No. 21-187

In The
Supreme Court of the United States

HAMDI MOHAMUD,

Petitioner,

v.

HEATHER WEYKER,

Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Throughout its brief, the government attempts to distinguish the decisions in the circuit split by pointing to factual distinctions between them. The government never explains why those distinctions are *meaningful*. Obviously, every case has factual distinctions. That is what makes them different cases. But that is not the question. The question over which the circuits are hopelessly split is: Which facts establish that a "case is different in a meaningful way" from *Bivens* and which facts merely describe the "common and recurrent sphere of law enforcement" where *Bivens* is a "fixed principle" that continues in force? *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857, 1859 (2017).

It is time for this Court to tell the bench and bar the answer. As demonstrated by the government's response and the conflicting decisions of the circuit courts—nine of them since *Abbasi*—no one seems to know. What is clear, however, is the importance of the issue and the need for this Court's review. The recent grant of certiorari in *Egbert* v. *Boule*, No. 21-147 (Nov. 5, 2021), proves that. While *Egbert* concerns the availability of claims against the half of federal police engaged in immigration enforcement, this case concerns the same issue applied to the other half engaged in domestic law enforcement.

The Court should grant this case to address the circuit confusion over the availability of Fourth Amendment *Bivens* claims against all federal police, not just half.

I. The government's arguments highlight the circuit split.

The government's arguments reinforce the confusion over the *Abbasi* test and the "common and recurrent sphere of law enforcement" in which *Bivens* is settled law. See *Abbasi*, 137 S. Ct. at 1857. The government not only contends, like the Eighth Circuit, that any factual distinction is a "meaningful" difference from *Bivens*. Gov't Br. in Opp. 12–14. The government outright argues that *Bivens* is already dead, insisting "this Court has *never* found that *any other* Fourth Amendment claim arose in the same context as the claim in *Bivens*." *Id.* at 14 (emphasis added).

While both positions contradict *Abbasi*, they reveal the government's belief that *Bivens* has already been repudiated. That belief is now shared by the Executive Branch and the Fifth and Eighth Circuits. Pet. App. 7a–8a, 14a (requiring that a case "exactly mirror[ ]" *Bivens*); *Byrd* v. *Lamb*, 990 F.3d 879, 883 (5th Cir. 2021) (per curiam) (Willett, J., concurring) ("The *Bivens* doctrine, if not overruled, has certainly been overtaken."), cert pending, No. 21-184 (Aug. 6, 2021).

That opinion is not shared by the First, Second, Third, Fourth, Sixth, Ninth, or Eleventh Circuits. The government responds to the post-*Abbasi* cases Mohamud cites from those circuits by continuing to split factual hairs, Gov't Br. in Opp. 16–19 (for the Fourth, Sixth, and Ninth Circuits), or demanding the cases be ignored because they did not directly address the antecedent issue of *Bivens*, *id.* at 19–20 (for the

rest). The government's arguments reinforce the need for this Court's review.

For instance, in response to the Fourth Circuit's decision in *Hicks* v. *Ferreyra*, 965 F.3d 302 (2020), the government argues that the context of that case—"a traffic stop that the plaintiff alleged became constitutionally unreasonable at some point * * *—is meaningfully different from the context of petitioner's false-arrest claim." Gov't Br. in Opp. 16. But if the government is correct, *Hicks* could just as easily have been distinguished from *Bivens*, which did not involve a traffic stop. Instead, the Fourth Circuit held that *Hicks* was "not an extension of *Bivens* so much as a replay." 965 F.3d at 311. If a traffic stop case is not meaningfully different from *Bivens*, Mohamud's case is not meaningfully different from *Bivens* either.

Similarly, the government attempts to distinguish the Sixth Circuit's decision in *Jacobs* v. *Alam*, 915 F.3d 1028 (2019), because that case involved "an arrest by [marshals] who had entered the plaintiff's home and engaged him in a physical altercation," while Weyker directed Mohamud's arrest remotely by phoning police on the scene and lying to them. Gov't Br. in Opp. 17. But the Sixth Circuit rejected those sorts of distinctions in *Jacobs*, dismissing the marshals' arguments that *Bivens* "involve[d] claims against a different federal agency, based upon a completely different set of facts" and that their case presented a new context because they "legally entered a residence by consent in the pursuit of a fugitive." See Pet. 14 n.9 (outlining the distinctions cited by the marshals in *Jacobs*). The Sixth

Circuit held that those factual distinctions were not meaningful differences for purposes of *Abbasi*: "We deal not with overarching challenges to federal policy in claims brought against top executives, but with claims against three individual officers for their alleged overreach in effectuating a standard law enforcement operation[.]" 915 F.3d at 1038 (quoting *Abbasi*, 137 S. Ct. at 1861–1862) (internal quotation marks omitted).

