No. 21-184

In The
Supreme Court of the United States

KEVIN BYRD,

Petitioner,

v.

RAY LAMB,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE AND BRIEF OF PETER SCHUCK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Peter H. Schuck is the Simeon E. Baldwin Professor of Law Emeritus at Yale University. Professor Schuck timely notified the parties that he intended to submit an amicus brief in this case, as required by Supreme Court Rule 37.2(a).[1] Petitioner consented. Respondent refused consent. Professor Schuck respectfully moves this Court, under Supreme Court Rule 37.2(b), for leave to file the attached brief in support of Petitioner.

This case presents the Court with the opportunity to address whether a victim of an unreasonable search or seizure committed by a line-level federal law enforcement officer during ordinary law enforcement activity can seek money damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Just four years ago, in *Ziglar v.* Abbasi, this Court answered the answer with an unequivocal yes. 137 S. Ct. 1843, 1857 (2017). In this case, however, the lower court flouted *Abbasi* and effectively overturned *Bivens* by confining the case to

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[1] Professor Schuck, through counsel, timely notified Respondent through Respondent's counsel in the proceedings below. After Respondent's pro se waiver was filed on the docket, Professor Schuck, through counsel, also notified Respondent directly.

its exact facts. Thus, this case also presents the Court with the opportunity to address the propriety of a rogue lower court arbitrarily and mindlessly confining a Supreme Court precedent to its exact facts rather than applying the precedent's broader meaning.

For over forty years, Professor Schuck has studied, taught about, and published on public officials' liability for civil damages. He has published books and articles on the topic. These writings have, at times, been critical of *Bivens* but have also affirmed the need for some form of civil liability for official abuses of federal civil rights. His attached amicus brief brings his expertise to bear on the lower court's misapplication of *Bivens* and misreading of *Abbasi*.

Respectfully Submitted.

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BRIEF OF PROFESSOR PETER H. SCHUCK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE

Peter H. Schuck is the Simeon E. Baldwin Professor of Law Emeritus at Yale University. For over forty years, Professor Schuck has studied, taught about, and published on the liability of public officials for civil damages. His relevant works include *Suing Government: Citizen Remedies for Official Wrongs* (1983); *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281 (1980); and *Suing Government Lawyers for Giving Dubious Legal Advice in a National Security Crisis: Notes on How (Not) to Become a Banana Republic*, 8 U. St. Thomas L.J. 496 (2011).[2]

Professor Schuck submits this amicus brief because the decision below departs radically from the established framework for evaluating damages claims

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[2] Under Supreme Court Rule 37.6, amicus curiae states that no party's counsel authored this brief in whole or in part, and that no party or person other than amicus curiae contributed money towards the preparation or filing of this brief.

against federal officials for constitutional torts under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Just four years ago, in *Ziglar v. Abbasi*, this Court reaffirmed the availability of the *Bivens* remedy against the "category of defendants" and in the "context[s]" in which *Bivens* and its progeny arose. 137 S. Ct. 1843, 1857 (2017).

In the decision below, the Fifth Circuit sharply departed from *Abbasi*'s mandate. Rather than employing *Abbasi*'s context-based analysis, the Fifth Circuit in effect overturned *Bivens*, and with it *Abbasi*, by literally confining *Bivens* to its exact facts rather than to its factual equivalents. In doing so, the Fifth Circuit has undermined official accountability and the rule of law and, by overturning *Bivens* through confining the case to its literal facts, has also bypassed the judicial and public scrutiny that occurs when this Court explicitly overturns its own precedent.

SUMMARY OF ARGUMENT

This case presents a classic abuse of power by a street-level law enforcement officer. Respondent Ray Lamb, a federal agent, used physical violence and threats to detain Petitioner Kevin Byrd, a citizen. Agent Lamb detained Kevin Byrd because of a personal dispute between Byrd and Agent Lamb's son.

Because of this personal dispute, Agent Lamb brandished a gun at Byrd, tried to smash through his car window, and then threatened to "put a bullet through his fucking skull" and "blow his head off." *Byrd v. Lamb*, 990 F.3d 879, 880–81 (2021).

These allegations—involving a street-level federal officer who violated the Fourth Amendment in a standard, everyday law enforcement setting—fall within the core of claims recognized by *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, for half a century. 403 U.S. 388 (1971). Four years ago, this Court affirmed *Bivens's* continuing vitality in this "common and recurrent sphere of law enforcement." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017).

