No. 19-1033

In the Supreme Court of the United States

DANIEL ENRIQUE CANTÚ, PETITIONER

v.

JAMES M. MOODY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly declined to extend the damages remedy recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to a Fourth Amendment claim involving federal agents' allegedly false statements about petitioner's role in a transnational drug-trafficking operation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 933 F.3d 414. The order of the district court (Pet. App. 66a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2019. A petition for rehearing was denied on October 18, 2019 (Pet. App. 68a-69a). On December 31, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 14, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a member of the Texas Mexican Mafia who was arrested as part of a transnational drug-

trafficking investigation. Pet. App. 1a-2a. He sued federal, state, and local officials for a variety of alleged constitutional and tort violations. *Id.* at 3a. As relevant here, he sued two Federal Bureau of Investigation (FBI) officials in their individual capacities, seeking damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for allegedly false statements in their affidavits describing his arrest. Pet. App. 4a, 10a. The district court dismissed all of petitioner's claims, including the *Bivens* claims at issue here. *Id.* at 66a-67a; see *id.* at 4a. The court of appeals affirmed. *Id.* at 1a-21a.

1. In 2010, the federal government began investigating the transnational drug-trafficking operations of a gang known as the Texas Mexican Mafia, of which petitioner is a member. Pet. App. 1a-2a. The federal government, working with state and local law enforcement, identified Jesus Rodriguez Barrientes as the gang's leader in the Rio Grande Valley. *Id.* at 2a. FBI agents planned a sting operation and convinced Juan Pablo Rodriguez, another member of the Texas Mexican Mafia, to work as an informant. *Ibid.* In August 2011, Rodriguez and an undercover officer met drug smugglers at the U.S.-Mexico border, with a plan to deliver heroin to whomever Barrientes designated as his recipient. *Ibid.*

According to petitioner's operative complaint, Rodriguez called him and asked him to come to a parking lot to talk, without indicating what Rodriguez wanted to discuss. Pet. App. 2a. Petitioner arrived at the parking lot, parked beside Rodriguez's car, and rolled down his passenger-side window. *Ibid.* Rodriguez then exited his car, opened the trunk, took out a cooler, and placed the cooler through petitioner's open window and onto the passenger seat. *Ibid.* Rodriguez stated, "I need you

to do me a favor," and petitioner responded, "What are you doing?" *Id.* at 2a-3a. At that point, law-enforcement officers arrived, pulled petitioner from his car, and arrested him. *Id.* at 3a. A search of the cooler revealed nearly two kilograms of heroin. *Ibid.*

Petitioner asserts that he remained in his car during the entire interaction and never touched the cooler with the heroin. Pet. App. 3a. But FBI Agent James Moody later stated in an affidavit that petitioner had left his car and had personally taken the cooler from Rodriguez's trunk, while FBI Agent Erin LaBuz stated that Rodriguez had handed the cooler to petitioner and that petitioner had placed it in his passenger seat. *Ibid.*[1]

A federal grand jury returned an indictment charging petitioner with possession of heroin with intent to distribute it and conspiracy. Pet. App. 3a. Petitioner was acquitted after a trial, but he spent two years in detention pending trial. *Ibid.*

2. Petitioner sued "a slew of defendants," Pet. App. 3a, including the United States and seven FBI agents in their individual capacities, raising claims under *Bivens*; the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*; 42 U.S.C. 1983; 42 U.S.C. 1985; and state law. Pet. App. 3a. He relied on a host of Fourth Amendment, Fifth Amendment, Fourteenth Amendment, and tort theories, stemming from the general allegation that 45 law-enforcement officers had "jeopardized a sophisticated, multi-year, multi-jurisdictional sting operation aimed at a transnational gang to frame an otherwise-

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[1] In an affidavit filed in district court, Agent Moody stated that his prior statement had been incorrect, but that it had been based on information provided by at least one other agent. See 15-cv-354 D. Ct. Doc. 60-3, at 2 (June 3, 2016).

innocent member of the Texas Mexican Mafia in an effort 'to improve each of their professional arrest and conviction rate records against drug traffickers.'" *Id.* at 3a-4a (quoting 15-cv-354 Third Am. Compl. ¶ 3).