The government notes that *Jacobs* was decided before *Hernandez* v. *Mesa*, 140 S. Ct. 735 (2020), and suggests without explanation that *Hernandez* would have changed the outcome in *Jacobs*. Gov't Br. in Opp. 17. But *Hernandez* found a new context for *Bivens* because there was a "world of difference" between an "unconstitutional arrest and search carried out in" the United States and a "cross-border shooting," "where 'the risk of disruptive intrusion by the Judiciary into the functioning of other branches' is significant." 140 S. Ct. at 744 (citing *Bivens* and *Abbasi*). That same world of difference exists between *Hernandez* and *Jacobs*, as well as this case—both of which involve an "unconstitutional arrest * * * carried out in" the United States.

The government contends that the remaining four cases Mohamud cites to reinforce the "common and recurrent sphere of law enforcement"[1] are inapposite

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[1] *Pagán-González* v. *Moreno*, 919 F.3d 582 (1st Cir. 2019); *McLeod* v. *Mickle*, 765 Fed. Appx. 582 (2d Cir. 2019) (summary order); *Bryan* v. *United States*, 913 F.3d 356 (3d Cir. 2019);

because they did not directly analyze *Bivens*. Gov't Br. in Opp. 18–19.[2] But the government's argument is misplaced. The Court has explained that *Bivens* is "antecedent" to any other issues and thus addresses *Bivens* even when it is not directly presented to the Court. Compare Pet. for Cert. at I, *Hernandez* v. *Mesa*, No. 15-118 (S. Ct. July 23, 2015) (presenting questions about qualified immunity and constitutional merits), with *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2006–2007 (2017) (per curiam) (remanding the case for consideration of the "antecedent" *Bivens* question). And yet, in the First, Second, Third, and Eleventh Circuit cases (all decided after *Hernandez*), the availability of a *Bivens* remedy against a federal law enforcement officer—despite factual distinctions like those the government terms meaningful here[3]—was so unremarkable that neither the parties nor the courts considered it worthy of discussion. And since the government blames this on the fact that "apparently * * * the defendants in each case did not challenge the existence of a *Bivens* cause of action," Gov't Br. in Opp. 18–19, it

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Harvey v. *United States*, 770 Fed. Appx. 949 (11th Cir. 2019) (per curiam).

[2] It does the same with the many decisions of this Court that permitted a *Bivens* remedy. See, *e.g.*, *Groh* v. *Ramirez*, 540 U.S. 551 (2004) (denying qualified immunity for a *Bivens* claim against a Bureau of Alcohol, Tobacco, and Firearms agent who searched a ranch with a facially invalid warrant). Gov't Br. in Opp. 11 n.2.

[3] The government also notes factual distinctions between these cases and Mohamud's, Gov't Br. in Opp. 19, but, as with *Hicks* and *Jacobs*, all the cited distinctions would apply with equal force to *Bivens* itself.

must be pointed out that the Department of Justice represented the defendants in all four cases.

The government's brief also illustrates the circuit confusion over *Abbasi*'s second step. On that issue, the government contends that the Eighth Circuit was right to find "special factors counseling hesitation" in extending *Bivens* because (1) a trial could interfere with Executive Branch investigative functions; (2) there are substantial costs with litigation; and (3) Congress should determine the availability of remedies.[4,5]

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[4] On this point, the government claims Congress has created "other remedies that redress the sort of injuries alleged by" Mohamud. Gov't Br. in Opp. 14–15 (citing 18 U.S.C. 3006A note and 28 U.S.C. 2513). That is incorrect. As the Eighth Circuit noted in a related case, the remedies the government cites would not apply to Mohamud or any of Weyker's other victims because they were represented by appointed counsel and never convicted. See *Farah* v. *Weyker*, 926 F.3d 492, 501 (8th Cir. 2019).

