No. 20-1060

In The
Supreme Court of the United States

JOSE OLIVA,

Petitioner,

v.

MARIO NIVAR, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT BRIEF OF MARIO GARCIA AND HECTOR BARAHONA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Maintaining a safe environment on federal properties is at a premium in this day and age. Law enforcement personnel have the unenviable daily task of ensuring the public is free from terrorism, foreign and domestic. The training and safety protocols utilized by federal law enforcement officers are designed to help identify potential threats and neutralize said threats so as to maintain the safe environment for both patrons and facility staff.

On February 16, 2016, Petitioner Jose Oliva for reasons only known to himself, decided not to cooperate with the Veterans' Affairs officers' requests to abide by the security protocol. Respondents, Hector Barahona and Mario Garcia were on duty on February 16th in their official capacity as Veterans' Affairs police officers when they encountered Petitioner. Petitioner was asked to provide his identification card while passing through the metal detector at the secure entrance to the hospital, to which he refused.

This episode was documented in a closed-circuit video that was requested and reviewed by the Fifth Circuit Court of Appeals. The ensuing lawsuit for alleged Constitutional violations was commenced by Petitioner pursuant to *Bivens* in addition to his Federal Tort Claims Act (FTCA) claims against the United States.

REASONS FOR DENYING THE PETITION

1. *Bivens* and its progeny unequivocally foreclose the possible expansion as presented by this particular case.

Bivens and its progeny summarily foreclose the expansion contemplated by Petitioner. Since the outset, this Court has cautioned against expanding implied causes of actions under *Bivens* beyond the discrete list that exists today. *Bivens* was decided as a means to redress Fourth Amendment violations in the absence of other remedial options. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

Granting the Petition for Writ of Certiorari would usurp the stare decisis that has refused to extend *Bivens* in cases involving claims of First Amendment violations by federal employers, *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983); claims involving harm to military personnel through activity incident to service, *United States v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987); *Chappell v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983); and claims brought involving wrongful denials of Social Security disability benefits, *Schweiker v. Chilicky*, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988). The Fourth Amendment claim asserted in this proceeding does not fall in line with the previously recognized *Bivens* fact pattern which only goes to undermine the Petitioner's claims given this Court's decision in *Abbasi*.

The *Abbasi* opinion outlines a "two-step framework for determining whether a *Bivens* remedy may properly be implied." *Abbasi v. Ziglar*, 137 S. Ct. 1843 at 1859 (2017); *Diaz v. Mercurio*, 442 F. Supp. 3d 701 (S.D.N.Y. 2020). At the first step, "a court must decide whether a plaintiff seeks damages in a new *Bivens* context," and to do so, "must evaluate whether 'the case is different in a meaningful way from previous *Bivens* cases decided by the Supreme Court.' " *Abbasi v. Ziglar*, 137 S. Ct. at 1859 (2017). The factual basis as alleged in the Petition for a Writ of Certiorari, on its face, establishes the "meaningful" difference for the Court's consideration. (Pet. Cert. at 3).

Although this Court has not yet created an exhaustive list of differences that are meaningful enough to make a given context a new one, it has provided some instructive examples that clearly indicate the intent to circumscribe any potential *Bivens* action to the parameters already espoused in the three existing areas. The guidance provided as to what might constitute a new context within the *Abbasi* test includes the following: "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." *Abbasi v. Ziglar*, 137 S. Ct. at 1859-1860.

The "new context" test is not demanding and can be satisfied even with minor extensions and even where the claim arises out of the same constitutional provision as was previously recognized under *Bivens*. *Abbasi v. Ziglar*, 137 S. Ct. 1843 at 1864. The original *Bivens* factual basis involved a warrantless search and detention inside a private home and the treatment of the officers of *Bivens* and his family while searching said home. *Bivens*, 403 U.S. at 390 (1971).

