No. _____

In The
Supreme Court of the United States

KEVIN BYRD,

Petitioner,

v.

RAY LAMB,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this Court's ruling in *Ziglar* v. *Abbasi*, 137 S. Ct. 184 (2017), federal courts recognize an implied cause of action against federal officials accused of unconstitutional conduct when (1) the case is not meaningfully different from *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or (2) the court is satisfied that the judiciary is well suited to decide whether to provide a remedy.

The circuits are split on how *Abbasi* applies to line-level federal police sued for individual instances of law enforcement overreach under the Fourth Amendment. In the First, Second, Third, Fourth, Sixth, and Eleventh Circuits, such cases can proceed under step one of *Abbasi* because they are not considered meaningfully different from *Bivens*. See, *e.g.*, *Hicks* v. *Ferreyra*, 965 F.3d 302 (4th Cir. 2020). In the Ninth Circuit, any case factually distinct from *Bivens* is considered meaningfully different, but line-level federal police can still be sued under step two of *Abbasi* for "conventional Fourth Amendment" violations. *Boule* v. *Egbert*, 998 F.3d 370 (9th Cir. 2021). In the Fifth and Eight Circuits, neither option is available. Those courts hold that such cases are (1) meaningfully different from *Bivens* and (2) the judiciary is not well suited to adjudicate them. See, *e.g.*, Pet. App. 6a–7a.

The question presented is:

Under either step of the *Abbasi* test, may line-level federal officers be sued for violating the Fourth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is plaintiff Kevin Byrd. Respondent is defendant Ray Lamb.

RELATED PROCEEDINGS

U.S. District Court for the Southern District of Texas:

Byrd v. *Lamb*,
No. 4:19-CV-3014 (Feb. 20, 2020)

U.S. Court of Appeals for the Fifth Circuit:

Byrd v. *Lamb*,
No. 20-20217 (Mar. 9, 2021)

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Kevin Byrd petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit, Pet. App. 1a, is reported as *Byrd* v. *Lamb*, 990 F.3d 879 (5th Cir. 2021) (per curiam). The judgment of the United States District Court for the Southern District of Texas, Pet. App. 13a, was given orally during a motion hearing and is not reported.

JURISDICTION

The Fifth Circuit entered its judgment below on March 9, 2021. Through its COVID-19 order, dated March 19, 2020, this Court extended the deadline to file a petition for a writ of certiorari to 150 days from the date of the judgment. Byrd timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV.

INTRODUCTION

On the morning of February 2, 2019, Kevin Byrd was trying to drive out of a parking lot in Conroe, Texas, when a Department of Homeland Security ("DHS") agent Ray Lamb stepped in front of Byrd's moving car, preventing Byrd from leaving and detaining him until local police arrived. Pet. App. 2a–3a, 53a. Though Lamb knew that Byrd had committed no crime, the agent pointed a gun at Byrd, tried to smash his driver's side window with a gun, and threatened to "put a bullet through his f—king skull" and "blow his head off." *Id*. at 2a. Lamb then pulled the trigger. *Id*. at 56a. The gun jammed. *Ibid*.

When police arrived, Agent Lamb showed them his DHS badge, leading the police to detain Byrd for several hours. Pet. App. 2a–3a. The police did not release Byrd until they reviewed security footage of the parking lot,[1] which confirmed Byrd's innocence. *Id*. at 3a.

Had Agent Lamb limited Byrd's movements by brandishing his loaded gun in the First, Second, Third, Fourth, Sixth, Ninth, or Eleventh Circuits, Byrd would have been able to sue him directly under the Fourth

[1] The video is available for the Court's review at the following link: https://tinyurl.com/KevinByrd.

Amendment. But because Agent Lamb acted in the Fifth Circuit, Byrd's lawsuit was thrown out on the ground that a *Bivens* cause of action was not available to him. Pet. App. 7a.

This split of authority is the latest to arise out of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which this Court recognized a damages remedy for Fourth Amendment violations committed by federal police who unlawfully search or seize someone. *Id*. at 397. Although the Court has curtailed the *Bivens* remedy over the ensuing decades, in *Ziglar* v. *Abbasi* it reaffirmed that the remedy remains available to people harmed by "individual instances of * * * law enforcement overreach." 137 S. Ct. 1843, 1862 (2017). In fact, the Court has gone as far as to specifically promise that, given the "necessity * * * of *Bivens* in the search-and-seizure context in which it arose" and given the "instruction and guidance to federal law enforcement officers" that it provides, a *Bivens* remedy would be "retain[ed] * * * in that sphere." *Id*. at 1856–1857.

Under *Abbasi*, there is a two-step test to determine whether a Fourth Amendment *Bivens* claim is available. First, a court must ask whether the claim is "different in a meaningful way" from the claim at issue in *Bivens*. 137 S. Ct. at 1859–1860. If it is not meaningfully different, the claim may proceed. If it *is* meaningfully different, the claim may still proceed so long as the court is satisfied that the federal judiciary is well suited to decide whether to grant a damages remedy. *Id*. at 1857–1858.

The federal appellate courts profoundly disagree with each other on the application of both steps of the *Abbasi* test to conventional search-and-seizure claims against line-level federal police. Six circuits—the First, Second, Third, Fourth, Sixth, and Eleventh—have concluded that these types of claims are not meaningfully different from *Bivens* and thus are permissible under step one of *Abbasi*. See, *e.g.*, *Hicks* v. *Ferreyra*, 965 F.3d 302, 311–312 (4th Cir. 2020).

