No. 20-1060

IN THE

Supreme Court of the United States

JOSE OLIVA,

Petitioner,

v.

MARIO NIVAR ET AL.,

Respondents.

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

BRIEF FOR PROFESSOR PETER H. SCHUCK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Peter H. Schuck is the Simeon E. Baldwin Professor of Law Emeritus at Yale University. For more than forty years, Professor Schuck has studied and published on issues related to the liability of public officials for civil damages. His works on the subject include *Suing Government: Citizen Remedies for Official Wrongs* (1983), *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281 (1980), and *Suing Government Lawyers for Giving Dubious Legal Advice in a National Security Crisis: Notes on How (Not) to Became a Banana Republic*, 8 U. St. Thomas L.J. 496 (2011).[1]

Professor Schuck submits this *amicus* brief because the decision below departs radically from this Court's established framework for evaluating damages claims against federal officials for constitutional torts, creating a split among the circuits on the proper scope of the cause of action recognized in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This Court recently reaffirmed the availability of the *Bivens* cause of action in the "context[s]," and against the "category of defendants," in which *Bivens* and its progeny arose. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017). The context-specific inquiry mandated in *Abbasi* provides

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no party's counsel authored this brief in whole or in part, and that no party or person other than amicus curiae contributed money towards the preparation or filing of this brief. Counsel of record for all parties received timely notice of the intention to file this brief and have consented to its filing. *See* S. Ct. R. 37.3(a).

a straightforward approach for the lower courts that preserves *Bivens* claims that arise in the same kinds of settings in which *Bivens* and its progeny have repeatedly and recently been upheld: where plaintiffs allege that street-level federal officers violated the Fourth Amendment in the course of their ordinary law enforcement activities.

SUMMARY OF ARGUMENT

Petitioner José Oliva alleges that he was placed in a chokehold and violently thrown to the ground by federal police officers during his routine visit to a Veterans Affairs hospital, in violation of his Fourth Amendment rights. These allegations—involving street-level federal officers who violated the Fourth Amendment in a standard, everyday law enforcement setting—fall squarely within the core of claims recognized by *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for almost half a century. While this Court's receptivity to implied causes of action for constitutional torts has varied since *Bivens* was decided, the Court recently reaffirmed *Bivens*'s vitality in the contexts in which *Bivens* and its progeny arose, suggesting the Court harbors concerns only where a plaintiff seeks to apply *Bivens* to a "new context" in which "the case is different in a meaningful way from previous *Bivens* cases decided by th[e] Court." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1859 (2017). This is emphatically not such a case.

Yet the Fifth Circuit below incorrectly read *Abbasi* to limit *Bivens* and its remedy-recognizing progeny to their specific facts. The Fifth Circuit held that the facts in this case presented a "new context," citing minor factual differences between this case and *Bivens*—the incident here occurred in public space

rather than at home, was undertaken by Veterans Affairs police officers rather than narcotics agents, and involved a chokehold rather than a manacle and strip-search. In *Abbasi*, however, this Court determined that niggling distinctions like these are not "meaningful" because they give rise to the identical considerations present when this Court recognized a right of action in *Bivens*. As the other courts of appeals have consistently held, claims against street-level federal officers for Fourth Amendment violations that occur during routine law enforcement activities are precisely the "context" in which *Bivens* arose. The Fifth Circuit's decision drastically departs from this Court's and other circuits' application of *Bivens*, and thus imposes limits on the *Bivens* remedy that this Court has rejected. Accordingly, this Court's review is warranted.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION UPSETS THE CAREFUL BALANCE STRUCK IN *ABBASI*.

In *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized a damages claim directly under the Fourth Amendment. There, the defendants were agents of the Federal Bureau of Narcotics who manacled Mr. Bivens in front of his family, searched his house, arrested him, and subjected him to a strip search—all, according to the complaint, without a warrant or probable cause. *See id.* at 389. Claims sharing these basic contours—street-level federal officers committing unreasonable searches and seizures in the course of ordinary law enforcement activity—are at the core of the *Bivens* remedy.

