No. 19-____

IN THE

Supreme Court of the United States

MYNOR ABDIEL TUN-COS, *ET AL.*,
Petitioners,

v.

B. PERROTTE, *ET AL.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether victims of an unconstitutional search and seizure, who were subjected to a home raid and detention without a warrant or suspicion, by law enforcement agents of Immigration and Customs Enforcement acting in contravention of both agency policy and clearly established constitutional rights, may bring a civil action against those rogue agents under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

PARTIES TO THE PROCEEDING

Petitioners were plaintiffs in the district court and appellees in the court of appeals: Mynor Abdiel Tun-Cos, Luis Velasquez Perdomo, Eder Aguilar Aritas, Eduardo Montano Fernández, Pedro Velasquez Perdomo, José Cárcamo, Nelson Callejas Pena, and Germán Velasquez Perdomo.[1]

Respondents B. Perrotte, T. Osborne, D. Hun Yim, P. Manneh, and A. Nicholas were defendants in the district court and appellants in the court of appeals.

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[1] Another plaintiff below, José Pajarito Saput, passed away while the case was pending in the court of appeals.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES iv
INTRODUCTION 1
OPINIONS BELOW 3
JURISDICTION 3
CONSTITUTIONAL PROVISION INVOLVED 3
STATEMENT OF THE CASE 4
REASONS FOR GRANTING THE PETITION 7
CONCLUSION 11
Appendix A: Court of Appeals Opinion 1a
Appendix B: District Court Opinion 27a
Appendix C: Court of Appeals Order Denying Rehearing En Banc 54a

TABLE OF AUTHORITIES

Page(s)

Cases

Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Hernandez v. Mesa, 885 F.3d 811 (5th Cir. 2018) 9

Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) 1

Statute

28 U.S.C. § 1254(1) 3

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

Petitioners, including a U.S. citizen, were subjected to an unconstitutional search and seizure by rogue law enforcement agents in their homes in suburban Virginia. This Court has long recognized that when "a federal agent acting under color of his authority" conducts an unconstitutional search or seizure, the victims have "a cause of action for damages." *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971). As recently as three Terms ago, this Court reaffirmed "the continued force . . . of *Bivens* in the search-and-seizure context in which it arose," recognizing that it "vindicate[s] the Constitution by allowing some redress for injuries" and "provides instruction and guidance to federal law enforcement officers." *Ziglar v. Abbasi,* 137 S.Ct. 1843, 1856–57 (2017).

The Fourth Circuit nonetheless rejected a *Bivens* remedy in this case because the unconstitutional search and seizure was carried out by Immigration and Customs Enforcement ("ICE") agents whose responsibilities include enforcing immigration laws. In sweeping terms, the court of appeals foreclosed the availability of a *Bivens* remedy for cases arising in the context of "immigration enforcement." App. 21a–23a.

That decision was incorrect, and the court of appeals' error will likely be confirmed when this Court

decides *Hernandez v. Mesa*, No. 17-1678. In *Hernandez*, the Court will decide whether a *Bivens* claim is available where petitioners have alleged that an officer working for U.S. Customs and Border Protection ("CBP") violated clearly established constitutional rights of a 15-year-old Mexican child in Mexico, while the CBP officer stood on U.S. soil. If the Court holds that a *Bivens* remedy is available in that context, then *a fortiori* a *Bivens* remedy would be available on the facts here: an unconstitutional search and seizure committed by immigration agents on U.S. soil, with the victims well within the United States.

Even if the Court holds that a *Bivens* remedy is not available in *Hernandez*, there is a strong likelihood that the Court's reasoning will undermine the decision by the court of appeals here. That is particularly so in light of questions and comments by Members of the Court at oral argument in *Hernandez*, which suggested that a *Bivens* claim would be uncontroversial had the constitutional injury caused by the immigration agent occurred entirely on U.S. soil. A decision along these lines would confirm the court of appeals' error here, where it held that the mere involvement of a law enforcement agent with "immigration enforcement" responsibilities renders a *Bivens* claim unavailable.

The petition should be held pending resolution of *Hernandez*. However *Hernandez* is decided, it will

likely be appropriate for the Court to grant the petition, vacate the Fourth Circuit's decision, and remand for further proceedings consistent with *Hernandez*.

OPINIONS BELOW

The opinion of the district court (App. 28a–54a) is not published in the Federal Supplement but is available at 2018 WL 3616863 (E.D. Va. Apr. 5, 2018). The Fourth's Circuit's opinion (App. 1a–27a) is reported at 922 F.3d 514 (4th Cir. 2019). The Fourth Circuit's order denying rehearing en banc (App. 55a) is unreported.

JURISDICTION

The Fourth Circuit issued its decision on April 26, 2019. A timely petition for rehearing en banc was denied on August 22, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides: "The 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."

STATEMENT OF THE CASE

Petitioners sue individual, line-level ICE agents who personally participated in two home raids and seizures without a warrant or reasonable suspicion, in violation of ICE policy and in a manner that violated Petitioners' clearly established constitutional rights.