The Ninth Circuit has reached the same result, but under step two of *Abbasi*. In *Boule* v. *Egbert*, 998 F.3d 370 (9th Cir. 2021), that court held that unless a case is factually identical to *Bivens*, it is meaningfully different and fails step one of *Abbasi*. *Id*. at 387. But the court went on to hold that such cases satisfy step two because "conventional Fourth Amendment" claims are "not an improper intrusion by the judiciary into the sphere of authority of other branches." *Id*. at 387, 389. After all, they are "indistinguishable from countless such claims brought against federal, state, and local law enforcement officials." *Id*. at 388.

In the Fifth and Eighth Circuits, by contrast, no *Bivens* remedy is allowed under either step of the *Abbasi* test. See Pet. App. 7a; *Ahmed* v. *Weyker*, 984 F.3d 564, 568 (8th Cir. 2020).[2] As a result, federal police

[2] Petitioner's counsel, the Institute for Justice, also represents Hamdi Mohamud in her concurrently filed petition for certiorari on the same issue. Pet. for Cert., *Mohamud* v. *Weyker*, No. 21-____ (S. Ct. Aug. 6, 2021). Closely related issues are also presented in Pet. for Cert., *Egbert* v. *Boule*, No. 21-147 (S. Ct. July 30, 2021), which is currently pending on certiorari before

in ten states have absolute immunity for "individual instances of * * * law enforcement overreach." *Abbasi*, 137 S. Ct. at 1862. The only exception is for claims against federal narcotics agents who unlawfully manacle a suspect inside his home and in front of his family—which is to say, cases identical to *Bivens*. Pet. App. 6a–7a. Only then will these circuits hold that the case satisfies step one of *Abbasi* and can proceed under the Fourth Amendment. If there is any factual deviation from this scenario—however trivial—then plaintiffs must continue to step two. And in the Fifth and Eighth Circuits, step two means "no *Bivens* claim." Pet. App. 9a (Willett, J., concurring).

This Court should grant certiorari and resolve the split over the application of the *Abbasi* standard to line-level federal officers sued for individual instances of law enforcement overreach under the Fourth Amendment. It is important for the courts to know whether such cases are similar enough to *Bivens* that they can be dealt with under step one of *Abbasi*, as the First, Second, Third, Fourth, Sixth, and Eleventh Circuits have determined. And if they are not, it is important for the courts to know whether the judiciary is still well suited in these types of cases "to consider and weigh the costs and benefits of allowing a damages action to proceed" under step two of *Abbasi*,

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this Court, and were presented in Pet. for Cert., *Oliva* v. *Nivar*, No. 20-1060 (S. Ct. June 17, 2021), denied ___ S. Ct. ___ (2021), reh'g denied (Aug. 2, 2021); see also note 9, *infra*.

as the Ninth Circuit has determined. *Boule*, 998 F.3d at 387 (quoting *Abbasi*, 137 S. Ct. at 1858).

This Court should grant certiorari even if—perhaps especially if—it agrees with the Fifth and Eighth Circuits that no remedy is available except under the precise circumstances of *Bivens*. In that case, this Court should say so. At least then Congress would know that *Abbasi*'s promise of preserving *Bivens* in the "common and recurrent sphere of law enforcement," 137 S. Ct. at 1857, is no longer good law and that it must step in to ensure that federal police—just like state and local police—may be held to account.

STATEMENT

Kevin Byrd's ordeal began with a car crash involving Byrd's ex-girlfriend, Darci, and Agent Lamb's son, Eric. Pet. App. 2a, 54a. On February 1, 2019, Darci and Eric, after being "kicked out of a bar," left a parking lot in Darci's car and soon collided with a Greyhound bus, injuring Darci. *Id*. at 2a, 54a–55a. Byrd learned about the accident the following morning, and immediately rushed to the hospital to check on Darci. *Id*. at 54a–55a. Darci and Byrd were still close because they had a child together and Darci worked in Byrd's mechanic shop.

When in the hospital, Byrd learned that Eric was the one driving Darci's car as it collided with the bus. Pet. App. 55a. Determined to find out more, Byrd went to the bar to investigate. *Id*. at 2a. Agent

Lamb was also at the bar that morning, picking up Eric's truck. *Id*. at 55a.

After Byrd established that the manager was out and would not be back any time soon, he decided to leave the bar and get some food. Pet. App. 55a. As Byrd was driving out of the parking lot, he was noticed by Agent Lamb, who knew about Byrd and his previous relationship with Darci. *Ibid*. Worried that Byrd's investigations could cause trouble for his son, Lamb jumped out of Eric's truck with his gun drawn. *Ibid.*; see also *id*. at 2a; note 1, *supra*. Lamb then approached Byrd's car and tried to smash the driver's side window, yelling that he would "put a bullet through [Byrd's] f—king skull" and "blow [Byrd's] head off." *Id*. at 2a, 56a. Lamb then stepped in front of Byrd's car to prevent Byrd from leaving and pulled the trigger. *Id*. at 56a. The gun jammed, causing the bullet to pop out of its chamber and fall on the ground. *Ibid*. At that point, both Byrd and Lamb called 911. *Ibid*. Byrd, because he feared for his life. Lamb, because he wanted Byrd arrested, so Byrd would stop investigating his son's involvement in the car crash.

When local police arrived, Agent Lamb holstered his gun and presented them with his DHS credentials. Pet. App. 2a–3a, 56a. This prompted the officers to handcuff Byrd and detain him for four hours in the back of a police car. *Id*. at 3a, 56a–57a. After reviewing the parking-lot surveillance footage, police officers released Byrd and arrested Lamb for aggravated assault with a deadly weapon and misdemeanor

criminal mischief. *Id*. at 3a, 57a–58a. The charges against Lamb were eventually dismissed.

