No. 21-_____

In The
Supreme Court of the United States

ANAS ELHADY,

Petitioner,

v.

BLAKE BRADLEY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For decades, this Court has vigilantly enforced the final judgment rule codified at 28 U.S.C. § 1291, emphasizing the "modest scope" of the "small class" of collateral orders from which an interlocutory appeal may be taken. *See, e.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106-07 (2009). And for nearly as long, this Court has admonished courts of appeals not to bootstrap issues onto collateral-order appeals that are not themselves interlocutorily appealable. *See, e.g.*, *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 49-50 (1995).

Yet in respondent's interlocutory appeal from the denial of qualified immunity, the Sixth Circuit *sua sponte* bootstrapped a liability issue—announcing a categorical prohibition against border-related damages remedies under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), without even reaching qualified immunity. The Questions Presented are:

1. In an interlocutory appeal from the denial of qualified immunity, does a court of appeals always have jurisdiction under § 1291 to decide whether a *Bivens* remedy exists for the claim against which the appellant asserts qualified immunity?

2. Are *Bivens* claims categorically precluded at the border, even when the plaintiff is a U.S. citizen who challenges mistreatment on U.S. soil by federal law-enforcement officers performing traditional law-enforcement duties?

PARTIES TO THE PROCEEDINGS

Petitioner Anas Elhady was the plaintiff in the United States District Court for the Eastern District of Michigan and the appellee in the United States Court of Appeals for the Sixth Circuit.

Petitioner initially sued Unidentified CBP Agents but, after discovery, named all defendants in the district court. Respondent Blake Bradley was a defendant in the district court and the appellant in the Sixth Circuit. Daniel Beckham, Jason Ferguson, Tonya Lapsley, and Joseph Piraneo were defendants in the district court but not parties to respondent's interlocutory Sixth Circuit appeal. Additionally, four defendants in the district court, Matthew Pew, Scott Rocky, Nyree Iverson, and Walter Kehr, were dismissed by stipulation prior to the district court's summary-judgment ruling that respondent interlocutorily appealed to the Sixth Circuit, resulting in the decision that is now before this Court.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Elhady v. Blake Bradley, et al.*, No. 2:17-cv-12969 (E.D. Mich. Feb. 10, 2020) (Opinion & Order Granting Motions for Summary Judgment for Defendants Tonya Lapsley (Dkt. 99), Daniel Beckham (Dkt. 100), Joseph Piraneo (Dkt. 100), and Jason Ferguson (Dkt. 101), and Denying Summary Judgment for Blake Bradley (Dkt. 101)) (Pet. App. 21a);

RELATED PROCEEDINGS—Continued

- *Elhady v. Unidentified CBP Agents, et al.*, No. 20-1339 (6th Cir.) (Opinion issued Nov. 19, 2021 (Pet. App. 1a); order denying rehearing en banc entered Jan. 25, 2022 (Pet. App. 72a)).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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The Sixth Circuit's opinion (Pet. App. 1a) is reported at 18 F.4th 880. The Eastern District of Michigan's opinion (Pet. App. 21a) is reported at 438 F. Supp. 3d 797.

JURISDICTION

The court of appeals entered its opinion and judgment on November 19, 2021, and denied petitioner's timely petition for rehearing en banc on January 25, 2022. *See* Pet. App. 1a, 72a. On April 14, 2022, Justice Kavanaugh granted petitioner's application to extend the time to file his petition for a writ of certiorari until May 25, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or

> limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

Under 28 U.S.C. § 1291,

> [t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Id.

STATEMENT

This suit arises from petitioner's detention by Customs and Border Protection (CBP) officers when he reentered the United States after visiting friends in Canada. Pet. App. 2a, 21a. A U.S. citizen and college student, petitioner alleges that the cruel and unusual conditions of his non-criminal confinement in a cell "at freezing or near freezing temperatures" violated his rights under the Due Process Clause of the Fifth

Amendment. *See* Pet. App. 18a (Rogers, J., dissenting); *id*. 21a, 46a, 50a.

At the summary judgment stage, the district court observed that "[m]uch of the timeline of Elhady's detainment is undisputed and corroborated by ambulance, hospital, and CBP records." *Id*. 22a. It identified a "core factual dispute" regarding the conditions in the cell where petitioner was detained—in particular, whether it was "unreasonably cold." *Id*. The facts below are drawn primarily from the district court's summary-judgment opinion (*id*. 21a-71a) and evidence in the summary-judgment record.

Neither respondent nor CBP offered any explanation for petitioner's detention in the district court or Sixth Circuit; rather, officer-defendants argued that petitioner had not established a genuine issue of material fact as to whether they violated his clearly established constitutional rights. *See id*. 18a (Rogers, J., dissenting); *id*. 23a-24a, 69a-71a.