The factual basis presented in this case stands in stark contrast to the previous Fourth Amendment cases cited to by Petitioner and therefore cautions against expansion of the current *Bivens* framework. Respondents take issue with the factual recitation contained within the Petition for a Writ of Certiorari, however, the single point that in uncontested is that Petitioner was in fact entering federal property, namely, the Veterans' Administration Hospital located in El Paso, Texas. (Brief for Petitioner, Opinion of the United States Court of Appeals for the Fifth Circuit, appendix A at 3a). As in most federal installations and property, each entrant was required to provide identification and a basic security check for entry. This administrative search was not intrusive, nor was it prolonged; the security checkpoint consisted of a metal detector and request for identification. This factual distinction is of paramount importance given that *Bivens* itself dealt with an intrusion into a private home, and not a public, federal building. Searches conducted as part of a "general regulatory scheme in furtherance of an administrative purpose, rather than as part of a

criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment" without a showing of probable cause. *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973).

This aforementioned security checkpoint is mandatory for all guests of the hospital. Petitioner was not entering his home, nor was he operating his personal vehicle. Petitioner was entering a secure, federal property voluntarily and was required to submit to a security check. Petitioner's contention that the factual basis falls squarely in-line with the previous Fourth Amendment cases ignores the glaring and dispositive factual difference.

If the Court finds that this case "does not present a new *Bivens* context, then such relief is not precluded, and the court may evaluate the claim for damages on the merits." *Abbasi v. Ziglar*, 137 S. Ct. at 1857. Anterior to the tribunal's evaluation of damages, the Petitioner would still have to overcome the protections built into the *Abbasi* analysis regarding any potential special factors presented. *Abbasi*, 137 S. Ct. at 1857 ("the court must determine whether there are 'special factors counselling hesitation in the absence of affirmative action by Congress.' "). The *Abbasi* opinion is representative of this Court's reluctancy to create new causes of action under the penumbra of *Bivens*. In *Wilkie*, Justice Souter writing for the majority opinion opined that "paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S. Ct. 2588, 2598, 168 L. Ed. 2d

389 (2007) citing *Bush v. Lucas*, 462 U.S. 367 at 378, 103 S. Ct. 2404 (2010).

This analysis "is focused 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." *Abbasi v. Ziglar*, 137 S. Ct. 1843 at 1858. It is imperative to note that even in the absence of an alternative remedial framework, this Court has refused to extend *Bivens* into new, uncharted waters. *Mesa v. Hernandez*, 140 S. Ct. 735 (2020).

As with the first step of the *Abbasi* framework, the Court has "not attempted to create an exhaustive list of factors that may provide a reason not to extend *Bivens*," but has recited a few instructive the "risk of interfering with the authority of the other branches," any reason to believe that Congress might doubt the efficacy or necessity of a damages remedy," and the existence of alternative means of recovery. *Mesa v. Hernandez*, 140 S. Ct. at 743, 749; see also *Abbasi v. Ziglar*, 137 S. Ct. 1843 at 1863, 1865 (noting that "the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action" and "when alternative methods of relief are available, a *Bivens* remedy usually is not").

This case varies significantly from current *Bivens* jurisprudence to caution against the creation of a new cause of action, where Congress has already created a parallel system of redress. An equal remedial framework exists. In the Fifth Circuit's opinion, the Court

addresses the fact that Petitioner has availed himself of the administrative claims process, and failing any finding of wrongdoing, has filed his federal complaint invoking the Federal Tort Claims Act (FTCA) along with the *Bivens* doctrine. (Brief for Petitioner, Opinion of the United States Court of Appeals for the Fifth Circuit, appendix A at 2a).

The Petitioner is asking that this Court ignore the logical and ever-evolving jurisprudence since the original *Bivens* decision and create a new implied cause of action under the guise of providing an avenue for addressing potential claims against federal law enforcement, however this Court has already indicated that this expansion is to be avoided "no matter how desirable that might be as a policy matter, or how compatible with the statute [or constitutional provision]." *Abbasi v. Ziglar*, 137 S. Ct. 1843 at 1856 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001)).

