No. 21-147

In the Supreme Court of the United States

ERIK EGBERT, PETITIONER

v.

ROBERT BOULE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ROY SARGEANT (FEDERAL PRISONER #11709-171) IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a cause of action exists under *Bivens* for First Amendment retaliation claims.

2. Whether a cause of action exists under *Bivens* for claims against federal officers engaged in immigration-related functions for allegedly violating a plaintiff's Fourth Amendment rights.

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INTEREST OF AMICUS CURIAE[1]

Roy Sargeant is a federal inmate who has a substantial interest in the resolution of the first question presented in this case: whether there are *any* circumstances where a cause of action exists under *Bivens* for a First Amendment retaliation claim. Mr. Sargeant's corrections counselor deliberately moved him into housing with violent inmates in retaliation for filing complaints under the Prison Rape Elimination Act (PREA) and the prison's designated reporting procedures. The district court dismissed Mr. Sargeant's complaint, holding that it presented a new *Bivens* context and special factors counseled hesitation. He appealed and his appeal is now being held in abeyance in the Seventh Circuit pending the Court's ruling in the instant matter. *Sargeant v. Barfield*, No. 21-2287 (7th Cir.).

Mr. Sargeant submits this brief to explain that there are cases, in addition to respondent's, where First Amendment retaliation claims meet the test set forth in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). His is one such case. Mr. Sargeant was the victim of petty retaliation by a low-level prison official. His case will have no impact on national security, foreign relations, or executive branch policymaking. He was transferred from the prison shortly after the incident, meaning he has no other remedy but damages. And the courts are well-equipped to handle claims like his. They decide identical claims with virtually identical facts brought by state prisoners against state prison officials under § 1983 using identical legal

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

standards every day. The screens against meritless and frivolous suits—embodied in the "no alternative remedies" requirement, the Prison Litigation Reform Act screening procedures, and the doctrine of qualified immunity—prevent all but the most well-pleaded and serious claims from burdening executive branch officers at all.

An additional consideration supports extension of *Bivens* to claims like Mr. Sargeant's: federal prisoners do not have the political power to obtain relief through legislation. They cannot lobby Congress to enact a cause of action to protect their rights. They lack all control over their residency and are frequently moved between prisons without any say. They lack attachment to their political communities, confined within the prison walls. In many states, they lack the right to vote, even after their release. Many are indigent and therefore lack the resources to "participate in democracy through political contributions." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014). They cannot leaflet on the public street or volunteer for political campaigns. They are politically unpopular. As a result, Mr. Sargeant is more likely to be *carved out* of a cause of action than carved into one. Democracy does not work for "discrete and insular minorities" who lack access to "those political processes ordinarily to be relied upon to protect" them. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). To the question, "Why shouldn't Congress, rather than the Court, decide whether to provide a damages remedy to Mr. Sargeant?" He can only answer: "Because Congress never will."

The Court should decline to close the door completely on First Amendment retaliation claims under *Bivens.* The Court could have shut that door on numerous earlier occasions, but did not, because of its recognition that cases like Mr. Sargeant's exist: cases where eliminating *Bivens*

retaliation claims would license low-level officials to engage in petty, vindictive, and egregiously unconstitutional conduct without even the theoretical possibility of being held accountable. The Court should either narrow the first question presented to a straightforward special factors analysis under *Abbasi* or dismiss the first question presented as improvidently granted.

SUMMARY OF ARGUMENT

The Court cannot categorically hold that no cause of action exists under *Bivens* for First Amendment retaliation claims without overruling *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). Yet neither the petitioner nor the United States have asked the Court to overrule *Abbasi*; and none of the factors that govern whether to overrule a precedent favor doing so. The Court should therefore apply *Abbasi* to the facts here or dismiss the first question as improvidently granted.

In *Abbasi*, the Court set forth a test for when federal courts can extend the *Bivens* remedy to new contexts. That test calls on courts to engage in a nuanced factual inquiry that looks at, among other things, the identity of the defendants, the facts constituting the claim, and the availability of alternative remedies, among other fact- and case-specific considerations. *Id.* at 1856-58. But Petitioner and the United States have asked the Court to hold, as a categorical matter, that *no* cause of action exists under *Bivens* for First Amendment retaliation claims. Pet'r. Br. 25; U.S. Br. 19. The only way for the Court to rule for petitioner in that manner without overruling *Abbasi* would be to find that *no* First Amendment retaliation fact pattern could ever satisfy *Abbasi*'s nuanced multifactor test.