The federal defendants moved to dismiss or, in the alternative, for summary judgment. Pet. App. 66a. The district court granted the motion, explaining that "the defenses of sovereign immunity, limitations, qualified immunity, and failure to state a claim required dismissal of and/or judgment upon" the claims against those defendants. *Id.* at 67a. After several hearings, the court also dismissed all of petitioner's other claims. *Id.* at 4a.

3. The court of appeals affirmed. Pet. App. 1a-21a.

a. As relevant here, the court of appeals affirmed the dismissal of the *Bivens* claims against Agents Moody and LaBuz. Pet. App. 10a-16a. The court explained that, under this Court's analysis in *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), a court addressing a *Bivens* claim must first determine whether the claim arises in a new context and, if so, must next determine whether special factors counsel hesitation before extending *Bivens* to that new context. Pet. App. 11a; see *id.* at 13a, 15a.

On the first question, the court of appeals determined that this case presents a new context. Pet. App. 11a-14a. The court explained that, even though petitioner and the plaintiff in *Bivens* had both invoked the Fourth Amendment, the key question under *Abbasi* is whether this case is "different in a meaningful way from previous *Bivens* cases." *Id.* at 13a (quoting *Abbasi*, 137 S. Ct. at 1859). And the court concluded that, "[b]y any measure, [petitioner's] claims are meaningfully different from the Fourth Amendment claim at issue in *Bivens*." *Id.* at 14a. The court explained that petitioner

"d[id] not allege the officers entered his home without a warrant or violated his rights of privacy," but rather alleged that Agents Moody and LaBuz "falsely stat[ed] in affidavits that [petitioner] willingly took possession of the cooler . . . to suggest he knowingly participated in a drug transaction . . . to induce prosecutors to charge him . . . to cause [him] to be seized." *Ibid.* The court reasoned that such a claim involves "different conduct by different officers from a different agency" and requires "intellectual leaps that a textbook forcible seizure never does." *Ibid.*

On the second question, the court of appeals determined that special factors counsel hesitation before "engag[ing] in the 'disfavored judicial activity' of recognizing a new *Bivens* action." Pet. App. 15a (quoting *Abbasi*, 137 S. Ct. at 1857); see *id.* at 15a-16a. The court listed three special factors that weighed against extending *Bivens* here: the existence of a statutory scheme for torts by federal law-enforcement officers under the FTCA; Congress's omission of a damages remedy despite its awareness that this Court has expressed reluctance to extend *Bivens* to new contexts; and the implications in this case, involving "a multi-jurisdictional investigation into transnational organized crime committed by a violent gang that has wreaked havoc along our border with Mexico," for security at our international border. *Id.* at 15a.

b. Judge Graves dissented. Pet. App. 18a-21a. He agreed that this case presents a new context but disagreed that special factors counsel against extending *Bivens* here. *Id.* at 18a. In his view, a *Bivens* remedy would be appropriate because petitioner alleged "run-of-the-mill 'law enforcement overreach.'" *Id.* at 19a. And Judge Graves would have limited *Abbasi*'s special-

factor analysis to cases involving "national security concerns," "broad governmental policies," or "high-level executive officials." *Id.* at 19a-20a.

ARGUMENT

Petitioner contends (Pet. 7-14) that the court of appeals erred in declining to extend the damages remedy recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to his claim that federal law-enforcement officers made false statements to induce prosecutors to bring charges against him. The decision of the court of appeals is correct and is consistent with this Court's decisions in *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), and *Hernández* v. *Mesa*, 140 S. Ct. 735 (2020). Although some narrow disagreement exists among the courts of appeals, those courts have not yet had the opportunity to consider relevant guidance from *Hernández*. This Court's review is therefore not presently warranted.

