No.

In the Supreme Court of the United States

DANIEL ENRIQUE CANTÚ,

Petitioner,

v.

JAMES M. MOODY, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether a plaintiff may pursue a claim under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that a federal officer fabricated evidence.

PARTIES TO THE PROCEEDING

Daniel Enrique Cantú was plaintiff in the district court, appellant in the court of appeals, and petitioner here.

James M. Moody, Erin S. LaBuz, Nathan Husak, David de los Santos, Ryan Porter, Rosa Lee Garza, Alfredo Barrera, Christopher Lee, and the United States of America were defendants in the district court, appellees in the court of appeals, and respondents here.

Rick Chapa, Roger Rich, Hidalgo County, Texas, Sheriff J.E. Guerra, in his official capacity, Daniel Martinez, and Donicio Arigullin were defendants in the district court and appellees in the court of appeals. Appeals as to these defendants were dismissed, which Mr. Cantú did not oppose. C.A. Order dated Oct. 3, 2018.

LCS Corrections Services, Inc., GEO Group, Inc., DPS Officer Donicio, Does 1-50, Unknown DPS Troopers, Unknown FBI Officers, Unknown US Customs and Border Protection Officers, Unknown US Marshals, and Unknown Hidalgo County Officers were defendants in the district court. Each of these defendants was voluntarily dismissed in the district court.

RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

Cantú v. *Moody*, No. 7:15-cv-354 (Mar. 29, 2018)

United States Court of Appeals (5th Cir.):

Cantú v. *Moody*, No. 18-40434 (Aug. 5, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Enrique Cantú respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 933 F.3d 414 (5th Cir. 2019). The decision of the district court (App., *infra*, 66a–67a) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 5, 2019. On October 18, 2019, the court of appeals denied a timely filed petition for rehearing and rehearing en banc. App., *infra*, 68a-69a. On December 31, 2019, Justice Alito entered an order extending the time for filing a petition for a writ of certiorari to and including February 14, 2020. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

INTRODUCTION

A fundamental tenet on which our judicial system rests is that the government may not fabricate evidence to justify stripping an individual of his liberty. The question then becomes what is a court to do when a federal official violates this bedrock principle.

The courts of appeals have deeply and intractably split over a substantial question—whether individuals may pursue a *Bivens* cause of action to remedy a federal official's fabrication of evidence. In two and a half years since this Court reaffirmed *Bivens*'s continued vitality in *Ziglar* v. *Abassi*, 137 S. Ct. 1843, 1856 (2017), two courts of appeals have said such a remedy exists. Two others have said such a remedy does not.

This circuit conflict on a recurring and important question warrants resolution. Because the decision below rested solely on the court's conclusion that *Bivens* provides no remedy for a federal officer's evidence falsification, this is an appropriate vehicle to resolve this conflict. The Court should thus grant review.

STATEMENT

A. Legal background

1. The Constitution prohibits officers from fabricating evidence to support criminal charges. Indeed, it is "inconsistent with the rudimentary demands of justice" for government to "contrive[] a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935). "[I]mplicit in any concept of ordered liberty" must be that government "may not knowingly use false evidence, including false testimony," where "a defendant's life or liberty may depend." *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). Put simply, "framing innocent persons * * * violate[s] the constitutional rights of the falsely accused." *Limone* v. *Condon*, 372 F.3d 39, 48 (1st Cir. 2004).

2. In *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Court recognized "[t]hat damages may be obtained for injuries

consequent upon a violation of the Fourth Amendment by federal officials" as a "remedy for an invasion of personal interests in liberty." 403 U.S. 388, 395 (1971). Later, the Court permitted a private suit in a Fifth Amendment gender-discrimination case, *Davis* v. *Passman*, 442 U.S. 228 (1979), and an Eighth Amendment cruel and unusual punishment case, *Carlson* v. *Green*, 446 U.S. 14 (1980).

Since then, the Court has declined to "cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1856 (2017). *Ziglar* reaffirmed the Court's two-part inquiry for a *Bivens* claim. The first consideration is whether "a case presents a new *Bivens* context," meaning the case "is different in a meaningful way from previous *Bivens* cases decided by this Court." *Id*. at 1859. Second, if the context is new, the Court asks whether "there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Id.* at 1857 (quoting *Carlson*, 446 U.S. at 18).