[5] Moreover, Congress determined the availability of the remedies Mohamud seeks when it passed the Westfall Act, 28 U.S.C. 2679(b)(2)(1) (recognizing the availability of "a civil action against an employee of the [Federal] Government * * * which is brought for a violation of the Constitution of the United States"). The government notes that the Westfall Act "left *Bivens* where it found it" in 1988, as if that forecloses Mohamud's claims. Gov't. Br. in Opp. 15–16 n.4 (quoting *Hernandez*, 140 S. Ct. at 748 n.9). To the contrary, it bolsters them.

When Congress amended the Federal Tort Claims Act in 1974 to include intentional torts committed by federal law enforcement officers, 28 U.S.C. 2680(h) (including false arrest and malicious prosecution), Congress explained it was creating "parallel, complementary causes of action" to already-existing *Bivens* causes of action. *Carlson* v. *Green*, 446 U.S. 14, 19–20 (1980) (quoting S. Rep. 93-588, 93rd Cong., 2. Sess. 3 (1973)). Citing police raids as its motivation, Congress acknowledged the availability of a *Bivens* "cause of action against * * * individual

Gov't Br. in Opp. 14. Of course, if these are special factors, they are present in every case, and Judge Willett is correct: "new context = no *Bivens* claim." *Byrd*, 990 F.3d at 883 (Willett, J., concurring). But like the distinctions the government identifies at step one, these distinctions would apply equally to *Bivens*. They are also directly in conflict with *Egbert*, where the Ninth Circuit held that an extension of *Bivens* was permissible because "border patrol and F.B.I. agents are both federal law enforcement officials, and * * * [the] Fourth Amendment excessive force claim is indistinguishable from Fourth Amendment excessive force claims that are routinely brought under *Bivens* against F.B.I. agents." *Boule* v. *Egbert*, 998 F.3d 370, 387 (9th Cir. 2021), cert. granted, No. 21-147 (Nov. 5, 2021).

II. The Court should consider this case alongside *Egbert* v. *Boule*.

A month after Mohamud filed her petition, the Court granted certiorari in *Egbert* v. *Boule* to address a similar issue: Whether a *Bivens* claim is available for Fourth Amendment violations committed by "federal officers engaged in immigration-related functions."[6]

Federal agents" for unreasonable "search[es] and seizures that are conducted without warrants or with warrants issued without probable cause." S. Rep. 93-588, *supra*. Thus, in 1988, Congress would have understood Mohamud's claims against Weyker to be actionable under *Bivens*.

[6] Pet. for Cert. I, *Egbert* v. *Boule*, No. 21-147 (S. Ct. July 30, 2021); ___ S. Ct. ___, 2021 WL 5148065 (granting certiorari "limited to Questions 1 and 2 presented by the petition").

The disposition of that question will undoubtedly affect the *Bivens* analysis in this case because both concern Fourth Amendment claims against federal law enforcement officers.[7] But *Egbert* will not settle the split Mohamud identifies because the courts treat *Bivens* claims arising from immigration enforcement differently from similar claims arising from domestic law enforcement. To address that issue, the Court should grant certiorari in this case to consider it alongside *Egbert*.[8]

Both this case and *Egbert* involve typical Fourth Amendment claims against line-level federal law enforcement officers. Weyker, a Special Deputy U.S. Marshal, lied to have Mohamud arrested without probable cause. "This was the claim at issue in *Bivens*." Pet. App. 18a (Kelly, J., dissenting); *id.* at 18a–19a (citing *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) ("[Bivens's] complaint asserted * * * that the arrest was made without probable cause.").[9] Egbert, a Customs and

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[7] The government hardly notes the grant of certiorari in *Egbert* in its brief and merely tries to distinguish the facts of *Boule* from the facts here. Gov't Br. in Opp. 18.

[8] This Court should also consider *Byrd* v. *Lamb*, No. 21-184 (S. Ct. Aug. 6, 2021), cert. pending, for similar reasons. Indeed, respondent's brief on certiorari in *Byrd* urges the Court to address this case and *Byrd* together. *Byrd* v. *Lamb*, Br. in Opp. 2 n.1, *supra*.