But Mr. Sargeant's case shows that there are fact patterns, in addition to respondent's, that meet *Abbasi*'s

requirements. Mr. Sargeant has no alternative remedies available to him, and his case involves no "special factors" counseling hesitation before extending *Bivens* to a new context. Failing to recognize a remedy under the circumstances of his case would free prison guards to retaliate against federal prisoners for their speech, and to bar them from access to institutional grievance processes whenever they wish, without the possibility of any sort of accountability.

Fact patterns like Mr. Sargeant's reveal that petitioner's conclusion—that no First Amendment retaliation claim could ever satisfy *Abbasi*—is flawed. Because these cases exist, the Court cannot rule for petitioner and the United States without overruling *Abbasi*. But neither petitioner nor the United States have pressed the Court to take that step. Nor should the Court do so; *Abbasi* is barely five years old. The Court in *Abbasi* went to great lengths to slow the extension of *Bivens* remedies to new contexts, setting forth a strict test designed to eliminate most claims while still leaving open the possibility that *Bivens* could work as intended for a select few, like Mr. Sargent and respondent. So far, the *Abbasi* test has functioned as designed: lower courts regularly apply the test to the specific facts they encounter and find that an extension of *Bivens* is not warranted. On ten previous occasions the Court has declined to extend the *Bivens* remedy, U.S. Br. at 13 (collecting cases), but the Court has not, on any of those occasions, adopted rigid categorical rules that would leave federal officials completely unaccountable for deliberate and egregiously unconstitutional conduct. The Court should not do so in this case.

The Court should stop short of any sweeping declarations. Instead it should honor the letter and spirit of *Abbasi*, and acknowledge the unique circumstances of incarcerated retaliation victims, by either applying

Abbasi exclusively to the unique facts of the case at bar or dismissing the first question presented as improvidently granted.

ARGUMENT

I. UNLESS NO CASE CAN MEET *ABBASI'S* TEST, THE COURT CANNOT CATEGORICALLY RULE OUT ALL *BIVENS* RETALIATION CLAIMS WITHOUT OVERRULING *ABBASI*

In *Abbasi*, the Court dedicated considerable space to setting forth the analysis for lower courts to apply when presented with *Bivens* claims in new contexts. Implausibly, petitioner would have the Court conclude that that very test was a false door through which no First Amendment retaliation claim could ever pass. Pet. Br. 25. But that is not what the Court intended. Instead, the Court stated explicitly: "[If] equitable remedies prove insufficient, *a damages remedy might be necessary* to redress past harm and deter future violations." *Abbasi*, 137 S. Ct. at 1858. If the *Abbasi* Court had not envisioned that an extension of *Bivens* might be warranted on some occasion, or if that Court had believed it possible to categorically eliminate entire classes of potential claims, then it would have had no reason to establish its test or to subject countless federal courts to its application.

Under the *Abbasi* test, federal courts asked to extend *Bivens* must first determine if the context is new. 137 S. Ct. at 1859-60. If the context is new, courts must assess whether "special factors" counsel "hesitation" before recognizing a *Bivens* claim in that new context. *Id.* at 1857. The Court explained this analysis in general terms:

> [T]he inquiry must concentrate 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. Thus, to be a "special factor counselling hesitation," a

> factor must cause a court to hesitate before answering that question in the affirmative. . . .
>
> [T]he decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies.

137 S. Ct. at 1857-58.

The generalized presentation of the special factors analysis makes for a test that is inherently fact-specific; to hold, based on one set of facts, that *no* conceivable First Amendment retaliation set of facts could ever satisfy such an inherently context-dependent test would be both needlessly overbroad (if not impossible) and unfaithful to *Abbasi*'s intent.

Abbasi explained that "sometimes there will be doubt [that *Bivens* should be extended] because the case arises in a context in which Congress has designed its regulatory authority in a guarded way." 137 S. Ct. at 1858. "And sometimes," the Court wrote, "there will be doubt because *some other feature of a case—difficult to predict in advance*—causes a court to pause[.]" *Id.* (emphasis added). Despite this recognition that the special factors in future cases are "difficult to predict in advance," petitioner and the United States urge this Court to "predict" features of every possible First Amendment retaliation case. *See* Pet. Br. 11 (drawing broad conclusions about "every *Bivens* extension").

