No. 21-1492

In The Supreme Court of the United States

ANAS ELHADY,

Petitioner,

v.

BLAKE BRADLEY,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

ARGUMENT

In *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), this Court identified two categories of claims that courts of appeals have jurisdiction to resolve as part of interlocutory appeals from a district court's denial of qualified immunity: those that are "inextricably intertwined" with qualified immunity and those the resolution of which is "necessary to ensure meaningful review of" such a denial. *Id*. at 51. Because "loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets," *id*. at 49-50, *Swint* limited courts of appeals' authority in such cases to only those few issues that are inseparable from qualified immunity.

Here, the Sixth Circuit considered whether petitioner had a cause of action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), without engaging *Swint* or its strict limits on appellate jurisdiction in interlocutory qualified-immunity appeals. The brief in opposition endorses that approach—not because of anything specific to petitioner's case or claims, or even anything specific to the existence of a *Bivens* cause of action. Instead, the government argues that the existence of a *Bivens* cause of action will *always* be properly pendent to an interlocutory qualified-immunity appeal because it is among "certain categories of issues" courts of appeals may consider in such cases. Opp. 9.

That argument does not undermine the case for certiorari; it underscores it. This Court has repeatedly emphasized the narrow scope of the "collateral order doctrine." *See*, *e.g.*, *Will v. Hallock*, 546 U.S. 345, 350 (2006) ("[W]e have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope."). "This admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009) (citation omitted); *see also id*. at 114-15 (Thomas, J., concurring in part and concurring in the judgment).

Against that backdrop, the Sixth Circuit's holding (and the government's argument here) that the availability of a *Bivens* cause of action will always be pendent to an interlocutory qualified-immunity appeal warrants this Court's plenary review. After all, the result would be a significant *expansion* of interlocutory appellate jurisdiction in qualified-immunity appeals. Even if such judge-made expansions are permissible after *Mohawk*, they ought to come with this Court's express imprimatur.

Certiorari is also warranted because the brief in opposition's defense of such a jurisdictional expansion is in no way limited to *Bivens* cases. The government never explains *why* the availability of a *Bivens* cause of action will always fall into one of the two *Swint* categories; indeed, it doesn't cite *Swint* in its brief

in opposition even once. Instead, the government pushes the Sixth Circuit's open-ended approach to interlocutory jurisdiction even further—invoking what it describes as a "straightforward rule that certain categories of issues . . . may properly be considered by a court of appeals when exercising collateral-order jurisdiction over an order denying qualified immunity." Opp. 9.

The government defends this view by claiming that this Court already endorsed it in *Hartman v. Moore*, 547 U.S. 250 (2006), *Wilkie v. Robbins*, 551 U.S. 537 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). But as the petition explained (at 31-33), in both *Hartman* and *Iqbal*, the specific *Bivens* claims at issue *were* intertwined with qualified immunity. And in *Wilkie*, the court of appeals did not in fact decide the *Bivens* question as part of an interlocutory qualified-immunity appeal. *See* Pet. 32 & n.3.

This case, in contrast, closely resembles *Swint*. There, a county commission and three police officers had appealed from the denial of motions for summary judgment. 514 U.S. at 37. This Court held that the court of appeals could not hear the commission's interlocutory appeal—because the officers' qualified immunity could be resolved without any analysis of the commission's claim that it could not be sued under 42 U.S.C. § 1983 as interpreted in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *See* 514 U.S. at 51. Even though the county's defense was a pure question of law that might have been dispositive, that was not enough to justify pendent

appellate jurisdiction over that issue.[1] Likewise, whether it was clearly established that respondent's alleged conduct in this case violated petitioner's Fifth Amendment rights does not depend on whether petitioner has a means of vindicating those rights.

The best that can be said about the brief in opposition is that it reveals a latent and cert.-worthy tension between *Wilkie* (which it over-reads) and *Swint* (which it does not mention). Under the government's reading of *Wilkie*, courts of appeals may exercise pendent jurisdiction in interlocutory qualified-immunity appeals over issues that lack the logical relationship to qualified immunity that *Swint* required. The government never argues that its view is limited to *Bivens* claims; indeed, it does not even cabin its "straightforward rule," Opp. 9, to *federal* officers. Instead, the position advanced by the brief in

