No. 20-1060

In The
Supreme Court of the United States

JOSÉ 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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

TABLE OF CITED AUTHORITIES – Continued

Page

TABLE OF CITED AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

REPLY BRIEF IN SUPPORT OF CERTIORARI

Had José Oliva—a seventy-year-old veteran beaten by federal police—brought his case in the First, Second, Third, Fourth, Sixth, Ninth, or Eleventh Circuit, his unreasonable-seizure claim would have proceeded as a garden-variety Fourth Amendment claim, not meaningfully different from *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The misfortune of being beaten in the Fifth Circuit, however, meant that Oliva's claim was thrown out. Since, in the Fifth Circuit's view, any claim not involving narcotics agents "manacling the plaintiff in front of his family in his home and strip-searching him" presents a new *Bivens* context. Pet. App. 5a. As respondents put it, whether a "factual difference is[] . . . small[] is irrelevant." Nivar Br. in Opp. 6; see also Barahona et al. Br. in Opp. 4.

Respondents acknowledge the circuit split by recognizing the disagreement over the breadth of *Abbasi*'s "meaningful differences" test and simply asserting that the Fifth Circuit is on the right side of the split. Nivar Br. in Opp. 7–8; Barahona, et al. Br. in Opp. 8–9. Respondents go as far as to recharacterize *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), as requiring lower courts to perform "a *particularized* analysis of these meaningful differences." Nivar Br. in Opp. 1 (emphasis added). They argue that the Fifth Circuit was right to engage in this hair-splitting inquiry and the other circuits were wrong to *not* do so. Nivar Br. in Opp. 9; Barahona et al. Br. in Opp. 8–9.

The Court should grant review to resolve the undisputed split the decision below created and make it clear that it is the Fifth Circuit, not its seven sister courts, that got *Abbasi* wrong. After all, when it comes to a claim like the one at issue here, *Abbasi* left no room for doubt: *Bivens* remains necessary "in the search-and-seizure-context in which it arose," and it should be "retain[ed] . . . in that sphere." *Abbasi*, 137 S. Ct. at 1856–1857. The Fifth Circuit's holding to the contrary not only repudiates *Abbasi*, which is only within *this* Court's power to do, it also creates confusion in the law and denies the residents of Texas, Louisiana, and Mississippi any Fourth Amendment remedy against federal police.

I. Respondents acknowledge the circuit split, arguing only that the Fifth Circuit is on the right side of it.

The Fifth Circuit's decision created a circuit split on the scope of *Abbasi*'s "meaningful differences" test. On one side of the split are the Fifth and the Eighth Circuits.[1] They interpret *Abbasi*'s "meaningful differences" standard as limiting the established context for *Bivens* claims to the exact factual scenario of *Bivens*, regardless the triviality of distinctions. See *Byrd* v. *Lamb*, 990 F.3d 879, 883 (5th Cir. 2021) (Willett,

[1] After the decision below was published, the Fifth Circuit was joined by the Eighth. *Ahmed* v. *Weyker*, 984 F.3d 564, 565–566 (8th Cir. 2020) (denying a *Bivens* remedy to three individuals arrested based on the "lies and manipulation" of a federal task-force member).

J., concurring) (describing the decision below as "isolat[ing] the precise facts" of *Bivens*). On the other side of the split are the First, Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits. They all permit search-and-seizure claims against federal police performing standard law enforcement operations, since, in their view, no "meaningful differences" exist between these claims and *Bivens*.[2] See Pet. 17–21 (discussing the cases that comprise the split).