Byrd sued Agent Lamb six months after the encounter, for using excessive force and for unlawfully detaining him.[3] Pet. App. 3a. Lamb moved to dismiss both Fourth Amendment claims under qualified immunity. *Id*. at 45a–50a. The district court denied the motion without issuing a written opinion. *Id*. at 19a. During the motion hearing, the court stated that "the complaint passes muster at this stage," since, according to the Fifth Circuit's own caselaw, "[a] police officer who terrorizes a civilian by brandishing a cocked gun in front of a civilian's face * * * has certainly laid the building blocks for a * * * [constitutional] claim against him." *Ibid.* (citing *Checki* v. *Webb*, 785 F.2d 534, 538 (5th Cir. 1986)).

Agent Lamb appealed the denial of qualified immunity to the Fifth Circuit, which reversed, but without addressing that issue. Pet. App. 4a, 7a. Instead, the court held that Byrd did not have a federal cause of action under *Bivens*. *Ibid*. The court acknowledged that "Agent Lamb's attorney did not even raise the *Bivens* issue in the district court." *Id*. at 6a. Still, the court reasoned that because the defense of qualified immunity directly implicated the question of federal-officer liability under *Bivens*, if there were no *Bivens*

[3] Byrd also sued two local police officers: one who detained him based on Agent Lamb's misrepresentations and another who did not intervene to stop the detention. Pet. App. 61a–63a. The district court dismissed both claims. Byrd did not appeal. *Id*. at 3a.

cause of action in the case, then the case could be dismissed on that ground alone. *Id*. at 4a.

The Fifth Circuit then performed *Abbasi*'s two-step test, as modified by its own decision in *Oliva* v. *Nivar*, 973 F.3d 438 (5th Cir. 2020), cert. denied, ___ S. Ct. ___ (May 24, 2021), reh'g denied (Aug. 2, 2021). Pet. App. 1a–2a. First, the Fifth Circuit held that Byrd's claims did not fall within an "established *Bivens* categor[y]" because "Agent Lamb did not manacle Byrd in front of his family, nor strip-search him, as was the case in *Bivens*." *Id*. at 7a. The list of factors the court found meaningful enough to distinguish *Bivens* included that:

- the case "arose in a parking lot, not a private home as was the case in *Bivens*," *id*. at 6a;
- "Agent Lamb prevented Byrd from leaving the parking lot; he was not making a warrantless search for narcotics in Byrd's home, as was the case in *Bivens*," *id*. at 6a–7a; and
- "[t]he incident between the two parties involved Agent Lamb's suspicion of Byrd harassing and stalking his son, not a narcotics investigation as was the case in *Bivens*," *id*. at 7a.

Second, the court held that despite this case involving conventional Fourth Amendment claims, it also failed step two of *Abbasi*. Pet. App. 7a. The court reasoned that "[h]ere, as in *Oliva*, separation of powers

counsels against extending *Bivens*," because in the Federal Tort Claims Act, Congress "did not make *individual* officers statutorily liable for excessive-force or unlawful-detention claims." *Ibid.* (emphasis added). In reaching this conclusion, the Fifth Circuit did not discuss this Court's holding in *Carlson* v. *Green* that "[the] FTCA and *Bivens* a[re] parallel, complementary causes of action." 446 U.S. 14, 20 (1980). The Fifth Circuit also did not acknowledge that Congress had endorsed excessive-force and unlawful-detention claims against individual officers "brought for a violation of the Constitution of the United States." Westfall Act, 28 U.S.C. 2679(b)(2); see *Hernandez* v. *Mesa*, 140 S. Ct. 735, 748 n.9 (2020) (stating that the Westfall Act "left *Bivens* where it found it" in 1988, which included a constitutional remedy for such claims).

Concurring in that judgment, Judge Willett acknowledged that the "recent decision in *Oliva*" precluded any *Bivens* remedy for Byrd. Pet. App. 9a. He recognized that, in the Fifth Circuit, plaintiffs now fail step one of *Abbasi* every time a case differs from "the precise facts of" *Bivens*. *Ibid*. And they fare no better under step two, which the Fifth Circuit has held means "no *Bivens* claim." *Ibid*.

Judge Willett went on to discuss the implications of the Fifth Circuit's precedent, emphasizing that "redress for a federal officer's unconstitutional acts is either extremely limited or wholly nonexistent, allowing federal officials to operate in something resembling a Constitution-free zone." Pet. App. 10a. Judge Willett

acknowledged that as a "[m]iddle-management circuit judge[ ]," he must follow precedent, *id*. at 8a, but expressed hope that "as the chorus" lamenting "today's rights-without-remedies regime" becomes "louder, change comes sooner," *id*. at 12a.

REASONS FOR GRANTING THE PETITION

I. The circuits are split over the application of *Abbasi* to conventional Fourth Amendment claims.

Since its 1971 *Bivens* decision, this Court has recognized a damages remedy for Fourth Amendment violations by federal police. *Bivens*, 403 U.S. at 397. And *Abbasi* confirmed that "in the search-and-seizure context in which [*Bivens*] arose," a constitutional remedy not only exists but is necessary. 137 S. Ct. at 1856.