1. In *Bivens*, this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001). The Court held that, despite the absence of such a remedy in the Fourth Amendment or in any statute, federal narcotics agents could be sued for damages for conducting a warrantless search and arrest of the plaintiff in his home. *Bivens*, 403 U.S. at 389. Since deciding *Bivens* in 1971, this Court has "extended its holding only twice." *Malesko*, 534 U.S. at 70. In the last 40 years, this Court has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Abbasi*, 137 S. Ct. at 1857 (citation omitted).

In *Abbasi*, the Court explained that its consistent refusal to extend *Bivens* reflects its changed understanding of the scope of judicial authority to create private rights of action. 137 S. Ct. at 1855-1857. "During th[e] '*ancien regime*,'" the Court "assumed it to be a proper judicial function" to imply causes of action "not explicit in the statutory text itself." *Id.* at 1855 (citation omitted). But in the decades since *Bivens*, the Court has made clear that the creation of damages remedies is a legislative function, *ibid.*, and it has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one," *Malesko*, 534 U.S. at 67 n.3. "Given the notable change in the Court's approach to recognizing implied causes of action," *Abbasi* made clear that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." 137 S. Ct. at 1857 (citation omitted).

Abbasi held that a case presents a "new context" for *Bivens* purposes if "the case is different in a meaningful way" from "the three *Bivens* claims the Court has approved in the past." 137 S. Ct. at 1859-1860. A case might be "'different in a meaningful way'" from those cases if, for example, it creates a "risk of disruptive intrusion by the Judiciary into the functioning of other branches"; "if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases." *Id.* at 1860, 1864 (citation omitted). As the Court emphasized, "even a modest extension is still an extension." *Id.* at 1864.

In determining whether a new context presents a "'special factor[] counselling hesitation,'" *Abbasi* explained that a court "must concentrate on whether the

Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." 137 S. Ct. at 1857-1858 (citation omitted). The Court observed that relevant considerations include whether "Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere"; whether "an alternative remedial structure" is available; or whether "some other feature of [the] case," such as the implications for policymaking, the burdens of litigation and liability, or the potential for intrusion on the political branches' prerogatives, "causes a court to pause before acting without express congressional authorization." *Id.* at 1858; see *id.* at 1860-1863. If there are any "sound reasons to think Congress *might doubt* the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts *must refrain* from creating the remedy in order to respect the role of Congress." *Id.* at 1858 (emphases added).

In *Hernández*, this Court reaffirmed its decision in *Abbasi*, reiterating both that the Court has abandoned the type of analysis used in *Bivens* itself and that it will not extend *Bivens* to any new context if special factors counsel hesitation. See 140 S. Ct. at 741-750.

Hernández involved claims under the Fourth and Fifth Amendments arising out of a cross-border shooting by a U.S. Border Patrol officer, 140 S. Ct. at 743-744—at an extremely high level of generality, the sort of Fourth Amendment "search-and-seizure context in which [*Bivens*] arose." *Abbasi*, 137 S. Ct. at 1856. The Court in *Hernández* nevertheless found it "glaringly obvious" that the plaintiffs' "cross-border shooting claims" presented a new context. 140 S. Ct. at 743-744.

The Court also determined that special factors, including foreign-policy and national-security considerations, counseled against extending *Bivens* to that new context. *Hernández*, 140 S. Ct. at 744-747. In so doing, the Court explained that the plaintiffs, who had attempted to minimize the national-security implications of extending *Bivens* to their specific claims, had "misse[d] the point": the relevant question was not whether national security required the specific conduct alleged "but whether the Judiciary should alter the framework established by the political branches for addressing cases in which it is alleged that lethal force was unlawfully employed by an agent at the border." *Id.* at 746. The Court also considered "what Congress has done in statutes addressing related matters," finding it "'telling' that Congress has repeatedly declined to authorize the award of damages for injury inflicted outside our borders." *Id.* at 747 (quoting *Abbasi*, 137 S. Ct. at 1862). Finally, the Court made clear that "Congress's decision not to provide a judicial remedy does not compel us to step into its shoes." *Id.* at 750.