B. Factual background

In 2010, federal officials began investigating the Texas Mexican Mafia. App., *infra*, 2a. After identifying Jesus Rodriguez Barrientes as the gang's leader in the Rio Grande Valley, the FBI arranged a sting operation on Barrientes's heroin purchases. *Ibid.*

To execute the sting, FBI agents relied on informant Juan Pablo Rodriguez, himself a member of the Texas Mexican Mafia. App., *infra*, 2a. The plan was for informant Rodriguez to meet drug smugglers hauling Barrientes's heroin at the Mexican border. *Ibid.* Rodriguez would then deliver the heroin to Barrientes's designated recipient under the watchful eye of law enforcement. *Ibid.*

Early on August 10, 2011, Rodriguez, accompanied by an undercover police officer, drove to the border to meet the drug smugglers. App., *infra*, 2a. After failing to reach Barrientes's designated recipient (Dist. Ct. R. 56-1 ¶ 35), Rodriguez instead called Cantú and asked to meet immediately at a grocery store parking lot (App., *infra*, 2a). Rodriguez did not tell Cantú what he wished to discuss. App., *infra*, 2a.

When Cantú arrived, he parked and rolled down his passenger-side window. App., *infra*, 2a. Rodriguez exited his car, removed a cooler from its trunk, and placed the cooler onto Cantú's passenger seat through the open window. *Ibid.* Rodriguez told Cantú, "I need you to do me a favor," to which Cantú only had time to ask, "What are you doing?" *Id.* at 2a-3a. Forty-five law enforcement officers then swarmed Cantú's car, pulled him out, searched him, and arrested him. *Id.* at 3a. Officers found nearly two kilograms of heroin in the cooler. *Ibid.*

Though Cantú had remained in his car the whole time and never touched the cooler, two FBI agents swore otherwise. App., *infra*, 3a. Agent James Moody said Cantú left his car and personally retrieved the cooler from Rodriguez's trunk; agent Erin LaBuz told a different story, claiming that Rodriguez handed the cooler to Cantú who personally placed it on his passenger seat. *Ibid.*

Based on fabricated testimony, a grand-jury indicted Cantú for possession of heroin with intent to distribute and conspiracy. App., *infra*, 3a; *id.* at 19a (Graves, J., dissenting). Cantú stood trial. App., *infra*, 3a. A federal jury acquitted him on October 31, 2013, after he had spent more than two years in jail. *Ibid.*

C. Procedural background

1. After his acquittal, Cantú brought suit against various individuals involved in the sting and his subsequent imprisonment. App., *infra*, 3a-4a.

As relevant here, in his operative Third Amended Complaint, Cantú alleged that agents Moody and LaBuz fabricated evidence against him to implicate him in the heroin conspiracy. Dist. Ct. R. 56-1 ¶¶ 45-46. Specifically, Moody falsely swore that Cantú "exited the vehicle and recovered a red and white cooler" from Rodriguez's trunk and then personally placed it into Cantú's own car. *Id.* ¶ 45. LaBuz falsely swore that Rodriguez "delivered the red and white water cooler" that Cantú then personally "placed * * * into the passenger compartment" of his car. *Id.* ¶ 46. Neither statement was true; it was Rodriguez who retrieved the cooler, placed it into Cantú's car, and then ran. *Id.* ¶ 39.

For his part, Cantú did not know why Rodriguez placed the cooler in his car, never touched the cooler, and only had time to ask Rodriguez what he was doing. Dist. Ct. R. 56-1 ¶ 40. All Cantú had done was park his car and roll down the window. App., *infra*, 2a. Cantú brought a *Bivens* claim alleging that the federal officers' evidence fabrication violated the Fourth and Fifth Amendments of the Constitution. Dist. Ct. R. 56-1 ¶¶ 79-81.

2. After holding several hearings, the district court dismissed all of Cantú's claims, including his *Bivens* claim for evidence fabrication. App., *infra*, 22a-67a. The district court did not issue any written opinion explaining its decision in favor of Moody and LaBuz. App., *infra*, 66a-67a.

3. A divided panel of the court of appeals affirmed dismissal of Cantú's *Bivens* claim arising out of

Moody's and LaBuz's evidence fabrication. App., *infra*, 1a-21a.

a. The majority based its holding exclusively on the ground that "*Bivens* does not provide a vehicle to bring" a claim for fabricating evidence. App., *infra*, 10a.

