No. 20-1060

IN THE

Supreme Court of the United States

JOSE OLIVA,

Petitioner,

v.

MARIO NIVAR, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

JAMES K. JOPLING
Counsel of Record
COMBINED LAW ENFORCEMENT ASSOCIATIONS OF TEXAS
747 East San Antonio Avenue, Suite 103
El Paso, Texas 79901
(915) 533-5754
jim.jopling@cleat.org

Counsel for Respondent Mario J. Nivar

303858

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether proper application of the *Abbasi* standard to a *Bivens* case summarily forecloses all Fourth Amendment search-and-seizure *Bivens* claims.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Cited Authorities

STATUTES AND OTHER AUTHORITIES:

Respondent, Mario J. Nivar, files this Brief in Opposition to the Petition of José Oliva for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

STATEMENT

A case presents a new *Bivens* context if it is different in a meaningful way from any of the trilogy of *Bivens* cases the Supreme Court has previously decided. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 1859 (2017); *see also id.* at 1854 – 1855 (summarizing three Supreme Court *Bivens* cases). The Fifth Circuit has ruled in a manner consistent with this jurisprudence by finding meaningful differences from the factual scenario of *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *See* Petition for Writ of Certiorari Appendix at 1a – 10a. By engaging in a particularized analysis of these meaningful differences, the Fifth Circuit carried forth this Court's directive in *Abbasi*. *See id.* at 6a – 7a.

"Federal tort causes of action are ordinarily created by Congress, not by the courts." *Meshal v. Higgenbotham*, 804 F.3d 417, 420 (D.C. Cir. 2015), cert. denied, 137 S.Ct. 2325 (2017). In constitutional cases, the Supreme Court has been reluctant to create new causes of action. *See Hernandez v. Mesa*, 140 S.Ct. 735, 742 (2020). Even though *Bivens* is "well-settled law in its own context," expanding *Bivens* is a "disfavored judicial activity." *See Abbasi,* 137 S.Ct. at 1857. This antipathy toward the expansion of *Bivens* is rooted in the Supreme Court's deference to the separation of powers principle. *See id.* at 1856 – 1857. That principle is central to any analysis of an implied constitutional cause of action, and raises the question of

"who should decide whether to provide a damages remedy, Congress or the courts?" *See id.* at 1857. "The answer most often will be Congress." *Id.* That is because "[w]hen an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them." *Id.* (internal quotations omitted). Thus, "[i]n most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if 'the public interest would be served by imposing a new substantive legal liability.'" *Id*. (citing *Schweiker v. Chilicky*, 487 U.S. 412, 426 – 427 (1988)).

The Petitioner, José Oliva, is a Vietnam War veteran who has passed through the security checkpoint at the VA hospital in El Paso, Texas "many times before" the incident made subject of this case. Petition for Writ of Certiorari at 3. The Respondents have alleged that, on this occasion, he failed to produce his identification. *Id.* at 4. As a result, he was apprehended by the three Respondents, who were the federal police officers working for the Veterans Administration and manning the security checkpoint at the time. *Id*. at 3. Petitioner alleges that Respondents applied excessive force when they arrested him, causing him injury. *Id.* at 4.

Respondents asserted qualified immunity in the courts below. Respondent, Mario Nivar, filed a motion to dismiss pursuant to Rule 12(b)(6), which the District Court denied. *See* Petition for Writ of Certiorari Appendix at 25a – 44a. All Respondents filed a Motion for Summary Judgment, based upon the defense of qualified immunity, which the District Court also denied. *See id.* at 11a – 24a.

The Respondents appealed to the Fifth Circuit, which noted that "'the *Bivens* question' is antecedent to questions of qualified immunity," *See id.* at 4a (citing *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017)). The Court did not further address the issue of qualified immunity, except to the extent that the issue was subsumed in the Court's *Abbasi* analysis of the *Bivens* claim.