I. FACTUAL BACKGROUND

Petitioner traveled from Detroit to visit friends in Canada on April 10, 2015. *Id*. 2a, 23a. When he attempted to return later that night through the Ambassador Bridge inspection point, officers told petitioner to exit his vehicle, patted him down, and handcuffed him. *Id*. They took him to a detention cell and searched him. *Id.* 24a.

Officers took petitioner's shoes and jacket before leaving him in the "really cold" cement cell, where he was "really shivering" and kept shoeless even though the floor was "freezing." *See id.* 27a-28a. He repeatedly informed officers how cold the cell was and asked multiple times if he could have back his shoes and jacket. *See id.* 28a. He felt like the cell was "cold and getting colder." *Id.* 29a. He yelled, "I'm freezing" to no avail, and he started losing feeling in parts of his body, like "ice [wa]s taking over my feet." *See id.* 30a-31a. During his at least four-hour-long detention, and through multiple rounds of questioning, petitioner renewed his requests for his jacket and shoes or at least a blanket, but officers just kept telling him he would be out shortly and otherwise ignored his pleas. *See id.* 21a, 27a-32a. Petitioner said he "felt like I was really dying at that point" and "they were waiting for me to die." *Id.* 31a.

Petitioner passed out and was woken up by one or two officers. *See id.* He requested an ambulance, was handcuffed and moved to a waiting room, and at some point was told he could leave but insisted on being taken to the hospital because "buzzing in his head" and "shaking from the cold prevented him from driving to the hospital himself." *Id.* 31a-32a. When the ambulance finally arrived, a CBP officer handcuffed him to the bed inside the ambulance, which petitioner said upset the nurse attending to him. *Id.* 33a.

When petitioner arrived at the hospital, his core body temperature was 35.6ºC (about 96°F), which was flagged as low. *Id.* 34a. Petitioner's thermophysiology

expert submitted a report explaining that, to cause that temperature drop, the detention cell was likely "even colder" than the frigid weather outside that night and "possibly below freezing." *See id.* 41a.

At the hospital, attending doctors and staff gave petitioner medication and took x-rays because he had developed severe back pain. *Id.* 35a. After petitioner rested and reported feeling better, he was released back into CBP custody. *Id.* 36a. Officers put him into a wheelchair, handcuffed him, and brought him to a CBP van. *Id.* At that time, it was just after 9am on April 11. *Id.*

Back at Ambassador Bridge, petitioner was finally given back his jacket, shoes, and other personal belongings. *Id.* He was released from CBP custody without any explanation as to why he had ever been detained in the first place. *See id.* 18a (Rogers, J., dissenting).

II. PROCEDURAL BACKGROUND

Petitioner sued respondent and other CBP officers, alleging that they violated his Fifth Amendment rights during his detention. *Id.* 21a, 46a. The officers jointly filed a motion to dismiss that did not assert qualified immunity but did argue that there was no cause of action under *Bivens*. *Id.* 4a, 46a-47a. The district court denied the motion, *id.* 4a, 46a, and respondent did not attempt to appeal that ruling.

Following discovery, the officers moved for summary judgment, asserting qualified immunity. *See id.* 4a. The district court granted summary judgment to all of the officer-defendants except for respondent. *Id.* 4a, 22a. As to respondent, the court found that petitioner "presented enough evidence that a reasonable jury could find that he was placed in a cell at freezing or near-freezing temperatures for at least four hours, and that such treatment constitutes a violation of his right to be free from exposure to severe weather and temperatures," *id.* 50a, and that this right was clearly established at the time. *Id.* 70a. Thus, respondent was not entitled to qualified immunity, at least at the summary-judgment stage. *Id.* 67a-71a. Respondent brought an interlocutory appeal challenging the denial of qualified immunity—but *not* the district court's earlier denial of the motion to dismiss based on *Bivens*. *See id.* 4a.

Instead of proceeding on the qualified-immunity issue that respondent appealed to the Sixth Circuit, that court *sua sponte* requested supplemental briefing on the availability of a *Bivens* remedy for petitioner's claim. *Id*. It rejected petitioner's argument that it lacked jurisdiction over the *Bivens* question and should not *sua sponte* consider an issue respondent did not raise. *Id.* 7a-10a. The court perfunctorily pointed to *Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007), and then advanced an efficiency rationale for reaching the *Bivens* question, citing opinions in non-interlocutory appeals, opinions that did not involve immunity-based collateral orders, and a law-review article on statutory

construction. Pet. App. 7a-8a (citing *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007-08 (2017) (per curiam) (*Hernandez I*), *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980), and Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948-49 & n.20 (1997)).