Applying the two-part framework the Court reaffirmed in *Ziglar*, the majority first held that Cantú's claim presented a new *Bivens* context. App., *infra*, 11a-15a. In the majority's view, *Bivens*'s approval of a claim based on a Fourth Amendment violation for entering a home without a warrant presents a different context than Cantú's claim under the Fourth Amendment based on officers' "allegedly falsified affidavits." *Id.* at 14a.

Turning to the second inquiry, the majority concluded that special factors counseled against authorizing a *Bivens* remedy. The relevant factors here, according to the Court, were the existence of the Federal Tort Claims Act (FTCA), that Congress has not authorized a *Bivens*-type remedy for this conduct, and that the case implicated security concerns at the border because it arose out of a multijurisdictional investigation into a gang. App., *infra*, 15a-16a.

b. Judge Graves dissented. App., *infra*, 18a-21a. Though he agreed that a claim for fabrication of evidence presents a new *Bivens* context, he found no special factors dictated against recognizing a new *Bivens* action in these circumstances. *Id.* at 18a.

In the dissent's view, "hold[ing] accountable two individual law enforcement officers who allegedly lied to support a finding of probable cause and a grand jury indictment * * * is exactly the type of run-of-the-mill 'law enforcement overreach' claim [*Ziglar*] emphasized could still be recognized under *Bivens*." App., *infra*,

19a. Judge Graves accordingly would have reversed in part.

c. The court of appeals denied a timely-filed petition for rehearing en banc. App., *infra*, 68a-69a.

REASONS FOR GRANTING THE PETITION

In the less than three years since this Court decided *Ziglar* v. *Abassi*, 137 S. Ct. 1843 (2017), disagreement among the circuits has crystallized on the question presented—whether *Bivens* authorizes a claim to remedy a federal officer's fabrication of evidence. This is an appropriate case to review this recurring question of substantial importance.

A. The lower courts are intractably divided over the question presented.

1. Two circuits have expressly approved *Bivens* claims to remedy fabrication of evidence post-*Ziglar*.

Following *Ziglar*, the **Sixth Circuit** has reaffirmed its longstanding precedent authorizing *Bivens* remedies for fabrication of evidence. *Jacobs* v. *Alam*, 915 F.3d 1028, 1036 (6th Cir. 2019). In *Jacobs*, while officers were searching a home and basement apartment for a fugitive, the apartment tenant returned home. Upon finding strangers in his home, he reached to pull his pistol but fell down the steps after which officers shot him three times. *Id.* at 1033-1034. One of the officers, however, testified that the tenant pointed a gun at him and fired it several times. *Id.* at 1034. A jury acquitted the tenant of all charges resulting from the event. *Id.* at 1035.

Thereafter, the tenant brought suit alleging, among other things, a *Bivens* claim to remedy officers' fabrication of the events in the home. *Jacobs*, 915 F.3d at 1035. The Sixth Circuit noted that it has "recognized," "for some time now," a *Bivens* remedy for a "fabrication of evidence" claim sounding in the Fourth

Amendment. *Id*. at 1038. This claim did not "differ[] in a meaningful way" from existing "run-of-the-mill challenges to 'standard law enforcement operations' that fall well within *Bivens* itself." *Ibid*.

In *Lanuza* v. *Love*, the **Ninth Circuit** held that *Bivens* provided a remedy where an ICE Assistant Chief Counsel submitted a forged document to eliminate an immigrant's right to seek lawful permanent residence. 899 F.3d 1019, 1022 (9th Cir. 2018). The parties agreed, and the court found, that the case presented a new *Bivens* context because it arose in the immigration context and sounded in Fifth Amendment due process. *Id*. at 1027-1028. But the court nonetheless concluded that no special factors counseled against recognizing a *Bivens* remedy for the fabrication of evidence. *Id.* at 1028-1029. Indeed, "judges are particularly well-equipped to weigh the costs of constitutional violations that threaten the credibility of our judicial system." *Id.* at 1032.[1]

2. Post-*Ziglar*, two circuits have expressly rejected *Bivens* claims as a remedy for fabrication of evidence.

In this case, the **Fifth Circuit** held that "*Bivens* does not provide a vehicle to bring" a claim that officers "violated the Fourth Amendment by fabricating evidence against him." App., *infra*, 10a.