The Fifth Circuit engaged in a detailed analysis of the meaningful differences between the factual allegations of the instant case and the *Bivens* case. *See id.* at 6a – 7a. It found, among other things, that the instant case created a new context because it invoked different legal mandates than *Bivens*. *See id.* at 7a. The Court then evaluated "whether to engage in the 'disfavored judicial activity' of recognizing a new Bivens action" under *Abbasi's* special factors analysis. *See id.* at 7a – 10a (quoting *Abbasi*, 137 S.Ct. at 1857). The Court found that the Petitioner's invocation of the alternative remedy under the Federal Tort Claims act created a special factor counselling hesitation. *See id.* at 8a – 10a. The Court then reversed and remanded with instructions to the District Court to dismiss the claims against the individual officers. *Id.*

The Petitioner seeks a Writ of Certiorari only upon the contention that the Fifth Circuit foreclosed any and all *Bivens* claims for Fourth Amendment violations committed by federal police during standard law enforcement operations. *See id.* at i. Petitioner does not contest the Fifth Circuit's conclusion under the special factors analysis.

Respondent continues to assert qualified immunity, as stated in his Motion to Dismiss and the Motion for Summary Judgment below.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition for a Writ of Certiorari. Doing so would uphold the Fifth Circuit's proper application of the *Bivens* framework, as explicated in *Abbasi*.

Abbasi lays out a two-part test for determining whether a *Bivens* claim should be recognized. Under the first prong, "a court must ask . . . whether the claim arises in a new *Bivens* context." *See Abbasi*, 137 S.Ct. at 1859 and 1864. "The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court, then the context is new." *Abbasi*, 137 S.Ct. at 1859. If the case presents a new context under this "meaningful differences" analysis, a court must then determine if the case presents any "special factors counselling hesitation in the absence of affirmative action by Congress." *Id*. at 1857.

In its opinion below, the Fifth Circuit simply engaged in a particularized "meaningful differences" analysis under *Abbasi*. *See* Petition for Writ of Certiorari Appendix at 6a – 7a. This analysis did not create the circuit split that the Petitioner urges.

I. The Fifth Circuit's characterization of the instant case as an extension of *Bivens* does not create a circuit split.

A. The Fifth Circuit's decision correctly applies *Abbasi's* "meaningful differences" analysis.

The Supreme Court has not created an exhaustive list of meaningful differences, but has provided examples. Those examples include: (a) the rank of the officers involved; (b) the constitutional right at issue; (c) the generality or specificity of the official action; (d) the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; (e) the statutory or other legal mandate under which the officer was operating; (f) the risk of disruptive intrusion by the Judiciary into the functioning of other branches; and (g) the presence of potential special factors that previous *Bivens* cases did not consider. *See Abbasi*, 137 S.Ct. at 1859 – 1860.

In the instant case, the Fifth Circuit considered: (a) the fact that the Respondents were protecting a government facility; (b) the difference in tactics applied to the Petitioner from those applied to Webster Bivens; (c) the fact that the Petitioner was not manacled in front of his family, as was Webster Bivens; and (d) the fact that the Petitioner was not strip-searched, as was Webster Bivens. *See* Petition for Writ of Certiorari Appendix at 6a – 7a.

The Fifth Circuit also noted that the instant case involved the Veterans Administration hospital's identification policy at its security checkpoint, and not a narcotics investigation, as was the case in *Bivens*. *See*

id. at 7a. The Court found that this distinction involved "different legal mandates" than *Bivens*. *Id.* While the Fifth Circuit did not specifically mention it, the implication is clear: the judiciary should not intrude into the security operations of a federal facility seeking to enforce its identification policy. *See id.* at 6a (risk of disruptive intrusion by Judiciary into functioning of other branches is example of meaningful difference).

