No. 19-1033

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

REPLY BRIEF FOR PETITIONER

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The government acknowledges the "disagreement" (BIO 6) and "division" (BIO 16) among the courts of appeals on the question presented. And the government does not dispute that this case is an excellent vehicle to address the issue. The Court should thus grant the petition to resolve the undeniably important and recurring question whether an individual has a remedy under *Bivens* when a federal officer fabricates evidence used against him.

The government's argument, in the main, tellingly focuses on the underlying merits. See BIO 6-16. But, in light of the acknowledged "disagreement" among the circuits, that is an argument appropriately addressed following a grant of certiorari. Indeed, the government itself often contends that certiorari is "warranted" in order to resolve a "circuit conflict," even when the government believes the decision below was "correct[]." U.S. Cert. *Amicus* 8, *Lamar, Archer & Cofrin, LLP* v. *Appling*, No. 16-1215. See also Gov't Reply 2, *Albence* v. *Guzman Chavez*, No. 19-897 ("Even if the court of appeals' decision were correct, it would still warrant review, because two circuits have adopted the opposite position."). The same is true here.

The government's only other argument—that review is premature in light of *Hernandez* v. *Mesa* (*Hernandez II*) (BIO 6, 19)—is incorrect. *Hernandez II*'s narrow holding, limited to the "distinctive characteristics of cross-border shooting claims" (140 S. Ct. 735, 739, 743-750 (2020)), is irrelevant to the circuit conflict implicated here.

The Court should grant review.

1. Because *Hernandez II* has no bearing on the circuit conflict, certiorari is warranted.

a. The government does not dispute our showing that the decision below materially conflicts with the Sixth Circuit's decision in *Jacobs* v. *Alam*, 915 F.3d 1028, 1036 (6th Cir. 2019). We detailed how, following *Ziglar*, the Sixth Circuit recognized a *Bivens* remedy for the "fabrication of evidence" (*id*. at 1038), which is diametrically opposed to the decision below. See Pet. 7-8. The government does not argue otherwise.

Instead, the government's sole argument (at 16-17) is that *Jacobs* "cannot survive this Court's recent decision in *Hernandez [II]*." That contention is insubstantial. In fact, *Jacobs* already considered—and rejected—the relevance of *Hernandez* to its holding.

Ziglar reaffirmed *Bivens* and the two-part inquiry used to assess such claims. *Ziglar* v. *Abassi*, 137 S. Ct. 1843 (2017). The Court first asks whether "a case presents a new *Bivens* context" and then, if it does, asks whether "special factors counsel[] hesitation." *Id.* at 1857, 1859. *Jacobs*, decided after *Ziglar*, expressly applied this framework. 915 F.3d at 1035-1038.

In *Hernandez II*, the Court declined to extend a *Bivens* remedy "[b]ecause of the distinctive characteristics of cross-border shooting claims." 140 S. Ct. at 739. At prong one, the Court held that a cross-border shooting claim presents a new *Bivens* context because it was cross-border, rather than unconstitutional activity "carried out in New York City," as in *Bivens*, or on "Capitol Hill," as in *Davis* v. *Passman*. *Id.* at 743.

At prong two, the Court concluded that special factors warranted hesitation; the Court's analysis focused solely on the cross-border nature of the officer's conduct and resulting claim. First, a cross-border shooting touches on foreign relations because "[a] cross-border shooting is by definition an international incident * * * [that] may lead to a disagreement between those coun-

tries, as happened in this case." *Hernandez II*, 140 S. Ct. at 744. Important was the Court's concern about interfering with the Executive's judgment that "Agent Mesa's conduct * * * [was] reasonable conduct by an agent under the circumstances." *Ibid.* Second, a cross-border shooting implicates national security due to the "risk of undermining border security," presenting the same risk as "interfer[ing] with the system of military discipline." *Id.* at 746-747. And third, Congress and the courts generally hesitate to extend damages remedies to "injury inflicted outside our borders." *Id.* at 747.

None of these issues bear on the holding in *Jacobs*. In fact, *Jacobs* expressly distinguished *Hernandez*. The Sixth Circuit recognized *Hernandez I*'s remand for reconsideration of a "cross-border shooting, in which a border patrol agent shot and killed a Mexican teenager standing in Mexico." (915 F.3d at 1038 (discussing *Hernandez* v. *Mesa* (*Hernandez I*), 137 S. Ct. 2003 (2017) (per curiam)). The court then rejected the relevance of *Hernandez* to its decision, noting that it was "not the silver bullet[] defendants claim[ed]." 915 F.3d at 1038. *Jacobs*—in sharp contrast to *Hernandez*—addressed "run-of-the-mill challenges to 'standard law enforcement operations.'" *Ibid*.