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[1] A similar issue arose in *Madigan v. Levin*, 571 U.S. 1 (2013) (per curiam). In an interlocutory appeal from the denial of qualified immunity in a § 1983 suit, the court of appeals had rejected the officer-defendant's argument that the § 1983 cause of action was displaced by the Age Discrimination in Employment Act. *See Levin v. Madigan*, 692 F.3d 607, 609, 617-22 (7th Cir. 2012). This Court granted certiorari to address that issue, but an *amicus* brief by a group of law professors (including counsel of record here) argued that the court of appeals had lacked jurisdiction over the matter. After oral argument largely focused on that jurisdictional defect (which respondent had not raised), the writ was dismissed as improvidently granted. *See* Amanda Frost, *Academic Highlight: Vladeck on Pendent Appellate Jurisdiction*, SCOTUSBLOG (Oct. 28, 2013, 10:35 AM), https://www.scotusblog.com/2013/10/academic-highlight-vladeck-on-pendant-appellate-jurisdiction/ (discussing *Madigan*); *see also Madigan*, 571 U.S. at 2.

opposition would have major consequences for interlocutory qualified-immunity appeals by state and local officials as well—in cases like *Swint* and *Madigan* as much as in cases like this one.

To preserve fidelity to the final judgment rule and this Court's decades of case law carefully policing it, those floodgates ought to be kept closed. But at the very least, if they *are* to be opened, it should be this Court that does so.

I. THE SCOPE OF JURISDICTION UNDER 28 U.S.C. § 1291 IN INTERLOCUTORY QUALIFIED-IMMUNITY APPEALS IS AN ISSUE OF IMMENSE IMPORTANCE THAT WARRANTS THIS COURT'S REVIEW.

By leaning into an expansive vision of interlocutory appellate jurisdiction, the brief in opposition unintentionally makes the case for why the first question presented should be granted. Rather than arguing that the jurisdictional issue here is limited to the facts of this case, or even to the availability of *Bivens* remedies in general, the government's position is that, in interlocutory qualified-immunity appeals, courts may consider an open-ended class of legal arguments that local, state, or federal officer-appellants can proffer—with no apparent limiting principle. Given that the brief in opposition fails to cite, let alone distinguish, this Court's most on-point precedent (*Swint*), the government's breezy suggestion that this important

question of federal law is not in serious dispute fails to persuade.

This is not the first time that the federal government has tried to expand the scope of interlocutory jurisdiction in qualified-immunity appeals. Previously, it has argued (unsuccessfully) that a district court's recognition of a *Bivens* cause of action is itself a collateral order subject to interlocutory appeal under 28 U.S.C. § 1291. *See Himmelreich v. Fed. Bureau of Prisons*, 5 F.4th 653, 662 (6th Cir. 2021) (rejecting this argument). The government's position now appears to be that there is a class of defenses the rejection of which are not *themselves* immediately appealable collateral orders, but which are nevertheless *always* within the pendent appellate jurisdiction of courts of appeals when considering interlocutory qualified-immunity appeals.[2] The government never identifies *which* defenses other than the absence of a *Bivens* cause of action fall into this category; nor does it explain why *those* defenses

[2] In *Himmelreich*, the court of appeals criticized the government for advancing an "overreaching interpretation of *Johnson* [*v. Jones*, 515 U.S. 304 (1995), that] would permit interlocutory appeal of every order denying a motion for summary judgment on a legal issue." 5 F.4th at 661-62. Here, the government's "overreaching interpretation" of interlocutory jurisdiction once again relies on *Hartman*, *Wilkie*, and *Iqbal*—this time to bootstrap rejections of legal defenses to interlocutory qualified-immunity appeals, in direct tension with *Swint*.

are (or should be) properly pendent to interlocutory qualified-immunity appeals in all cases.[3]

Instead, the government's argument reduces to the claim that this Court has already held as much in *Wilkie* (and, to a lesser extent, in *Hartman* and *Iqbal*). But none of those decisions come close to bearing the weight the government places on them. As the petition noted, this Court in *Hartman* specifically explained why defining the elements of a retaliatory prosecution claim was "directly implicated by the defense of qualified immunity." 547 U.S. at 257 n.5; Pet. 31-32. Indeed, this Court stressed that, consistent with the limits on the court of appeals' jurisdiction, its holding "does not go beyond" that interrelated legal issue. 547 U.S. at 257 n.5.

The same sort of direct implication existed in *Iqbal*, which held that courts of appeals considering qualified-immunity appeals could also consider whether the complaint sufficiently alleged the underlying constitutional violation. *See* 556 U.S. at

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[3] The government finds support for treating *Bivens* as *always* pendent to interlocutory qualified-immunity appeals in statements from this Court that the availability of a *Bivens* cause of action "puts great stress on the separation of powers," and that *Bivens* is "antecedent to" qualified immunity. Opp. 12. But these statements establish only that appellate courts with jurisdiction over a *final judgment* should reach the *Bivens* question first—even *sua sponte*—as in *Hernandez v. Mesa* (*Hernandez I*), 137 S. Ct. 2003, 2006-07 (2017) (per curiam). None of the cited statements can fairly be read to endorse the exercise of interlocutory appellate jurisdiction that is not already available under 28 U.S.C. § 1291.

