

No. 23A\_\_\_

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IN THE  
**Supreme Court of the United States**

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MICHAEL BORESKEY,

*Applicant,*

v.

JEREMY GRABER,

*Respondent.*

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**APPLICATION FOR AN EXTENSION OF TIME TO FILE A  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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July 28, 2023

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## APPLICATION

To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Third Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Michael Boresky, respectfully requests a 60-day extension of time, to and including October 9, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

1. The Third Circuit entered judgment, over a dissent by Judge Hardiman, on February 10, 2023. *See Graber v. Doe II*, 59 F.4th 603 (3d Cir. 2023); App. 1a-31a. The court denied Applicant's petition for rehearing en banc on May 10, 2023. *See* App. 41a-42a. Unless extended, the time to file a petition for a writ of certiorari will expire on August 8, 2023. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. Applicant Special Agent Michael Boresky is a Secret Service agent and was part of the security team for the 2016 Democratic National Convention in Philadelphia. Before that event, the Secret Service restricted access to certain areas around the Convention site and sealed those areas with a fence. App. 3a. Federal law prohibits persons from entering an area restricted by the Secret Service in conjunction with an event of national significance. 18 U.S.C. § 1752.

3. Respondent Jeremy Graber participated in protests one night of the Convention. At one point in the night, several protesters breached the fence and entered the restricted area. Philadelphia Police took seven of the demonstrators into custody, including Respondent. App. 4a. Prosecutors then charged Respondent with violating 18 U.S.C. § 1752 based on an affidavit signed by Special Agent Boresky identifying Respondent as one of the individuals who entered the restricted area. *Id.* at 4a-5a. Respondent remained in pre-trial detention overnight.

4. The next day, Respondent's counsel submitted video footage to the Government demonstrating that Respondent did not breach the fence along with the other protestors. He was then released and the charge dismissed. *Id.* at 5a.

5. Respondent sued Special Agent Boresky in his individual capacity alleging a Fourth Amendment *Bivens* claim for false arrest and unlawful detention. *Id.* at 5a.

6. Special Agent Boresky moved to dismiss. He argued that, under this Court's two-step framework set out in *Ziglar v. Abbasi*, 582 U.S. 120 (2017), Respondent's claims represented a new *Bivens* context and that special factors, chiefly the risk of "judicial intrusion into matters of national security," strongly cautioned against expanding *Bivens* beyond its current, limited scope. *Graber v. Dales*, No. CV 18-3168, 2019 WL 4805241, at \*4 (E.D. Pa. Sept. 30, 2019).

7. The District Court denied that motion despite acknowledging multiple "differences" between this case and *Bivens*. *Id.* at \*3-4. It recognized that "even relatively trivial factual differences might make a context new," but nonetheless

opined that Respondent's claims were close to the "core" "Fourth Amendment activity" that *Bivens* already protects. *Id.* at \*3. Even if this case presented a new context, the District Court continued, separation-of-powers concerns did not counsel against extending *Bivens* to this case. *Id.* at \*4-6. After the start of discovery, Special Agent Boresky sought summary judgment on qualified immunity grounds. The District Court denied that motion, too, finding Respondent needed additional discovery to respond effectively. App. 40a.

8. Special Agent Boresky appealed the District Court's determination under the collateral order doctrine. *Id.* at 6a-7a. That doctrine allows for parties to immediately appeal rulings that (1) "conclusively determine" a (2) "important issue completely separate from the merits" that is (3) "effectively unreviewable" in a final judgment appeal." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (quotation marks omitted).

9. A divided panel of the Third Circuit determined it lacked jurisdiction to review district court rulings on the cognizability of a *Bivens* claim. To reach that result, the panel majority relied solely on the third collateral order element—the inability to review a ruling after final judgment. In its view, that element only applies to rights that "protect a defendant from facing trial" such as one of "various immunity doctrines." App. 8a. Because *Bivens* "is not an immunity doctrine," the panel majority concluded that "any error in," or harm from, "a *Bivens* ruling" could be cured "at the end of the case." *Id.* at 10a-11a.

10. Judge Hardiman dissented. He disagreed with the panel majority’s immunity analogy and would have applied the third collateral order element to denials of pretrial defenses that “implicate[] a sufficiently important public value.” *Id.* at 15a (Hardiman, J. dissenting). He found this case easily met that element because the District Court’s creation of a *Bivens* cause of action “imperiled” the “constitutional separation of powers.” *Id.* at 14a.