Respondents acknowledge the split. They admit, for example, that "the *Jacobs* court did not engage in a particularized 'meaningful differences' analysis, as did the Fifth Circuit" and that "*Hicks* is even more uninhibited by a relevant *Abbasi* analysis." Nivar Br. in Opp. 7–8 (citing *Jacobs* v. *Alam*, 915 F.3d 1028 (6th Cir. 2019); *Hicks* v. *Ferreyra*, 965 F.3d 302 (4th Cir. 2020)); see also Barahona et al. Br. in Opp. 8–9. They even note that "the lack of any particularized *Abbasi* analysis in most of these cases seems to indicate that the various circuit courts believe that [a garden variety *Bivens*] context exists." Nivar Br. in Opp. 9. This approach by the Fifth Circuit's sister courts—so aptly described in respondents' briefs—contrasts starkly with the Fifth

[2] In the Ninth Circuit, there is some confusion about the application of the "meaningful differences" test. Compare *Ioane* v. *Hodges*, 939 F.3d 945 (9th Cir. 2018) (permitting *Bivens* action against IRS agent forcing a homeowner to use the bathroom in her presence), with *Boule* v. *Egbert*, 980 F.3d 1309, 1313–1314 (9th Cir. 2020) (holding that a claim against a Customs and Border Protection officer presents a new context because "[d]efendant is an agent of the border patrol rather than of the FBI," though still allowing this claim to proceed).

Circuit's decision in this case, which makes "[v]irtually everything" into a new context, including when federal police "place [a person] in a chokehold," instead of "strip-search[ing] him." Pet. App. 7a. The two distinct approaches taken by federal appellate courts represent a textbook circuit split. To resolve it, the Court should grant review.[3]

II. Respondents defend the Fifth Circuit's decision by mischaracterizing *Abbasi*'s "meaningful differences" standard.

1. To salvage the Fifth Circuit's reasoning, respondents mischaracterize *Abbasi*'s standard by turning the "meaningful differences" test that *Abbasi* outlines into a hair-splitting inquiry, where a trivial factual distinction from the facts of *Bivens* itself—such as whether a person was manacled right away or only after being placed in a chokehold—puts the case into the new-context category. Nivar Br. in Opp. 1, 4; Barahona et al. Br. in Opp. 3. Respondents even argue

[3] In addition to discussing *Bivens*, respondents also spend some time discussing qualified immunity. Nivar Br. in Opp. 10–11; Barahona et al. Br. in Opp. 9–11. Although the district court denied respondents qualified immunity, Pet. App. at 43a, the Fifth Circuit did not reach this issue, choosing instead to focus on the *Bivens* inquiry. Pet. App. 4a. The question of qualified immunity is not before this Court. To the extent that there is a question that needs to be resolved, the Fifth Circuit can address the issue on remand, provided this Court grants review and rules in favor of Oliva.

that whether a "factual difference is[ ] . . . small[ ] is irrelevant." Nivar Br. in Opp. 6.[4]

But *Abbasi* did not authorize Fourth Amendment cases to be analyzed through such a granular level of factual specificity, explicitly stating that "[s]ome differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context." 137 S. Ct. at 1865. As Justice Kennedy stated in the majority opinion, when it comes to the Fourth Amendment searches and seizures, particularly in the context of "individual instances of . . . law enforcement overreach," "the settled law of *Bivens* in this common and recurring sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere." *Id.* at 1857, 1862. Accordingly, *only* "meaningful" differences suffice to create a new *Bivens* context. *Id*. at 1859.

But instead of analyzing and applying the Court's examples of meaningful differences—such as the rank of the officers involved, or the constitutional right at issue, or whether the officer was performing executive level duties as opposed to engaging in standard law enforcement operations—the Fifth Circuit looked past

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[4] Respondents point to *Abbasi*'s distinction of *Carlson* v. *Green*, 446 U.S. 14 (1980), as an example of hyper-specificity, but this example misses the mark. *Abbasi* distinguished *Carlson* not based on niggling factual distinctions, but based on two meaningful differences, namely that the claim against a warden in *Abbasi* implicated a different constitutional right and that the judicial guidance with respect to a claim for abuse of pre-trial detainees was less clear. *Abbasi*, 137 S. Ct. at 1864.

this crucial part of the analysis and limited its determination *specifically* to whether federal narcotics agents "manacl[ed] the plaintiff in front of his family in his home and strip-search[ed] him," while conducting a narcotics investigation.[5] Pet. App. 5a; see also Pet. App. 7a (emphasizing that Oliva's claim involved VA police, as opposed to narcotics agents). Because the answer was "no"—and would be "no" in virtually any search-and-seizure case—the Fifth Circuit determined that the situation presented a new *Bivens* context and that no *Bivens* remedy was available.[6]

