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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Kevin Byrd respectfully petitions under Rule 44 for rehearing of this Court's June 23, 2022 order denying his petition for a writ of certiorari on the question of whether a *Bivens* cause of action is available for excessive force violations in matters of domestic policing.

In light of the new legal standard this Court announced in *Egbert* v. *Boule*, 142 S. Ct. 1793 (2022), petitioner asks that this Court grant rehearing and grant the petition for writ of certiorari, vacate the judgment below, and remand this case for reconsideration.

GROUNDS FOR REHEARING

The Court should order a GVR in this case. Rule 44.2 authorizes a petition for rehearing based on "intervening circumstances of a substantial or controlling effect." S. Ct. R. 44.2. With its June 8, 2020 decision in *Egbert* v. *Boule*, this Court announced a new legal standard for determining whether a cause of action is available under *Bivens*, displacing the old standard articulated in *Ziglar* v. *Abbasi*. This change presents a substantial and directly controlling circumstance that justifies rehearing and a GVR.

In its decision below, the Fifth Circuit applied the two-part test from *Ziglar* v. *Abbasi* to determine the availability of a *Bivens* claim. Pet. App. 6a; *Ziglar* v. *Abbasi*, 137 S. Ct. 1859–1860 (2017). First, the Fifth Circuit considered whether petitioner's case "presents a new context" for *Bivens*. Pet. App. 7a. Second,

finding it did, the court considered "whether there are 'any special factors that counsel hesitation" against extending *Bivens*. *Id.* at 5a. The Court concluded there were and ordered petitioner's case dismissed. *Id.* at 7a.

Petitioner sought certiorari. While his petition was pending, the Court announced a new one-part test in *Egbert*. Now, "[a] court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Egbert*, 142 S. Ct. at 1805.

Egbert presents an intervening circumstance, and if the Fifth Circuit is instructed to reconsider the decision below in light of this new standard, there is a reasonable probability of a different result. *Lawrence* v. *Chater*, 516 U.S. 163, 166–167 (1996) (per curiam) ("Where intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration * * * a GVR order is * * * potentially appropriate."). Rehearing and a GVR are therefore warranted in this case[1] and in line with the Court's practice of issuing such orders following its announcements of new legal standards. *Ibid*.; see also, *e.g.*, *Ass'n. of N.J. Rifle & Pistol Clubs, Inc.* v. *Bruck*, ___ S. Ct. ___ (No. 20-1507) (2022) (mem.) (GVR for *New York State Rifle & Pistol Ass'n., Inc.* v. *Bruen*, 597 U.S. 142 S. Ct. 2111 (2022)); *Smith* v. *Chicago*, 142 S. Ct. 1665 (2022) (mem.) (GVR for

[1] This Court should also GVR *Mohamud* v. *Weyker*, No. 21-187 (S. Ct. Aug. 6, 2021), for the same reasons.

Thompson v. *Clark*, 142 S. Ct. 1332 (2022)); *Graham* v. *Barnette*, 141 S. Ct. 2719 (2021) (mem.) (GVR for *Caniglia* v. *Strom*, 141 S. Ct. 1596 (2021)); *McCoy* v. *Alamu*, 141 S. Ct. 1364 (2021) (mem.) (GVR for *Taylor* v. *Riojas*, 141 S. Ct. 52 (2020) (per curiam)); *Swartz* v. *Rodriguez*, 140 S. Ct. 1258 (2020) (mem.) (GVR for *Hernandez* v. *Mesa*, 140 S. Ct. 735 (2020)); *St. Augustine Sch.* v. *Taylor*, 141 S. Ct. 186 (2020) (mem.) (GVR for *Espinoza* v. *Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020)).

I. A GVR is appropriate in this case because *Egbert* v. *Boule* announced a new one-part test for evaluating *Bivens* claims, different from the two-part test applied by the Fifth Circuit below.

In *Egbert* v. *Boule*, the Court announced a new standard for evaluating *Bivens* claims. Explaining that, although earlier cases "framed the inquiry as proceeding in two steps," 142 S. Ct. at 1803 (citing *Hernandez*, 140 S. Ct. at 742–743; *Abbasi*, 137 S. Ct. at 1858), "those steps often resolve to a single question." *Egbert*, 142 S. Ct. at 1803. Under the new *Egbert* test, "[a] court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" 142 S. Ct. at 1805 (quoting *Abbasi*, 137 S. Ct. at 1858). Thus, while "[i]nitially, the Court told lower courts to follow a 'two-ste[p]' inquiry before applying *Bivens*," the *Egbert* test now "boils down to a 'single question.'" *Egbert*, 142 S. Ct. at 1809 (Gorsuch, J., concurring). See also *id.* at 1818 (Sotomayor, J., dissenting in part)

(noting that *Egbert* creates a new legal standard for evaluating *Bivens* claims).

