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**

## SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

## SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

Petitioner Hamdi Mohamud files this supplemental brief to call the Court's attention to assertions made by the government at oral argument on March 2, 2022, in the related case of *Egbert* v. *Boule*, No. 21-147, that are directly contrary to the government's arguments in Mohamud's case. Like this case, *Egbert* concerns the availability of Fourth Amendment *Bivens* claims against line-level federal law enforcement officers following *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017). Arguing as amicus in *Egbert*, the government asserted that "domestic search-and-seizure" claims "involving * * * the Marshals Service" are available under *Bivens*, but as party counsel in this case, the government argues they are not. The government's change of position suggests that it may no longer oppose Mohamud's petition and now disagrees with recent rulings from the Fifth and Eighth Circuits. See also *Byrd* v. *Lamb*, No. 21-184, cert. pending on the same issue. In either case, the Court's review is urgently needed.

*Egbert* concerns whether a *Bivens* claim is available against a border patrol agent who shoved down an innkeeper in his driveway near the Canadian border. At oral argument, counsel for the agent argued no. Indeed, she asserted, *Bivens* does not provide a cause of action against *any* federal law enforcement officers—other than, perhaps, those employed by the DEA. *Egbert* Tr. 14:18–17:6. But the government took a less radical approach. Appearing as amicus in support of the agent, the government argued a *Bivens* claim is not

available against the border patrol agent because of the national security implications of border protection. Subject to such exceptions, the government maintained, *Bivens* claims are generally available for Fourth Amendment violations committed by federal officers engaged in domestic law enforcement activities. *Id.* at 34:3–35:16.

Responding to questions from the Court, the government articulated a broad understanding of *Bivens* in the context of domestic policing. For instance, when asked by Justice Thomas what meaningful differences exist between the narcotics agents in *Bivens* and border patrol agents, the government emphasized that even border patrol agents are subject to *Bivens* when engaged in domestic policing. *Egbert* Tr. 24:21–22, 26:3–7 ("[P]olicing of the border has a clear and strong connection to national security," but "the case would be different if you had a Border Patrol agent who's just investigating -- you know, assisting with local law enforcement to perform routine law enforcement functions."). Similarly, when asked by Justice Breyer to identify the most common officials subject to *Bivens*, the government pointed to the FBI and federal marshals, agreeing they are "right at the heart of *Bivens*." *Id.* at 27:1–19.

More concretely, Chief Justice Roberts asked the government to provide a "hypothetical case where your office would say *Bivens* permits a cause of action." *Id.* at 34:3–5. The government responded: "[A] case involving an FBI agent or * * * the Marshals Service * * * that is a routine domestic search-and-seizure claim or

an excessive force claim[.]" *Id.* at 34:6–12. "[I]n that routine, run-of-the-mill Fourth Amendment case by an FBI agent," the government explained, *Bivens* applies. *Id.* at 34:25–35:2. Indeed, the point was so clear that the government claimed it "has not argued either before or after *Abbasi* that those cases" fall outside the established context for *Bivens*. *Id.* 34:12–14.

This case proves otherwise. Despite presenting the very hypothetical described by the government in *Egbert*, the government has consistently argued that *Bivens* does not permit a cause of action in this case. Respondent Heather Weyker was deputized as a U.S. Marshal and sponsored by the FBI when she had Mohamud arrested as part of a domestic law enforcement investigation. Pet. App. 3a, 48a. Not only was Weyker assisted by *and* assisting local law enforcement in performing a routine law enforcement function (*i.e.*, investigating a domestic crime and responding to a 911 call), she herself is a St. Paul police officer. Pet. App. 2a–3a. But when Mohamud brought her domestic search-and-seizure claims against Weyker, the government convinced the Eighth Circuit to throw them out under *Abbasi* and continued to advocate against Mohamud's claims in this Court.

Contrary to the government's assurances in *Egbert* that claims like Mohamud's are quintessential *Bivens*, the government has split hairs to avoid them here. Arguing in opposition to Mohamud's petition, for example, the government contends that Mohamud's case presents a different context from *Bivens*. That is so, the government contends, because Mohamud's claims

arise out of an arrest, whereas *Bivens* involved a search, or because Weyker did not physically arrest Mohamud but directed a local officer to put her in cuffs. Gov't Br. in Opp. 13. But see Mohamud Reply 8–9 n.9. The government's position in this case cannot be squared with its representation to the Court in *Egbert* that "a case involving * * * the Marshals Service" for "a routine domestic search-and-seizure claim or a[n] excessive force claim" is available under *Bivens*. *Egbert* Tr. 34:6–12.

If its statements at oral argument are to be credited, the government has now changed position in this case and *Byrd* and agrees with the petitioners. After *Abbasi*, *Bivens* is still generally available against federal officers for individual instances of law enforcement overreach in violation of the Fourth Amendment. Otherwise, the "United States [is not speaking] with one voice before this Court," *United States* v. *Providence J. Co.*, 485 U.S. 693, 706 (1988), and even the Executive Branch—like the circuit courts—is split over how to interpret *Abbasi* or apply *Bivens*. Both possibilities increase the need for this Court's consideration of Mohamud's and Byrd's petitions.

## 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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