2. Under *Abbasi* and *Hernández*, the court of appeals correctly rejected petitioner's *Bivens* claims against Agents Moody and LaBuz. This case presents a new context, and special factors counsel hesitation before extending *Bivens* to that new context.

a. The court of appeals first correctly concluded that this case presents a "new context." *Abbasi*, 137 S. Ct. at 1859. Petitioner asserts (Pet. 11) that his claims are not "meaningfully" different from the claims "in *Bivens* itself," as both cases involve Fourth Amendment claims against "individual law-enforcement agents" for "specific conduct." But, as *Hernández* demonstrates, even cases that share those high-level features do not arise

in the same context where they present a different type of claim or involve materially different factual circumstances. See 140 S. Ct. at 743; see also *Abbasi*, 137 S. Ct. at 1859.

The claim and facts here are materially different from *Bivens*. The core allegation in petitioner's complaint is that two FBI agents "falsely stat[ed] in affidavits that [petitioner] willingly took possession of the cooler * * * to induce prosecutors to charge him," which ultimately led to his detention. Pet. App. 14a. Although cast in Fourth Amendment terms, that claim looks nothing like the Fourth Amendment claim in *Bivens* itself, which involved a warrantless search and seizure in a person's home. See 403 U.S. at 389; see also *Abbasi*, 137 S. Ct. at 1860 (characterizing *Bivens* as involving a claim against federal agents "for handcuffing a man in his own home without a warrant"). As the court of appeals properly concluded, because this case "involves different conduct by different officers from a different agency," it presents a new context "[b]y any measure," Pet. App. 14a—a proposition that even the dissent below did not dispute, see *id.* at 18a. The Eighth Circuit has reached the same conclusion, explaining that a claim against an officer for allegedly false statements leading to an indictment involved the officer's performance of "a different part of police work than the apprehension, detention, and physical searches at issue in *Bivens*." *Farah* v. *Weyker*, 926 F.3d 492, 499 (2019).

b. The court of appeals next correctly concluded that special factors counsel hesitation before extending *Bivens* to the new context here. Petitioner asserts that no special factors are present because his claim "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.'" Pet. 12 (quoting *Abbasi*, 137 S. Ct. at 1860) (brackets in original); see *id.* at 12-14. But as *Hernández* recently made clear, the special-factors analysis is not relevant only in suits against high-level officials or challenges to general agency policies. See 140 S. Ct. at 744-749. Rather, the question remains whether a court has any "reason to pause before applying *Bivens* in a new context or to a new class of defendants." *Id.* at 743; see *Abbasi*, 137 S. Ct. at 1858.

i. The court of appeals properly identified as a special factor the several statutory indications that Congress's omission of the damages remedy sought here is intentional. Pet. App. 15a; see *Hernández*, 140 S. Ct. at 747 (conducting a "survey of what Congress has done in statutes addressing related matters"); *Abbasi*, 137 S. Ct. at 1862 (finding Congress's silence "telling"); see also *Farah*, 926 F.3d at 501 (emphasizing "what Congress has already done to address injuries of the sort the plaintiffs have allegedly suffered").

As an initial matter, the FTCA offers an alternative path for bringing claims that a federal law-enforcement officer knowingly fabricated evidence. The FTCA expressly authorizes malicious-prosecution claims against the United States based on a federal investigative or law-enforcement officer's actions. See 28 U.S.C. 2680(h). Thus, to the extent a plaintiff asserts that a law-enforcement officer knowingly fabricated evidence to procure criminal charges, he may have a cognizable malicious-prosecution claim. Indeed, as this Court has explained, "the most natural common-law analogy" for a fabricated-evidence claim is a claim for "malicious prosecution." *McDonough* v. *Smith*, 139 S. Ct. 2149, 2155 (2019); see Pet. App. 11a (describing petitioner's *Bivens* claim as a "malicious-prosecution-type-claim").