The *Abbasi* Court continued, "[i]n a related way, if there is an alternative remedial structure *present in a certain case*, that alone *may* limit the power of the

judiciary to infer a new *Bivens* cause of action." 137 S. Ct. at 1859 (emphasis added).

Petitioner and the United States argue as if *Abbasi* left open the possibility of eliminating entire *Bivens* "contexts" wholesale without any fact-specific inquiry. Pet. Br. at 25-26 (claiming that all First Amendment retaliation claims *as a category* are a "new context"); U.S. Br. at 15-16 (same). But such an interpretation would render whole passages of the *Abbasi* opinion entirely superfluous.

The Court stated that "if Congress has created any alternative, existing process for protecting the injured party's interest[,] that itself may amount to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 1858. (quotations and alterations omitted). Determining whether Congress created a process for protecting the interests of an injured party must necessarily appraise the specific interests at issue *in that case*. For example, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court held that a First Amendment retaliation claim by a federal employee was not cognizable under *Bivens* "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." *Id.* at 368. While federal employees have access to comprehensive and meaningful procedural safeguards for retaliation claims, federal inmates like Mr. Sergeant do not. The determination whether to extend *Bivens* retaliation claims to federal inmates, as opposed to federal employees, requires a fresh inquiry.

The *Abbasi* Court itself assessed the claims before it individually, identifying *claim-specific* reasons for refusing to recognize *Bivens* claims:

> With respect to the claims against the Executive Officials, it must be noted that a *Bivens* action is not a proper vehicle for altering an entity's policy. . . .
>
> A closely related problem . . . is that the discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formulation of the policy in question.

137 S. Ct. at 1860-61 (internal quotations and citations omitted). The Court observed, though, that these concerns did not apply to the claims against the other petitioners. *Id.* at 1861 ("this special factor . . . applies to the claims against the Executive Officials"). And one petitioner in *Abbasi* "require[d] a different analysis" altogether. *Id.* at 1863.

Though the *Abbasi* Court indicated that few cases would pass its test, the language of the opinion undoubtedly envisioned that some cases would: "The answer most often will be Congress . . . In most instances . . . Sometimes there will be doubt . . . And sometimes there will be [other reasons for] doubt." *Id.* at 1857-58. Mr. Sargeant does not dispute that *Bivens* extensions are not warranted "in most instances," but for him the difference between "most instances" and *all* instances means everything. And yet petitioner and the United States casually suggest that no gap exists between the two.

To accept petitioner's invitation to categorically eliminate all First Amendment *Bivens* retaliation claims without overruling *Abbasi*, the Court must determine that no retaliation fact pattern could possibly meet *Abbasi*'s requirements. That is, petitioner asks the Court to omnisciently envision every conceivable First Amendment retaliation claim and hold that *all* of them have special factors counseling hesitation, and that *none* of them might, like Mr. Sargeant's case, have features that counsel *extending* the *Bivens* remedy. But

envisioning every conceivable case is an impossible task. "It ties the judicial assessment . . . to . . . judicially imagined [cases] . . . not to real-world facts." *Johnson v. United States*, 576 U.S. 591, 597 (2015). "How does one go about deciding" what these imagined cases involve? *Id.* "A survey? Expert evidence? Google? Gut instinct?" *Id.* Fortunately, envisioning every conceivable case is unnecessary here, as even a single example would be sufficient to show that the Court cannot eliminate all First Amendment retaliation claims without overruling *Abbasi.* Mr. Sargeant's case offers a particularly clear example.

II. MR. SARGEANT'S CASE SATISFIES *ABBASI*'S REQUIREMENTS

Mr. Sargeant's case illustrates why this Court should hesitate before broadly concluding that no First Amendment retaliation fact pattern could ever satisfy the test set forth in *Abbasi.* Mr. Sargeant's case features no special factors counseling hesitation. And it presents one important special factor counseling in favor of extending the remedy: lack of political power.

At all times relevant to his case, Mr. Sargeant was an inmate confined in the United States Penitentiary in Thomson, Illinois ("Thomson"). D. Ct. Dkt. No. 67 at 1.[2] The facts relevant to his claim revolve around adverse actions taken by Mr. Sargeant's case manager, Aracelie Barfield, who was responsible for guiding and evaluating his progress while incarcerated; Ms. Barfield is the defendant in Mr. Sargeant's case.[3] *Id.*

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[2] These citations are to the docket for the Northern District of Illinois in *Sargeant v. Barfield*, No. 19-cv-50187 (N.D. Ill.).