1. On February 8, 2017, in the early morning hours, Petitioner Germán Velasquez Perdomo left his house in Arlington, Virginia on his way to work when he was stopped in his driveway, without reasonable suspicion, by ICE agents who identified themselves as "police" and shined flashlights in his face. C.A.4 J.A. 30 (C.A.4 Dkt. # 21). The agents flashed a photograph of a purported suspect and asked Mr. Velasquez if he knew the man. C.A.4 J.A. 30. When he responded, truthfully, that he did not, the agents insisted he empty his pockets, frisked him, and demanded to be let into the house. C.A.4 J.A. 30–31.

Once inside, Respondents went from room to room. They detained all seven male residents, including Petitioner José Cárcamo, the U.S. citizen homeowner. C.A.4 J.A. 32–36. In the process, Respondents forced their way into bedrooms, including those of Mr. Cárcamo's sleeping 12-year-old daughter, who is a U.S. citizen, and 80-year-old mother-in-law, who is a lawful permanent resident of the United States. C.A.4 J.A. 33–34.[2]

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[2] Mr. Cárcamo's relatives, along with Petitioners, filed a related *Bivens* action, based on the same events. *See Tun-Cos v. Perrotte*,

Petitioners are all of apparent Latino race or ethnicity. C.A.4 J.A. 28–29. None of them looks like the individual in the photograph shown by the agents. C.A.4 J.A. 43–44. Respondents had no reasonable suspicion that any of the Petitioners had violated any U.S. law. C.A.4 J.A. 28–38. Indeed, Respondents had no information at all about any of the individuals they detained, except their apparent Latino race or ethnicity. In the course of detaining the men, one of the agents asked Mr. Cárcamo if there were any other "Spanish families" in the neighborhood. C.A.4 J.A. 37.

Early in the morning of February 17, 2017, in a separate but similar raid, Respondents stopped Petitioners Mynor Abdiel Tun-Cos and José Pajarito Saput — both men of apparent Latino race or ethnicity — without reasonable suspicion as they were pulling out of their apartment's parking space in Annandale, Virginia, to drive to work. C.A.4 J.A. 38–41. Respondents blocked their car with multiple unmarked SUVs. *Id.* Despite having no reasonable, articulable suspicion that either individual had violated any U.S. law, Respondents, with guns visible on their waistbands, surrounded the car, banged on the windows, and demanded the men produce identification. C.A.4 J.A. 39–40. After ordering the men out of the car, two agents ordered Mr. Saput to let them into his apartment despite not having a warrant. C.A.4 J.A. 40.

Once in the apartment, an agent showed Mr. Tun-Cos photos of two young men and asked if he knew

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No. 19-cv-147 (AJT/TCB) (E.D. Va. Feb. 7, 2019). If the Fourth Circuit's decision in this case is not disturbed, then their case will be dismissed.

them. Neither Mr. Tun-Cos nor Mr. Saput nor the other individuals who were in the car resemble either of the young men in the photos, and Respondents knew nothing about Mr. Tun-Cos or Mr. Saput other than that they were men of apparent Latino race or ethnicity. C.A.4 J.A. 41. Respondents arrested and frisked both men. *Id.*

Petitioners have alleged that Respondents' conduct, in addition to violating clearly established constitutional rights, was inconsistent with ICE agency policy. C.A.4 J.A. 44.

2. On August 23, 2017, Mr. Tun-Cos and Mr. Saput filed a Complaint in the District Court for the Eastern District of Virginia. *See* C.A.4 J.A. 12–48. On November 16, 2017, Petitioners filed an Amended Complaint, adding as plaintiffs seven victims of the Arlington search-and-seizure. *See* C.A.4 J.A. 26–48. The Amended Complaint alleged that Respondents, acting contrary to ICE's instructions, violated Petitioners' clearly established constitutional rights by stopping and detaining them, and invading their homes, without a reasonable, articulable suspicion that Petitioners had violated any laws. *See*, *e.g.*, C.A.4 J.A. 42–44.

Respondents moved to dismiss Petitioners' Amended Complaint. On April 5, 2018, the district court denied Respondents' motion to dismiss, holding that Petitioners could bring *Bivens* claims against the law enforcement officers that had subjected them to an unconstitutional search and seizure. *See* App. 53a–54a. In rejecting Respondents' qualified immunity argument, the district court also held that Petitioners allege "clearly established violations of the

Fourth Amendment," a holding that Respondents did not challenge on appeal.

3. On April 26, 2019, a panel of the Fourth Circuit reversed the district court. App. 27a. It held that Petitioners' claims extend *Bivens* into a new context because "[t]he ICE agents were not enforcing the criminal law, as in *Bivens*, but rather were enforcing the immigration law of the" Immigration and Nationality Act ("INA"); "enforcement of the immigration laws implicates broad policy concerns"; and ICE agents are a "new category" of *Bivens* defendant. App. 19a. The panel further held that special factors counseled hesitation because the case concerns "immigration enforcement." App. 55a. On August 22, 2019, the Fourth Circuit denied the Petitioners' petition for rehearing en banc. App. 55a.

