

No. 20-1060

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In The  
**Supreme Court of the United States**

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JOSÉ 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**

—◆—  
**PETITION FOR REHEARING**

—◆—  
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## PETITION FOR REHEARING

Petitioner José Oliva respectfully petitions under Supreme Court Rule 44 for rehearing of the Court’s order denying certiorari on the following question:

Whether claims against federal police for Fourth Amendment violations committed during standard law enforcement operations fall within an established context for *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or whether such claims present a new context unless they involve narcotics officers manacled the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment.



## GROUNDS FOR REHEARING

Rehearing may be granted when “intervening circumstances of a substantial or controlling effect” or “other substantial grounds not previously presented” arise. S. Ct. R. 44.2. Since the Fifth Circuit’s decision below, the 7-1 circuit split on the question presented here has become a 6-3 split with the Eighth and Ninth Circuits joining the Fifth in holding that any factual deviation from *Bivens* itself—no matter how small or insignificant—presents a new context under *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). *Ahmed v. Weyker*, 984 F.3d 564 (8th Cir. 2020); *Boule v. Egbert*, 998 F.3d 370 (9th Cir. 2021), amending and denying rehearing en banc of 980 F.3d 1309 (9th Cir. 2020).

The Institute for Justice, Oliva’s counsel here, will be seeking certiorari in *Ahmed* and another recent Fifth Circuit decision, *Byrd v. Lamb*, 990 F.3d 879 (5th Cir. 2020), on August 6. It also seems likely that a petition for certiorari may be filed seeking review of the Ninth Circuit’s May 20, 2021, decision in *Boule v. Egbert*. Those cases involve the same question presented here. Accordingly, this Court should grant Oliva’s petition for rehearing and reconsider this case alongside the forthcoming petitions.

**I. Two petitions for certiorari presenting the same question as this case will be filed this August.**

Despite the Court’s clear guidance in *Abbasi* that Fourth-Amendment claims are available against federal police in the “common and recurrent sphere of law enforcement,” 137 S. Ct. at 1857, there is a growing pattern of post-*Abbasi* cases in which federal police:

- Violate the Fourth Amendment while engaged in street-level policing;
- Are denied qualified immunity by a district court because their actions violated clearly established law; but
- Are still granted immunity by a circuit court through the misapplication of *Abbasi*’s new-context analysis.

So far, that has happened in *Oliva v. Nivar*, 973 F.3d 438 (5th Cir. 2020) (this case), *Ahmed v. Weyker*, and *Byrd v. Lamb*.

In *Oliva*, federal police choked and assaulted 70-year-old Vietnam veteran José Oliva in an unprovoked attack at a Veterans Affairs hospital. After the district court denied the officers qualified immunity, the Fifth Circuit threw out Oliva’s constitutional claim because of inconsequential factual distinctions from *Bivens*. Pet. App. 6a–7a.

In *Ahmed*, a “rogue law-enforcement officer” named Heather Weyker, “through lies and manipulation,” caused the arrest and subsequent imprisonment of 16-year-old refugee Hamdi Mohamud and two of her friends to cover up a crime committed by a witness Weyker had cultivated for an unrelated case. *Ahmed*, 984 F.3d at 565–566.<sup>1</sup> Just like in *Oliva*, the district court denied Weyker qualified immunity, *Ahmed*, 984 F.3d at 566, but the Eighth Circuit held that Weyker was immune from suit because her actions did not “exactly mirror[] the facts” of *Bivens*. *Id.* at 568. Judge Kelly dissented, finding “no meaningful differences between plaintiffs’ \* \* \* arrest claim and what the Supreme Court recognized in *Bivens* and has continued to recognize in *Ab-basi*.” *Id.* at 574 (Kelly, J., dissenting).