[3] The factual account that follows reflects Mr. Sargeant's handwritten allegations as construed by the District Court for the Northern District of Illinois.

On or around July 19, 2019, Mr. Sargeant filed a Prison Rape Elimination Act PREA report complaining of sexual harassment by a prison guard, Ms. Cruz. *Id.* at 2. The same day, Ms. Barfield gave Mr. Sargeant a copy of the institution's response to his PREA report, signed by Ms. Cruz. D. Ct. Dkt No. 23 at 6. When Mr. Sargeant complained that the response should not have been viewed by Ms. Cruz, its subject, Ms. Barfield began telling other prison officers that Mr. Sargeant had filed a PREA report. *Id.* at 7. Concerned by this behavior, Mr. Sargeant filed a bias complaint against Ms. Barfield, accusing her of misconduct. *Id.*

Shortly thereafter, Mr. Sargeant was denied customary privileges such as using the telephone and accessing the library. *Id.* at Exhibit 3. In addition, Ms. Barfield filed multiple false reports about Mr. Sargeant, resulting in a 60-day delay in the completion of his rehabilitation program. *Id.* at 7. Unsatisfied that she had gotten her point across, Ms. Barfield deliberately assigned Mr. Sargeant to live with inmates who were known to be particularly violent, some of whom attacked Mr. Sargeant on multiple occasions.[4] *Id.* at 9.

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[4] This Court has recognized that the transfer of an inmate to housing with known safety risks constitutes a clearly established Eighth Amendment violation. *See Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Federal courts of appeals have recognized for decades that forcing a prisoner to live with violent inmates in retaliation for filing a grievance is clearly unconstitutional under the First Amendment. *See, e.g.*, *Rhodes v. Robinson*, 408 F.3d 559, 569 (9th Cir. 2005) (prohibition on retaliatory punishment clearly established); *Atkinson v. Taylor*, 316 F.3d 257, 269–70 (3d Cir. 2003) (similar); *Scott v. Churchill*, 377 F.3d 565, 570–72 (6th Cir. 2004) (citing *Gibbs v. Hopkins*, 10 F.3d 373, 378-80 (6th Cir. 1993)) (similar); *see also Crawford-El v. Britton*, 951 F.2d 1314, 1318 (D.C. Cir. 1991) (holding that "interfere[nce] with the transmission of an

Mr. Sargeant suffered at the hands of Ms. Barfield until he was transferred from Thomson to a different facility. D. Ct. Dkt. No. 67 at 3. Because Mr. Sargeant's physical safety is no longer threatened by his retaliatory housing assignment at Thomson, neither injunctive relief nor relief through the prison grievance system is available. For these clear violations of Mr. Sargeant's constitutional rights, only damages can provide redress.

Tragically, inmates nationwide regularly experience retaliation, often resulting in physical harm, for accessing institutional grievance processes. For those in federal custody who exhaust those processes, no remedies exist; worse, for some, such as Mr. Sargeant, it is that very exhaustion that triggers the retaliation. This absence of alternatives to the very remedy that motivates constitutional violations has a chilling effect on the exercise of those processes, and on inmate speech generally; as a result, the scale of unreported federal prison official misconduct is difficult to measure.

Further, this class of particularly vulnerable federal inmates is expansive: federal prisoner claims based on First Amendment retaliation are dismissed in the federal courts nearly every day. And felons in federal custody who often lack the right to vote and any fixed residency have no ability to exercise the political power necessary to persuade Congress to provide a damages remedy to protect their constitutional rights. *See Carolene Prods. Co.*, 304 U.S. at 153 n.4. That so many are subject to retaliation without redress reveals a blind spot in the patchwork of constitutional rights.

The case now before the Court does not concern that blind spot; whether this Court decides to recognize

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inmate's legal papers for the purpose of thwarting the inmate's litigation" is unconstitutional).

respondent's First Amendment *Bivens* claim need not—and should not—bear on the viability of distinct First Amendment retaliation claims under *Bivens*. Yet petitioner seeks precisely that result, pitching respondent's particular circumstances as a model for determining whether *any* First Amendment retaliation claim could *ever* support a remedy under *Bivens*. Mr. Sargeant's case demonstrates the need for a cautious response to petitioner's argument.