In sum, *Jacobs* held that "garden-variety *Bivens* claims" are "viable post-*Ziglar* and *Hernandez [I]*." *Jacobs*, 915 F.3d at 1038-1039. Having already considered—and rejected—the relevance of the claim in *Hernandez*, the Court's *Hernandez II* decision has no bearing whatever on the clear circuit conflict.

Indeed, the government fails to identify any aspect of *Hernandez II* that casts even remote doubt on *Jacobs*. The government points (at 17) to the statement that, in *Hernandez II*, it was "'glaringly obvious' that the case arose in a new context." But this "new context" was tied directly to the nature of "cross-border shooting

claims, where 'the risk of disruptive intrusion by the Judiciary into the functioning of other branches' is significant." 140 S. Ct. at 744. *Jacobs* already distinguished the "garden-variety" claim of evidence fabrication from the claim in *Hernandez*.

The government's cryptic argument (at 17) regarding "the individual-versus-policy dichotomy" gains no more traction. To be sure, as the government contends (*ibid.*), the presence of "national security implications" may caution against *Bivens* claims. *Hernandez II*, 140 S. Ct. at 747. But, as to evidence fabrication, there is no similar policy consideration—indeed, the government surely does not point to one.

Nor could the government seriously contend that judicial inquiry might interfere with the Executive's judgment that evidence fabrication was "reasonable conduct by an agent." *Ibid.* It is "inconsistent with rudimentary demands of justices" for government to "contrive[] a conviction * * * 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).

b. The Ninth Circuit's decision in *Lanuza* v. *Love*, 899 F.3d 1019 (9th Cir. 2018), further supports the need for review.

Although *Lanuza* arose in an immigration case (BIO 18), the court's reasoning applies to fabrication-of-evidence claims arising in the criminal context. Indeed, *Lanuza* found that there was "no reason to distinguish the due process rights of a criminal defendant in a criminal proceeding from the due process rights of an immigrant in a deportation proceeding when a government attorney falsifies evidence." 899 F.3d at 1026.

Nor does *Hernandez II* call *Lanuza* into question. *Lanuza* itself distinguished the *Hernandez* claim by

analyzing the Fifth Circuit's decision that this Court ultimately affirmed. *Lanuza*, 899 F.3d at 1030 (discussing *Hernandez* v. *Mesa*, 885 F.3d 811, 820 (5th Cir. 2018)). Unlike in *Hernandez*, there was "no evidence that any executive official has taken an interest in Lanuza's case, or that his situation has been the subject of diplomatic discussions between the United States and other sovereign nations." *Ibid.* And *Lanuza* expressly distinguished its own circuit precedent involving a cross-border shooting. See *Lanuza*, 899 F.3d at 1028 n.5 (finding "distinguishable" a case "extending a *Bivens* remedy to the mother of a child who was shot and killed on Mexican soil by an American agent standing on U.S. soil"). *Lanuza* was undoubtedly aware of cross-border shooting claims and found them inapposite. *Hernandez II* thus does not obviate this conflict.

In sum, whether a party injured by the government's fabrication of evidence has a damages remedy under *Bivens* is a discrete and exceedingly important legal question on which the courts of appeals have divided. *Hernandez II* has no bearing on this "disagreement" (BIO 6) among the circuits. Further review is warranted.

2. The government's leading argument (at 6-16) is that the decision below correctly decided the merits in view of *Ziglar* and *Hernandez II*. But, as we have said, this is no reason to deny review; whatever the answer, the Court should resolve the circuit conflict. In all events, petitioner is very likely to prevail on the merits.

a. The government is wrong to contend (at 9-10) that, under the first prong of the *Bivens* inquiry, this case presents a new context.

To begin with, the government disregards the factors *Ziglar* enumerated to inform this analysis. 137 S.

Ct. at 1859-1860. As we showed, each consideration weighs in favor of concluding that this is not a new *Bivens* context. Pet. 11. And that is precisely the result reached by the Sixth Circuit in *Jacobs*, which held that "the search-and-seizure context" of *Bivens* encompasses a "fabrication of evidence" claim. 915 F.3d at 1038-1039.