Post *Abbasi*, there is a two-step judicial inquiry to determine whether a plaintiff may bring a Fourth Amendment *Bivens* claim. The first step asks whether a case presents a "new context," in that it is "different in a meaningful way" from the *Bivens* case itself. *Abbasi*, 137 S. Ct. at 1859–1860. If there are no meaningful differences, then the inquiry stops there, and the plaintiff can proceed with the claim. If there are meaningful differences, the inquiry continues to the second step, which asks "whether the Judiciary is well suited" to decide whether to allow a damages claim to move forward. *Id*. at 1857–1858.

Circuits are split on both steps of the *Abbasi* test.

A. Nine circuits disagree on whether conventional Fourth Amendment claims satisfy step one of *Abbasi*.

In *Abbasi*, the Court explained that a Fourth Amendment claim fails step one of *Abbasi* when it is "different in a meaningful way from previous *Bivens* cases decided by this Court." 137 S. Ct. at 1859; see also *Hernandez*, 140 S. Ct. at 743. The Court also supplied examples of differences that might be meaningful, such as the: (1) rank of the officers involved; (2) constitutional rights at issue; (3) generality or specificity of the official action; (4) extent of judicial guidance supplied to an officer; (5) statutory mandate for the officer's actions; (6) risk of disruptive intrusion by the judiciary into the functioning of other branches; or (7) presence of potential factors previous *Bivens* cases did not consider. *Abbasi*, 137 S. Ct. at 1860.

This Court's recent decisions in *Hernandez* and *Abbasi* provide practical examples of the sort of cases that will be found meaningfully different from *Bivens*. *Hernandez* involved a cross-border shooting by a Customs and Border Protection officer of a foreign national on Mexico's side of the U.S.–Mexico border. 140 S. Ct. at 740. Due to the case's international dimension, which quickly made "[t]he shooting * * * an international incident," the Court held that "the risk of disruptive intrusion by the Judiciary into the functioning of other branches [was] significant." *Id.* at 740, 743 (cleaned up). The Court also found meaningful differences in *Abbasi*, in which some of the claims

involved high-ranking justice department officials in charge of national security policy, while others—against a prison warden—lacked the necessary judicial guidance. 137 S. Ct. at 1860, 1864.

Because neither *Hernandez* nor *Abbasi* dealt with conventional Fourth Amendment claims against line-level federal police, circuits adjudicating such cases have split on what constitutes a meaningful difference under step one of *Abbasi*. According to six of them, individual instances of law enforcement overreach by line-level officers are not meaningfully different from *Bivens* and can proceed under step one; according to three of them, they are meaningfully different and may only proceed if they satisfy step two.

1. Six circuits hold that standard Fourth Amendment violations by line-level federal police satisfy step one of *Abbasi*.

Since *Abbasi*, at least six circuits—the First, Second, Third, Fourth, Sixth, and Eleventh—have recognized that search-and-seizure claims against line-level federal police are not meaningfully different from *Bivens* and thus arise in an established context. After all, these "garden-variety *Bivens* claims," *Jacobs* v. *Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019), are fundamentally distinct from cases like *Hernandez* or *Abbasi*, where, given the nature of the claims, "it is

glaringly obvious that [they] * * * involve[d] a new context," *Hernandez*, 140 S. Ct. at 743.

The Sixth Circuit, for example, recently held that a claim against U.S. marshals was not meaningfully different from *Bivens* when those officers searched a home while in pursuit of a fugitive and subsequently shot a resident of the home. *Jacobs*, 915 F.3d. at 1038–1039. The marshals argued that the case was meaningfully different from *Bivens* because it involved a different federal agency and a different set of circumstances that led to the entry of the home. Defendants-Appellants' Br. at 26, *Jacobs* v. *Alam*, 915 F.3d 1028 (6th Cir. 2019) (No. 18-1124), 2018 WL 2331732. But the Sixth Circuit disagreed. Noting that *Abbasi* "took great care to emphasize the continued force and necessity of *Bivens* in the search-and-seizure context in which it arose," the court ruled that the plaintiff's Fourth Amendment claims were "run-of-the-mill challenges to standard law enforcement operations that fall well within *Bivens* itself." *Jacobs*, 915 F.3d. at 1037–1038 (cleaned up).

Similarly, in the Fourth Circuit, a plaintiff (a federal officer himself) was allowed to sue U.S. Park Police officers who twice stopped his car without probable cause or reasonable suspicion. *Hicks*, 965 F.3d at 306. The officers argued that the case was meaningfully different from *Bivens* because "Appellants *and* Appellee were law enforcement officers and members of the executive branch of the federal government" and because "a *Terry* stop of a vehicle * * * is a *de minimis*

constitutional intrusion compared to the warrantless home invasion, arrest and strip-search in *Bivens*." Defendants-Appellants' Reply Br. at 7–8, *Hicks* v. *Ferreyra*, 965 F.3d 302 (4th Cir. 2020) (No. 19-1697), 2019 WL 5789882. But the Fourth Circuit disagreed. It ruled that "along every dimension the Supreme Court has identified as relevant to the inquiry, this case appears to represent not an extension of *Bivens* so much as a replay." *Hicks*, 965 F.3d at 311. "Just as in *Bivens*, [the plaintiff] seeks to hold accountable line-level agents of a federal criminal law enforcement agency, for violations of the Fourth Amendment, committed in the course of a routine law-enforcement action." *Ibid*.

