under 28 U.S.C. § 1441(a). Once a case is removed, venue may lie in the district of the State in which the plaintiff originally filed, even if venue would have been improper there as an original matter. Without

appropriate limits on personal jurisdiction, Section 1441(a) would permit plaintiffs to evade Section 1391(b) and this Court's venue holding. For this reason, this Court should reverse the Ninth Circuit's holding that Nevada had personal jurisdiction over petitioner.

ARGUMENT

I. AFFIRMANCE WOULD ADVERSELY AFFECT FEDERAL LAW ENFORCEMENT OFFICERS, THE AGENCIES FOR WHICH THEY WORK, AND THE PUBLIC THEY SERVE AND PROTECT.

As the flurry of dissenting opinions below make clear, the Ninth Circuit's anomalous decision—that the Due Process Clause is satisfied so long as a defendant's actions allegedly were "targeted at a known individual who has a substantial, ongoing connection to the forum" (Pet. App. 19a)—jettisoned established due process principles by subjecting petitioner to suit in a distant forum with which he has no contacts, ties, or connections. That "virtually limitless expansion of personal jurisdiction" cannot be reconciled with the due process guarantee of basic fairness or Supreme Court precedent. Pet App. 91a (McKeown, J., dissenting from denial of reh'g en banc). For the reasons stated in petitioner's opening brief and the reasons set forth below, this Court should reverse the decision below.

A. The Ninth Circuit's Decision Expands Personal Jurisdiction Beyond The Boundaries Of The Due Process Clause.

The Fourteenth Amendment's Due Process Clause "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). This fundamental procedural safeguard "'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Ibid*. (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

"Although it has been argued that foreseeability of causing *injury* in another State" should be sufficient for a forum to exercise personal jurisdiction over a nonresident, this Court "has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 295). "Instead," this Court has long maintained that "'the foreseeability that is critical to due process analysis . . . is that *the defendant's* conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Ibid*. (quoting *World-Wide Volkswagen*, 444 U.S. at 297) (alteration in original) (emphasis added). Accordingly, a State may exercise jurisdiction over a defendant who has "purposefully directed" his activities at the forum. *Id.* at 472 (internal quotation marks omitted).

To determine whether a nonresident defendant "purposefully directed" tortious conduct at the forum State, due process requires a plaintiff to allege that the defendant (1) committed an intentional tort; (2) that was expressly aimed at the forum State; and (3) which causes harm the defendant knew would likely be felt in that State. *Calder v. Jones*, 465 U.S. 783, 788-90 (1984). A proper application of *Calder* compels the conclusion that the district court lacked jurisdiction in this case.

The Ninth Circuit's contrary conclusion disregards seminal precedent from this Court and the holdings of at least six circuits,[2] that due process is not satisfied when a defendant aims conduct not at the forum State, but merely at a known forum resident. *See* Pet. App. 84a (O'Scannlain, J., dissenting from denial of reh'g en banc). In complete disregard of that distinction, the panel majority held that, in allegedly preparing a false affidavit in support of forfeiture, petitioner expressly aimed his conduct at Nevada because he "intentionally targeted persons and funds with substantial connections to Nevada." *Id.* at 47a. That is not the type of purposeful direction that this Court has insisted a plaintiff allege be-

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[2] *See Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.*, 623 F.3d 440 (7th Cir. 2010); *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008); *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5th Cir. 2001) (per curiam); *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 256 (3d Cir. 1998); *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997). The First and Sixth Circuits also appear to follow this majority view, although neither Circuit has squarely addressed the issue. *See Noonan v. Winston Co.*, 135 F.3d 85, 90-92 (1st Cir. 1998); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir. 1994).

fore a State legitimately may exercise personal jurisdiction over a nonresident.

