No. 21-184

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court-invented damages remedy in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is applicable where a Department of Homeland Security agent displays a firearm in a public parking lot during an alleged personal dispute; and, if so, whether the Court should overrule *Bivens*.

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INTRODUCTION

Petitioner asks this Court to review the Fifth Circuit's decision declining to recognize a *Bivens* action arising out of an unusual factual scenario involving an alleged personal dispute between the families of Petitioner and Respondent (a since-retired agent for the Department of Homeland Security), which came to a head in a public parking lot when Respondent displayed his firearm to prevent Petitioner from leaving the scene.

This Court should decline Petitioner's request. This Court recently denied a petition raising the same question presented, brought by the same attorneys, in a case from the same circuit, citing the same alleged circuit split, featuring the same three *amici* in support. *See Oliva v. Nivar*, No. 20-1060. But Petitioner offers no explanation for why his case should receive different treatment.

In any event, there is no circuit split on what types of Fourth Amendment *Bivens* claims survived this Court's announcement in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), that *Bivens* will not be extended to any "new context" where there are "'special factors counselling hesitation.'" *Id.* at 1857. Most of the cases Petitioner cites never even mention *Ziglar*'s test. Of the few that do, the allegations were noticeably different than those here, with no indication that those courts would have allowed a *Bivens* claim had they faced the facts here.

Even if these cases could be construed as conflicting, the unusual allegations in this case make it an especially poor vehicle. The lower courts are unlikely to see another case based on an alleged personal dispute where the sole alleged use of force was displaying a weapon.

Finally, the Fifth Circuit's decision correctly declined to recognize a *Bivens* claim here. There are numerous factors demonstrating that this case arises in a new context—*e.g.*, the personal nature of the alleged dispute, the location of the incident away from Petitioner's home or property, and Respondent's display of a firearm rather than the use of physical force. And there is an obvious factor counseling hesitation: separation-of-powers considerations militate against expanding a judicially created cause of action for damages in circumstances where Congress itself has declined to do so.

The Court should deny the petition. In the event the Court grants the Petition, however, Respondent would argue that the judgment below should be affirmed on the alternative basis that the Court should overrule *Bivens* altogether.[1]

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[1] Petitioner asks the Court to grant *Mohamud v. Weyker*, No. 21-187, and consolidate it with this case. Pet. 32 n.9. The Court should deny both cases. But if the Court does grant them, it should allow for separate respondents' briefs and divided oral argument because the U.S. Department of Justice (representing Respondent Weyker) will not adequately pursue the "interest[s]" of Respondent Lamb. 28 C.F.R. § 50.15(a).

STATEMENT OF THE CASE

A. District Court.

On August 13, 2019, Petitioner filed suit in the U.S. District Court for the Southern District of Texas, alleging a claim pursuant to *Bivens*.[2] Because this case is on interlocutory appeal from the denial of qualified immunity, the allegations are taken as true, although Respondent vigorously denies Petitioner's version of events.

Petitioner alleges that on February 2, 2019, he visited his ex-girlfriend Darci Wade in the hospital after she had been a passenger in a vehicle crashed by her current boyfriend (who is Respondent's son) the prior night. Pet.App.2a. Petitioner then went to a restaurant that had allegedly kicked out Darci and Respondent's son before the crash. Petitioner waited in the parking lot but then decided to leave. *Id.*

Petitioner alleges that Respondent—then an agent of the Department of Homeland Security—"jump[ed] out" of a nearby car, drew his firearm, identified himself as a federal agent, and threatened to kill Petitioner. Complaint ¶¶ 23–24, *Byrd v. Lamb*, No. 4:19-cv-3014 (S.D. Tex. Aug. 13, 2019), ECF No. 1. Petitioner claims Respondent attempted to break the window of Petitioner's car, then stepped in front of the car to keep it from leaving, then allegedly pulled the

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[2] Petitioner also brought 42 U.S.C. § 1983 claims against two City of Conroe police officers, but those claims were dismissed and are not at issue here. Pet.App.3a.

trigger of his weapon, but the bullets inexplicably fell out of the gun. *Id.*, ¶ 28. For his part, Respondent admitted that he had drawn his weapon but said he was "suspicio[us] of [Petitioner] harassing and stalking his son." Pet.App.7a.