Four other circuits on this side of the split are:

- the First Circuit, which allowed a *Bivens* claim for a Fourth Amendment violation by FBI agents who unlawfully searched a plaintiff's computer and then arrested and detained the plaintiff based on this unlawful search, *Pagán-González* v. *Moreno*, 919 F.3d 582 (1st Cir. 2019);
- the Second Circuit, which allowed a *Bivens* claim for a Fourth Amendment violation by a U.S. Forest Service officer who "unreasonably prolonged an otherwise lawful traffic stop for an expired vehicle inspection sticker" to question the plaintiff about drugs and perform a "dog sniff" search, *McLeod* v. *Mickle*, 765 Fed. Appx. 582 (2d Cir. 2019) (summary order);

- the Third Circuit, which allowed a *Bivens* claim for a Fourth Amendment violation by Customs and Border Protection officers who unlawfully searched plaintiffs' cruise-ship cabins on suspicion of drug-smuggling activity, *Bryan* v. *United States*, 913 F.3d 356 (3d Cir. 2019); and
- the Eleventh Circuit, which allowed a *Bivens* claim for a Fourth Amendment violation by a U.S. Postal Service investiator who unlawfully seized a plaintiff's storage unit by preventing entry to it for three months, *Harvey* v. *United States*, 770 Fed. Appx. 949 (11th Cir. 2019) (per curiam).

Thus, in these six circuits, traditional Fourth Amendment claims against line-level federal officers are not considered meaningfully different from *Bivens* and are allowed to proceed.

2. Three circuits hold that standard Fourth Amendment violations by line-level federal police fail step one of *Abbasi*.

By contrast, three circuits—the Fifth, Eighth, and Ninth—hold that any factual distinction from *Bivens* constitutes a meaningful difference and a claim may only proceed if it satisfies step two of *Abbasi*.

The Fifth Circuit panel below relied on *Oliva* v. *Nivar* to hold that Fourth Amendment *Bivens* cases are limited to those that involve "manacl[ing] [the plaintiff] in front of his family in his home [and] strip-searching him in violation of the Fourth Amendment." Pet. App. 6a (citing *Oliva*, 973 F.3d at 442).

In that case, Veterans Affairs police wrestled a veteran to the ground in a chokehold and arrested him because he placed his identification card in a plastic bin instead of handing it to police while going through a security checkpoint. *Oliva*, 973 F.3d at 440–441. The Fifth Circuit held that the case was meaningfully different from *Bivens* because:

- "[t]his case arose in a government hospital, not a private home";
- "[t]he VA officers were manning a metal detector, not making a warrantless search for narcotics";
- "[t]he dispute that gave rise to Oliva's altercation involved the hospital's ID policy, not a narcotics investigation";
- "[t]he VA officers did not manacle Oliva in front of his family or strip-search him"; and
- "the narcotics officers did not place Webster Bivens in a chokehold."

Id. at 442–443.

In the opinion below, the Fifth Circuit reaffirmed this holding. As it did in *Oliva*, the court held that

Byrd's case does not fall within an "established *Bivens* categor[y]," concluding that it was meaningful that "Agent Lamb did not manacle Byrd in front of his family, nor strip-search him, as was the case in *Bivens*." Pet. App. 6a–7a. The court also thought it significant that: (1) the case "arose in a parking lot, not a private home as was the case in *Bivens*"; (2) "Agent Lamb prevented Byrd from leaving the parking lot; he was not making a warrantless search for narcotics in Byrd's home, as was the case in *Bivens*"; and (3) "[t]he incident between the two parties involved Agent Lamb's suspicion of Byrd harassing and stalking his son, not a narcotics investigation as was the case in *Bivens*." *Ibid*.

The Fifth Circuit is joined by the Eighth in its crabbed interpretation of *Abbasi*'s meaningful differences test. In *Ahmed* v. *Weyker*, plaintiffs sued a task-force agent whose lies to another police officer caused their unlawful arrest. 984 F.3d 564, 566 (8th Cir. 2020). The court rejected the plaintiffs' unlawful-detention claims under *Bivens*, observing that "no Supreme Court case *exactly mirrors* the facts and legal issues presented here." *Id*. at 568 (cleaned up) (emphasis added). The court then purported to identify meaningful differences, including that: (1) the task-force officer "did not enter a home"; (2) "[l]ying and manipulation * * * are simply not the same as the physical invasions that were at the heart of *Bivens*"; and (3) "[the agent] did not arrest anyone herself," even though her lies in her capacity as a task-force officer caused the plaintiffs to be arrested. *Id*. at 568–570; see also *Farah* v. *Weyker*,

926 F.3d 492, 498–500 (8th Cir. 2019) (performing a virtually identical meaningful differences analysis based on the same set of facts).

Finally, the Ninth Circuit has also recently determined that trivial factual differences are sufficient to preclude *Bivens* actions against line-level federal officers from moving forward under step one of *Abbasi*. In *Boule* v. *Egbert*, an innkeeper sued a Customs and Border Protection ("CBP") officer for "grabb[ing] * * * and push[ing] him aside and onto the ground" before approaching the innkeeper's guest to ask about the guest's immigration status. 998 F.3d 370, 386 (9th Cir. 2021). The court admitted that the innkeeper's Fourth Amendment claim was "indistinguishable from Fourth Amendment excessive force claims that are routinely brought under *Bivens* against F.B.I. agents." *Id*. at 387. Still, the Ninth Circuit held that this claim arose in a new context because the defendant was an agent of the border patrol and not the FBI. *Ibid*.[4]

3. The decision below conflicts with *Abbasi* and exacerbates the circuit split.

Abbasi confirmed that, when it comes to "individual instances of * * * law enforcement overreach" by line-level federal police, *Bivens* is still good law. 137 S. Ct. at 1857. That's because in "this common and

[4] Ironically for a case requiring factual identity, *Boule* wrongly identified the agents in *Bivens* as working for the FBI, rather than for the now-defunct Federal Bureau of Narcotics.

recurrent sphere of law enforcement," there is "undoubted reliance" on *Bivens* as a "settled" and "fixed principle." *Ibid*.

