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**

## PETITION FOR REHEARING

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## PETITION FOR REHEARING

Petitioner Hamdi Mohamud respectfully petitions under Rule 44 for rehearing of this Court's June 23, 2022 order denying her petition for a writ of certiorari on whether a *Bivens* cause of action is available to remedy search-and-seizure violations committed by federal officers engaged in domestic policing.

Because this Court announced a new legal standard to answer that question in *Egbert* v. *Boule*, 142 S. Ct. 1793 (2022), while this case was pending, 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 allows a petition for rehearing based on "intervening circumstances of a substantial or controlling effect." S. Ct. R. 44.2. Through 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 from *Ziglar* v. *Abbasi*. This change presents a substantial and directly controlling circumstance that justifies rehearing and a GVR.

In its decision below, the Eighth Circuit applied the two-part test from *Ziglar* v. *Abbasi* to determine the availability of petitioner's *Bivens* claims. Pet. App. 6a–7a; *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1859–1860 (2017). First, the Eighth Circuit considered whether petitioner's case "presents one of the three *Bivens*

claims the Supreme Court has approved in the past." Pet. App. 7a (cleaned up). Second, finding it did not, the court considered "whether 'any special factors counsel hesitation before implying a new cause of action.'" *Id.* (citation omitted). The Eighth Circuit held they did and ordered petitioner's *Bivens* claims dismissed. Pet. App. 16a.

Petitioner sought certiorari. While her petition was pending, the Court announced a new one-part test in *Egbert*. Unlike the two-part test applied below, after *Egbert* "[a] court faces only one question": "whether there is any reason to think that Congress might be better equipped to create a damages remedy" than the courts. *Egbert*, 142 S. Ct. at 1803, 1805.

*Egbert* presents an intervening circumstance, and if the Eighth Circuit is instructed to reconsider the decision below under 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 appropriate 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.,*

[1] This Court should also GVR *Byrd* v. *Lamb*, No. 21-184 (S. Ct. Aug. 6, 2021), for the same reasons.

*Inc.* v. *Bruen*, 142 S. Ct. 2111 (2022)); *Smith* v. *Chicago*, 142 S. Ct. 1665 (2022) (mem.) (GVR for *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 Eighth 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 Eighth Circuit's decision below is, therefore, based on the now-outdated two-part *Abbasi* test. In this case, petitioner sued respondent—a St. Paul police officer working on a federal task force as a deputized United States Marshal—for "landing [petitioner] in jail through lies and manipulation." Pet. App. 2a. To determine whether petitioner could proceed under *Bivens*, the Eighth Circuit first considered "whether *this* 'case is different in a meaningful way from . . . *Bivens*." Pet. App. 8a (quoting *Abbasi*, 137 S. Ct. 1859). On that question, the court held that petitioner's case presented a new context because it does not "exactly mirror[] the facts and legal issues presented" in *Bivens*. Pet. App. 7a–8a (citation omitted). Turning to the second part of the *Abbasi* test, the Eighth Circuit then found "reasons to pause" before allowing petitioner's claims to proceed—*i.e.*, that having a trial would "risk . . . burdening and interfering with the executive branch's investigative . . . functions," *id.* at 14a (citation omitted), and that Congress has created "other remedies" for *some* criminal defendants (though not petitioner). *Id.* at 14a–15a.

The Eighth Circuit did not address, as now required by the *Egbert* test, "whether there is any reason to think that Congress might be better equipped to create a damages remedy" than the Judiciary. *Egbert*, 142 S. Ct. at 1803. It did not even consider the competing competencies of Congress and the courts.

Worse still, the Eighth Circuit framed its analysis around the particulars of this case, Pet. App. 8a—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 here whether a court is competent to authorize a damages action not just against Agent Egbert but against Border Patrol agents generally."). The Eighth Circuit did not do that; it did the opposite. Pet. App. 8a.

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

If the Eighth Circuit is ordered to reconsider this case under *Egbert*'s new test, a different result is probable on remand. Thus, 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 Eighth 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 Weyker, using

federal authority, but carrying out no legitimate "mandate," *id*. at 1804, framed petitioner to save the credibility of a witness respondent had been cultivating. Pet. App. 3a. Respondent's actions are plainly "individual instances of * * * law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1862.

The Eighth Circuit's case-specific approach also means that it missed the forest for the trees. 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. *Id.* at 1803–1804. When the relevant field of federal action is considered—domestic policing conducted by an officer working as a United States Marshal—this case falls within the "common and recurrent sphere of law enforcement" for which *Abbasi* proclaimed *Bivens* "settled law." 137 S. Ct. at 1857; see also *Egbert* Oral Arg. Tr. 34:6–12 (Solicitor General describing available *Bivens* claims to include, as here, "a case involving * * * the Marshals Service * * * that [raises] a routine domestic search-and-seizure claim"). With *Egbert*'s instruction that courts should look broadly to the relevant field of government action, a different outcome is reasonable, if not likely on remand.

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 a 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 under 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 under *Egbert*, there is a reasonable probability 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/Patrick Jaicomo
Patrick Jaicomo

July 15, 2022