Petitioner telephoned the local police, who arrived and placed Petitioner in handcuffs. Pet.App.2a–3a. After further investigation, the officers allowed Petitioner to leave the scene. Pet.App.3a. Petitioner claims he later received threatening calls that he believes were from Respondent's son; he also avers that he has "experienced stalking and his business has received false tips of unlawful activity," which he alleges—"[u]pon information and belief"—were "caused" by Respondent. Complaint ¶¶ 45, 47.

Petitioner's lawsuit alleges that Respondent's display of his weapon and refusal to let Petitioner drive away amounted to unlawful detention and excessive force in violation of the Fourth Amendment. *Id.*, ¶¶ 51–66.

Respondent moved to dismiss the *Bivens* action, and—in an oral ruling from the bench—the district court denied the motion, citing Fifth Circuit precedent that brandishing a firearm was sufficient to state a claim under § 1983, which the court apparently considered to be sufficient for a *Bivens* claim, as well. Pet.App.19a.

Respondent timely filed an interlocutory appeal challenging the denial of qualified immunity. Pet.App.3a.

B. Fifth Circuit.

The Fifth Circuit reversed. It first noted that this Court "has cautioned against extending *Bivens* to new contexts" and "has provided a two-part test to determine when extension would be appropriate." Pet.App.4a–5a. First, "courts should consider whether the case before it presents a 'new context.'" Pet.App.5a (quoting *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020)). If so, the second step is "whether there are 'any special factors that counsel hesitation about granting the extension.'" *Id.* (quoting *Hernandez*, 140 S. Ct. at 743).

Proceeding with this framework, the Fifth Circuit cited its recent decision in *Oliva v. Nivar*, 973 F.3d 439 (5th Cir. 2020), which involved an altercation "between police officers in a Veterans Affairs (VA) hospital and Oliva over hospital ID policy"; these officers "wrestled Oliva to the ground in a chokehold and arrested him." *Id.* The court in *Oliva* held that this Court has recognized *Bivens* claims in three situations: (1) "'manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment,'" (2) "'discrimination on the basis of sex by a congressman against a staff person in violation of the Fifth Amendment,'" and (3) "'failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the Eighth Amendment.'" Pet.App.6a (quoting *Oliva*, 973 F.3d at 442). *Oliva* stated that "[v]irtually everything else is a 'new context.'" 973 F.3d at 442.

The panel below concluded that Petitioner's claims did not "fall[] squarely into one" of those "established *Bivens* categories" because the allegations "differ[] from *Bivens* in several meaningful ways." Pet.App.6a. *First*, "[t]his case arose in a parking lot, not a private home as was the case in *Bivens*." *Id. Second*, Petitioner alleged no "warrantless search"—let alone of his home—as occurred in *Bivens*. Pet.App.7a. *Third*, the dispute here appeared to be of a personal nature, where Respondent acted out of "suspicion of [Petitioner] harassing and stalking his son," rather than "a narcotics investigation" as in *Bivens*. *Id. Fourth*, Respondent did not "manacle [Petitioner] in front of his family, nor strip-search him, as was the case in *Bivens*." *Id.* And finally, there were certainly no allegations resembling the other scenarios where this Court had allowed *Bivens* claims—*i.e.*, discrimination by a member of Congress, or the refusal to provide medical care. *Id.*

Because this case presented a "new context," the Fifth Circuit proceeded to step two of the analysis and concluded that "special factors counsel[ed] against extending *Bivens*." *Id.* In particular, "Congress did not make individual officers statutorily liable for excessive-force or unlawful-detention claims, and the 'silence of Congress is relevant.'" *Id.* (quoting *Ziglar*, 137 S. Ct. at 1862). As this Court had held in *Hernandez*, one "reason to pause," *id.*, before extending *Bivens* is that "'there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy,'" Pet.App.5a (quoting *Hernandez*, 140 S. Ct. at 743). Given the "separation

of powers" concerns in recognizing a cause of action by judicial fiat, the Fifth Circuit declined to extend *Bivens* to cover Petitioner's claims and remanded with instructions to dismiss the claim against Respondent. Pet.App.7a.