By basing personal jurisdiction on a defendant's knowledge of a plaintiff's "significant connection" to a forum and awareness that his actions may impact that forum (Pet. App. 27a), the panel decision effectively ellipsed the second prong of the *Calder* test and revived the "foreseeability" regime flatly rejected by this Court. Pet. App. 91a (McKeown, J., dissenting from denial of reh'g en banc). The result, as the dissenting panel judge recognized, is that "there are no effective limits to the majority's reasoning: all the airport officials who interacted with Fiore and Gipson in Atlanta have potentially subjected themselves to the judicial power of Nevada." *Id.* at 63a (Ikuta, J., dissenting). So too for *every* federal officer who interacts with nonresidents after gaining knowledge of the State or States to which a plaintiff has a "significant connection." Indeed, actions directed at multiple people with connections to different States could result in numerous suits pending in various jurisdictions. This substantial expansion of personal jurisdiction cannot be—and indeed is not—the law. *See id.* at 62a (Ikuta, J., dissenting) ("This case deals the coup de grace to any semblance of compliance with Supreme Court precedent.").[3]

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[3] The Ninth Circuit was also wrong to interpret 28 U.S.C. § 1391(b)(2) as permitting venue in a district in which petitioner never acted, but in which the respondents nevertheless felt the effects of the alleged tort. *Amicus* supports petitioner's arguments on that score, but as explained in Part II *infra*, a ruling on venue alone is insufficient to protect law enforcement officers from defending in faraway States.

B. The Ninth Circuit's Unbounded Theory Of Personal Jurisdiction Will Disproportionately Harm Federal Law Enforcement Officers.

1. As of 2009, federal officials faced upwards of 5,000 *Bivens* claims each year. *See* David Zaring, *Personal Liability as Administrative Law*, 66 Wash. & Lee L. Rev. 313, 322 (2009). Indeed, an attorney in the Department of Justice remarked that, as of 2002, "constitutional tort suits [were] filed against federal employees in every significant law enforcement mission in recent memory, including the seizure of the Branch Davidian compound in Waco, Texas, the stand-off at Ruby Ridge, and now the investigation of terrorist activities in the wake of 9/11." Mary Hampton Mason, *You Mean I Can Be Sued? An Overview of Defending Federal Employees in Individual Capacity Suits*, Civil Issues I, U.S. Attorneys' Bulletin 1, 4 (July 2002). Thousands of other suits arise from officers' daily performance of routine law enforcement responsibilities, such as protecting the United States border, monitoring points of entry, patrolling interstate highways, or guarding government buildings, national parks, and other areas under federal protection.

Regardless of their origin, this Court has long recognized that defending *Bivens* suits exacts significant costs from law enforcement officers, extending far beyond litigation expenses and attorney's fees. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). *Bivens* actions can take "a psychological toll" on the officers whose personal reputations and livelihoods are on the line, causing significant "disrupt[ion to] the lives of [officers] and their families." Mason, *supra* at 2. Even if plaintiffs rarely prevail in *Bivens*

actions, the officer defending her professional reputation and good name may find that, for the duration of the protracted litigation, she is unable to obtain a loan or home mortgage merely because of her status as a defendant to a civil action. *See Federal Tort Claims Act: Hearing on S. 1775 Before the Subcomm. on Agency Admin. of the S. Comm. on the Judiciary*, 97th Cong. 144 (1982) (written statement of Donald J. Devine, Director, Office of Personnel Management).

The decision below unfairly exacerbates these burdens by requiring officers to defend their actions, reputations, and livelihoods in unpredictable and inconvenient locations. According to the court of appeals, it was "reasonable and comports with traditional notions of fair play" to require petitioner to answer the complaint in Nevada in part because his job "necessitates regularly interjecting himself into affairs of other jurisdictions." Pet App. 32a, 37a. Not so. As a deputized agent of the Drug Enforcement Administration assigned to duty at the Hartsfield-Jackson International Airport in Atlanta, petitioner's only connection to Nevada is *respondents'* purported ties to the State. *See id.* at 27a ("[Petitioner] individually targeted [respondents], as he was aware of their significant connection to Nevada and of the likely impact of his defrauding actions on their property and business in Nevada.").