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[5] The Fifth Circuit's use of impossibly fine factual distinctions to overrule *Abbasi*'s "meaningful differences" analysis mirrors the court's similarly granular interpretation of the clearly established test in the qualified immunity context, which the Court twice reversed this term. *Taylor* v. *Stevens*, 946 F.3d 211, 222 (5th Cir. 2019) (requiring a case where "a time period so short [as six days] violated the Constitution"), vacated *sub nom. Taylor* v. *Riojas*, 141 S. Ct. 52 (2020); *McCoy* v. *Alamu*, 950 F.3d 226, 233–234 (5th Cir. 2020) (requiring a case where pepper-spraying, rather than tasing or punching, was deemed unconstitutional), vacated 141 S. Ct. 1364 (2021) (mem.).

[6] The Fifth Circuit's analysis of the second step of the *Bivens* inquiry—whether special factors counsel against extending *Bivens*—is not before this Court, since in Oliva's view this case is not meaningfully distinct from *Bivens*. That said, there are disagreements among federal circuit courts on how to apply the "special factors" analysis. The availability of the Federal Tort Claims Act ("FTCA") as an alternative remedy in particular stands out. In this case, for example, the Fifth Circuit held that the availability of the FTCA is a special factor counselling hesitation and therefore Oliva's *Bivens* claim cannot be extended into the new context. Pet. App. 9a. But in *Bistrian* v. *Levi*, the Third Circuit held that the availability of the FTCA remedy does not constitute a special factor, allowing a *Bivens* claim to move forward. 912 F.3d 79, 92 (3d Cir. 2018). This case presents a clean vehicle for

2. The Fifth Circuit's reasoning in this case is not an aberration. The court further entrenched its disregard of *Abbasi* in a subsequent *Bivens* case, *Byrd* v. *Lamb*, which involved a Department of Homeland Security officer who unprovokedly "attempted to smash the window of [the plaintiff's] car," threatening to "put a bullet through his f—king skull" and "blow his head off." 990 F.3d at 880 (internal quotation omitted). The federal officer then used his authority to cause local police to arrest the plaintiff and have him detained for four hours. *Ibid*. Thankfully, the whole incident was recorded on surveillance video, which made clear that the plaintiff was the victim and the DHS officer the perpetrator. *Id*. at 880–881.

Relying on the Fifth Circuit's decision in this case, the court again held that unless a case involves a narcotics officer "manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment," the context is new. *Id*. at 882 (quoting the decision below, Pet. App. 5a); see also *ibid*. (reasoning that there is a meaningful difference between seizing a person in a parking lot and "making a warrantless search for narcotics in [a person's] home"). In his concurrence, Judge Willett recognized that the decision below "isolated the precise facts" of *Bivens* and "concluded that Oliva had no constitutional remedy," making the result in *Byrd* "precedentially inescapable." *Id.* at 883 (Willett, J., concurring). The Fifth

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addressing the first step of the *Bivens* test. But if the Court is interested in resolving the circuit split on the second step, this case allows for that as well.

Circuit's misreading of *Abbasi* in the decision below and its further entrenchment of this misreading in *Byrd* are reasons for this Court's review.

III. If *Bivens* and *Abbasi* are no longer good law, it is for this Court to say so, not the Fifth Circuit.

Respondents wrongly claim that the Fifth Circuit's decision leaves intact "garden-variety *Bivens*" claims, despite the court explicitly limiting *Bivens* claims to narcotics agents "manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment." Nivar Br. in Opp. 9; Pet. App 5a; see also *Byrd*, 990 F.3d at 883 (Willett, J., concurring) (explaining that the decision below "erases any doubt" that "[t]he *Bivens* doctrine, if not overruled, has certainly been overtaken"). Instead of faithfully applying *Bivens* and *Abbasi*, the Fifth Circuit repudiated both decisions.

It is axiomatic that this Court alone has the "prerogative . . . to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997); see also *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (lower courts should "leav[e] to this Court the prerogative of overruling its own decisions"). As the nation's high court, its "decisions remain binding precedent until [this Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubt about their continuing vitality." *Bosse* v. *Oklahoma*, 137 S. Ct. 1, 2 (2016) (citation omitted).