Judge Willett concurred, agreeing that the "majority opinion correctly denies *Bivens* relief," Pet.App.8a, but questioning whether any other relief should be available, Pet.App.9a–12a.

REASONS TO DENY THE PETITION

I. The Court Recently Denied Review Of The Same Question Raised Here.

This Court recently denied the petition for a writ of *certiorari* in *Oliva v Nivar*, where the same attorneys sought review of the same question presented in this case. *See Oliva v. Nivar*, 141 S. Ct. 2669 (2021). Oliva then sought rehearing, alerting the Court to the forthcoming petition in this case (*Byrd v. Lamb*) and asking to be held for simultaneous consideration. Pet. for Rehearing 2–5, *Oliva*. The Court denied that request, too. *See Oliva v. Nivar*, 141 S. Ct. 2886 (2021).

To be sure, the denial of a petition for a writ of *certiorari* says nothing about the underlying merits, but Petitioner never attempts to explain why his case is worthy of the Court's review when *Oliva* was denied at each step. Nothing has changed in the few intervening months. When *Oliva* was submitted, the same alleged circuit split already existed. *See* Pet. 17–21, *Oliva*; Reply 2 n.1, *Oliva*. And *Oliva* and this case both arose from the same circuit and rely on the same rationale. The cases even feature the same three amicus briefs in support of granting the petitions.

The Court should deny review here, as well.

II. There Is No Circuit Split.

Petitioner argues that the Fifth and Eighth Circuits have split from numerous other circuits

regarding the scope of Fourth Amendment *Bivens* claims. But most of the decisions he cites from other circuits failed to address the *Ziglar* test at all. In the few that did, the courts addressed fact-bound inquiries about whether particular allegations were "different in a meaningful way" from *Bivens* itself, with no indication they would have allowed a *Bivens* action under the unusual allegations Petitioner makes here. The different outcomes across the circuits result from different factual allegations, not differences in circuit law.

1. Petitioner argues that the First, Second, Third, Fourth, Sixth, and Ninth Circuits would have recognized his *Bivens* claim. Pet. 13–19. But the majority of cases he cites in support never even mention the "new context" and "special factors" tests. Of the few that do, one found the issue forfeited, and another spent only two sentences on it. The remaining cases are fact-bound and easily distinguishable. A meaningful circuit split, this is not.

Turning first to the only two cases that even purport to address directly the *Ziglar* test: in *Jacobs v. Alam*, 915 F.3d 1028 (6th Cir. 2019); *see* Pet. 13–14, the court allowed a *Bivens* claim to proceed where the plaintiff alleged that a task force of officers had entered his home, attempted to arrest him, and then shot him without cause. 915 F.3d at 1038. The court conducted a cursory examination of whether the allegations were meaningfully different from *Bivens*, pointing to the numerous similarities between the cases—both involved allegations that police entered the plaintiffs' homes and conducted a "warrantless

search" and used "unreasonable force during [an] arrest" that lacked "probable cause"—before concluding, "[A]t no point do defendants articulate why this case 'differs in a meaningful way' under *Ziglar*'s rubric." *Id.* (alteration omitted).

It is unclear whether *Jacobs* would come out the same way now, given that it was issued before this Court's decision in *Hernandez*, 140 S. Ct. at 742–43. But even if it would, the allegations in *Jacobs* were similar to those in *Bivens* but substantially different than those here. In *Jacobs*, the officers had entered the plaintiff's home and used excessive force in an attempt to arrest him; but here, the entire events occurred far away from Petitioner's home (or even his property generally), and the only alleged use of force is the display of a firearm. In short, there is no reason to believe the Sixth Circuit would have allowed a *Bivens* claim under Petitioner's allegations.