A. Like the Court's two other decisions recognizing implied constitutional rights of action—*Davis* v.

Passman, 442 U.S. 228 (1979), and *Carlson* v. *Green*, 446 U.S. 14 (1980)—*Bivens* has occasionally been criticized as potentially too expansive. But every court of appeals except the Fifth Circuit below has applied a *Bivens* remedy in standard law enforcement disputes. And just four years ago, this Court upheld *Bivens* as "settled law." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017). At least "in the search-and-seizure context in which [*Bivens*] arose"—a "common and recurrent sphere of law enforcement"—the decision is "a fixed principle in the law." *Id.* at 1856–57.

This Court has struck a careful balance, preserving *Bivens* claims "in the search-and-seizure context in which it arose," while requiring additional inquiry before "'extend[ing] *Bivens* to any new context or new category of defendants.'" *Abbasi*, 137 S. Ct. at 1856–57. The courts of appeals have carefully applied this balance—both before and after *Abbasi*—to allow damages claims for illegal searches and seizures by street-level officers engaged in routine law enforcement. Indeed, as the D.C. Circuit has noted, a case like this—where "a federal law enforcement officer uses excessive force, contrary to the Constitution or agency guidelines"—represents "the classic *Bivens*-style tort." *Meshal* v. *Higgenbotham*, 804 F.3d 417, 424 (D.C. Cir. 2015) (citation omitted); *see also*, *e.g.*, *Hicks* v. *Ferreyra*, 965 F.3d 302, 311 (4th Cir. 2020) (noting, in case involving traffic stops by Park Police officers, that "courts regularly apply *Bivens* to Fourth Amendment claims arising from police traffic stops like this one"); *Jacobs* v. *Alam*, 915 F.3d 1028, 1039 (6th Cir. 2019) (case in which U.S. Marshals searched a home and shot plaintiff was "precisely the kind of Fourth Amendment search-and-seizure case Courts have long adjudicated through *Bivens* actions" (citations omitted)); *Big Cats of Serenity*

Springs, Inc. v. *Rhodes*, 843 F.3d 853, 864 (10th Cir. 2016) (noting, in case involving forcible entry and inspection of business premises by USDA agents, that "Fourth Amendment *Bivens* causes of action have been routinely applied to the conduct of federal officials in a variety of contexts" (citations omitted)); *Sutton* v. *United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) (discussing "the classic *Bivens*-style tort, in which a federal law enforcement officer uses excessive force, contrary to the Constitution or agency guidelines").

This case falls squarely within the "search-and-seizure context in which [*Bivens*] arose." *Abbasi*, 137 S. Ct. at 1856. The petitioner alleges that Department of Veterans Affairs police officers used excessive force by placing him in a chokehold and forcing him to the ground, causing serious injuries that necessitated two shoulder surgeries. *See* Pet. App. 2a–3a, 27a. The incident occurred at a Veterans Affairs hospital in El Paso, Texas, where the officers were manning a metal detector. *See id.* at 2a. Far from presenting a "new context" for *Bivens*, this case presents the *typical Bivens* context: street-level officers allegedly using excessive force in the course of ordinary law enforcement activity.

B. The Fifth Circuit's approach to the "new context" inquiry in effect repeals *Abbasi*'s careful balance. *Abbasi* directs courts to consider whether a "case is different in a meaningful way from previous *Bivens* cases decided by this Court," 137 S. Ct. at 1859, or falls within the same context as previous *Bivens* cases—including "the search-and-seizure context in which [*Bivens*] arose," *id.* at 1856; *see also Hernandez* v. *Mesa*, 140 S. Ct. 735, 743 (2020). The Fifth Circuit, however, distorted this inquiry by fo-

cusing on whether there were *any* differences—however trivial or irrelevant—between the facts of this case and those in *Bivens* or the other *Bivens* cases. *See* Pet. App. 5a–7a. Indeed, according to the Fifth Circuit, "[v]irtually everything" outside the precise facts of *Bivens*, *Davis*, and *Carlson* "is a 'new context.'" *Id.* at 5a.