Mr. Sargeant's claims are the kind that this Court sought to preserve in *Abbasi* and *Hernandez v. Mesa*, 140 S. Ct. 735 (2020). Seeking to ensure that courts did not overstep the judicial role under *Bivens*, the Court identified special factors counseling against the extension of *Bivens* to new contexts. Principally, these cases established that the Court should hesitate before extending *Bivens* remedies to claims against high-level officials or implicating government policymaking; claims that implicate sensitive issues of national security; and where alternative remedies are available to the plaintiff. In setting forth these factors, *Abbasi* and *Hernandez* clarified the Court's view as to the narrow availability of a *Bivens* remedy, simultaneously leaving open the possibility that, for certain claims, a *Bivens* remedy might be necessary.

Mr. Sargeant's is one of those claims—none of the *Abbasi* factors are implicated in Mr. Sargeant's case. Neither are the factors identified in *Hernandez*, nor those alleged by petitioner and the United States in the case at bar.

In *Abbasi*, this Court concluded that four "special factors" prevented the Court from recognizing the respondents' claims: (1) the attempt to use a *Bivens* remedy as a vehicle for altering an entity's policy, 137 S. Ct. at 1860, (2) the attempt to use a *Bivens* claim to

challenge "more than standard 'law enforcement operations,'" *id.* at 1861 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990)), (3) congressional silence in the face of salient, high-level executive policy, *id.* at 1862, and (4) the existence of alternative available remedies for the constitutional harm, apart from the recognition of an implied claim for money damages, *id.* None of these apply to Mr. Sargeant.

First, Mr. Sargeant seeks money damages *only* for a clear violation of his First Amendment rights at the hands of a low-level government official, not any government policy. The official did not act pursuant to any "policy," and Mr. Sargeant does not charge that she did. Second, Mr. Sargeant challenges *only* the conduct of one individual low-level government official that occurred in the scope of that official's employment; his case falls within the recurrent sphere of standard law enforcement operations. Third, there is no high-level executive policy implicated by Mr. Sargeant's suit against a low-level prison official, in contrast to the sweeping executive policies that were central to the *Bivens* claims disallowed in *Abbasi*. Mr. Sargeant does not even challenge *low*-level policy, such as the administration of the prison grievance system. He specifically challenges the retaliation of a single official for his having made use of that system. Finally, Mr. Sargeant's case is one of "damages or nothing." *Id.* at 1862 (quoting *Bivens*, 403 U.S at 410 (Harlan, J., concurring). Mr. Sargeant has been transferred from the facility where his constitutional rights were violated and no longer faces a constant threat of physical harm, so no equitable relief is available. Further, the only administrative grievance processes available to Mr. Sargeant were self-defeating: his very use of them motivated the violations of his constitutional rights. To determine that the availability of the prison grievance process obviates the need for a *Bivens* remedy

would effectively erase Mr. Sargeant's right to be free from retaliation for exercising his freedom of speech.[5] It would permit the Executive Branch to establish administrative procedures that not only fail to address retaliation, but generate it, allowing low-level Executive officials to weaponize the Court's "hesitation" against prisoners who seek redress for the wide variety of harms that they inevitably suffer while in custody.[6]

In addition to the special factors recognized in *Abbasi*, the special factors that the Court identified in *Hernandez*, as well as those that petitioner and the United States have identified, are inapplicable to Mr. Sargeant's case. His case will have no potential effect on

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[5] The Court has recognized "circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief" in the prison context. *See Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016). These circumstances include when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misinterpretation, or intimidation." *Id.*

[6] Cases brought pursuant to 42 U.S.C. § 1983 demonstrate the severity of the conditions to which inmates are routinely subjected. *See Glover v. Alabama Dep't of Corrections*, 734 F.2d 691 (11th Cir. 1984) (prison inmate stabbed by fellow inmate after a prison official offered five to six packs of cigarettes in exchange for plaintiff's killing); *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984) (inmate injured by prison guards' use of high-pressure water hoses, tear gas and billy clubs to subdue him while he was confined to a one-man cell); *Smith v. Rowe*, 761 F.2d 360 (7th Cir. 1985) (inmate held in segregation for over 22 months for possessing tape recorder); *Henderson v. DeRobertis*, 940 F.2d 1055 (7th Cir. 1991) (inmates subjected to freezing temperatures in cellblock without heating and exposed to winter elements, not permitted to bring warm clothes or provided blankets). If there were no *Bivens* remedy for federal inmates who suffer retaliation for complaining about circumstances such as these, then the fate of a prisoner's constitutional rights could depend simply on whether they are housed in state or federal facilities.