2. There is no circuit split as alleged by Petitioner.

Petitioner's argument that the Fifth Circuit's decision below runs afoul of several other opinions dealing with Fourth Amendment *Bivens* claims fails when the factual basis of each case discussed is scrutinized. Ultimately, a *Bivens* claim or lack thereof hinges upon a factual determination given the guidance provided by this Court in current jurisprudence. Petitioner cites to *Jacobs v. Alam*, 915 F.3d 1028 (6th Cir. 2019) and *Hicks v. Ferreya*, 965 F.3d 302 (4th Cir. 2020) as supporting

the contention that the Fifth Circuit has misinterpreted this Court's opinions in *Bivens* and *Abbasi*.

In *Jacobs*, the Sixth Circuit affirmed the availability of a *Bivens* cause of action for perceived wrongs committed by United States Marshalls searching for a federal fugitive inside a private residence. *Jacobs v. Alam*, 915 F.3d 1028 at 1033. This factual similarity to Bivens does not offend the reluctance of this Court to create new causes of action, especially when there is a parallel remedial framework available. Interestingly enough, the *Jacobs* Court does write that "[a] *Bivens* remedy is available only if (1) there are no alternative, existing processes for protecting a constitutional interest, and even in the absence of an alternative, there are no special factors counseling hesitation before authorizing a new kind of federal litigation." *Jacobs v. Alam*, 915 F.3d 1028 at 1035-1036 citing *Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417 96th Cir. 2016).

In *Hicks*, the Fourth Circuit conducted a cursory review of the *Bivens* issue within the context of an alleged Fourth Amendment violation of a private vehicle. *Hicks v. Ferreya*, 965 F.3d 302 at 305-306. The *Hicks* Court only briefly addresses what it perceives as a "routine law enforcement action" given that the Defendant has not properly challenged the availability of a *Bivens* cause of action in the proceedings below. *Hicks v. Ferreya*, 965 F.3d 302 at 309. The cases cited above by Petitioner are factually distinguished from this matter insofar as the agency, location, function and reason for the security checkpoint. The Petition for

Writ of Certiorari is attempting to shoehorn a new factual context into existing *Bivens* jurisprudence.

The Fifth Circuit's decision below is cognizant of this Court's guidance in *Abbasi* and *Mesa* in recognizing new, judicially created causes of action. The reversal of the District Court's denial of the motion for summary judgment represents the Fifth Circuit's acknowledgment, correctly, that Petitioner's claim varies substantially from the existing Fourth Amendment jurisprudence under *Bivens*.

3. Respondents are shielded by Qualified Immunity.

The qualified immunity framework has been long established by the Supreme Court. In 1982, the Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) established that governmental officials performing discretionary functions are immune from civil liability as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Wyatt v. Cole*, 504 U.S. 158, 166, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992). This doctrine ensures that governmental officers' on-the-spot judgments are not evaluated with twenty-twenty hindsight. *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997).

In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), the Supreme Court mandated a two-step sequence for resolving government

officials qualified immunity claims. First, the court must decide whether the facts that a plaintiff has alleged make out a violation of a constitutional right. See *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 815-816, 172 L. Ed. 2d 565 (2009). In some cases, the ruling on this first question may end the legal inquiry, and the case against the agent, for "[i]f no constitutional right would have been violated were the [factual] allegations established, there is no necessity for further inquiries concerning qualified immunity. *Saucier*, 533 U.S. 194 at 201 citing *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991).

If a plaintiff satisfies the first question, the court must decide whether the right at issue was "clearly established that the officer's conduct was unlawful in the circumstances of this case" at the time of the defendant's alleged misconduct. *Saucier*, 533 U.S. at 201. In other words, qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009) citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). In *Pearson*, the Supreme Court further held that following the rigid two-step test under *Saucier* would no longer be mandatory, and that courts should "be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the case at hand." *Pearson v. Callahan*, 129 S. Ct. 808 at 818.

The Respondents were simply carrying out the administrative procedures outlined by the Veterans Affairs Hospital when they came into contact with Petitioner. The administrative safety protocol is in place to protect the public and employees of the hospital. Respondents' exercise of this critical function falls within the actions originally contemplated at the conception of qualified immunity.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondents pray that this Honorable Court deny the Petition for a Writ of Certiorari and affirm the decision below from the Fifth Circuit Court of Appeals.

Respectfully submitted,

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