Although petitioner correctly notes (Pet. 13) that the FTCA does not authorize suits for constitutional violations as such, see 28 U.S.C. 2679(b)(2)(A), the existence of a statutory remedy for the alleged underlying conduct constitutes an alternative avenue for redress, even if Congress has not authorized "complete relief" or relief for "the constitutional violation itself." *Schweiker* v. *Chilicky*, 487 U.S. 412, 425, 427 (1988). Because the FTCA creates an "alternative remedial structure" to address malicious-prosecution claims, "that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Abbasi*, 137 S. Ct. at 1858; see *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007) (explaining that the existence of an "alternative, existing process" is a reason not to extend *Bivens*).

A variety of other statutes and procedures "form a pattern" that further establishes Congress's preference for handling claims like petitioner's without a *Bivens* remedy. *Hernández*, 140 S. Ct. at 749. At a general level, Congress has designed the federal criminal-justice process to handle claims of flawed evidence. See *Wilkie*, 551 U.S. at 551-552 (observing that the plaintiff had a remedy for criminal charges in his jury trial). The Federal Rules of Criminal Procedure, for example, allow criminal defendants to move to dismiss an indictment for a variety of defects in the prosecution, including the use of illegally obtained evidence, and to move for a judgment of acquittal. See Fed. R. Crim. P. 12, 29.[2]

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[2] Petitioner twice moved for a judgment of acquittal, and both motions were denied. See 11-cr-1380-3, 10/30/13 and 10/31/13 Minute Entries (S.D. Tex.).

At a more specific level, Congress has created tailored remedies for persons who have been acquitted after unjust prosecutions or who have been wrongly convicted and incarcerated. Long after *Bivens* was decided, Congress enacted the Hyde Amendment, which authorizes a federal court to award a criminal defendant "a reasonable attorney's fee and other litigation expenses" from the government if he is the "prevailing party" in a federal case and if "the court finds that the position of the United States was vexatious, frivolous, or in bad faith." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, Tit. VI, § 617, 111 Stat. 2519 (18 U.S.C. 3006A note); see *Farah*, 926 F.3d at 501. The goal of the Hyde Amendment was to strike "the proper balance" of "deter[ring] unjustifiable governmental conduct" without "inhibit[ing] the aggressive prosecution of justifiable cases." *Statement of Honorable Henry J. Hyde Before the House Rules Comm. on an Amendment to H.R. 2267 to Allow for the Recovery of Attorneys Fees and Litigation Costs in a Criminal Prosecution*, 1997 WL 545756, at 2 (Sept. 5, 1997). That is, in enacting the Hyde Amendment, Congress chose payment of attorney's fees as a remedy instead of imposition of personal liability. See *ibid.* That choice "make[s] it less probable that Congress would want the Judiciary" to strike a different balance. *Abbasi*, 137 S. Ct. at 1858.

Moreover, for certain criminal defendants who are wrongly convicted and incarcerated, Congress enacted 28 U.S.C. 2513, a "remedial act" designed to compensate an "irreparable wrong" caused by "an error on the part of [the] government." *Osborn* v. *United States*, 322 F.2d 835, 839 (5th Cir. 1963) (citation omitted). A

person seeking compensation must present the Court of Federal Claims with a "certificate" of innocence issued by the court that heard the facts leading to the wrongful conviction. 28 U.S.C. 2513(b). The Court of Federal Claims may then award up to $50,000 per year of incarceration (or up to $100,000 per year in capital cases) to a person who satisfies the requirements of the statute. 28 U.S.C. 2513(e). Section 2513 thus reflects another legislative judgment about who should be compensated, and how, for injustices in federal prosecutions. See *Farah*, 926 F.3d at 501.