By providing a list of examples of meaningful differences, see Section I(A), *supra*, *Abbasi* could not have meant that every difference, however slight, is meaningful. After all, the "settled law of *Bivens*" includes this Court's own precedent. *Abbasi*, 137 S. Ct. at 1857. And the Court has never cabined *Bivens* to its facts. See *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (stating that "*Bivens* * * * allow[s] a plaintiff to seek money damages from government officials who have violated his Fourth Amendment rights"); accord *Meshal* v. *Higgenbotham*, 804 F.3d 417, 429 (D.C. Cir. 2015) (Kavanaugh, J., concurring) ("The classic *Bivens* case entails a suit alleging an unreasonable search or seizure by a federal officer in violation of the Fourth Amendment."). To the contrary, when offered the opportunity, the Court has consistently summarized the original context of *Bivens* in general terms.[5]

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[5] See, *e.g*., *Hui* v. *Castaneda*, 559 U.S. 799, 803 n.2 (2010) (describing *Bivens* as "an implied cause of action for damages against federal officers alleged to have violated the petitioner's Fourth Amendment rights"); *Wilkie* v. *Robbins*, 551 U.S. 537, 549 (2007) (stating that pursuant to *Bivens*, "the victim of a Fourth Amendment violation by federal officers had a claim for damages"); *Correctional Servs. Corp*. v. *Malesko*, 534 U.S. 61, 66 (2001) (describing the holding of *Bivens* as allowing "a victim of a Fourth Amendment violation by federal officers [to] bring suit for money damages against the officers in federal court"); *United States* v. *Stanley*, 483 U.S. 669, 678 (1987) (stating that "[i]n *Bivens*, we held that a search and seizure that violates the Fourth Amendment can give rise to an action for damages against the

Making the point even more clearly, *Abbasi* itself explicitly noted 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. And that is consistent with this Court's precedent, which has repeatedly allowed *Bivens* Fourth Amendment actions from different agencies—and occurring in different locations—than those in *Bivens*. 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*, 526 U.S. 603 (federal marshals searching a home with a news crew); *Hunter* v. *Bryant*, 502 U.S. 224 (1991) (per curiam) (Secret Service agent making a warrantless arrest in a home); *Anderson* v. *Creighton*, 483 U.S. 635 (1987) (FBI agents 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).

With its decision below, the Fifth Circuit confirmed its departure from *Abbasi*'s meaningful differences test. Here, just like in *Oliva*, it failed to properly apply this test, relying instead on inconsequential distinctions regarding the precise nature of Byrd's Fourth Amendment injury. Pet. App. 6a–7a. But as six other circuits have held, *Abbasi* unquestionably preserved *Bivens* in the "common and recurrent sphere of law enforcement" where "individual instances of

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offending federal officials even in the absence of a statute authorizing such relief").

* * * law enforcement overreach * * * are difficult to address except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1857, 1862. This is a far cry from limiting *Bivens* to its facts. The Fifth Circuit, along with the Eighth and the Ninth, is wrong. The Court should grant review and reverse.

B. Three circuits disagree on whether, under step two of *Abbasi*, the judiciary is well suited to decide whether to provide a damages remedy in conventional Fourth Amendment claims.

If a court determines that a Fourth Amendment case is "different in a meaningful way" from *Bivens*, it must then decide whether, given separation-of-powers considerations, it can still allow the case to move forward. *Abbasi*, 137 S. Ct. at 1859. The outcome of this analysis can be highly consequential, as the court must determine "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." *Id.* at 1857–1858. Often that means that if a court authorizes a damages remedy in a context remote to *Bivens*, it recognizes a "new substantive legal liability," *id.* at 1857 (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 426–427 (1988)), or, in the words of *Wilkie* v. *Robbins*, creates a "new species of litigation," 551 U.S. 537, 562 (2007) (quoting *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983)). On the other hand, denying a damages remedy often means that there is no way to hold federal officers to account for even the

most flagrant Fourth Amendment violations. See *Abbasi*, 137 S. Ct. at 1862.

The circuits are divided on whether conventional Fourth Amendment claims dealing with individual instances of law enforcement overreach present the weighty concerns that should preclude a federal cause of action. The Fifth and Eighth Circuits hold that they do. By contrast, the Ninth Circuit has held that these claims are "indistinguishable from countless such claims brought against * * * state[] and local law enforcement officials," and thus are not "an improper intrusion by the judiciary into the sphere of authority of other branches." *Boule*, 998 F.3d at 388–389.

1. The Fifth and Eighth Circuits have held that the judiciary is not well suited to decide whether to recognize a Fourth Amendment remedy.

The Fifth and Eight Circuits hold that recognizing a *Bivens* remedy, even in a conventional Fourth Amendment context, would improperly intrude on a congressional sphere of authority. Even in this context, therefore, Fourth Amendment claims brought in these circuits fail under step two of *Abbasi*.

In the Fifth Circuit, the court recently denied a damages remedy to José Oliva, the Vietnam veteran who was assaulted by VA police, and petitioner Kevin Byrd, the plaintiff in the case below who was threatened by an armed DHS officer. *Oliva*, 973 F.3d at 442,

444; Pet. App. 7a. Both men raised straightforward claims involving "individual instances of * * * law enforcement overreach." *Abbasi*, 137 S. Ct. at 1862. Both men's claims are "indistinguishable from countless such claims brought against federal, state, and local law enforcement officials." *Boule*, 998 F.3d at 389. Yet, the court determined that allowing either man's claims to proceed would mean improperly intruding on a congressional sphere of authority. *Oliva*, 973 F.3d at 443–444; Pet. App. 7a.