This is not dissimilar to the Court's analysis in *Abbasi* when it distinguished the *Carlson* case.[1] The Supreme Court found that the legal standard for a claim against a warden who allowed guards to abuse pre-trial detainees was "less clear" than the legal standard for claims alleging failure to provide medical treatment to a prisoner. *See Abbasi*, 137 S.Ct. at 1864 – 1865. Although this analysis involved a different factor (availability of judicial guidance), *see id.* at 1864, the analysis applies because it turns upon a factual difference. Whether this factual difference is, in and of itself small, is irrelevant. The focus of the analysis is on the notion that the factual difference, however small, leads to the application of a different legal mandate. *See id.* at 1865 ("The differences between this claim and the one in *Carlson* are perhaps small, at least in practical terms. Given this Court's expressed caution about extending the *Bivens* remedy, however, the new-context inquiry is easily satisfied.")

1. *Carlson v. Green*, 446 U.S. 14 (1980).

B. No other circuit has performed a particularized "meaningful differences" analysis under *Abbasi* that conflicts with the decision below.

Petitioner primarily relies upon two cases for his contention that the Fifth Circuit has created a circuit split: *Jacobs v. Alam*, 915 F.3d 1028 (6th Cir. 2019) and *Hicks v. Ferreyra*, 965 F.3d 302 (4th Cir. 2020). *See* Petition for Writ of Certiorari at 2 and 17 – 20. In *Jacobs*, the Court noted that the defendants failed to articulate how that case differed from *Bivens* in a meaningful way. *See Jacobs*, 915 F.3d at 1038 – 1039.[2] Thus, the *Jacobs* Court did not engage in a particularized "meaningful differences" analysis, as did the Fifth Circuit in the instant case below. *See generally, Jacobs*, 915 F.3d 1028.

Hicks is even more uninhabited by a relevant *Abbasi* analysis. In that case, the Court found that the defendants had forfeited their *Abbasi* arguments. *See Hicks,* 965 F.3d at 309 – 310. The Court noted that the defendants never raised an *Abbasi* issue in the trial court; instead, they raised the issue for the first time on appeal and asked the Fourth Circuit to rule that the trial court should have raised the issue *sua sponte. See id.* at 310. In its denial of the defendants' appeal to the Court's application of fundamental justice, the Fourth Circuit did state the case was a "replay" of *Bivens. See id.* at 311. It also provided an overview of a few cases to support the notion of a garden-variety *Bivens* claim for Fourth Amendment violations. *See id.* at 311 – 312. However, the *Hicks* Court wholly failed

2. While it appears that the defendants in *Jacobs* did argue that there were factual differences between that case and *Bivens*, *see* Petition for Writ of Certiorari at 18, n.12, they failed to establish *how* those differences were meaningful. *See Jacobs*, 915 F.3d at 1038 – 1039.

to engage in a particularized first-prong analysis under *Abbasi*. *See generally Hicks*, 965 F.3d 302.

Of the remaining six circuit court opinions upon which the Petitioner secondarily relies, *see* Petition for Writ of Certiorari at 17, n.11, four do not contain particularized "meaningful differences" analyses under *Abbasi*. *See generally Pagán-González v. Moreno*, 919 F.3d 582 (1st Cir. 2019) (no analysis of meaningful differences); *McLeod v. Mickle*, 765 Fed.Appx. 582 (2d Cir. 2019) (same); *Bryan v. United States*, 913 F.3d 356 (3d Cir. 2019) (same); *Harvey v. United States*, 770 Fed.Appx. 949 (11th Cir. 2019) (same).

One of the Petitioner's cases, *Ioane v. Hodges*, 939 F.3d 945 (9th Cir. 2018), does contain an *Abbasi* analysis. However, the fact that two courts reach different conclusions after applying the proper analysis does not necessarily place those courts in conflict with each other. In *Ioane*, a female FBI agent refused to allow the plaintiff to relieve herself in her bathroom unless the agent observed her doing so. *See id.* at 949 – 950. The Ninth Circuit concluded that this was not meaningfully different than the strip search that occurred in *Bivens*. *See id.* at 952 n.2. Moreover, the Court concluded that there was "no difference between the two cases with respect to the rank of the officers involved, the generality or specificity of the official action at issue, or the legal mandate under which the officers were operating." *Id.* at 952. In the instant case, the Fifth Circuit's decision turned mainly upon the difference in the legal mandate and not the same issues analyzed in *Ioane*. *See* Petition for Writ of Certiorari Appendix at 7a. Therefore, no split has been created as to the Fourth Circuit.