Finally, those who have been convicted and are incarcerated in violation of the Constitution may seek a writ of habeas corpus. Even before *Abbasi*, most courts of appeals to have considered the issue held that habeas is an alternative remedy that is significant in deciding whether to foreclose a *Bivens* remedy. See *Alvarez* v. *U.S. Immigration & Customs Enforcement*, 818 F.3d 1194, 1209 (11th Cir. 2016), cert. denied, 137 S. Ct. 2321 (2017); *Mirmehdi* v. *United States*, 689 F.3d 975 (9th Cir. 2012), cert. denied, 569 U.S. 972 (2013); *Lebron* v. *Rumsfeld*, 670 F.3d 540 (4th Cir.), cert. denied, 567 U.S. 906 (2012); *Wilson* v. *Rackmill*, 878 F.2d 772 (3d Cir. 1989); *Rauschenberg* v. *Williamson*, 785 F.2d 985 (11th Cir. 1986); but see *Engel* v. *Buchan*, 710 F.3d 698, 706 (7th Cir. 2013). And in *Abbasi*, this Court specifically cited habeas as an alternative remedy that could provide "a faster and more direct route to relief" than a *Bivens* action. 137 S. Ct. at 1863.

Petitioner broadly asserts (Pet. 13) that "no other remedy," aside from *Bivens*, is available to him. But while petitioner may not have been eligible for some of the remedies discussed above, including under the wrongful-conviction statute, he may have been able to

seek relief under others, such as the Hyde Amendment. In all events, the relevant point is that Congress has extensively legislated in this area and has deliberately decided to provide some remedies but not others. See *Abbasi*, 137 S. Ct. at 1858. "Congress's decision not to provide" the particular remedy that petitioner seeks "does not compel [the Court] to step into its shoes." *Hernández*, 140 S. Ct. at 750.

ii. Other special factors also counsel hesitation. For example, the court of appeals determined that "the nature of the underlying federal law enforcement activity" here—involving "a multi-jurisdictional investigation into transnational organized crime committed by a violent gang that has wreaked havoc along our border with Mexico"—may have national-security implications not present in *Bivens* itself. Pet. App. 15a. Petitioner responds (Pet. 14) that the specific allegedly unconstitutional conduct here does not implicate border security. But, as in *Hernández*, "that misses the point." 140 S. Ct. at 746. The appropriate question is whether, in this particular law-enforcement context, "the Judiciary should alter the framework established by the political branches." *Ibid.*

In addition, claims like petitioner's present "the risk of burdening and interfering with the executive branch's investigative and prosecutorial functions." *Farah*, 926 F.3d at 500. Although petitioner's allegations imply that the arresting officers lacked probable cause to conduct a warrantless arrest, petitioner does not challenge his arrest but rather his subsequent prosecution and detention pending trial. See Pet. App. 14a. As the court of appeals recognized, *ibid.*, the relationship between the constitutional harm and the alleged

misconduct in *Bivens* was far more direct: the defendants "manacled [the plaintiff] in front of his wife and children" and "searched the apartment from stem to stern." 403 U.S. at 389. Here, by contrast, petitioner alleges that the defendants made false statements in affidavits ". . . to suggest he knowingly participated in a drug transaction . . . to induce prosecutors to charge him . . . to cause [him] to be seized." Pet. App. 14a. "The connection between the officers' conduct and the injury thus involves intellectual leaps that a textbook forcible seizure never does." *Ibid.* That attenuation also risks a wide-ranging inquiry into the investigation and charging process to determine whether the allegedly false statements in fact affected the prosecutor's decision to charge or the grand jury's decision to indict, or whether probable cause existed for those decisions regardless. See *Farah*, 926 F.3d at 500-501. The potential for interference with those criminal-justice functions at a minimum should "cause[] a court to pause before acting without express congressional authorization." *Abbasi*, 137 S. Ct. at 1858.