REASONS FOR GRANTING THE PETITION

The Court Should Hold This Petition Pending Disposition of *Hernandez v. Mesa* and Then Grant the Petition, Vacate the Decision Below, and Remand for Further Proceedings Consistent with *Hernandez*

Hernandez bears directly on this case. Petitioners in *Hernandez* brought suit under *Bivens* alleging that the defendant law enforcement officer, while acting within the scope of his employment as a CBP agent, shot and killed their unarmed, 15-year-old son. Pet., *Hernandez v. Mesa*, 17-1768, at 1. The question presented before the Court in *Hernandez* is: "Whether, when plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there

is no alternative legal remedy, the federal court can and should recognize a cause of action for damages under *Bivens*." *Id.* at i. However the Court decides that question, its decision in *Hernandez* will likely affect the proper outcome in this case.

If the Court answers the *Hernandez* question in the affirmative, the Fourth Circuit's decision in this case will almost certainly no longer stand. Petitioners here have alleged that rogue law enforcement officers working for ICE violated Petitioners' clearly established constitutional rights while carrying out raids in violation of ICE's own policies. C.A.4 J.A. 44. Petitioners lack an alternative, existing process through which to vindicate their constitutional rights. Below, the Fourth Circuit held that merely because the allegations concerned the acts of law enforcement officers who were enforcing immigration law the case presented a new *Bivens* context and established the existence of special factors counseling hesitation. If the Court holds in *Hernandez* that a CBP officer may be subject to suit under *Bivens* for unconstitutional acts committed in the course of carrying out immigration enforcement responsibilities, with the unconstitutional conduct injuring a victim in Mexico, the Fourth Circuit's decision precluding any *Bivens* action against officers with immigration enforcement responsibilities, with the unconstitutional conduct injuring a victim in Virginia, would necessarily be incorrect.

Even if the Court finds that no *Bivens* claim is available on the facts of *Hernandez*, the decision in that case is still likely to undermine the Fourth Circuit's reasoning and holding in this case. *Hernandez* concerns a law enforcement officer who is alleged to

have violated the clearly established constitutional rights of a 15-year-old child standing on Mexican soil. When the Fifth Circuit considered *Hernandez* en banc, the majority rejected a *Bivens* action because of "the transnational aspect." *Hernandez v. Mesa*, 885 F.3d 811, 814 (5th Cir. 2018). Yet it emphasized that "denying a remedy here does not . . . repudiate *Bivens* claims where constitutional violations by the Border Patrol are wholly domestic." *Id.* at 819 n.14. The dissenters agreed that the application of *Bivens* to immigration agents in the domestic setting is uncontroversial: "[A]s the majority recognizes, Border Patrol agents are unquestionably subject to *Bivens* suits when they commit constitutional violations on U.S. soil." *Id.* at 828 (Prado, J., dissenting).

The oral argument before this Court in *Hernandez* provides reason to anticipate that a decision finding no *Bivens* claim is available would likewise draw a distinction between actions of immigration officers with a "transnational aspect" and those that are "wholly domestic." Several Justices suggested in their questioning and comments that a *Bivens* remedy would likely have been available but for the 15-year-old Mexican child's physical presence in Mexico, since the CBP officer was on U.S. soil. *See*, *e.g.*, *Hernandez*, Tr. of Oral Arg. 42 (question of Justice Sotomayor asking what "instability" would be created by the availability of a *Bivens* action "when you already admit that *Bivens* . . . would apply if the child was standing two feet from the border"); *id.*, at 43 (question of Justice Breyer asking, "what's the special problem of giving damages remedy to a Mexican youth just as you would give it to an American youth, whether the American youth is over on one side of the border or other?"); *id.*

at 48 (response of Justice Kavanaugh to question about "line drawing" in the border context, stating, "Well, Justice Sotomayor gave you the line. You have a defendant on U.S. soil who's a U.S. official."); *id.* at 50 (question of Justice Kagan inquiring "why, when we just moved three inches over [the border] there's a different answer" about the availability of *Bivens*); *see also id.* at 35 (question of Justice Ginsburg asking why the Court should consider foreign policy questions in the application of *Bivens* when the case is about "a rogue officer acting in violation of the agency's own instructions" to violate a clearly established constitutional right).

Thus, even if the Court in *Hernandez* agrees with the Fifth Circuit that no *Bivens* claim is available because of the "transnational aspect," it may recognize that a *Bivens* remedy can be available against law enforcement officers with immigration responsibilities in appropriate circumstances, such as if the immigration officer violates clearly established constitutional rights of an individual who is on U.S. soil. Such a decision would undermine the Fourth Circuit's holding that a law enforcement officer working for an agency that enforces immigration laws is not a proper subject for a *Bivens* action. And it would undermine the court of appeals' rejection of a cause of action in a case presenting the paradigmatic *Bivens* claim—for an unconstitutional search and seizure resulting from a warrantless seizure and home raid—where the rogue law enforcement officers happens to work for ICE or CBP instead of the FBI or DEA.

CONCLUSION

The petition should be held pending resolution of *Hernandez* and then granted, vacating the Fourth Circuit's decision and remanding for further proceedings consistent with *Hernandez*.

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