The Fifth Circuit identified as dispositive a handful of factual differences between this case and *Bivens*: the incident occurred in a public space, not at home; was undertaken by federal police securing a Veterans Affairs building, not narcotics officers; and involved the use of a chokehold, not a manacle or strip-search. *See* Pet. App. 6a–7a. But there are always *some* factual differences between cases. The relevant question is whether those differences are "meaningful" enough to constitute a "new context." *Abbasi*, 137 S. Ct. at 1857. This is why other courts of appeals have not treated as "meaningful" the kind of picayune factual distinctions that the Fifth Circuit treated as determinative. *See*, *e.g.*, *Jacobs*, 915 F.3d at 1039 ("Defendants have identified no meaningful difference, no reason for the Court to doubt its competence to carry the venerable Fourth Amendment *Bivens* remedy into this context" involving U.S. Marshals (citation omitted)); *Ioane* v. *Hodges*, 939 F.3d 945, 952 & n.2 (9th Cir. 2018) (no meaningful difference from *Bivens* in case involving IRS agent who allegedly forced a homeowner to use the bathroom in the agent's presence); *Bistrian* v. *Levi*, 912 F.3d 79, 91 (3d Cir. 2018) (failure-to-protect claim arising under the Fifth Amendment rather than the Eighth Amendment was not a "new context" because it was not meaningfully different from previous *Bivens* contexts recognized by *Abbasi*); *Big Cats of Serenity Springs*, 843 F.3d at 864 (rejecting argument that

"animal inspection context" was a meaningful difference from *Bivens* and concluding the case presented "a garden-variety constitutional violation (hardly a new context).").

Instead, a meaningful difference exists where the decision whether to apply a remedy under the Constitution would implicate different policy considerations than in *Bivens* and its progeny. In addition to the "instructive" "examples" listed in *Abbasi*, 137 S. Ct. at 1859–60, meaningful differences could conceivably exist in national security cases, where the involvement of the federal courts might intrude on the separation of powers. *See Abbasi*, 137 S. Ct. at 1861; *Hernandez*, 149 S. Ct. at 745; *see also* Peter H. Schuck, *Suing Government Lawyers for Giving Dubious Legal Advice in a National Security Crisis: Notes on How (Not) to Become a Banana Republic*, 8 U. St. Thomas L.J. 496, 505–06 (2011). The same would be true of cases that affect the interests of multiple countries, thus implicating foreign relations and diplomacy, *see*, *e.g.*, *Hernandez*, 149 S. Ct. at 745, or that involve the military, where Congress has established a comprehensive internal system of military justice, *see United States* v. *Stanley*, 483 U.S. 669, 679 (1987); *see also Chappell* v. *Wallace*, 462 U.S. 296, 297 (1983).

In each of these examples, it is obvious *why* the difference from the *Bivens* context is "meaningful." But one searches the Fifth Circuit's opinion in vain for any comparable explanation. *Cf.* Pet. App. 6a–7a. The distinctions that the Fifth Circuit cited—the public versus private setting, the use of a chokehold versus manacle and strip search, and the involvement of the Department of Veterans Affairs instead of the now-defunct Department of Narcotics—do not

give rise to *any conceivably different* policy considerations than *Bivens* presented. Notwithstanding those distinctions, the petitioner's claims here present "[t]he classic *Bivens* case," in which a plaintiff "alleg[es] an unreasonable search or seizure by a federal officer in violation of the Fourth Amendment." *Meshal*, 804 F.3d at 429 (Kavanaugh, J., concurring). The Fifth Circuit's distinctions are without any meaningful difference.[2]