The Fifth Circuit reached this conclusion after looking to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671 *et seq*., which allows suits against the United States government—and not individual officers—for certain intentional torts, such as false arrest, assault, and battery, 28 U.S.C. 2680(h). The FTCA's very existence, in the court's view, meant that by granting a remedy to Oliva and Byrd, the judiciary would improperly intrude on Congress's power. *Oliva*, 973 F.3d at 444; Pet. App. 7a. Moreover, the deliberate choice by Congress to provide an intentional-tort remedy against the government and not individual officers also meant that Congress did not want the judiciary to be acting in this space. *Ibid*.

The Fifth Circuit's analysis of the FTCA overlooks two very important factors. First, it is "crystal clear that Congress views [the] FTCA and *Bivens* as parallel, complementary causes of action," and, therefore, plaintiffs with claims that can be described as both a constitutional violation and an intentional tort "shall have an action under FTCA against the United States

as well as a *Bivens* action against the individual officials." *Carlson*, 446 U.S. at 19–20. As such, the mere existence of the FTCA does not indicate that, by adjudicating traditional Fourth Amendment claims, the judiciary would be improperly stepping into a congressional sphere of authority.

Second, through the Westfall Act amendment to the FTCA, Congress did endorse remedies against individual officers for exactly the types of excessive-force and unlawful-detention claims at issue in this case. Such claims can be brought not under the FTCA, but under *Bivens*, when, like here, they allege "a violation of the Constitution of the United States." 28 U.S.C. 2679(b)(2). The Court acknowledged this endorsement in *Hernandez*, stating that "[b]y enacting [the Westfall Act], Congress made clear that it was not attempting to abrogate *Bivens*" and that it "left *Bivens* where it found it" in 1988, which included a constitutional remedy for excessive-force and unlawful-detention violations. 140 S. Ct. at 748 n.9; see also *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 491 (2020) (citing the Westfall Act to conclude that "damages against federal officials [are] an appropriate form of relief today").

Thus, not only did Congress allow for FTCA and *Bivens* claims to be complementary—it specifically recognized that the judiciary is well equipped to deal with such claims under *Bivens*.

The Eighth Circuit joins the Fifth in its nigh-irrebuttable presumption against Fourth Amendment

Bivens claims. In *Ahmed*—the case dealing with a rogue task-force agent who knowingly lied to cause the plaintiffs to be arrested—the court refused to "weigh the costs and benefits of creating a new substantive legal liability," stating that "Congress is better equipped than we are to make the call." 984 F.3d at 570–571 (internal quotation marks omitted). In the court's view, recognizing a damages action would be improper because allowing this case—or any case—to go to trial "would risk burdening and interfering with the executive branch's investigative functions," divert public resources to litigation, and deter "able citizens from public office." *Id*. at 570 (cleaned up).

In other words, just like in the Fifth Circuit, the court created an impossibly high standard for satisfying step two of *Abbasi*. According to this view, the judiciary is never well positioned to decide whether to allow a remedy directly under the Fourth Amendment, since even in the most typical of excessive-force cases, the judiciary would intrude into the activities of other branches by simply doing its job, like allowing discovery. Importantly, these same concerns would have been present in *Bivens* itself. And yet, *Abbasi* preserved *Bivens* in this "common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1857.

2. In the Ninth Circuit, the judiciary is well suited to decide whether to recognize a Fourth Amendment remedy.

The Ninth Circuit sharply disagrees with the Fifth and the Eighth on step two of *Abbasi*. According to that court, when the judiciary is asked to decide a conventional Fourth Amendment case involving line-level federal police, it is well positioned to consider and weigh the costs and benefits of allowing a damages action to move forward.

The Ninth Circuit's leading case is *Boule*—the same case that limited *Bivens* to its facts for the purpose of recognizing an established context, see Section I(A), *supra*. There, the Ninth Circuit also held that, just as in *Bivens* itself, allowing plaintiffs to proceed on their Fourth Amendment claims for individual instances of law enforcement overreach would not intrude into a congressional sphere of authority. *Boule*, 998 F.3d at 388–389.

As mentioned earlier, *Boule* involved a CBP officer shoving down an innkeeper to get to his guest and interrogate that man about his immigration status. 998 F.3d at 386. The court did hold that, because the officer worked for CBP, and not the FBI, the context was new. *Id*. at 387; see also note 4, *supra*. But it also held that in a "conventional Fourth Amendment excessive force claim" such as the one at issue in *Boule*, the judiciary is well suited to decide whether to allow a damages remedy—just like it did in *Bivens* itself,

and just like it has in countless other excessive force cases brought against state and local police. *Id*. at 389.