The *Egbert* test is different from the two-step *Abbasi* test applied by the Fifth Circuit in petitioner's case below. There, petitioner sued respondent—a rogue Department of Homeland Security officer acting on his own time and for his private benefit—for trying to kill him with a government-issued gun and causing his arrest by local police. Pet. 2, 6–7. In analyzing petitioner's claims, the Fifth Circuit first asked "whether his case falls squarely into one of the established *Bivens* categories, or if it is 'different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court.'" Pet. App. 6a. Because the case (1) "arose in a parking lot," (2) did not involve "a warrantless search for narcotics in Byrd's home," and (3) did not include "manacl[ing] Byrd in front of his family, nor strip-search[ing] him," the Fifth Circuit determined that "Byrd's case presents a new context." *Id.* at 6a–7a.

The Fifth Circuit then turned to the second prong of the *Abbasi* test to determine whether "any special factors counsel against extending *Bivens*." Pet. App. 7a. In the court's view, the "silence of Congress" was one such factor, and it gave the court "'reason to pause' before extending *Bivens*." *Ibid*.

The Fifth Circuit did not consider, as required by the *Egbert* test, "whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Egbert*, 142 S. Ct. at 1805. It did

not consider the competing competencies of Congress and the Judiciary at all. Worse still, the Fifth Circuit framed its analysis around the particulars of this case, Pet. App. 6a—an inquiry *Egbert* calls "deeply flawed." 142 S. Ct. at 1805. "[A] court should not inquire * * * whether *Bivens* relief is appropriate in light of * * * the 'particular case.'" *Id.* (citation omitted). The proper approach, *Egbert* clarifies, must consider the appropriateness of a *Bivens* claim by looking "more broadly" at "a given field." *Id.* (citation omitted); see also, *e.g.*, *id.* at 1806 ("[W]e ask whether a court is competent to authorize a damages action not just against Agent Egbert but against Border Patrol agents generally."). The Fifth Circuit did not do that; it did the opposite. Pet. App. 6a–7a.

II. If the Fifth Circuit applies this new *Egbert* test, there is a reasonable probability of a different result on remand.

If the Fifth Circuit is ordered to reconsider this case in light of *Egbert*'s new test, a different result is probable on remand. *Lawrence* 516 U.S. at 167–168. As such, the Court should agree to rehear this petition and issue a GVR order pursuant to 28 U.S.C. 2106, which allows it to "remand the cause and * * * require such further proceedings to be had as may be just under the circumstances." See *Lawrence*, 516 U.S. at 166–167.

Under *Egbert*'s new single-question inquiry, the Fifth Circuit would have to answer "who should decide whether to provide for a damages remedy, Congress or the courts?" 142 S. Ct. at 1803. Given the

facts and circumstances of this case, a reasonable answer is "the courts." Respondent Lamb, using his federal badge and his gun, but carrying out no official "mandate," *id*. at 1804, threatened petitioner with deadly force and caused him to be detained by local police. Pet. 7–8. Respondent's actions are a pure "individual instance[] of * * * law enforcement overreach," which is difficult to address except by way of damages in actions after the fact." Pet. 28–29 (quoting *Ziglar* v. *Abbasi*, 137 S. Ct. at 1862). Unlike a suit implicating border security, *Egbert*, 142 S. Ct. at 1803, there are no "'systemwide' consequences of recognizing a cause of action under *Bivens*" in this case, which concerns domestic policing, *ibid*.

There is also no "uncertainty" here. *Id.* at 1804. If federal courts are allowed to continue adjudicating cases like this—involving discrete Fourth Amendment violations committed by federal officers engaged in domestic policing—it will not create new species of litigation or cause unintended consequences. And hundreds of years of evidence prove it. See, *e.g.*, 3 W. Blackstone, Commentaries on the Laws of England 127 (1768); *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804) (U.S. Navy officer liable for trespass after he seized a ship pursuant to an invalid presidential order); *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331, 337 (1806) (federal officer liable for trespass after he entered the plaintiff's home to collect a fine that had been improperly imposed by a court-martial); *Bates* v. *Clark*, 95 U.S. 204, 209 (1877) (U.S. Army officers liable for trespass when they seized the plaintiff's goods without lawful authority); see also *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 491 (2020) ("In the context of suits

against Government officials, damages have long been awarded as appropriate relief.”).

In *Egbert*, the Court explicitly refused to overrule *Bivens*. *Egbert* v. *Boule*, 142 S. Ct. 457 (2021) (mem.) (declining to consider on certiorari “[w]hether the Court should reconsider *Bivens*”). It must be, then, that there are still cases that fall under *Bivens*. If the court below is allowed an opportunity to reconsider this case in light of *Egbert*, there is at least a reasonable probability that it would determine this is one such case and allow a *Bivens* remedy to proceed. It certainly should.

CONCLUSION

The Court should grant rehearing, grant the petition for writ of certiorari, vacate the judgment below, and remand for reconsideration in light of *Egbert* v. *Boule*.

Respectfully submitted,

July 15, 2022

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CERTIFICATION OF COUNSEL

As Counsel of Record for Petitioner, I hereby certify that this petition for rehearing is restricted to the grounds specified in Rule 44.2 and is presented in good faith and not for delay.

/s/Anya Bidwell
Anya Bidwell

July 15, 2022