Here there is no doubt.[7] *Abbasi* provides a clear roadmap for recognizing a *Bivens* cause of action "in the search-and-seizure context in which it arose." 137 S. Ct. at 1856. It further supplies lower courts with the non-exclusive list of "meaningful" differences that take a *Bivens* claim outside the established context. *Id*. at 1860. The Fifth Circuit pays no attention to either the roadmap or the list. But it still wants the pretense of following the precedent.

The Fifth Circuit can't have it both ways: Either a Fourth Amendment cause of action exists in the "common and recurrent sphere of law enforcement," *id*. at 1857, or "[v]irtually everything" is a new context in which extending *Bivens* is disfavored, Pet. App. 5a. If it is the former, the Fifth Circuit's analysis misinterprets *Abbasi* and should be corrected. See S. Ct. R. 10(c) (stating that if a circuit court "has decided an important federal question in a way that conflicts with relevant decisions of this Court," this constitutes a

[7] In addition to providing clear guidance in *Abbasi*, this Court has regularly acknowledged Fourth Amendment *Bivens* claims in a myriad of cases without cabining *Bivens* to its precise facts. See, *e.g.*, *Groh* v. *Ramirez*, 540 U.S. 551 (2004) (Bureau of Alcohol, Tobacco, and Firearms agent conducting a search in a home); *Saucier* v. *Katz*, 533 U.S. 194 (2001) (military police officer using excessive force on an army base); *Wilson* v. *Layne*, 526 U.S. 603 (1999) (federal marshals searching a home with a news crew); *Hunter* v. *Bryant*, 502 U.S. 224 (1991) (per curiam) (Secret Service agents making a warrantless arrest in a home); *Anderson* v. *Creighton*, 483 U.S. 635 (1987) (FBI agent searching a home without a warrant); *General Motors Leasing Corp*. v. *United States*, 429 U.S. 338 (1977) (IRS agents seizing property from a business). Unless and until *this* Court reverses these decisions, the Fifth Circuit is bound to follow where they lead.

"compelling reason[]" to grant review). If the latter, this Court—not the Fifth Circuit—should clarify the law for the bench and bar. *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."). In either case, the Court should grant review.

IV. Clarity regarding the application of *Bivens* and *Abbasi* is essential in the search-and-seizure context.

Leaving the Fifth Circuit's decision in place would not only undermine *Abbasi*, it would also frustrate one of the main reasons *Abbasi* preserved the *Bivens* remedy in the search-and-seizure context: the provision of "instruction and guidance to federal law enforcement officers going forward." 137 S. Ct. at 1856–1857. As things stand now, in Texas, Louisiana, and Mississippi,[8] where federal police number over seventeen thousand, Pet. 22, "[p]rivate citizens who are brutalized—even killed—by rogue federal officers can find little solace" because, under the Fifth Circuit's interpretation of the "meaningful differences" standard, "redress for a federal officer's unconstitutional acts is either extremely limited or wholly nonexistent, allowing federal officials to operate in something resembling

[8] As well as in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, following the Eighth Circuit's ruling in *Ahmed*, 984 F.3d at 564.

a Constitution-free zone." *Byrd*, 900 F.3d at 883–884 (Willett, J., concurring). In the First, Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits, on the other hand, federal police operate under stricter standards. This lack of uniformity is damaging, since "the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of . . . the State in whose jurisdiction that power is exercised." *Bivens*, 403 U.S. at 392.

The Fifth Circuit's decision also runs contrary to the other goal of *Abbasi*: the vindication of Fourth Amendment rights by "allowing some redress for injuries." 137 S. Ct. at 1856–1857. After all, it is in the search-and-seizure context that the potential for government abuse is at its peak, with "an agent acting . . . in the name of the United States possess[ing] a far greater capacity for harm than an individual trespasser." *Bivens*, 403 U.S. at 392. This is a "powerful reason[]" to retain *Bivens* in that sphere (*Abbasi*, 137 S. Ct. at 1862) and militates in favor of granting review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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