Rather than consider whether this case "is different in a meaningful way from previous *Bivens* cases decided by th[e] Court," *id.* at 1859, the Fifth Circuit nit-picked trivial factual differences between this case and *Bivens* to hold that the case presented a "new context," *Byrd*, 990 F.3d at 882. Indeed, the Fifth Circuit held that "virtually everything" that does not precisely copy *Bivens* "is a 'new context.'" *Id.*

By confining *Bivens* to its literal facts, the Fifth Circuit deputized itself to functionally overturn *Bivens* and with it *Abbasi*. This result presents significant concerns both for law enforcement

accountability and for stare decisis. Our nation is embroiled in a public debate about law enforcement accountability. Amid this debate, the Fifth Circuit removed a key tool of that accountability—civil remedies against federal law enforcement officers who abuse the public trust—that this Court has scrupulously preserved, most recently in *Abbasi*. And the Fifth Circuit did so without the judicial or public scrutiny that normally attends a decision by this Court to overturn one of its own precedents, especially one of fifty years standing. For these reasons, this Court should grant certiorari and clarify the continuing vitality of the *Bivens* remedy for plaintiffs alleging unreasonable searches and seizures during ordinary law enforcement activity.

ARGUMENT

This case presents the Court with the opportunity to address whether a victim of an unreasonable search or seizure committed by a line-level federal law enforcement officer during ordinary law enforcement activity can seek money damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioner Kevin Byrd alleges that Respondent Ray Lamb, a federal agent, used violence and threats to detain him in pursuit of a personal dispute between Mr. Byrd and Agent Lamb's son. The Fifth Circuit rejected Mr. Byrd's

claims, reasoning that because they did not parallel *Bivens*'s literal facts, they were not cognizable. In confining *Bivens* to its literal facts, the Fifth Circuit functionally overturned *Bivens* and, in doing so, flouted this Court's clear statement, just four years ago, that *Bivens* remains good law against the "category of defendants" and in the "context[s]" in which *Bivens* and its progeny arose. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017).

I. THIS COURT'S OPINION IN *ZIGLAR V. ABBASI* RESTRICTED *BIVENS* ACTIONS TO ABUSES OF POWER IN TRADITIONAL LAW ENFORCEMENT SETTINGS.

Fifty years ago, this Court recognized a damages claim directly under the Fourth Amendment in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the defendants were agents of the Federal Bureau of Narcotics. *Id.* at 389. The defendants had manacled Mr. Bivens in front of his family, searched his house, arrested him, and then subjected him to a strip search, all, according to the complaint, without a warrant or probable cause. *Id.* Claims sharing these basic contours—street-level federal officers committing unreasonable searches and seizures during ordinary law enforcement activity—are at the core of the *Bivens* remedy.

A. Like this Court's two other decisions recognizing implied constitutional rights of action—*Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980)—*Bivens* has been criticized as potentially too expansive. At first, courts and scholars expressed concern that imposing liability might over-deter officers from appropriately performing their duties. Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 68–77 (1983).[3] This is

[3] When these concerns were first raised, they were necessarily based on speculation about how—and by whom—*Bivens* damages would be borne; there was almost no relevant empirical evidence at the time. But research conducted since then strongly suggests that the remote possibility of *Bivens* liability would not deter individual officers from performing their legal duties. This is because *Bivens* liability rarely if ever falls on the actual individual officer. *See* James E. Pfander et al., *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 Stan. L. Rev. 561 (2020); *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 78 & n.61 (1999); *cf.* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144 (2016); Joanna C.

why courts have hesitated to extend *Bivens* to circumstances where implying a right of action could disrupt delicate policy balances. For example, courts have declined to enforce civil liability for decisions that implicate national security, *Abbasi*, 137 S. Ct. at 1861; *cf.* Peter H. Schuck, *Suing Government Lawyers for Giving Dubious Legal Advice in a National Security Crisis: Notes on How (Not) to Become a Banana Republic*, 8 U. St. Thomas L.J. 496, 505–06 (2011), or where enforcing civil liability affects multiple countries' interests, thus implicating foreign relations and diplomacy, *see, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 745 (2020). Similarly, this Court has declined to extend *Bivens* liability to the military because Congress has established a comprehensive internal system of military justice. *See United States v. Stanley*, 483 U.S. 669, 679 (1987); *Chappell v. Wallace*, 462 U.S. 296, 297 (1983). In these circumstances, extending civil liability would have implicated meaningful policy differences from those presented in *Bivens* and its progeny.