The only other case Petitioner cites that addresses *Ziglar* directly is *Boule v. Egbert*, 998 F.3d 370 (9th Cir. 2021), *cert. granted sub nom. Egbert v. Boule*, ___ S. Ct. ___, 2021 WL 5148065 (Nov. 5, 2021); Pet. 19, where the court allowed a *Bivens* claim based on the allegation that a federal officer came onto the plaintiff's property and shoved him against a car. 998 F.3d at 387–89. The court agreed that the case presented a new context, but the court nonetheless permitted a *Bivens* remedy because it concluded that no special factors counseled hesitation. *Id.* at 387. The court leaned heavily on the fact that the allegations involved excessive force "suffered on [plaintiff's] own property in the United States"—the same key element

present in *Bivens* and *Jacobs* but absent here. *Id.* at 387, 388. The court neither said nor implied what the outcome would have been if (like in Petitioner's case) the allegation of force had not occurred on the plaintiff's own property.[3]

Moreover, Petitioner cites no Fifth or Eighth Circuit cases addressing facts like those in *Jacobs* or *Boule* as evidence that those two circuits would reject a *Bivens* claim under those facts. And on the flip side, Petitioner cites no cases from other circuits with facts like his own, as evidence that he could have prevailed outside the Fifth Circuit. Indeed, given the lack of nexus to his home or own property, odds are that he would have still lost in the Sixth and Ninth Circuits.

Petitioner does cite several other circuits' decisions, but they are far afield. In *Hicks v. Ferreyra*, 965 F.3d 302 (4th Cir. 2020); *see* Pet. 14–15, the court found the *Ziglar* issue to have been forfeited: "At no point during the lengthy proceedings in the district court did the officers argue or even suggest that Hicks lacked a cause of action under *Bivens*. We thus conclude that this argument is forfeited on appeal."

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[3] Given the substantially different allegations in *Egbert* (which involves First Amendment and border/immigration-related Fourth Amendment claims) than those here, and given that the Fifth Circuit below refused to grant a *Bivens* remedy, there is no need for the Court to hold this Petition pending the decision in *Egbert*. Regardless of how the Court rules in *Egbert*, the Fifth Circuit's decision below would still stand.

965 F.3d at 309.[4] The rest of Petitioner's cases never even cite *Ziglar* or invoke its "new context" or "special factors" tests—the issues apparently were not raised. *See Pagan-Gonzalez v. Moreno*, 919 F.3d 582 (1st Cir. 2019); *Bryan v. United States*, 913 F.3d 356 (3d Cir. 2019); *Harvey v. United States*, 770 F. App'x 949 (11th Cir. 2019); *McLeod v. Mickle*, 765 F. App'x 582 (2d Cir. 2019); Pet. 15–16.

2. On the other side of his ledger, Petitioner tries to create a split by exaggerating the Fifth and Eighth Circuits' precedents as essentially providing "absolute immunity" for federal law enforcement officers. Pet. 5. But neither circuit has issued a decision holding that "no *Bivens* remedy is allowed" against "line-level federal police" for Fourth Amendment violations. Pet. i, 4.

Nor have those circuits' rulings relied on "trivial" differences from *Bivens* itself when denying relief to plaintiffs. Pet. 5. In its opinion below, for example, the Fifth Circuit pointed out numerous material differences between this case and *Bivens*—most notably that the acts occurred in a public parking lot, not in or at the plaintiff's home. Pet.App.6a. This is undoubtedly a material distinction in the Fourth

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[4] The court—several pages later—said that "this case appears to represent not an extension of *Bivens* so much as a replay," 965 F.3d at 311, but that ambivalent and truncated analysis was in the context of whether enforcing the officers' forfeiture would work a "fundamental injustice" for purposes of *plain error* review, not whether these allegations, reviewed *de novo*, actually presented a materially different scenario from *Bivens*, *id.*