foreign relations, 140 S. Ct. at 744; no risk of undermining border security, *id.* at 746-47; Pet. Br. at 29; will not cause any reluctance by Congress to authorize damages awards for injuries outside of our borders, 140 S. Ct. at 747; and involves no adequate alternative remedies under other laws, Pet. Br. at 32-35; U.S. Br. at 24.[7]

Mr. Sargeant's case also presents one important feature counseling in favor of extending *Bivens* to cases like his: prisoners have no ability to influence Congress to establish a cause of action to protect them. Prisoners are true societal outcasts: disenfranchised, scorned and feared, shut away from public view. But the First Amendment is of general application, and its protections reach prisoners, too. To whom but the courts can prisoners turn, without any power to cobble together legislative majorities, to guarantee those rights? A constitution, no less than a society, can be judged by how it treats its prisoners.

The Court's test in *Abbasi* was carefully crafted to protect federal officials from the imposition of implied damages remedies in the face of factors counseling hesitation. But it was also crafted to protect claims like Mr. Sargeant's from being swept away by unwarranted generalizations. The Court left the door open for future *Bivens* extension because it recognized that cases involving petty constitutional violations by low-level federal officials in the recurrent sphere of quotidian law

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[7] Though not raised by petitioner or the United States, the common refrain that federal courts are ill-equipped to hear claims of monetary damages against law enforcement officers for constitutional violations also should not bar the extension of a *Bivens* remedy to Mr. Sargeant's case. His case raises no policy implications that are not equally prevalent in the context of claims under § 1983, which federal courts routinely and competently assess.

enforcement *exist*, and that some victims of those acts might require a damages remedy to be made whole. Mr. Sargeant's case is such a case. The *Abbasi* test demands case-by-case analysis of the particular factual circumstances before a court. The Court cannot, consistent with *Abbasi*, foreclose "any First Amendment retaliation claim" under *Bivens*.

III. BECAUSE NO PARTY HAS ASKED THE COURT TO OVERRULE *ABBASI*, THE COURT SHOULD EITHER APPLY IT TO THIS CASE'S UNIQUE FACT PATTERN OR DISMISS THE FIRST QUESTION AS IMPROVIDENTLY GRANTED

The question of whether this Court should revisit or overrule *Abbasi* has not been contemplated or briefed by the parties. The Court should therefore either apply *Abbasi* to the facts or dismiss the first question presented as improvidently granted.

The Court has not been asked to revise or overrule the *Abbasi* standard and should not do so. *See Janus v. American Federation of State County and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018) ("We will not overturn a past decision unless there are strong grounds for doing so.") (citing *United States v. International Business Machines Corp.*, 517 U.S. 843, 855–856 (1996) and *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring)); *see also Payne v. Tennessee*, 501 U.S. 808, 827, (1991) ("Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

The Court should not disturb *Abbasi* because *Abbasi* has achieved its aim: *Abbasi* signified a turning point in

the Court's *Bivens* jurisprudence, explicitly identifying *Bivens* as a disfavored remedy, but wisely preserving the possibility for rare cases that lack special factors or other avenues of redress. 137 S. Ct. at 1876. Its goal was to stem the tide of claims brought by plaintiffs who would use the Judicial Branch to shape or alter government policy, or who had other meaningful means of redress available to them, while simultaneously permitting the *Bivens* remedy to persist in the common and recurrent sphere of prisons where, the Court realized, it might still be necessary on rare occasions to invoke.

That goal has been achieved: judicial opinions extending *Bivens* claims to novel contexts post-*Abbasi* are vanishingly few. Lower courts have taken their task seriously, carefully analyzing facts and stopping when special factors cause them to hesitate. And yet the tool for vindicating the constitutional rights of victims of petty, lawless and unaccountable acts by low-level federal officials remains available in the limited cases where the Court recognized that it should. The very prospect that such a case might still be cognizable may well serve as a deterrent to federal officials who would, in its absence, subject another human being to the fate that befell Mr. Sargeant.

Because the parties have not requested that this Court overrule *Abbasi*, the issue has not been briefed, and the *Abbasi* test works as intended, the Court should either apply *Abbasi* or dismiss the first question presented as improvidently granted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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