B. But just four years ago, this Court upheld *Bivens* as "settled law" in the "common and recurrent sphere of law enforcement." *Id. Abbasi* involved

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Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 915 (2014).

claims against high-level national security decision makers responding to the September 11, 2001 terrorist attacks. *Id.* at 1847. Because a claim involving "high-level executive policy created in the wake of a major terrorist attack on American soil" presented very different circumstances than *Bivens* itself, the Court declined to recognize a *Bivens* remedy. *Id.* at 1860. The Court also reasoned that *Bivens* was intended to deter errant misconduct by individual officers, not to provide a vehicle to change organizational policy. *Id.*

In coming to this conclusion, *Abbasi* clarified the framework for when a *Bivens* remedy is available. To start, *Abbasi* affirmed "the necessity" for and continuing viability of the *Bivens* remedy in the "common and recurrent sphere of law enforcement." *Id.* at 1856–57. Outside this context, *Abbasi* instructed lower courts to employ a two-step analysis. First, it directed courts to consider whether "the case is different in a meaningful way from previous *Bivens* cases." *Id.* at 1859–60. To illustrate what makes a case meaningfully different, *Abbasi* laid out "instructive" examples of what constitute a meaningful difference. Taken together, these examples do not represent mere factual differences: they represent differences that raise "special factors that previous *Bivens* cases did not consider." *Id.* at 1860. In other words, *Abbasi* directs courts to consider whether a case is different

from *Bivens* in ways that implicate true policy differences when considering whether to recognize a *Bivens* claim. *See id*. Second, if a case is meaningfully different, *Abbasi* directs lower courts to evaluate whether allowing a *Bivens* remedy would implicate special factors "that previous *Bivens* cases did not consider." *Id.* at 1860–61.

In short, this Court struck a careful balance in *Abbasi*, preserving *Bivens* claims "in the search-and-seizure context in which it arose," while requiring more inquiry before "'extend[ing] *Bivens* to any new context or new category of defendants.'" *Abbasi*, 137 S. Ct. at 1856–57. Most courts of appeals have carefully applied this balance—both before and after *Abbasi*—to allow damages claims for illegal searches and seizures by street-level officers engaged in routine law enforcement. *Meshal v. Higgenbotham*, 804 F.3d 417, 424 (D.C. Cir. 2015) (claim where "a federal law enforcement officer uses excessive force, contrary to the Constitution or agency guidelines" represents "the classic *Bivens*-style tort"); *see also*, *e.g.*, *Hicks v. Ferreyra*, 965 F.3d 302, 311 (4th Cir. 2020) (noting, in case involving traffic stops by Park Police officers, that "courts regularly apply *Bivens* to Fourth Amendment claims arising from police traffic stops like this one"); *Jacobs v. Alam*, 915 F.3d 1028, 1039 (6th Cir. 2019) (case in which U.S. Marshals searched a home and shot plaintiff was "precisely the kind of

Fourth Amendment search-and-seizure case Courts have long adjudicated through *Bivens* actions" (citations omitted)); *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 864 (10th Cir. 2016) (noting, in case involving forcible entry and inspection of business premises by USDA agents, that "Fourth Amendment *Bivens* causes of action have been routinely applied to the conduct of federal officials in a variety of contexts" (citations omitted)); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) (discussing "the classic *Bivens*-style tort, in which a federal law enforcement officer uses excessive force, contrary to the Constitution or agency guidelines").

Unlike the other courts of appeals, the Fifth Circuit ignored this careful balance to chart its own course.

II. THE FIFTH CIRCUIT WENT FURTHER AND FUNCTIONALLY OVERTURNED *BIVENS*.

In the opinion below, the Fifth Circuit in effect overturned *Bivens* and with it *Abbasi*'s careful balancing of reliance, optimal deterrence, and accountability interests against separation of powers concerns related to implying causes of actions. Indeed, at each step, the Fifth Circuit ignored this Court's instructions in *Abbasi*, instead substituting its own judgment to treat *Bivens* as overruled precedent.