Amendment context, not some trumped-up triviality that implicitly overrules *Ziglar*, *Hernandez*, and *Bivens*. *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 589–90 (1980) (recognizing that the home is unique when it comes to alleged Fourth Amendment violations); *Ziglar*, 137 S. Ct. at 1860 (a "new context" arises where, *e.g.*, "judicial guidance as to how an officer should respond to the problem or emergency to be confronted" is different). The Eighth Circuit case to which Petitioner points likewise involved facts far afield from *Bivens*—not trivial distinctions. *See Ahmed v. Weyker*, 984 F.3d 564, 566 (8th Cir. 2020) (denying *Bivens* remedy where officer had lied to another officer, who then arrested the plaintiff). There is no reason to believe either of those cases would have turned out differently in any other circuit.

3. Finally, it is noteworthy that not one of the circuit decisions Petitioner cites—on either side of his ledger—has been criticized by another circuit. Different allegations have yielded different outcomes, as often happens even when courts agree on the relevant legal test.

There is no circuit split.

III. This Case Is A Poor Vehicle.

Even if the cases above could somehow be construed as creating a split, review is still unwarranted because this case presents a poor vehicle for resolving questions about *Bivens*'s scope over Fourth Amendment claims. To be sure, *Bivens* cases naturally tend to involve especially fact-bound

allegations that make them difficult vehicles for announcing bright-line legal rules, but the allegations in this case are especially unsuited for announcing any clear legal test for the lower courts.

As Judge Elrod noted below during oral argument, this "isn't a run of the mill stop, in any way," because the people involved here "have a relationship." Oral Argument Recording at 8:34–9:06, *Byrd v. Lamb*, No. 20-20217 (5th Cir., argued Feb. 3, 2021), *available at* https://www.ca5.uscourts.gov/OralArgRecordings/20/20-20217_2-3-2021.mp3. Judge Elrod's questioning highlighted several of the many aspects of this case that would make it a poor vehicle.

First, Petitioner alleges that this case arises out of a personal dispute between Respondent's family (including Respondent's son and the son's girlfriend) and Petitioner (who previously dated that same girlfriend), not from any sort of typical law-enforcement activity. Pet.App.7a.

Second, Petitioner alleges that the relevant events all occurred in a public parking lot, not at Petitioner's home or property. Pet.App.2a.

Third, Petitioner alleges that Respondent's use of force consisted solely in brandishing his firearm (Petitioner claims the bullets somehow fell out of the gun), rather than through the application of physical force. Complaint ¶¶ 23–24, 28.

None of these allegations is typical of a Fourth Amendment *Bivens* case—as demonstrated by

Petitioner's failure to identify a case from any other circuit raising similar allegations. *See* Part II, *supra*. Any decision based on these facts would likely not provide meaningful guidance to the lower courts, which are unlikely to face such an unusual factual scenario again.

If the Court wants to address the viability of Fourth Amendment *Bivens* claims writ-large (as Petitioner requests the Court to do), it should await a case raising more mine-run allegations.

IV. The Decision Below Is Correct.

Review is unwarranted for the additional reason that the decision below is correct.

A. This Case Presents A New Context, And Special Factors Counsel Hesitation.

Largely for the same reasons why this case would make a poor vehicle, *see* Part III, *supra*, the Fifth Circuit was correct to hold that this case presented a "new context," Pet.App.6a–7a. The threshold for a scenario to present a "new context" is slight. It asks only whether the case is "different in a meaningful way from previous *Bivens* cases decided by this Court." *Ziglar*, 137 S. Ct. at 1859. This test is satisfied when, for example, "the rank of the officers involved" is different than in *Bivens* itself, or where "judicial guidance as to how an officer should respond to the problem or emergency to be confronted" is different. *Id.* at 1860.

Although each of the factors listed in Part III makes this a new context, the fact that the key events occurred in a public parking lot, rather than at Petitioner's home or property, is an especially significant factor in finding that this case presents a new context. The established "judicial guidance as to how an officer should respond" is notably different when at someone's house than when in public. *See, e.g.*, *Payton*, 445 U.S. at 589 ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.").