The Sixth Circuit asserted that, "[i]n *Hernandez v. Mesa* (*Hernandez I*), the Court advised lower courts in our position—that is, reviewing an interlocutory appeal of qualified immunity—to first consider the *Bivens* question," Pet. App. 8a, even though *Hernandez I* was not an interlocutory appeal and did not include such advice. 137 S. Ct. at 2005, 2007-08. The Sixth Circuit emphasized that allowing cases like petitioner's to go to trial would "risk 'needless expenditure' of time and money," and it would be "an utterly unnecessary exercise" to resolve qualified immunity. Pet. App. 9a (quoting in part *Bistrian v. Levi*, 912 F.3d 79, 89 (3d Cir. 2018)).

On the merits of the *Bivens* question, the Sixth Circuit stated that this Court's decision in *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (*Hernandez II*) "made clear that border-related disputes always present a new *Bivens* context," and the border context "is new regardless of what constitutional claim is at issue." Pet. App. 11a-12a. Turning to the second step of the analysis, it stated that "*Hernandez II* made clear that national security will always be a special factor counseling against extending *Bivens* to the border context." *Id.* 12a. In short, "the Supreme Court has spoken: *Bivens* is unavailable." *Id.* 13a. Indeed, the court broadly proclaimed that "when it comes to the

border, the *Bivens* issue is not difficult—it does not apply." *Id.* 14a. And it admonished district courts that they "would be wise to start and end there." *Id.*

Judge Rogers dissented. He emphasized that "Government counsel for [respondent] repeatedly indicated that he was not raising the issue" whether a *Bivens* cause of action exists. *Id.* 18a-19a (Rogers, J., dissenting). Respondent "instead assumed that there was a cause of action and proceeded to argue on the merits that [he] was entitled to qualified immunity." *Id.* 15a (Rogers, J., dissenting). As such, the issue was forfeited. *Id.* Unlike the majority, which moved past the forfeiture to reach the *Bivens* question respondent had not appealed, Judge Rogers would have resolved the appeal instead on the issue respondent had actually presented to the court: qualified immunity. "As a general rule, we do not reach forfeited arguments," he explained. *Id.* "That rule should apply especially in cases such as this one, which involves a difficult question about the reach of *Bivens* that the Government repeatedly declined to ask us to address." *Id.*

As Judge Rogers further stated, "[t]he Supreme Court has emphasized that it is often appropriate to decline to reach the *Bivens* issue when the case can be decided on other grounds." *Id.* 16a (Rogers, J., dissenting). Judge Rogers would have affirmed the district court's "interlocutory order on that ground for the reasons given by the district court" in its "thoughtful opinion," which, "based on the totality of these facts, determined that [respondent] may have

violated Elhady's Fifth Amendment due process rights." *Id.* 20a (Rogers, J., dissenting).

Judge Rogers elaborated on why the *Bivens* issue presented a "close question" that the majority should not have resolved *sua sponte* in respondent's interlocutory appeal on qualified immunity. *See id.* 17a-19a (Rogers, J., dissenting). Although petitioner's case and *Hernandez II* both involved border-patrol officials and incidents that occurred close to the border, "there are also critical factual differences." *Id.* 17a (Rogers, J., dissenting). And unlike either *Hernandez II* or *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), this case involved "the alleged treatment of a U.S. citizen within the United States," and respondent had "not argued that any national security or foreign relations circumstances impacted this case in particular." Pet. App. 18a (Rogers, J., dissenting). At least "arguably," petitioner's case was "more analogous to *Bivens* itself" because he "was an American college student who was detained within the United States without any explanation or apparent justification." *Id.* "Although the Court has recently limited the reach of *Bivens*, it does not necessarily follow that U.S. citizens have no remedy if they are abused within the United States by their own border patrol officials." *Id.*

Over Judge Rogers's dissent, the court of appeals reversed and remanded to the district court with instructions to enter final judgment for respondent.

Id. 14a. Petitioner filed a timely petition for rehearing en banc, which the Sixth Circuit denied. *Id*. 72a.

SUMMARY OF ARGUMENT

This Court should grant the petition to rein in the growing—and deeply problematic—practice in which courts of appeals are using interlocutory appeals from denials of qualified immunity to instead resolve the existence of a cause of action under *Bivens*. When federal district courts reject pre-trial assertions of qualified immunity by government officers, this Court has established that those rulings can be immediately appealed under the collateral order doctrine—a judicial construction of the final judgment rule codified in 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). That rule makes good sense; if a district court erroneously rejects a claim of immunity from suit, forcing the officer to go to trial would defeat the *purpose* of that immunity—even if the officer ultimately prevails. *See id*. at 527-29.

