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

SUPPLEMENTAL BRIEF IN OPPOSITION

C. BOYDEN GRAY
R. TRENT MCCOTTER
Counsel of Record
JONATHAN BERRY
MICHAEL BUSCHBACHER
JARED M. KELSON
BOYDEN GRAY & ASSOCIATES PLLC
801 17th Street N.W.
Suite 350
Washington, DC 20006
(202) 706-5488
mccotter@boydengrayassociates.com

TABLE OF CONTENTS

ARGUMENT 1
CONCLUSION 3

ARGUMENT

Petitioner recently submitted a supplemental brief in support of his petition for a writ of *certiorari*, claiming that statements made by the government during oral argument in *Egbert v. Boule*, No. 21-147, support a grant of a writ of *certiorari* here. But oral argument in *Egbert* changed nothing. The Petition should be denied.

Petitioner first claims that the government's statements during oral argument are relevant because the federal government is Respondent's "employer." Supp.Pet.1. That is incorrect, as Respondent stated several times in his brief in opposition. *See* BIO1 (noting that Respondent has retired from the Department of Homeland Security); *id.* at 3.

Petitioner next points to several occasions from the oral argument in *Egbert* where the government attorney acknowledged that *Bivens* claims may possibly survive where an agent is "perform[ing] routine law enforcement functions." Supp.Pet.3 (quoting *Egbert* Tr. 26:1–7); *see also id.* ("routine domestic search-and-seizure claim or a[n] excessive force claim" (quoting *Egbert* Tr. 34:6–12)); *id.* ("routine, run-of-the-mill Fourth Amendment case" (quoting *Egbert* Tr. 34:25–35:2)). Petitioner then asserts that his own case falls within that category: "If this is not a 'routine, run-of-the-mill Fourth Amendment case,' nothing is." *Id.* at 4 (quoting *Egbert* Tr. 34:25–35:2).

But as Judge Elrod noted below, this case "isn't a run of the mill stop, in any way." 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.

Petitioner's allegations arise 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). The Fifth Circuit's opinion relied on this unusual aspect in rejecting Petitioner's claim that this case arose out of any sort of routine stop or seizure. The court held that this case is materially distinguishable from *Bivens* in part because Respondent allegedly acted out of "suspicion of [Petitioner] harassing and stalking his son," rather than anything like the "narcotics investigation" in *Bivens* itself. Pet.App.7a. Respondent's brief in opposition to this Court made the same argument, *see* BIO14–15, demonstrating that this case does not arise from any sort of "routine" law-enforcement activity.

Accordingly, Petitioner's citations to the government's arguments about "routine, run-of-the-mill Fourth Amendment case[s]," Supp.Pet.4 (quoting *Egbert* Tr. 34:25–35:2), are misplaced. Regardless of the ultimate outcome in *Egbert*, this Court should deny *certiorari* here. *See also* BIO8–15.

CONCLUSION

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

Respectfully submitted,

C. BOYDEN GRAY
R. TRENT MCCOTTER
Counsel of Record
JONATHAN BERRY
MICHAEL BUSCHBACHER
JARED M. KELSON
BOYDEN GRAY & ASSOCIATES PLLC
801 17th Street N.W.
Suite 350
Washington, DC 20006
(202) 706-5488
mccotter@boydengrayassociates.com

March 17, 2022