The court of appeals' focus on the *plaintiffs'* connections to a forum instead of the *defendant's* turns established due process analysis on its head. On the Ninth Circuit's theory, the same intrastate conduct could be the basis for jurisdiction anywhere in the country, based on the fortuity of the "target's" geographical connections. Chance does not provide law enforcement officers any of the required assurances

as to where their conduct will render them liable to suit. *See Burger King*, 471 U.S. at 472.

Moreover, the decision below eliminates any meaningful limits on where law enforcement officers will have to defend damages actions in their personal capacities. *See* Pet. App. 59a (Ikuta, J., dissenting). For example, on the panel majority's reasoning, after checking licenses, a border agent would be subject to suit in the home States of every individual who alleges an intentional tort on the theory that a border-protection agent is "necessarily aware that his actions would often have their principal impact outside of [the State], as many of the people he investigates are [crossing the border] only on their way to somewhere else." Pet. App. 31a. Similarly, an officer providing security at events and sites that attract a nationwide audience, such as the Inauguration, the Washington Monument, or the Super Bowl, could be required to submit to the burdens of litigation in a faraway forum if he knew that his conduct would impact a person in another State. *See id.* at 20a, 24a, 27a. In short, any "disgruntled travele[r]" can force a federal law enforcement officer "to litigate in any traveler's home state." *Id.* at 63a (Ikuta, J., dissenting).

Indeed, the doors to the courthouse may be open in more than just the plaintiff's home State. The court of appeals' test does not require knowledge of *residency* for personal jurisdiction, but only knowledge that a plaintiff has an undefined "significant connection" to a State. Pet. App. 22a-23a ("For the purposes of personal jurisdiction, it does not matter whether [respondents] were legal residents of Nevada or whether they simply had a significant connection to the forum."). Thus, an officer who questions a traveler whose license indicates that he

resides in Oregon, yet who is wearing a Boston College sweatshirt and a Red Sox hat, may be subject to jurisdiction on either coast.

2. The Ninth Circuit diminished the real, concrete costs borne by individual officer defendants, stating that "the traditional weight given to a defendant's inconvenience in having to litigate in a forum in which he has few contacts does not apply in this case" (Pet. App. 37a), given that petitioner received assistance from the Department of Justice, "the world's largest law firm with offices in all fifty states." *Id.* at 33a (internal quotation marks omitted). Constitutional rights, however, are not contingent on the office locations of legal counsel.

Moreover, contrary to the court of appeals' assertion (Pet. App. 32a), representation by the federal government is discretionary; officers cannot count on such aid as a matter of right. Federal regulations authorize government representation for suits brought against officers in their personal capacities only when the officer acted in the scope of employment *and* representation is in the interests of the United States. 28 C.F.R. § 50.15(a)(2). The same is true of an employing agency's decision to indemnify a defendant for any verdict, judgment, or other monetary award rendered against her: Indemnification is not fully guaranteed to an officer at the time a complaint is filed. *See id.* § 50.15(c); *Indemnification of Dep't of Justice Emps.*, 10 Op. O.L.C. 6, 6 (1986) ("The Attorney General *may* use funds from the Department of Justice's general appropriation to indemnify Department employees for actions taken

within the scope of their employment." (emphasis added)).[4]

Even where legal assistance and indemnification are available, federal officers may not know the extent of the indemnification or how far their government counsel will take the case until well into the litigation process. The government determines whether it will provide indemnification only *after* judgment or settlement, 28 C.F.R. § 50.15(c)(3), and (as this case illustrates), government representation does not always extend to all stages of litigation, *see e.g.*, *id.* § 50.15(a)(8)(iv) ("any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General").

This Court previously rejected the contention that government reimbursements obviated the need for qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 641 n.3 (1987). "[E]ven assuming that conscientious officials care only about their personal liability and not the liability of the government they serve," this Court stated that one cannot contend that regulations permitting discretionary reimbursement "make reimbursement sufficiently certain and generally available to justify" reconsideration of the principles of qualified immunity. *Ibid.* If anything, doubt about the extent of available indemnification *adds* to the anxiety and uncertainty surrounding litigation.