The Fifth Circuit also correctly held that Congress's refusal to "make individual officers statutorily liable [under the Federal Tort Claims Act] for excessive-force or unlawful-detention claims" counseled against extending *Bivens*. Pet.App.7a. This Court has held that when "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," the courts should not provide a *Bivens* remedy. *Hernandez*, 140 S. Ct. at 743. Congress's refusal to provide statutory liability for the scenario Petitioner alleges here provides more than sufficient doubt about whether Congress would have desired the courts to push forward and create a damages remedy anyway.

B. Alternatively, The Court Should Overrule *Bivens*.

If the Court nonetheless grants the Petition, Respondent would argue at the merits stage that the

judgment below should be affirmed on the alternative basis that this Court should overrule *Bivens* altogether. *See Alabama v. Shelton*, 535 U.S. 654, 660 n.3 (2002) (refusing in a merits opinion to consider a request to overrule precedent because that argument was not made "in the respondent's opposition to a petition for *certiorari*"); *see also* Stephen M. Shapiro *et al.*, SUPREME COURT PRACTICE § 6-140 (11th ed. 2019) ("A respondent's safest course is therefore to identify in the brief in opposition any alternative basis for affirmance that it intends to raise if *certiorari* is granted."). Petitioner himself seems to ask the Court to take this very step. *See* Pet. 6.

There is no historical support for federal courts creating direct damages actions, as it did in *Bivens*. Traditionally, courts heard long-existing common-law claims (usually trespass), where the constitutionality of the federal defendant's actions sometimes arose as a *defense* (not as an element of the plaintiff's cause of action). *See, e.g.*, *Boule*, 998 F.3d at 375–76 (Bumatay, J., dissenting from denial of rehearing *en banc*) ("[I]f the plaintiff could establish that the official's conduct violated the Constitution, the defendant's shield of federal power would dissolve, and he would stand as a naked state-law tortfeasor.") (alteration and quotation marks omitted); *see also Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176–79 (1804); *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) ("When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. Federal law, however, supplies the defense, if the conduct complained of was done pursuant to a federally

imposed duty, or immunity from suit.") (citations omitted).

In addition to its lack of historical support, *Bivens* also violated separation of powers. By creating an affirmative federal cause of action, *Bivens* usurped Congress's legislative power under Article I's Vesting Clause. This Court has recognized the "tension between this practice [of creating *Bivens* causes] and the Constitution's separation of legislative and judicial power." *Hernandez*, 140 S. Ct. at 741. Thus, over the last few decades, the Court has increasingly "expressed doubt about [its] authority to recognize any causes of action not expressly created by Congress." *Id.* at 742.

Unsurprisingly, there has been an ever-growing chorus of criticism of *Bivens*'s foundations, as well as calls for it to be reconsidered. *See id.* at 750 (Thomas, J., concurring); *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 252 (D.C. Cir. 2021) (Silberman, J., dissenting in part) (calling *Bivens* a "prime example[] of rank policymaking by the High Court, not [a] legitimate exercise[] of constitutional interpretation"); *Boule*, 998 F.3d at 376–79 (Bumatay, J., dissenting from denial of rehearing *en banc*, joined by Callahan, Ikuta, Bennett, R. Nelson, Lee, and VanDyke).

Given the longstanding criticisms of *Bivens*'s foundations, as well as this Court's consistent narrowing of the contexts in which *Bivens* claims are permitted, there can be little or no reliance interests.

And, to the extent the Court agrees with Petitioner that the Courts of Appeals cannot agree on how to apply *Bivens*, it merely provides confirmation that the test has proven unworkable despite this Court's repeated interventions. *See, e.g., Boule*, 998 F.3d at 384 (Owens, J., dissenting from denial of rehearing *en banc*) (calling *Bivens* a "jurisprudential word jumble" that has not "improved with age").

As for the consequences of eliminating a damages remedy for federal officers' violations of constitutional rights, perhaps a clear overruling of *Bivens*—rather than a silent burial, *see Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021)—would prompt Congress to pass a remedial statute if it so chose, in accordance with Article I's vesting of legislative power in that branch alone.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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