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[1] These holdings are consistent with other courts of appeals' precedents predating *Ziglar*. See *Limone* v. *Condon*, 372 F.3d 39 (1st Cir. 2004) (allowing *Bivens* claim for fabrication of evidence to proceed); *Zahrey* v. *Coffey*, 221 F.3d 342 (2d Cir. 2000) (same); *Webb* v. *United States*, 789 F.3d 647 (6th Cir. 2015) (approving *Bivens* action and rejecting qualified immunity as to "fabrication-of-evidence claims"); *Hammond* v. *Kunard*, 148 F.3d 692, 695 (7th Cir. 1998) (approving *Bivens* action based on "fraudulently induced and manufactured evidence").

The **Eighth Circuit** adopted the same rule. "If a federal law-enforcement officer lies, manipulates witnesses, and falsifies evidence, should the officer be liable for damages? We hold that the Constitution does not imply a cause of action under *Bivens*." *Farah* v. *Weyker*, 926 F.3d 492, 496 (8th Cir. 2019).

This circuit split is ripe for resolution.

B. This is an appropriate vehicle to resolve an important question.

1. The question presented is frequently recurring, and it has significant practical implications for the credibility of law enforcement and, more broadly, the judicial system.

As an initial matter, fabrication-of-evidence claims arise with sufficient regularity that several courts of appeals have addressed damages remedies for such claims in the less than three years since *Ziglar*. Likewise, several district courts have addressed the issue, to divergent results.[2]

The question presented is also important independent of the frequency with which it arises. "[I]mplicit in any concept of ordered liberty" must be that government "may not knowingly use false evidence, including false testimony," where "a defendant's life or liberty may depend." *Napue*, 360 U.S. at 269. In-

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[2] Compare *Graber* v. *Dales*, 2019 WL 4805241 (E.D. Pa. Sept. 30, 2019) (applying *Ziglar*; approving a *Bivens* cause of action where a Secret Service agent submitted an affidavit in support of a warrant that was "completely false"), with *Boudette* v. *Sanders*, 2019 WL 3935168 (D. Colo. Aug. 19, 2019) (applying *Ziglar*; holding no cause of action for tampering with evidence and filing false charges); *Karkalas* v. *Marks*, 2019 WL 3492232, at *10 (E.D. Pa. July 31, 2019) (applying *Ziglar*; finding no *Bivens* cause of action for "alleged false statements in the grand jury leading to a false indictment, arrest, detention and trial").

deed, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Limone*, 372 F.3d at 44–45.

Further, these acts compromise the very integrity of the Judicial Branch, which routinely relies on evidence from government officials to make critical decisions about an individual's liberty. See generally *Lanuza*, 899 F.3d at 1032-1033. "[T]he federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them." *Sherman* v. *United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring). Ultimately, "[p]ublic confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." *Ibid*.

2. What is more, this case is a suitable vehicle for addressing the question presented. The court of appeals resolved the fabrication-of-evidence claim exclusively on the ground that "*Bivens* does not provide a vehicle to bring that claim." App., *infra*, 10a. If that holding is incorrect, even the majority below recognized that "Cantú's strongest allegations are that Moody and LaBuz lied to justify seizing him." *Ibid*.

C. The decision below is wrong.

Certiorari is also warranted here because the decision below is wrong. Proper application of *Ziglar* confirms the continued viability of the *Bivens* remedy for evidence fabrication.

Bivens recognized "[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials" as a necessary "reme-

dy for an invasion of personal interests in liberty." 403 U.S. at 395. That promise holds doubly true here, where a federal officer fabricates evidence to seize and detain someone, contravening "rudimentary demands of justice" by "depriving a defendant of liberty through a deliberate deception." *Mooney*, 294 U.S. at 112.

1. Cantú's case does not present a new *Bivens* context because it is not "different in a meaningful way from previous *Bivens* cases decided by this Court." *Ziglar*, 137 S. Ct. at 1859. The Court has provided a list of factors to consider in discerning whether differences are "meaningful enough to make a given context a new one":

> the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Ziglar, 137 S. Ct. at 1859-1860.