The government instead simply declares that *Bivens*'s "warrantless search and seizure" context is wholly different than evidence fabrication. BIO 10. Not so. Evidence fabrication violates the Fourth Amendment *because* it is a categorically unreasonable form of a search and seizure. As the Sixth Circuit recently confirmed, "[a] reasonable police officer would know that fabricating probable cause, thereby effectuating a seizure, would violate a suspect's clearly established Fourth Amendment right to be free from unreasonable seizures." *Rieves* v. *Town of Smyrna*, __ F.3d __, 2020 WL 2503260, at *12 (6th Cir. May 15, 2020) (quoting *Spurlock* v. *Satterfield*, 167 F.3d 995, 1006 (6th Cir. 1999)). This is thus the same context as *Bivens*—an unreasonable search and seizure in violation of the Fourth Amendment.

What is more, there is no doubt that "judicial guidance" exists as to how an officer should respond to the problem or emergency to be confronted." *Ziglar*, 137 S. Ct. at 1859-1860. The rule for law enforcement officers is as clear as it is ironclad: Officers may not fabricate evidence for use against criminal suspects. We explained this earlier (Pet. 11), and the government fails to respond.

b. Because this is not a new *Bivens* context, the Court need not consider whether "special factors" are present that hesitate against recognizing a remedy. In any event, the government is wrong to contend (at 10-

16) that there are policy reasons counseling against petitioner's claim.

i. Though acknowledging that petitioner "may not" have another remedy available to him (he does not), the government cobbles together inapplicable statutes and procedures and asserts that, taken in combination, these show that Congress has intentionally not authorized the damages remedy sought here. BIO 11-15. This contention is not persuasive. The *Bivens* damages remedy petitioner seeks is the only one available; Congress has never expressed an intent to foreclose it.

Regarding the Federal Tort Claims Act (FTCA), the government concedes that it does not provide a damages remedy for constitutional torts. BIO 12. Indeed, Congress rendered the FTCA exclusive of any other remedy against the United States or a federal employee with a critical exception—a civil action "which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b). This carve-out contradicts the government's assertion that the FTCA manifests an intent to preclude a *Bivens* remedy. This Court has said as much: it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson* v. *Green*, 446 U.S. 14, 20 (1980).

The only other damages remedy the government identifies—28 U.S.C. § 2513, which authorizes an award against the United States for an unjust conviction and imprisonment—is obviously inapplicable. The damage to petitioner was not an unjust conviction (because the jury acquitted him), but rather the harm from being detained and held in jail on the basis of fabricated evidence before any conviction.

The government's citation to the 1997 Hyde Amendment, 18 U.S.C. § 3006A note, fares no better. It

allows an award of attorney's fees and expenses to a winning defendant against the United States in a criminal case when the government's position was "vexatious, frivolous, or in bad faith." *Ibid.* While an award of attorney's fees to petitioner in his criminal case would be appropriate, it still does not remedy the damage he seeks in this action from being wrongfully detained and held in jail for more than two years based on government-fabricated evidence. That damage is different in kind from attorney's fees incurred defending the criminal case.

The government's final two proposed remedies—the criminal justice process and habeas corpus—offer even less. To say that the criminal-justice or habeas-corpus process is a "remedy" for a government official's purposeful subversion of that process by fabricating evidence is beyond the pale. *Cf. Lanuza* v. *Love*, 899 F.3d 1019, 1032 ("The [system] provides no remedial scheme for forgery if undiscovered. * * * The system does not account for actions designed to circumvent it."). Nor does securing the prospective relief of getting out of jail remedy the damage done by having been placed there based on a fraud. As in *Bivens*, for petitioner, "it is damages or nothing." *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

ii. The government's other supposed factors have no more force. The government tepidly suggests that this case "*may* have national-security implications." BIO 15 (emphasis added). But, like below, the government fails to substantiate what those national-security implications are. See Pet. App. 19a & n.1 (Graves, J., dissenting) ("[T]he Government has not argued that this case implicates any national security interests.").

Nor does the government demonstrate how this case could possibly "alter the framework established by

the political branches." BIO 15 (quoting *Hernandez II*, 140 S. Ct. at 746). The government surely does not mean to suggest that the "political branches" have somehow condoned evidence fabrication in the course of law enforcement. In the end, there is no substance behind the government's vague invocation of national security interests and political branch discretion.

Finally, it is hard to take seriously the government's contention that a claim asserting that officers fabricated evidence presents a "risk of burdening and interfering with the executive branch's investigative and prosecutorial functions." BIO 15-16. It is beyond reasonable debate that law enforcement officers may not fabricate evidence during the course of an investigation. The government provides no explanation as to how vindication of this most basic right could meaningfully burden any aspect of the executive branch's legitimate investigative and prosecutorial activities.

If, contrary to fact, a prohibition on the use of fabricated evidence did materially alter government policies regarding investigative and prosecutorial activities, that would be decisive evidence in *favor* of a *Bivens* remedy.

No special factors counsel hesitation here.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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May 2020