No. 19-661

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This Court's recent decision in *Hernandez v. Mesa*, No. 17-1678, casts serious doubt on the judgment of the United States Court of Appeals for the Fourth Circuit in this case. In *Hernandez*, the Court recognized that a cause of action is available for an "unconstitutional arrest and search carried out in New York City," as opposed to an alleged "cross-border" constitutional violation. *Hernandez v. Mesa*, 140 S. Ct. 735, 744 (2020); *see also Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The Court further emphasized the sensitivities of applying *Bivens* to immigration agents "stationed right at the border," as opposed to those who "work miles from the border." *Id.* at 746. And nowhere did the Court endorse the court of appeals' extraordinary view that a run-of-the-mill Fourth Amendment violation is not covered by *Bivens* simply because the officer committing the violation happens to conduct "immigration enforcement." Pet. App. 18a. Indeed, if the Fourth Circuit's *Bivens* analysis were correct, then virtually all of the reasoning in this Court's *Hernandez* decision was unnecessary.

In light of the substantial differences between the court of appeals' analysis and the proper *Bivens* analysis under *Hernandez*, Petitioners respectfully submit that this Court grant the petition, vacate the Fourth Circuit's decision, and remand the case (GVR) for further proceedings consistent with *Hernandez*.

The Supreme Court "may . . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and

. . . require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. Section 2106 "appears on its face to confer upon this Court a broad power to GVR." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 165 (1996) (per curiam).

The Court has made clear that a GVR is appropriate where "intervening developments, or recent developments" provide the Court with "reason to believe the court below did not fully consider such development, and they reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Id.* at 166. Such intervening developments frequently include this Court's own decisions. *Id.*; *id.* at 180 (Scalia, J., dissenting); *see also*, *e.g.*, *Klein v. Or. Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019) (No. 18-547), 2019 WL 2493912 (issuing GVR order in light of an intervening decision); *Stern v. United States*, 138 S. Ct. 2619 (2018) (No. 17-6904), 2018 WL 2767655 (same); *Doyle v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2324, 2325 (2017) (No. 15-556), 2017 WL 2742811 (same).

Hernandez constitutes such an intervening development. The Court's decision in *Hernandez* illustrates that the Fourth Circuit's opinion in this case rests on an inaccurate and incomplete consideration of the Court's current approach to the availability of a cause of action under *Bivens*.

1. *Hernandez* undermines the Fourth Circuit's holding that Petitioners' claims arise in a new context

and clarifies that the court of appeals did not conduct the appropriate analysis.

In *Hernandez*, the Court explained that "*Bivens* concerned an allegedly unconstitutional arrest and search carried out in New York City," but held that in *Hernandez* the petitioners' claims arose in a new context because "[t]here is a world of difference between those claims and petitioners' 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.

Notably, the Court did *not* describe the relevant context in *Bivens* as an allegedly unconstitutional arrest and search carried out in New York City *by agents of the Federal Bureau of Narcotics*. In the present case, the Fourth Circuit found a new context by drawing a distinction between a search-and-seizure by officers with immigration responsibility, and a search-and-seizure by so-called "traditional law enforcement officers." Pet. App. 17a. The exact same distinction could have been drawn—but was not drawn—in *Hernandez*: the defendants there were officers of Customs and Border Protection.

Thus, in defining the relevant context, the Court did not focus on the particular law enforcement responsibilities of the defendant, but instead on whether the alleged conduct was transnational or purely domestic. Thus, the Court distinguished the law enforcement conduct in *Bivens*, which occurred "in New York City," with a "cross-border shooting." *Hernandez*, 140 S. Ct. at 744. The present case, like

Bivens, involves purely domestic law enforcement activity: searches and seizures in Northern Virginia. Had the Fourth Circuit properly focused on the context analysis this Court subsequently conducted in *Hernandez*, instead of drawing distinctions among different types of law enforcement officers, its decision likely would have been different.

2. Even if this case did present a new context, the Court's special factors analysis in *Hernandez* undermines the Fourth Circuit's conclusion that a law enforcement officer working for an agency that enforces immigration laws is not a proper subject of a *Bivens* action, particularly as it relates to the Fourth Circuit's determination that the Petitioners' claims here affect "foreign policy."

In conducting the special factors analysis, the Court in *Hernandez* focused entirely on the international, trans-border nature of the dispute. Every section of the Court's analysis relied on this fact. *See id.* at 744–50.

For example, in holding that the petitioners' claims had a potential effect on foreign relations, the Court focused on the fact that "[a] cross-border shooting is by definition an international incident; it involves an event that occurs simultaneously in two countries and affects both countries' interests." *Id.* at 744. The Court went on to highlight an explicit disagreement between the governments of the United States and Mexico in how the Court should decide the case.

Most significantly, in holding that the petitioners' claims implicated national security, the *Hernandez*

Court distinguished a Border Patrol agent "work[ing] miles from the border" with one "stationed right at the border [with] the responsibility of attempting to prevent illegal entry." *Id.* at 746. The Court did not make a broad-brush conclusion that the actions of *every* immigration officer, wherever stationed, implicates national security and thus should not be subject to *Bivens* claims. Rather, the Court concluded that "the conduct of *agents positioned at the border* has a clear and strong connection to national security." *Id.* (emphasis added).

In the instant case, the Fourth Circuit disregarded the distinction this Court has now drawn in *Hernandez*, and painted with the broad brush that this Court in *Hernandez* eschewed. The court of appeals here held in the broadest possible terms that immigration enforcement, writ large, implicates foreign policy and national security concerns, even if conducted in the interior of the United States. Pet. 21a–22a. That is the case even where, as here, there are allegations that immigration officers operating in the interior of the United States violated the agency's own policies in the way they carried out searches and seizures in the home of a U.S. citizen. C.A.4 J.A. 44. The Fourth Circuit should have the opportunity to reconsider that extraordinary result in light of the distinction this Court has now drawn between "agents positioned at the border" and those who "work miles from the border."

Finally, the Court in *Hernandez* cited the fact that "Congress has repeatedly declined to authorize the award of damages for injury inflicted outside our borders" as a factor counseling hesitation in allowing the

petitioners' *Bivens* claims to go forward. *Hernandez*, 140 S. Ct. at 747. Again, this Court's analysis was far more specific and precise than the generalities on which the Fourth Circuit relied. According to the Fourth Circuit, the Immigration and Nationality Act *as a whole* provides an alternative "remedial structure" for immigration-related cases. Pet. App. 23a. The same point could have been made by this Court in *Hernandez*, but once again, it was not.

The Fourth Circuit's special factors analysis did not comport with the Court's reasoning and analysis in *Hernandez*. Everything the Fourth Circuit said in this case could have been a reason for denying a *Bivens* remedy in *Hernandez*. But this Court instead treated the trans-border nature of the claims—and the fact that the defendant was stationed right at the border and not deep in the interior of the United States—to be of paramount importance in concluding that no *Bivens* claim was appropriate. The Court should remand this case so that the court of appeals can apply the correct *Bivens* analysis with the guidance of this Court's decision in *Hernandez*.

CONCLUSION

This petition should be granted, vacating the Fourth Circuit's decision and remanding for further proceedings consistent with *Hernandez*.

Respectfully submitted,

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