11. As Judge Hardiman explained, this case exists at the intersection of this “Court’s careful policing of” “the collateral order doctrine” and “its repeated refusal to allow new [*Bivens*] actions.” *Id.* Given the exceptionally important separation-of-powers issues at stake, that balance tips in favor of a right to appeal similar rulings. The Third Circuit’s view to the contrary is wrong, and it warrants this Court’s review.

12. This Court has assiduously reminded lower courts that “in most every case” “no *Bivens* action may lie.” *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022). That skepticism is grounded in separation-of-powers concerns. When a court creates a “new cause of action,” it usurps the power to “assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation.” *Id.* at 1809-10 (Gorsuch, J., concurring in the judgment). Extension of *Bivens* into a new context occasions “‘substantial costs’ for Executive officers,” App. 23a (Hardiman, J. dissenting) (quoting *Abbasi*, 582 U.S. at 134), and threatens to “impai[r] governmental interests” across the board, *Egbert*, 142 S. Ct. at 1805 (quotation marks omitted). And those concerns are only heightened in cases like this which involve the judiciary’s “intrusion into the Secret Service’s management of the government’s

response to security breaches.” App. 29a (Hardiman, J. dissenting). Of all separation-of-powers issues in *Bivens* cases, national security determinations are those “for which the Judiciary has neither aptitude, facilities, nor responsibility.” *Hernandez v. Mesa*, 140 S. Ct. 735, 749 (2020) (alteration and quotation marks omitted).

13. The consequences of extending *Bivens* provide a compelling reason to allow immediate appeals of rulings that recognize new *Bivens* claims. The central purpose of the collateral order doctrine’s “effectively unreviewable” requirement is to single out values that are “*too important . . . to require that appellate consideration be deferred.*” *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498 (1989) (emphasis added) (quotation marks omitted); *see also id.* at 502 (Scalia, J. concurring) (“The importance of the right asserted has always been a significant part of our collateral order doctrine.”); *Will*, 546 U.S. at 351-352 (the requirement “boils down to a judgment about the value of the interests that would be lost” (quotation marks omitted)). And there is no doubt that the separation of powers is a “particular value of a high order” sufficient to satisfy that criteria. *Will*, 546 U.S. at 352. In limiting the doctrine to immunity orders, the panel majority failed to follow that settled rule.

14. This Court’s frequent grants of certiorari in *Bivens* cases demonstrate the importance of mitigating the separation-of-powers harms that arise in cases like this. *See Egbert*, 142 S. Ct. at 1806; *Abbasi*, 582 U.S. at 136; *Hernandez*, 140 S. Ct. at 749; *cf. Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1938 (2021) (recognizing the

“judicial creation of a cause of action is an extraordinary act that places great stress on the separation of powers”).

15. Good cause exists for a 60-day extension. As a federal officer, Applicant was represented by counsel from the Department of Justice in the courts below. In light of the lengthy process required to retain private counsel for federal employees in this Court, *see* 28 C.F.R. § 50.15, undersigned counsel was first contacted about this case four days ago, and signed a retention agreement to represent Applicant in this Court just two days ago. Counsel will therefore require additional time to become appropriately familiar with this litigation and to prepare a petition that fully addresses the important questions raised by the proceedings below. This case, moreover, is one of the few in which the Government concludes that retaining private counsel for a federal official in this Court would “be in the interest of the United States.” 28 C.F.R. § 50.15(a). Thus, although Justice Alito has recently denied requests for 60-day extensions of time to seek certiorari, there are especially compelling reasons for a 60-day extension here.

16. Over the next several weeks, counsel is occupied with briefing deadlines in a variety of matters, including a certiorari petition in *Rogers v. Jarrett*, No. 22A1093 (U.S.), due July 28; a responsive pleading in *Students for Fair Admissions, Inc. v. Yale University*, No. 3:21-cv-00241-OAW (D. Conn.), due July 31; an opening brief in *Wye Oak Technology, Inc. v. Republic of Iraq*, No. 23-7009 (D.C. Cir.), due August 21; and a reply brief in *Carr v. Google LLC*, No. 23-15285 (9th Cir.), due

August 21. These deadlines further demonstrate good cause for the requested extension.

17. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari by 60 days, to and including October 9, 2023. If a 60-day extension is deemed unwarranted, Applicant respectfully requests an extension of at least 45 days, to and including September 22, 2023.

Respectfully submitted,

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