Further, by concluding that "virtually everything" that does not precisely replicate *Bivens*, *Davis*, or *Carlson* "is a 'new context,'" Pet. App. 5a, the Fifth Circuit's decision treats *Abbasi* as limiting those decisions to their respective facts. But just as the courts of appeals cannot "conclude [that this Court's] more recent cases have, by implication, overruled an earlier precedent," *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997), they cannot reach the same result in the

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[2] In its separate discussion of "special factors," the Fifth Circuit suggested that this case raises separation-of-powers concerns because, under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, "Congress waived the United States' sovereign immunity as to some claims and not others." Pet. App. 10a. This view is difficult to reconcile with *Carlson*, which said it was "crystal clear that Congress views the FTCA and *Bivens* as parallel, complementary causes of action." *Carlson*, 446 U.S. at 20; *see also Wilkie* v. *Robbins*, 551 U.S. 537, 553 (2007) (same); *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001) (same); *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983) (same). But even if the FTCA might be relevant to the "special factors" inquiry, it is not relevant to whether this case presents a "new context." The FTCA was unavailable for Mr. Bivens's claims, just as it is unavailable here, because of the exception for constitutional claims against federal employees. *See* 28 U.S.C. § 2679(b)(2); *see also Carlson*, 446 U.S. at 18.

Bivens context by defining the "context[s]" of *Bivens* and its progeny impossibly narrowly.

* * *

The Fifth Circuit's decision effectively eliminates the "meaningful" part of the "meaningful difference" test, differs dramatically from the approach adopted by other circuits, and undermines *Bivens* even in its core domain.

II. THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO RECONSIDER ITS CONCERNS ABOUT OVERDETERRENCE.

In framing remedies, this Court rightly considers—among other things—a proposed remedy's compensation and deterrence goals. *See*, *e.g.*, *Bivens*, 403 U.S. at 395–97; *see also*, *e.g.*, *Minneci* v. *Pollard*, 565 U.S. 118, 120 (2012). With regard to deterrence, there is always a concern that imposing liability would over-deter officers so that they would not appropriately perform their duties. *See*, *e.g.*, *Abbasi*, 137 S. Ct. at 1863 ("If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis."); *see also* Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 68–77 (1983). But when these concerns were first raised, they were necessarily based on speculation about how—and by whom—*Bivens* damages would be borne; there was almost no relevant empirical evidence. Now, however, the research has been conducted and published, and the data strongly suggest that the remote possibility of *Bivens* liability would not deter individual officers from performing their legal duties.

A new study of 171 successful *Bivens* lawsuits, including claims against the Federal Bureau of Prisons and its officers, found that the damages awarded in these cases were almost always paid through the Judgment Fund of the United States Treasury, rather than by individual officers or the agencies responsible for their conduct. *See* James E. Pfander *et al.*, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 Stan. L. Rev. 561 (2020). In particular, the study determined that the federal Treasury indemnified its officials in more than 95% of the successful cases brought against them, and paid more than 99.5% of the total claims. *See id.* at 566. Moreover, even the BOP did not once contribute to these judgments from its own budget. *Id.* at 579.

This study examined only one agency, but its findings are entirely consistent with previous research finding that the United States has never failed to reimburse a federal officer for the costs of a *Bivens* settlement or judgment in cases where it provided representation to the individual defendant. *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 78 & n.61 (1999). That representation is almost always provided. *Id.* at 76 n.51 ("The federal government provides representation in about 98% of the cases in which representation is requested.").

Similarly, studies of analogous proceedings against local law enforcement reveal that these "officers are almost always provided with defense counsel free of charge when they are sued," Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 915 (2014); that local governments have paid approximately 99.98% of the amounts that plaintiffs

recovered in lawsuits alleging civil rights violations by police officers, *ibid.*; and that local governments regularly structure these payouts in ways that avoid any financial repercussions for law enforcement agencies, *see* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144 (2016).

Individual officers and their employing agencies almost never bear financial consequences from constitutional claims, including those under *Bivens*. The data therefore contradict previously expressed fears of overdeterrence. The Court should grant review to clarify this point while emphasizing that *Abbasi* meant what it said.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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