The court explained that "any costs imposed by allowing a *Bivens* claim to proceed are outweighed by compelling interests in favor of protecting United States citizens * * * from unconstitutional activity by federal agents." 998 F.3d at 389. "[C]onventional Fourth Amendment" *Bivens* actions, after all, are "a far cry from the contexts in *Abbasi* and *Hernandez*," where such costs would have involved a recognition of a new substantive legal liability. *Id*. at 387. Instead, in run-of-the-mill cases, all that was needed was the exact same remedy allowed to Webster Bivens: a damages claim against the line-level law enforcement officer who violated Boule's Fourth Amendment rights.[6]

3. The decision below conflicts with *Abbasi* and exacerbates the circuit split.

When *Abbasi* spoke of sensitive considerations involving a recognition of "a new substantive legal liability," it excluded claims like the one made by Byrd, in which "individual instances of * * * law enforcement overreach" arise in a conventional Fourth Amendment context and "are difficult to address except by way of

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[6] The Ninth Circuit in *Boule*, in contrast to the Fifth Circuit in *Oliva* and *Byrd*, did not consider the existence of an FTCA remedy—or the FTCA's omission of individual liability for excessive-force torts—as preclusive of a *Bivens* claim, especially in light of this Court's *Carlson* v. *Green* precedent. *Boule*, 998 F.3d at 391–392; see also Section I(B)(1), *supra*.

damages actions after the fact." *Abbasi*, 137 S. Ct. at 1862. Such cases simply do not implicate the "host of considerations that must be weighed and appraised" before recognizing a new species of litigation. *Id*. at 1857–1858 (cleaned up). These ordinary claims do not require special congressional deliberation, as they are a part of the "common and recurrent sphere of law enforcement" in which *Bivens* remains "settled law." *Id*. at 1857. Thus, the judiciary is well suited to weigh the benefits associated with letting such claims proceed and to consider the costs.

The Fifth Circuit's decision deepens the split and is wrong. This Court should grant review and reverse.

II. This case is an appropriate vehicle to resolve the split over the application of the *Abbasi* standard to conventional Fourth Amendment claims.

This case is an excellent vehicle to answer the question presented. First, it provides the Court with an opportunity to clarify the *Abbasi* standard as it applies to conventional Fourth Amendment claims against line-level federal police. Neither *Abbasi* nor *Hernandez* squarely presented that question, which has resulted in significant circuit confusion on how to approach *Bivens* claims arising in this "common and recurrent sphere." *Abbasi*, 137 S. Ct. at 1857.

Second, this case presents an opportunity for the Court to clarify both steps of the *Abbasi* test. The Fifth Circuit held both (1) that this case does not arise in a

conventional Fourth Amendment context because it is factually distinguishable from *Bivens* and (2) that this case does not warrant a *Bivens* extension because the judiciary is not well suited to determine whether to authorize a damages remedy here.

Third, the case comes to this Court with a clean record, and the Court's answer to the question presented would be outcome determinative. There are no claims left below and the district court already held that Agent Lamb is not entitled to qualified immunity. Moreover, at this stage in the litigation, everything in the complaint is presumed true and no facts are in dispute. Thus, the answer to the *Bivens* question would either end the case or let it move to discovery.

This case is an excellent vehicle for clarifying *Abbasi*, and, in light of a large split on the issue, there is no reason for this Court to allow even more federal circuits to deprive plaintiffs of a remedy for the violation of their Fourth Amendment rights. This case squarely tees up the dispositive question, warranting the Court's review.

III. The question presented is of national importance.

The Fifth and Eighth Circuits misapplied each step of the *Abbasi* framework. As a result, in ten states across this nation, there is no such thing as a constitutional remedy for individual instances of law enforcement overreach—except, perhaps, against narcotics officers under limited circumstances.

Yet more than 100,000 federal officers operate in the United States today.[7] As of 2008, over 22,000 of them policed the Fifth and Eighth Circuits.[8] This means that at least one-fifth of the federal force works under different "instruction and guidance" than the rest of the law enforcement officers, including those working for local and state government. *Abbasi*, 137 S. Ct. at 1856–1857. And the instruction and guidance those officers have received is that they may violate the Fourth Amendment with impunity. Pet. App. 10a.

This state of the law is unstable and unsustainable. It frustrates one of the main reasons for a *Bivens* remedy, which is to ensure that federal police are all held to the same standard of accountability, see *Abbasi*, 137 S. Ct. at 1856–1857, and it also flies in the face of this Court's pronouncements that "*federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers," *Butz* v. *Economou*, 438 U.S. 478, 501 (1978) (emphasis in original). It is essential that this Court clarifies the application of the *Abbasi* standard to routine policing and ensures that the Fourth Amendment applies with equal rigor to local, state, and federal police all across the United States.

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[7] Connor Brooks, Bureau of Justice Statistics, *Federal Law Enforcement Officers, 2016*, 6–7 tbls. 4 & 6 (Oct. 2019), https://tinyurl.com/FederalPolice.

[8] Brian A. Reaves, Bureau of Justice Statistics, *Federal Law Enforcement Officers, 2008*, 11 tbl. 1 (June 2012), https://tinyurl.com/5th8thCirPolice (the 22,000 count is a conservative estimate, as it excludes employees of federal prisons).

This Court should grant review even if it agrees with the Fifth and Eighth Circuits that no constitutional remedy is available for standard Fourth Amendment misconduct. At least in that case, Congress would know that neither *Bivens*, nor *Abbasi*'s two-step test for recognizing a *Bivens* remedy, is any longer good law, and that it must step in to ensure that federal officers are held to the same standard of constitutional accountability as state and local officers.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9] This case can be granted alone, or consolidated with *Egbert* v. *Boule* or *Mohamud* v. *Weyker*. *Boule* is before this Court on a petition for certiorari. Pet. for Cert., *Egbert* v. *Boule*, No. 21-147 (S. Ct. July 30, 2021). A petition for certiorari in *Mohamud* has been filed concurrently with this petition and is asking this Court to review the Eighth Circuit's decision in *Ahmed* v. *Weyker*, 984 F.3d 564. Pet. for Cert., *Mohamud* v. *Weyker*, No. 21-____ (S. Ct. Aug. 6, 2021).