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[4] Representation is generally not available, or at least is significantly less likely, in cases involving federal criminal proceedings, criminal investigations, cases in which there is a possibility of criminal proceedings, or any civil, congressional, or state proceedings related to an ongoing federal criminal investigation. 28 C.F.R. § 50.15(a)(4)-(7).

3. Additionally, the Ninth Circuit's ruling could diminish the value of the qualified-immunity defense. Because the defense "'is an immunity from suit rather than a mere defense to liability,' [this Court] repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation" to minimize the expense and burden of defense. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (emphasis omitted) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Yet if a defendant were to assert a qualified-immunity defense at the outset without contesting personal jurisdiction, the defendant's objection to personal jurisdiction might be waived. *See* Fed. R. Civ. P. 12(h)(1).

Even if a defendant were initially to contest personal jurisdiction, the Ninth Circuit has stated that a "'plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss.'" Pet. App. 12a (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010)). If the plaintiff makes that showing, "the district court may still order an evidentiary hearing or the matter may be brought up again at trial." *Id.* at 12a n.13 (quoting *Metro. Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064 n.1 (9th Cir. 1990)). Thus, under the decision below, a plaintiff need only make a minimal "prima facie showing of jurisdictional facts" to force a federal officer to expend the considerable resources necessary to pursue jurisdictional discovery or litigate a qualified-immunity defense in a State to which he may have no connection. *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (officials entitled to qualified immunity should not be "subjected to unnecessary and burdensome discovery or trial proceedings").

C. The Ninth Circuit's Unwarranted Expansion Of Personal Jurisdiction Comes At A Substantial Cost Not Only To Individual Officers, But Also To The Public They Serve.

Federal law enforcement officers would not bear the brunt of the Ninth Circuit's ruling alone: Federal agencies, the public fisc, and the citizenry would all bear additional burdens. As recognized by this Court: "[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814 (deciding scope of immunity available to presidential advisors). In addition to the expense of litigation, these societal costs include (1) "distract[ing] . . . officials from their governmental duties," (2) "inhibit[ing] . . . discretionary action," and (3) deter[ring] . . . able people from public service." *Id*. at 816. The court of appeals' unwarranted erosion of due process protections implicates these serious concerns.

Diversion of Public Resources: Exposing government officers to personal liability for alleged constitutional torts "entail[s] substantial social costs." *Creighton*, 483 U.S. at 638. Of those costs, "diversion of official energy from pressing public issues" and "distraction of officials from their government duties," *Harlow*, 457 U.S. at 816, 814, have been held serious enough to warrant shielding officials from liability for some actions altogether. *See, e.g.*, *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (noting "the time and energy required to defend against a lawsuit" as a concern animating legislative immunity). Although these concerns are present wherever a

complaint is filed, defending suits in unfamiliar forums intensifies these concerns.

Even where the government provides legal representation, the time and resources expended by the Department of Justice are not to be underestimated. It is not the case, as the Ninth Circuit asserted, that a defendant "can be represented just as easily by the United States Attorney's Office in Nevada as by the Office in Georgia." Pet. App. 37a-38a. Filing an action in one State—when the majority of evidence and witnesses are located in another—makes for a more costly and time-consuming defense. The vitality of the Department of Justice is drained by the inefficiencies of mounting an unduly burdensome defense. *Cf.* Statement of Devine, *supra* at 146 ("[T]he time and energy spent by the Executive Branch on the drawn-out judicial proceedings required to separate the few meritorious [*Bivens*] claims from the many frivolous ones cannot be available for the pursuit of other Government interests.").

The increased costs to the Justice Department extend beyond relative expenses and lost time in any given case: The court of appeals' "intentional targeting" test will dramatically increase the number of interactions federal officers have that could subject them to suits in faraway jurisdictions. A plaintiff's ability to force a federal officer to justify his actions in the plaintiff's home State may increase the incentives to sue *at all*, thereby increasing the absolute number of *Bivens* actions and further diminishing fiscal and human resources.