None of these factors meaningfully distinguish this case from those present in *Bivens* itself. Both involve individual law-enforcement agents; the Fourth Amendment right against unreasonable searches and seizures; and specific conduct (handcuffing a man in his home without a warrant versus fabricating evidence to ensure seizure). There is ample judicial guidance as to how officers should respond; indeed, in this case judicial guidance could not be more clear—officers cannot fabricate evidence. The officers' mandate ap-

pears no different. There is no risk of disruptive intrusion by the Judiciary into the functioning of other branches as a result of deterring evidence fabrication. Nor are there special factors that *Bivens* did not consider.

In *Jacobs*, the Sixth Circuit agreed, concluding that the plaintiff's "run-of-the-mill challenges to 'standard law enforcement operations' * * * f[ell] well within *Bivens* itself." 915 F.3d at 1038.

The court of appeals glossed over *Ziglar*'s enumeration of relevant factors in concluding this case presented a "new" *Bivens* context, characterizing the case as involving "different conduct by different officers from a different agency." App., *infra*, 14a. But the question is the underlying right, not the agency that violates it. Indeed, the court failed entirely to explain why the difference between a Bureau of Narcotics officer and an FBI agent is "meaningful." 137 S. Ct. at 1859-1860 (identifying "*rank* of the officers involved") (emphasis added). The court's analysis was mistaken.

2. Further, there are no "special factors counselling hesitation" in allowing this case to proceed. *Ziglar*, 137 S. Ct. at 1857. Cantú's case does not seek to "alter[] an entity's policy" but instead seeks only a remedy against an "individual official for his or her own acts." *Id.* at 1860; see also *Lanuza*, 899 F.3d at 1028-1029 (approving challenge to acts of individual low-level attorney). Indeed, the risk that an evidence-fabrication claim could implicate an agency's general policy formulation is minimal given that a federal agency should not have an agency policy of engaging in evidence fabrication. *Lanuza*, 899 F.3d at 1029 ("[N]o one is arguing that the United States has a policy of allowing federal officers to submit forged government documents to thwart the integrity of immigration proceedings."); cf. *Mooney*, 294 U.S. at 112. Nor does this case "challenge more than

standard 'law enforcement operations.'" *Ziglar*, 137 S. Ct. at 1861.

This case does not implicate "[n]ational-security policy [that] is the prerogative of the Congress and President" nor cause an officer "to second-guess difficult but necessary decisions concerning national-security policy." *Ziglar*, 137 S. Ct. at 1861. It implicates only a domestic official submitting fabricated evidence in a domestic criminal process.

There is also no other remedy. The Federal Tort Claims Act (FTCA) cannot remedy constitutional torts. App., *infra*, 16a n.4. And it is of "central importance" that this case is "damages or nothing." *Ziglar*, 137 S. Ct. at 1862 (quoting *Bivens*, 403 U.S. at 410). Cantú secured his acquittal notwithstanding earlier fabrications that resulted in his seizure and detention.

At the end of the day, this case presents a *Bivens* claim suited to judicial remedy without "congressional action or instruction." *Ziglar*, 137 S. Ct. at 1858. "Judges are particularly well-equipped to weigh the costs of constitutional violations that threaten the credibility of our judicial system." *Lanuza*, 899 F.3d at 1032. In fact, "there are few persons better equipped to weigh the cost of compromised adjudicative proceedings than those who are entrusted with protecting their integrity." *Id*. at 1032-1033. Ultimately, it is the Judiciary, "not Congress or the Executive," who is principally "responsible for remedying circumstances where a court's integrity is compromised by the submission of false evidence." *Id*. at 1033.

The court of appeals disregarded all of this, focusing myopically on the existence of the FTCA (even though it cannot remedy constitutional torts) and the time that has passed since *Bivens* without Congress enacting a remedy. App., *infra*, 15a. But both of these

are always true whenever a court considers whether to extend *Bivens*. There would have been no need for *Ziglar* to adhere to the special factors analysis if these two factors would always foreclose creation of a remedy.

Thus, the court of appeals is left with a single special factor—that the lawsuit arose out of a "multijurisdictional investigation into transnational organized crime." App., *infra*, 15a. But even the government did not argue that this particular case implicated national security concerns. *Id.* at 19a n.1 (Graves, J., dissenting). And the analysis rings hollow in the context of Cantú's claim. His claim for evidence fabrication does not seek a change in border-security policy. It seeks only a remedy for the fabrication of evidence that resulted in his wrongful detention for more than two years.

In sum, the decision below is wrong and warrants further review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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