A. First, the Fifth Circuit overstepped its bounds by failing to heed *Abbasi*'s clear instruction that *Bivens* is settled law in the "search-and-seizure context in which [*Bivens*] arose." *Abbasi*, 137 S. Ct. at 1856. This case falls squarely within that search-and-seizure context. Mr. Byrd alleges that Agent Lamb, a Department of Homeland Security agent, used excessive force by threatening him with a gun and orally threatening to "put a bullet through his fucking skull" and then caused an unlawful seizure by local police officers all while pursuing a personal dispute between Agent Lamb's son and Mr. Byrd. *Byrd v. Lamb*, 990 F.3d 879, 880–81 (2021). By failing to recognize a *Bivens* action in this typical *Bivens* context—where a street level officer allegedly used excessive force during an ordinary law enforcement action—the Fifth Circuit ignored *Abbasi*.

B. Second, the Fifth Circuit distorted *Abbasi*'s "new context" analysis, and the careful balance that it demands. Under the Fifth Circuit's approach, every case will present a new context. That is because, rather than focus on whether the differences between this case and *Bivens* are meaningful, the Fifth Circuit focused on whether there were any differences—however picayune—between this case's facts and *Bivens*'s facts. *Byrd*, 990 F.3d at 882.

The Fifth Circuit identified as dispositive a handful of trivial, factual differences with *Bivens*: the incident occurred in a parking lot, not Mr. Byrd's home; Mr. Byrd was threatened with a gun, not manacled and strip-searched; Agent Lamb's vendetta was personal, not related to a narcotics investigation. But there are always some factual differences between cases. The relevant question is whether those differences are "meaningful" enough to constitute a "new context," not whether there is any conceivable factual basis to distinguish *Bivens*. *Abbasi*, 137 S. Ct. at 1857; *see*, *e.g.*, *Jacobs*, 915 F.3d at 1039 ("Defendants have identified no meaningful difference, no reason for the Court to doubt its competence to carry the venerable Fourth Amendment *Bivens* remedy into this context" involving U.S. Marshals (citation omitted)); *Ioane v. Hodges*, 939 F.3d 945, 952 & n.2 (9th Cir. 2018) (no meaningful difference from *Bivens* in case involving IRS agent who allegedly forced a homeowner to use the bathroom in the agent's presence); *Bistrian v. Levi*, 912 F.3d 79, 91 (3d Cir. 2018) (failure-to-protect claim arising under the Fifth Amendment rather than the Eighth Amendment was not a "new context" because it was not meaningfully different from previous *Bivens* contexts recognized by *Abbasi*); *Big Cats of Serenity Springs*, 843 F.3d at 864 (rejecting argument that "animal inspection context" was a

meaningful difference from *Bivens* and concluding the case presented "a garden-variety constitutional violation (hardly a new context)").

One searches the Fifth Circuit's opinion in vain for any explanation why Mr. Byrd's claims are meaningfully different from the claims in *Bivens*. They are not. The distinctions that the Fifth Circuit cited do not conceivably give rise to any policy considerations different from those present in *Bivens*, nor do they present any of the circumstances that *Abbasi* identified as reasons to depart from *Bivens*. Instead, Mr. Byrd alleges that a line-level law enforcement officer engaged in individual misconduct and in doing so violated his Fourth Amendment rights. This claim presents "[t]he classic *Bivens* case," in which a plaintiff "alleg[es] an unreasonable search or seizure by a federal officer in violation of the Fourth Amendment." *Meshal*, 804 F.3d at 429 (Kavanaugh, J., concurring).

C. Third, the Fifth Circuit's special factors analysis does not address the concerns raised in *Abbasi*. Nor could it. After all, a case is meaningfully different only if it implicates special factors not considered in or presented by *Bivens* itself. What is more, the task of adjudicating search and seizure claims against line-level police officers engaged in ordinary law enforcement actions has been a fixture in the day-to-

day work of the federal judiciary for many decades. That is why the Fifth Circuit's special factors analysis consists of only two sentences. *See Byrd*, 990 F.3d at 882. And those two sentences wholly fail to identify anything that is special about this case. *Id.*

In sum, by concluding that "virtually everything" that does not precisely repeat *Bivens* literal facts "is a 'new context,'" *Byrd*, 990 F.3d at 882, the Fifth Circuit went much further than this Court ever did: it confined *Bivens* to its exact facts and in doing so functionally overturned the precedent.