In *Byrd*, a Department of Homeland Security agent held Kevin Byrd at gunpoint to prevent him from investigating the involvement of the agent’s son in an apparently drunken car crash. The agent tried to smash the window of Byrd’s car and threatened to “put

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<sup>1</sup> That case would later fall apart after “the district court caught Weyker lying” there too. *United States v. Fahra*, 643 Fed. Appx. 480 (6th Cir. 2016).



a bullet through his f—king skull” before using his federal authority to have local police detain Byrd for nearly four hours. Surveillance footage exonerated Byrd and led to the agent’s arrest. *Byrd*, 990 F.3d at 880–881. As in *Oliva* and *Ahmed*, the agent was denied qualified immunity. But as in *Oliva* and *Ahmed*, the circuit court held that the agent could not be sued based on insignificant factual distinctions from *Bivens*. *Byrd*, 990 F.3d at 882. Judge Willett reluctantly<sup>2</sup> concurred, noting that *Oliva* “erases any doubt” that “[t]he *Bivens* doctrine, if not overruled, has certainly been overtaken.” *Id.* at 883 (Willett, J., concurring).

The Institute for Justice will be filing petitions for certiorari in both *Byrd* and *Ahmed* on August 6, asking this Court to review the same question presented in this case. Were the Court to grant either or both, it would be appropriate—and consistent with the Court’s practice—to grant rehearing of *Oliva*’s petition and either hold it pending decision in those cases or consolidate it with them.<sup>3</sup> Like this case, both *Ahmed* and

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<sup>2</sup> Although Judge Willett conceded that he was bound by Fifth Circuit precedent (namely, *Oliva*), *Byrd*, 990 F.3d at 883, his opinion concluded by adding his “voice to those lamenting today’s rights-without-remedies regime, hoping (against hope) that as the chorus grows louder, change comes sooner.” *Id.* at 885.

<sup>3</sup> For instance, the Court granted rehearing in many previously denied sentencing-guidelines petitions after granting certiorari in *United States v. Booker*, 543 U.S. 220 (2005). *Hawkins v. United States*, 543 U.S. 1097 (2005) (mem.); *Lauersen v. United States*, 543 U.S. 1097 (2005) (mem.); *Epps v. United States*, 543 U.S. 1116 (2005) (mem.); *Rideout v. United States*, 543 U.S. 1116 (2005) (mem.); *Jimenez-Velasco v. United States*, 543 U.S. 1116 (2005) (mem.); *Van Alstyne v. United States*, 543 U.S. 1116 (2005)

*Byrd* involved Fourth Amendment claims against federal police where the district court denied qualified immunity but the circuit court immunized the officers from suit through an overly restrictive application of *Bivens*. In each case, the circuit court disregarded *Abbasi*'s directive that constitutional remedies are still available "in this common and recurrent sphere of law enforcement." 137 S. Ct. at 1857.

**II. The Ninth Circuit's post-distribution decision in *Boule v. Egbert* highlights the growing split on the issue presented in this case.**

Along with the forthcoming petitions in *Ahmed* and *Byrd*, an intervening shift in the circuit split on the first step of *Abbasi*'s new-context analysis provides another ground for rehearing. Two weeks after this case was distributed for conference, the Ninth Circuit issued an amended opinion in *Boule v. Egbert*. 998 F.3d 370. There, the court held that an innkeeper's Fourth Amendment claims against a Customs and Border Protection Agent who shoved him down presented a

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(mem.); *Carbajal-Martinez v. United States*, 543 U.S. 1116 (2005) (mem.); *McDonnell v. United States*, 543 U.S. 1116 (2005) (mem.); *Pearson v. United States*, 543 U.S. 1116 (2005) (mem.); *Salas v. United States*, 543 U.S. 1116 (2005) (mem.); *Campbell v. United States*, 543 U.S. 1116 (2005) (mem.); *Newsome v. United States*, 543 U.S. 1116 (2005) (mem.). See also, e.g., *Boumediene v. Bush*, 551 U.S. 1160 (2007) (mem.) (granting rehearing and consolidating with *Al Odah v. United States*, 551 U.S. 1161 (2007) (mem.)). Cf., e.g., *Kent Recycling Servs., LLC v. United States Army Corps of Eng'rs*, 136 S. Ct. 2427 (2016) (mem.) (granting rehearing after decision in *Army Corps of Engin'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016)).

new context simply because “Agent Egbert is an agent of the border patrol rather than of the F.B.I.”<sup>4</sup> *Boule*, 998 F.3d at 387.<sup>5</sup>

*Boule* shows that the circuit split on the new-context issue is now three (Fifth, Eighth, and Ninth)<sup>6</sup> to six (First, Second, Third, Fourth, Sixth, and Eleventh).<sup>7</sup> *Boule* also underscores the growing confusion in the

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<sup>4</sup> The defendants in *Bivens* were not FBI agents, but agents of the now-defunct Federal Bureau of Narcotics. The requirement that a case have facts identical to *Bivens* makes little sense under *Abbasi*, but especially when courts requiring factual identity mistake the relevant facts in *Bivens*. *Boule*, 998 F.3d at 387–392.