3. Petitioner asserts that, after *Abbasi*, the courts of appeals "are intractably divided" over the question whether to extend a *Bivens* remedy to fabrication-of-evidence claims. Pet. 7 (emphasis omitted); see *id.* at 7-9. But any division is narrow and may be resolved in light of this Court's intervening guidance in *Hernández*. Further review in this Court is thus not presently warranted.

Petitioner first contends (Pet. 7-8) that in *Jacobs* v. *Alam*, 915 F.3d 1028 (2019), the Sixth Circuit authorized a *Bivens* suit that included a fabrication-of-evidence claim. In *Jacobs*, the court observed that, before *Abbasi*, circuit precedent had extended a *Bivens*

remedy to such a claim. See *id.* at 1038. And the court believed that *Abbasi* did not disturb that conclusion for "run-of-the-mill challenges to standard law enforcement operations" involving "individual line officers," but rather concerned only "overarching challenges to federal policy in claims brought against top executives." *Ibid.* (internal quotation marks omitted).

That narrow reading of *Abbasi* cannot survive this Court's recent decision in *Hernández*. As explained above, *Hernández* involved a claim against an individual Border Patrol officer for the use of force in a cross-border shooting. See 140 S. Ct. at 740. The Court found it "glaringly obvious" that the case arose in a new context, even though it involved an individual law-enforcement officer and, in part, a Fourth Amendment claim. *Id.* at 743. And in performing the special-factors analysis prescribed by *Abbasi*, the *Hernández* Court rejected the plaintiffs' attempts to narrow the question to the alleged misconduct of a single agent, see *id.* at 746, explaining that judicial regulation more generally of "the conduct of agents at the border unquestionably has national security implications," *id.* at 747. Because *Hernández* undermines the individual-versus-policy dichotomy that the Sixth Circuit articulated in *Jacobs*, the Sixth Circuit should have the opportunity to reconsider circuit precedent before this Court intervenes.

Petitioner also relies (Pet. 8) on the Ninth Circuit's decision in *Lanuza* v. *Love*, 899 F.3d 1019 (2018), but that decision is inapposite. In *Lanuza*, an alien was denied immigration relief for which he was eligible because a government attorney forged a form to indicate that the plaintiff had previously agreed to voluntary departure. *Id.* at 1021-1022. The attorney was later prosecuted and barred from practicing law for ten years. *Id.*

at 1023. The alien then brought a *Bivens* suit based on an alleged violation of his Fifth Amendment right to due process. *Ibid.* "[O]n these narrow and egregious facts," the Ninth Circuit concluded that a *Bivens* remedy was available. *Id.* at 1021.

For several reasons, the Ninth Circuit's decision in *Lanuza* does not conflict with the decision below. First, the Ninth Circuit made clear that its decision was limited to cases in which attorneys falsify evidence that results in the unavailability of immigration relief for which an alien is otherwise eligible. See *Lanuza*, 899 F.3d at 1021, 1033. Second, the *Bivens* claim in *Lanuza* involved the Fifth Amendment right to due process, unlike the Fourth Amendment right to be free from unreasonable seizures that petitioner asserts here. See *id.* at 1023, 1025-1026. Third, because *Lanuza* arose in the immigration context, the Ninth Circuit did not have the opportunity to consider the extensive statutory remedies that Congress has specifically enacted for criminal defendants asserting wrongdoing in their prosecutions. Cf. *id.* at 1027 (distinguishing circuit precedent in which would-be *Bivens* plaintiffs "were able to challenge their detention through two different remedial systems"); see *id.* at 1031-1032.

In any event, even if the Ninth Circuit's decision could be construed more broadly, that court—like the Sixth Circuit—should be permitted to reconsider its precedent in light of *Hernández*. See, *e.g.*, *Lanuza*, 899 F.3d at 1026 (asserting that *Abbasi* "cabined its holding to suits against executive officials issuing policy responses to sensitive issues of national security"); *id.* at 1029 (emphasizing that the defendant "was a low-level federal officer" and that the plaintiff "does not seek to hold anyone else, including high-level officials,

accountable"). Further review is therefore not presently warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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