Inhibiting Official Action: Another key rationale for providing predictable protection from "personal monetary liability and harassing litigation" is to ensure that officers are not "unduly inhibit[ed] in the

discharge of their duties." *Creighton*, 483 U.S. at 638. "Federal agents are charged with a responsibility for making sophisticated Constitutional judgments, in the heat of action, about questions which divide lawyers and judges even after they have had the benefit of scholarly arguments and leisurely deliberations." Statement of Devine, *supra* at 141. Uncertainty as to what conduct may result in a lawsuit against an employee personally can "'dampen the ardor of all but the most resolute, or the most irresponsible [federal law enforcement officers], in the unflinching discharge of their duties.'" *Harlow*, 547 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

Under the Ninth Circuit's rule, federal law enforcement officers might think twice during interactions with nonlocals lest they be haled into court thousands of miles away. For any of the myriad decisions federal officers face on a daily basis (on-the-spot decisions such as whether to detain a suspicious party no less than after-the-fact judgments about whether to pursue a prosecution), fear of potential litigation in a distant forum should not stifle the decisive actions necessary to protect our communities and borders.

Deterring Public Service: "As Attorney General Black noted in [1857], it will be difficult to recruit or maintain a superior federal work force if employees are fearful that they may face financial ruin for their actions notwithstanding the fact that they have acted within the scope of their employment." *Indemnification of Dep't of Justice Emps.*, *supra* at 8 (citing 9 Op. Att'y Gen. 51, 52 (1857)). Justice Black echoed this concern in his dissenting opinion in *Bivens*, warning "[t]here is . . . a real danger that such suits might deter officials from the proper and honest per-

formance of their duties." *Bivens*, 403 U.S. at 429 (emphasis omitted).

Recruitment and retention concerns are especially acute for federal law enforcement officers, who may decide that the ever-present risk of bodily injury and increasing threat of personal liability outweigh the benefits of public service. The added costs and inconveniences of litigating more frequently in far-off jurisdictions will only make it harder to attract and retain exceptional citizens in vital, public safety positions—a burden that "'society as a whole'" will be required to bear. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) (quoting *Harlow*, 457 U.S. at 814)). Indeed, after this case, the Drug Enforcement Administration could well find a shortage of state officers willing to serve as deputized agents in our nation's airports.

II. A RULING ON VENUE IS INSUFFICIENT TO PROTECT LAW ENFORCEMENT OFFICERS.

The Ninth Circuit ruled, incorrectly, that Nevada could exercise personal jurisdiction over petitioner and that venue was proper in the District of Nevada. Although reversal on either ground would protect petitioner here, only a decision on personal jurisdiction would provide full protection for law enforcement officers moving forward.

The Ninth Circuit erroneously held that Nevada was an appropriate venue under the general venue statute, 28 U.S.C. § 1391(b), which as relevant here permits suits against private persons in the judicial district (1) "in which any defendant resides, if all defendants are residents of the State in which the district is located"; (2) where "a substantial part of the events or omissions giving rise to the claim oc-

curred"; or (3) if no permissible district exists under the previous subsections, where any defendant is subject to the court's personal jurisdiction. According to the Ninth Circuit, the District of Nevada was an appropriate venue under the "events or omissions" prong of Section 1391(b) because respondents "suffered harm in Nevada." Pet. App. 41a.

The court of appeals' focus on the location of the plaintiff's injury is at odds with this Court's admonition that Congress could not have intended to subject individual officers to suit in every district in the country. For a suit against an officer in his *official* capacity, venue may lie in the district in which the plaintiff resides. 28 U.S.C. § 1391(e)(1)(C). In *Stafford v. Briggs*, 444 U.S. 527 (1980), however, this Court clarified that Section 1391(e)(1)(C) is inapplicable to suits against federal officers *individually*. *Id*. at 542, 544. There is "no indication," this Court stated, "that a Congress concerned with the sound and equitable administration of justice intended to impose on those serving the Government the burden of defending personal damages actions in a variety of distant districts." *Id.* at 545 (internal citations and quotation marks omitted). Significantly, Congress did not make the plaintiff's residence an appropriate venue in all civil actions. *See* 28 U.S.C. § 1391(b).