<sup>5</sup> Despite concluding that the case presented a new context for *Bivens*, *Boule* held that no special factors counselled against extending a *Bivens* remedy to the innkeeper.

<sup>6</sup> See *Byrd v. Lamb*; *Ahmed v. Weyker*; *Boule v. Egbert*. Although both the original and amended decisions in *Boule* applied a similar, cursory new-context analysis, the substantial amendment of the opinion suggests that *Boule* has now supplanted *Ioane v. Hodges*, 939 F.3d 945 (9th Cir. 2019), in the Ninth Circuit as the case governing the circuit’s application of *Abbasi*.

<sup>7</sup> See *Pagán-González v. Moreno*, 919 F.3d 582 (1st Cir. 2019) (FBI agents fabricating an emergency to search a home and computer); *McLeod v. Mickle*, 765 Fed. Appx. 582 (2d Cir. 2019) (summary order) (U.S. Forest Service officer prolonging a traffic stop); *Bryan v. United States*, 913 F.3d 356 (3d Cir. 2019) (Customs and Border Protection officer searching the cabin of a cruise ship docked in the U.S. Virgin Islands); *Hicks v. Ferreyra*, 965 F.3d 302 (4th Cir. 2020) (U.S. Park Police stopping a motorist without justification); *Jacobs v. Alam*, 915 F.3d 1028 (6th Cir. 2019) (federal marshals shooting the resident of a home being searched); *Harvey v. United States*, 770 Fed. Appx. 949 (11th Cir. 2019) (per curiam) (USPS criminal investigator precluding the plaintiff from accessing his storage unit).

circuit courts over the availability of constitutional remedies.

Concurrent with its amended opinion, the Ninth Circuit also denied rehearing en banc, but a dozen judges dissented. Three—Judges Bress, Owens, and Bumatay—wrote separately.

Ninth Circuit Judge Bumatay’s 22-page opinion contrasts starkly with Fifth Circuit Judge Willett’s concurrence in *Byrd* and highlights the substantive confusion—both within and among the circuits—over *Abbasi* and *Bivens*. Both judges cited *Oliva*.<sup>8</sup> Both addressed the historic availability of claims against federal officials.<sup>9</sup> Both cited *Marbury v. Madison* for the “general and indisputable rule, that where there is a legal right, there is also a legal remedy.”<sup>10</sup> Despite those shared premises, the judges reached opposite conclusions. While Judge Bumatay resolved that withholding implied constitutional remedies “is all that keeps us a government of laws and not of men,” *Boule*, 998 F.3d at 384, Judge Willett, cited the same maxim from *Marbury* to lament “that individuals

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<sup>8</sup> *Boule*, 998 F.3d at 379 (Bumatay, J., dissenting); *Byrd*, 990 F.3d at 883 (Willett, J., concurring).

<sup>9</sup> *Boule*, 998 F.3d at 375 (Bumatay, J., dissenting) (citing, among others, Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. Pa. L. Rev. 509, 531 (2013)); *Byrd*, 990 F.3d at 884 n.11 (Willett, J., concurring) (citing, among others, Vázquez & Vladeck, *supra* at 532).

<sup>10</sup> 1 U.S. (5 Cranch) 137 (1803) (quoting 3 William Blackstone, *Commentaries* 23); *Boule*, 998 F.3d at 375 (Bumatay, J., dissenting); *Byrd*, 990 F.3d at 884 n.12 (Willett, J., concurring).

whose constitutional rights are violated at the hands of federal officers are essentially remedy-less.” *Byrd*, 990 F.3d at 884.

The growing rift in the circuit courts calls out for this Court’s review of the question presented in this case. This Court should grant Oliva’s petition and consider his case alongside the petitions in *Ahmed*, *Byrd*, and possibly *Boule*.

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### CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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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.

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June 17, 2021