III. THE FIFTH CIRCUIT BYPASSED THE PUBLIC AND JUDICIAL SCRUTINY THAT NORMALLY ACCOMPANIES SUCH MOMENTOUS DECISIONS.

By confining *Bivens* to its literal facts, the Fifth Circuit has functionally overturned the case. The problems with the Fifth Circuit's methodology are myriad, *see generally* Daniel Rice and Jack Boeglin, *Confining Cases to Their Facts*, 105 Va. L. Rev. 865 (2019), but three are particularly concerning. First, when this Court considers overturning its own decisions, it undertakes a rigorous analysis. It considers both the reliance interests at stake and the strength of the justification for overturning the prior case. This careful approach protects our system of stare decisis and minimizes doctrinal instability by

limiting when a case is overturned. *Id.* at 905. Confining a case to its literal facts, however, bypasses this analysis while accomplishing the same result. *Id.* at 904–05.

Second, the decision below interferes with a long-standing dialogue between this Court and Congress about the appropriate avenue for constitutional tort litigation, a dialogue that is continuing in Congress and the country as we speak. Congress first acknowledged *Bivens* three years after it was decided, when it amended the Federal Tort Claims Act to permit certain causes of actions against law enforcement officers. *See* 28 U.S.C. § 2680(h). In amending the Act, Congress explained that it saw the new causes of action as a "counterpart to *Bivens*." S. Rep. No. 93-588, at 3 (1973); *Carlson*, 446 U.S. at 20; James E. Pfander and David P. Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 Georgetown L.J. 117, 131–38 (2009). At the same time, Congress rejected proposed legislation from the Department of Justice that would have handicapped *Bivens* litigation. S. 2258, 93d Congress (1973). Again, in 1988, Congress legislated in the area of tort litigation when it passed the Westfall Act. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (amending 28 U.S.C. § 2679(b)). The Westfall Act preempts state law tort

litigation against federal employees for acts committed "within the scope of [their] office or employment." 28 U.S.C. § 2679(b)(1). In circumscribing other tort litigation against federal employees, Congress took the trouble to explicitly preserve *Bivens* actions. *Id.* § 2679(b)(2)(A); 29 H.R. Rep. No. 100-700, at 6 (1988) (assuring that the Westfall Act "would not affect the ability of victims of constitutional torts to seek personal redress from federal employees who allegedly violate their Constitutional rights."). In short, Congress has not only ratified *Bivens* but also relied on its availability in crafting its system of remedies for abuses by low-level federal officers.

Third, the Fifth Circuit overstepped its proper institutional role as a lower federal court. Confining a case to its facts as a subterfuge to overrule it is a problematic methodology no matter what court undertakes it. Rice and Boeglin, *supra*, at 900–12. But it is particularly problematic that a lower court has employed this subterfuge to overturn *Bivens*. Our nation is grappling with how to balance the need for public safety with the need for law enforcement accountability. Congress is now embroiled in deep debate over this issue. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. Amid this debate, the Fifth Circuit has furtively interceded to eliminate—through a pettifogging narrowing of this

Court's careful decision in *Abbasi*—an important federal instrument of accountability and remedy against individual line law enforcement officers who violate their duty to the public. The design of such remedies is the responsibility of Congress, not a lower court.

Nor is it the Fifth Circuit's role to, in effect, overturn a precedent of the Supreme Court by confining it to its facts. The Supreme Court is the only court that can overturn its own precedent. Because of this, courts of appeals cannot "conclude [that this Court's] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton,* 521 U.S. 203, 237 (1997). It follows then, that the Fifth Circuit cannot simply reach the same result by defining the "context[s]" of *Bivens* and its progeny too narrowly.

Bivens has been the law of the land for fifty years. Congress has never disavowed *Bivens*. Instead, Congress expressly preserved the *Bivens* remedy in the Westfall Act. 28 U.S.C. § 2679(b)(2)(A). Other than Congress, only this Court has the power to modify the scope and availability of *Bivens* actions to remedy abuses of power by line-level federal law enforcement officers. It should grant certiorari to confirm this basic principle.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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