[9] The government argues to the contrary that Mohamud's case presents a new context because the elements of Mohamud's false-arrest claim "differ from the elements that the plaintiff in *Bivens* had to prove to succeed on his warrantless-search claim" and because Weyker "was not physically involved in petitioner's

Border Protection officer, used excessive force against Boule. *Boule*, 998 F.3d at 387. This too was a claim at issue in *Bivens*. 403 U.S. at 389. ("[Bivens's] complaint asserted * * * that unreasonable force was employed in making the arrest.").

But differences between domestic law enforcement and immigration enforcement are often dispositive in the lower courts. *See* Pet. for Cert. at 19, 26, *Egbert*, *supra*. For instance, the Fourth Circuit has specifically distinguished immigration-related claims, which it holds are not covered by *Bivens*, from "run-of-the mill, unconstitutional law enforcement activity by individual law enforcement agents," which are. Compare *Tun-Cos* v. *Perrotte*, 922 F.3d 514, 525–526 (4th Cir. 2019) (internal quotation marks omitted), with *Hicks, supra*. A similar distinction exists in the Eleventh Circuit. Compare *Harvey* v. *United States*, 770 Fed. Appx. 949 (11th Cir. 2019) (per curiam) (permitting *Bivens* claims against a domestic law enforcement officer), with *Alvarez* v. *United States Immigr. & Customs Enf't*, 818 F.3d 1194 (11th Cir. 2016) (prohibiting *Bivens* claims against an immigration enforcement officer).

About half of the more-than-100,000 federal police who patrol the United States are engaged in

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arrest." Gov't Br. in Opp. 13. But, as noted above, *Bivens* itself involved a false-arrest claim. 403 U.S. at 389. And Bivens sued six officers. Although the record is unclear, it is unlikely all of them were "physically involved" in Bivens's arrest.

immigration enforcement.[10] The other half are engaged in domestic law enforcement. *Ibid.* The circuits are split over the application of *Bivens* to both groups. Thus, this Court's guidance is equally crucial for immigration enforcement and domestic law enforcement. Considering Mohamud's case with *Egbert* would allow the Court to address the similarities or dissimilarities between these two enormous categories of federal police when it comes to Fourth Amendment *Bivens* claims and whether one or both are included in the "common and recurrent sphere" *Abbasi* safeguarded.

Further, this case is a better vehicle than *Egbert* because crucial facts in that case are under seal. *See*, *e.g.*, Redacted Br. in Opp., *Egbert*, *supra*, 2–4, 6–7, 15–16, 18, 20, 23–24 (S. Ct. Oct. 4, 2021). Because both parts of the *Abbasi* test are fact bound, the inability of the Court to publicly announce the facts salient to its *Abbasi* analysis impairs the effectiveness of any guidance this Court's decision in *Egbert* might otherwise provide. With an open record, this case offers a transparent vehicle for this Court to guide the lower courts.[11]

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

[11] The government disingenuously argues that this case is a bad vehicle because the Eighth Circuit "remanded the case to permit the district court to determine whether respondent was acting under color of state law, which might permit petitioner's constitutional claim to proceed under Section 1983." Gov't Br. in Opp. 20. Not only has the government consistently argued that Weyker was acting under color of federal law (in all of the two

The Court's grant of certiorari in *Egbert* reflects the importance of Fourth Amendment *Bivens* claims and the widespread confusion among the circuits on their availability against law enforcement officers. The Court should grant certiorari here to provide guidance on the application of the *Abbasi* test to all 100,000 federal police—not just the half engaged in immigration enforcement. The circuits are split over both.

dozen lawsuits filed against her, see Pet. App. 84a–86a), but as dissenting Judge Kelly explained below, "the district court [judge, who is also presiding over Mohamud's case] has already determined in a related case [involving the same facts as this case] that, on the date in question, Officer Weyker was acting as a federally deputized officer, not under color of state law, making a § 1983 claim unavailable." Pet. App. 23a n.7 (citing *Yassin* v. *Weyker*, No. 16-CV-2580, 2020 WL 6438892, at *4–5 (D. Minn. Sept. 30, 2020)). The government's suggestion that the same district court judge, reviewing the same facts on the same date, might conclude Weyker was acting under color of state law in Mohamud's case is meritless.

CONCLUSION

This Court should grant the petition, reaffirm its recognition in *Abbasi* that *Bivens* is "settled law * * * in th[e] common and recurrent sphere of law enforcement," 137 S. Ct. at 1857, and reverse the Eighth Circuit's decision below.

Respectfully submitted,

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