By equating the location in which the plaintiff suffers injury with the location in which the events giving rise to the cause of action occurred, the Ninth Circuit did violence to the statutory text and eviscerated the greater protections Congress intended for officers sued in their personal, rather than official, capacities. *See Stafford*, 444 U.S. at 544-45. Such a result runs directly contrary to this Court's affirmation that "the purpose of statutorily specified venue is to protect the *defendant* against the risk that a

plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183-84 (1979).

Although correcting the Ninth Circuit's erroneous construction of Section 1391(b)(2) would provide some relief, that alone would not avert the harm of the Ninth Circuit's personal jurisdiction ruling. Section 1391 governs venue in civil actions brought in federal district court, but a separate provision, Section 1441(a), governs venue in removed actions. 28 U.S.C. § 1441(a); *see also Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953). For removed actions, Section 1441(a) "expressly provides" that venue lies in "'the district court of the United States for the district and division embracing the place where such an action is pending.'" *Polizzi*, 345 U.S. at 666 (quoting 28 U.S.C. § 1441).

As a result of disparate venue rules for original and removed actions, *Bivens* plaintiffs in the Ninth Circuit could circumvent the venue provisions of Section 1391(b) by filing their claims in state court. If the defendant chooses to remove the case to federal court, venue would lie in the district where the state case was filed—even if venue would not have been proper in that district had the plaintiff brought suit in federal court. Limitations on personal jurisdiction normally provide a check on this type of gamesmanship, but not if this Court were to leave unchecked the Ninth Circuit's unrestrained theory of personal jurisdiction.[5]

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[5] Although a defendant could seek a transfer under 28 U.S.C. § 1404, the *forum non conveniens* statute, a mechanism for discretionary transfer is not an adequate substitute for the constitutional right not to be haled into court in distant jurisdictions.

Additionally, a holding limited to venue would cause significant disparity in the locations in which defendants are subject to suit. While plaintiffs who have a "significant connection" to any of the nine States covered by the Ninth Circuit's incorrect reading of *Calder*'s "express aiming" requirement could potentially circumvent an objection to venue under Section 1391(b) by filing in state court, that same option would not be available to plaintiffs in the other forty-one States who remain properly constrained by the due process limits of personal jurisdiction.[6] Thus, a holding limited to venue would create opportunities for plaintiffs to evade Section 1391(b) and this Court's decision based on the fortuity of the States in which those plaintiffs reside.

* * *

The Ninth Circuit was wrong on both venue and personal jurisdiction, and this Court should reverse both errors. Federal law enforcement officers—like the citizens they safeguard—are entitled to the protections of the Due Process Clause, without regard to the plaintiff's connections to another jurisdiction or the identity or office locations of their legal counsel. Only a ruling on personal jurisdiction would both provide a rule with uniform application, and effectively protect federal officers from the fundamentally

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[6] Additionally, plaintiffs in the Eleventh Circuit might not be appropriately restrained by personal jurisdiction. *See Licciardello v. Lovelady*, 544 F.3d 1280, 1287 (11th Cir. 2008) (holding that court may exercise personal jurisdiction over defendant who allegedly made unauthorized use of a plaintiff's trademark "calculated to cause injury in the forum State"). Thus, plaintiffs in any of the three States within that Circuit might also evade a venue ruling.

unfair burdens of defending in inconvenient forums without fair warning.

There is nothing just about subjecting federal officers, who devote their careers and risk their lives on behalf of the citizenry, to suit in distant States because they interact frequently with nonlocals in our nation's borders, tourist sites, and transportation hubs. Reversal is appropriate to disapprove the Ninth Circuit's ill-conceived attempt to subject officers to suit in jurisdictions with which they have little, if any, ties, and to affirm once again that the Due Process Clause mandates that a court may not impose the significant costs of litigating in faraway forums—whether defendants bear them alone or share them with an indemnifying party—unless defendants expressly aim their conduct at the forum State.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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