No. 21-187

In the Supreme Court of the United States

HAMDI MOHAMUD, PETITIONER

v.

HEATHER WEYKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT IN OPPOSITION

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The brief in opposition explained multiple reasons why the petition for a writ of certiorari in this case should be denied: The decision of the court of appeals is correct (Br. in Opp. 12-15); it does not conflict with any decision of another federal court of appeals, none of which has recognized an individual damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on facts comparable to those here (Br. in Opp. 16-20); no reasonable prospect exists that this Court's decision in *Egbert* v. *Boule*, No. 21-147 (argued Mar. 2, 2022), will affect the outcome of this case (Br. in Opp. 18); and the interlocutory posture here—which could ultimately obviate the need for resolution of the question presented—makes this case unsuited for further review (*id.* at 20).

Contrary to petitioner's supplemental brief, none of those factors weighing against a writ of certiorari was

affected by the oral argument in *Egbert*, in which the United States participated as amicus curiae. Petitioner's contention that "the government has now changed position in this case * * * and agrees with [petitioner]," Pet. Supp. Br. 4, misapprehends the United States' arguments in *Egbert*.

1. Petitioner asserts that the government in *Egbert* "articulated a broad understanding of *Bivens* in the context of domestic policing" and "agree[d]" that "federal marshals" are "'right at the heart of *Bivens*.'" Supp. Br. 2 (quoting Tr. of Oral Arg. at 27, *Egbert*, *supra* (No. 21-147) (*Egbert* Tr.)). That characterization is not accurate. Counsel for the government agreed that Deputy United States Marshals are among the "most common" defendants who face *Bivens* actions. *Egbert* Tr. at 27. But counsel emphasized that "whether special factors counsel hesitation and, thus, whether a Bivens claim can go forward depends" on what the officer was "doing" at the relevant time. *Id.* at 25. Counsel accordingly stated that, if a hypothetical federal officer with national-security responsibilities was merely "assisting with local law enforcement to perform routine law enforcement functions," the fact that the officer has some other "duties that do implicate national security" is not a sufficient reason by itself to reject a *Bivens* claim. *Id.* at 25-26. Counsel went on to explain, however, that any number of differences can give rise to a new *Bivens* context or to special factors counseling hesitation, and that the *Bivens* analysis should not be conducted at a high level of generality. See *id.* at 29; accord U.S. Amicus Br. at 31, *Egbert*, *supra* (No. 21-147) (arguing that the court of appeals had failed to consider whether to extend *Bivens* "at the appropriate level of generality").

Those statements are fully consistent with respondent's argument in this case. The brief in opposition endorsed (at 12-15) the court of appeals' analysis, which carefully reviewed the specific allegations against respondent, compared them to the claims at issue in *Bivens*, and "consider[ed] the risk of interfering with the authority of the other branches," *Hernández* v. *Mesa*, 140 S. Ct. 735, 743 (2020), if *Bivens* were extended. See Pet. App. 8a-15a. By contrast, petitioner commits just the sort of mistake that the government has consistently warned against by describing "the new-context" inquiry for *Bivens* at a "high level of abstraction." Br. in Opp. 9. See, *e.g.*, Pet. 26 (describing this case as involving an "individual instance[] of law enforcement overreach"); Pet. Supp. Br. 1 (arguing that this case, like *Egbert*, "concerns the availability of Fourth Amendment *Bivens* claims against line-level federal law enforcement officers"). As respondent has explained, "this Court has not read *Bivens* as sweeping so broadly across the variety of Fourth Amendment claims that may be alleged." Br. in Opp. 13.

2. Petitioner next asserts (Supp. Br. 2-4) that the government in *Egbert* conceded the availability of a *Bivens* remedy for "claims like [petitioner's]," *id.* at 3, by informing the Court that, "[i]n a case involving" an FBI agent or Deputy U.S. Marshal "that is a routine domestic search-and-seizure claim or a[n] excessive force claim," the United States "has not argued either before or after" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), that the claim presents special factors counseling hesitation, *Egbert* Tr. at 34. See *id.* at 34-35 (stating that, in a "routine, run-of-the-mill Fourth Amendment case," the government does not "see special factors that counsel [hesitation]"); *id.* at 37 (accepting "a routine domes-

tic search-and-seizure" or "excessive force" claim "involving a U.S. citizen").

But this case does not involve a "routine" or "run-of-the-mill" search-or-seizure claim for all of the reasons explained in the brief in opposition (at 12-13) and in the opinion of the court of appeals (Pet. App. 9a-12a). Most obviously, respondent did not search or seize petitioner—she was not even present on the scene. See *id.* at 10a. Instead, petitioner claims that respondent provided false information about petitioner to another police officer in a different department, prompting that officer to arrest petitioner, and then made false accusations in a criminal complaint. See *id.* at 3a-4a, 9a-10a. Those false-arrest theories of Fourth Amendment injury are hardly routine. Resolving them would require probing respondent's state of mind in a way that the claims in *Bivens* did not, as well as undertaking a complex assessment of the effects of actions by other persons in the causal chain that allegedly caused petitioner's injuries. See *id.* at 11a-12a; cf. *Hartman* v. *Moore*, 547 U.S. 250, 261-263 (2006).

3. Petitioner's account of the *Egbert* oral argument also omits other important aspects of the government's position. Immediately after explaining that the United States typically does not challenge the availability of a *Bivens* remedy for routine domestic search-or-seizure claims, counsel for the government added that *Abbasi* had recognized a "non-exhaustive" "list of things that can create special factors" counseling hesitation, *Egbert* Tr. at 34, and as a result, "the Court really needs to consider the full picture" in every case, *ibid.*, and it "should be quite skeptical before it recognizes" a "new Bivens cause of action," *id.* at 38-39. Accord U.S. Amicus Br. at 13-15, 17, 19, *Egbert*, *supra* (No. 21-147).

The court of appeals' decision here reflects an appropriate caution against extending *Bivens* into the new contexts presented by petitioner's claims, where an individual damages remedy would "risk . . . burdening and interfering with the executive branch's investigative . . . functions." Pet. App. 14a (citation omitted). The court also correctly recognized alternative processes for protecting the interest asserted by petitioner, *id.* at 14a-15a, which counsel against supplementing those processes with a judicially created damages remedy, see Br. in Opp. 14-15; accord U.S. Amicus Br. at 19, *Egbert*, *supra* (No. 21-147) (arguing that a *Bivens* remedy is not appropriate where "alternative remedial structure[s]" exist to deter and address the kind of misconduct alleged by the plaintiff) (quoting *Abbasi*, 137 S. Ct. at 1858)). The court's conclusion on that point was not affected by the United States' oral argument in *Egbert*, which did not have occasion to discuss alternative remedial structures.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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