Finally, the Petitioner cites to *Boule v. Egbert*, 980 F.3d 1309, 1313 – 1314 (9th Cir. 2020). The *Boule* court found that the case created a new *Bivens* context because it involved a Border Patrol agent, as opposed to an FBI agent. *See id.* at 1313. The decision did not turn on meaningful differences. *See id.* at 1313 – 1314. Instead, it turned on the Court's finding, in the second prong of the *Abbasi* analysis, that there were no special factors counseling hesitation to extend *Bivens* into the context of that case. *See id.* Thus, *Boule* does not conflict with the Fifth Circuit's "meaningful differences" analysis in the instant case.

Petitioner relies upon the foregoing cases for the idea that *Abbasi* creates a garden-variety *Bivens* context for all Fourth Amendment search-and-seizure cases involving standard law enforcement operations. *See* Petition for Writ of Certiorari at 7 and 18-20. Indeed, the lack of any particularized *Abbasi* analysis in most of these cases seems to indicate that the various courts believe that such a context exists. That leads to the question of whether the Fifth Circuit's opinion below stands for the proposition that no such garden-variety *Bivens* context exists. It clearly does not.

The Fifth Circuit's ruling did not summarily "cabin" *Bivens* to its specific facts, as Petitioner avers. *See id.* at 8. Instead, it engaged in a thoughtful and logical analysis along the contours provided by this Court in *Abbasi*. *See id.*, Appendix at 6a – 7a. The Court did opine, in dicta, that virtually everything other than the Supreme Court's *Bivens* trilogy is a new context. *See id.* at 5a. However, because it carefully and properly applied the *Abbasi* framework to its analysis, the Fifth Circuit's holding does not summarily foreclose all Fourth Amendment search-and-seizure *Bivens* claims. The instant case, therefore,

does not present this Court with a split of authority among the circuits. If this Court were to deny the Petition for a Writ of Certiorari, *Bivens* claims would still be available to Fifth Circuit litigants, subject to the strictures of the *Abbasi* framework that have been in place since 2017.

II. Qualified immunity shields the Respondent from liability.

Courts engage a two-part test for qualified immunity claims. First, it must be determined whether the plaintiff alleged violation of a constitutional or statutory right. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), overruled in part on other grounds, *Pearson v. Callahan*, 555 U.S. 223 (2009). If so, the court must determine whether the constitutional right was clearly established at the time of the officer's alleged misconduct. *See id.* Courts have discretion to decide which of the two prongs of the qualified immunity analysis should be addressed first, in light of the circumstances of the particular case. *See Pearson*, 555 U.S. at 236.

In looking at what constitutes "clearly established law," courts avoid a high level of generality and rather consider "whether the violative nature of particular conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam). "[C]learly established law" should not be defined "at a high level of generality," but instead "must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017). "Although this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (internal quotations omitted). "[S]pecificity is especially important in the Fourth Amendment context, where the

Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Id.* at 1152 – 1153 (quoting *Mullenix*, 577 U.S. at 12).

"'[T]he *Bivens* question' is antecedent to questions of qualified immunity." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017). Therefore, the Fifth Circuit properly addressed the issue of qualified immunity when it declined to extend the instant case as a new context under *Bivens*. Even if the court below had allowed this case to proceed against the Respondent under *Bivens*, the Respondent would have been shielded from immunity under the standards of qualified immunity, as stated above.

CONCLUSION

The Fifth Circuit, by correctly applying the *Abbasi* analysis to find that the instant case creates a new *Bivens* context, did not create a circuit split. Therefore, this Court should deny the petition.

Respectfully Submitted,

James K. Jopling
Counsel of Record
Combined Law Enforcement
Associations of Texas
747 East San Antonio Avenue, Suite 103
El Paso, Texas 79901
(915) 533-5754
jim.jopling@cleat.org

Counsel for Respondent
Mario J. Nivar