673 ("[W]hether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded."); *see also Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."). Tellingly, this Court in *Iqbal* explained that interlocutory appellate jurisdiction was appropriate in both *Hartman* and *Iqbal because* the issues were sufficiently interconnected to qualified immunity under *Swint*. *See Iqbal*, 556 U.S. at 673 (citing *Swint*, 514 U.S. at 51). Those discussions belie any notion that *Swint* no longer cabins the scope of interlocutory jurisdiction in qualified-immunity appeals.

That leaves *Wilkie*, in which the court of appeals reached the availability of a *Bivens* cause of action as part of an appeal after final judgment, *not* an interlocutory qualified-immunity appeal. *See* Pet. 32. The government's response that "the order *this* Court reviewed in *Wilkie* was interlocutory" misses the point. Opp. 11 n.1 (emphasis added). The interlocutory order in *Wilkie* that reached this Court had been preceded by a separate, *non*-interlocutory appeal from a final judgment in which the court of appeals made its *Bivens* cause-of-action ruling. *See Robbins v. Wilkie*, 300 F.3d 1208, 1209-10 (10th Cir. 2002). That ruling became law of the case on remand and gave rise to the subsequent interlocutory denial of qualified immunity that this

Court then reviewed. *See Robbins v. Wilkie*, 433 F.3d 755 (10th Cir. 2006), *rev'd*, 551 U.S. 537 (2007). Moreover, this Court's jurisdiction in *Wilkie* under 28 U.S.C. § 1254 was (and is in petitioner's case, too) necessarily broader than a court of appeals's jurisdiction under § 1291. *See* Pet. 34 n.4. For both of those reasons, *Wilkie* did not implicate the jurisdictional question that this petition presents.

Even on its own terms, though, the government's reading of *Wilkie* would mean, at best, that this Court overruled *Swint* in a footnote and *sub silentio* (never mind that the later-decided *Iqbal* justified interlocutory appellate jurisdiction under *Swint*). But *Swint* is squarely on point, whereas the cryptic footnote in *Wilkie* appears to be the kind of "drive-by jurisdictional ruling[]" to which this Court seldom defers. *See*, *e.g.*, *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 91 (1998).

In any event, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Petitioner believes that *Swint* foreclosed the Sixth Circuit's jurisdiction to reach the availability of a *Bivens* cause of action here. Whether or not petitioner is correct on that point, certiorari is warranted at a minimum so that this Court—unlike the brief in opposition—can reconcile *Wilkie* and *Swint*.

II. *EGBERT* DOES NOT FORECLOSE PETITIONER'S CONDITIONS-OF-CONFINEMENT CLAIM.

As for whether a *Bivens* cause of action *should* be available in this case, the government is wrong to contend that *Egbert v. Boule*, 142 S. Ct. 1793 (2022), conclusively forecloses petitioner's *Bivens* claim. *See id*. at 1803 (declining to "dispense with *Bivens* altogether"). Although *Egbert* reiterated that courts should hesitate before recognizing new *Bivens* remedies, this Court has previously recognized *Bivens* remedies in challenges to the conditions of federal confinement. *See Carlson v. Green*, 446 U.S. 14, 19-23 (1980) (holding that *Bivens* remedies are available for Eighth Amendment conditions-of-confinement claims); *cf. Sell v. United States*, 539 U.S. 166, 193 (2003) (Scalia, J., dissenting) (suggesting that federal pretrial detainees could challenge the conditions of their confinement under *Bivens*). And petitioner does not contest any aspect of the decision to stop and detain him at the border crossing—only the conditions of his subsequent confinement within the United States.

This Court's skepticism toward *Bivens* remedies is beyond question. And yet, however justified that skepticism may be, it is no warrant to allow government officers to upend the final judgment rule—or to unsettle decades of established principles concerning the modest scope of the collateral order doctrine and the narrow jurisdiction that courts of appeals may exercise when reviewing interlocutory collateral orders.

But even if this Court is of the view that *Bivens* does warrant such special interlocutory appellate treatment, or that, more generally, the government's much broader "straightforward rule" ought to be adopted, this Court should grant certiorari and say so. Leaving the Sixth Circuit's analysis in this case untouched would allow the courts of appeals to expand their own jurisdiction in interlocutory qualified-immunity appeals based upon their (and the government's) over-readings of *Hartman*, *Wilkie*, and *Iqbal*—and their refusal to properly account for, and distinguish, *Swint*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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