But this Court has also emphasized, repeatedly, that the courts of appeals' jurisdiction in such a case is quite modest. *See, e.g.*, *Will v. Hallock*, 546 U.S. 346, 350 (2006). It does not include *factual* disputes implicating the availability of qualified immunity, *see Johnson v. Jones*, 515 U.S. 304 (1995), or *other* legal questions that are not necessarily intertwined with the immunity defense. *See Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35 (1995). Those limits are

necessary, this Court has admonished, to preserve the final judgment rule—"Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (quoting *Will v. United States*, 389 U.S. 90, 96 (1967)); *see also Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) ("In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation.'" (citation omitted)).

Were it otherwise, as this Court warned in *Swint*, officer-defendants could "parlay . . . collateral orders into multi-issue interlocutory appeals tickets," 514 U.S. at 49-50, bootstrapping issues that are *not* subject to immediate, interlocutory appeal onto those that are. In the process, the "narrow" exception for collateral orders would swallow the final judgment rule. *See Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) ("[T]he 'narrow' exception [for collateral orders] should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." (citation omitted)).

If anything, the bootstrapping in this case was worse. After the district court denied respondent's motion for summary judgment based on qualified

immunity, respondent took an interlocutory appeal under *Mitchell*, seeking review of his qualified-immunity assertion—and *only* his qualified-immunity assertion. But a divided panel of the Sixth Circuit, on its own motion, reached out to decide that petitioner has no cause of action under *Bivens*—without even reaching the qualified-immunity issue on which its appellate jurisdiction necessarily rested.

In so doing, the Sixth Circuit turned this Court's § 1291 jurisprudence on its head. It did not hold that the existence of a *Bivens* remedy is *itself* a collateral order subject to immediate, interlocutory appellate review. Rather, it perfunctorily pointed to a footnote in *Wilkie*, 551 U.S. at 549 n.4, which stated that the *Bivens* question was "directly implicated by the defense of qualified immunity" in that case, without actually explaining how the two analytically distinct issues implicate each other in petitioner's case—or in general. Pet. App. 7a. In the process, the Sixth Circuit exacerbated a growing trend in lower courts of resolving the availability of a *Bivens* remedy in interlocutory qualified-immunity appeals.

To whatever extent the recognition of *Bivens* remedies has become "disfavored," *Abbasi*, 137 S. Ct. at 1857, that is no excuse for courts of appeals to defy long-settled limits on their interlocutory appellate jurisdiction. As Justice Scalia put it 24 years ago, "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better*

Envt., 523 U.S. 83, 89 (1998). And because no court, including this Court, has suggested that the absence of a *Bivens* remedy is itself a collateral order, the only possible basis for interlocutory appellate jurisdiction would be if the qualified-immunity issue cannot be resolved without also deciding the *Bivens* question. That is not the case here—and the Sixth Circuit did not even attempt to suggest otherwise.

Not only did the Sixth Circuit lack jurisdiction to *sua sponte* reach the availability of a *Bivens* remedy in this case, but its resolution of that issue was equally flawed. It incorrectly read this Court's decision in *Hernandez II*, 140 S. Ct. 735, to categorically foreclose any and all *Bivens* claims arising out of border-patrol operations—even claims brought by U.S. citizens arising out of alleged abuses committed on U.S. soil. *Hernandez II*, which repeatedly emphasized the unique special factors that arose from a suit brought by Mexican nationals arising out of a cross-border shooting, hardly supports such a broad assertion. And in *Abbasi*, this Court declined to make *Bivens* causes of action categorically unavailable to U.S. citizens challenging "individual instances of discrimination or 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; *see also id*. at 1857 ("The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere."). Thus, the Sixth Circuit failed to conduct the

more nuanced analysis this Court's precedents require—analysis that had led the district court to deny the *Bivens*-based motion to dismiss.

It would be one thing if the Sixth Circuit's dual errors were likely to have a limited impact. But they won't. The subtle but significant expansion of interlocutory appellate jurisdiction sanctioned by the decision below has no logical stopping point. And it would allow not just government officers, but courts of appeals acting on their own, to routinely "parlay . . . collateral orders into multi-issue interlocutory appeals tickets," *Swint*, 514 U.S. at 50, not just in the *Bivens*/qualified-immunity context, but beyond. Yet this Court "ha[s] not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will*, 546 U.S. at 350. And this Court has been just as clear that any *expansions* of the interlocutory appellate jurisdiction of the courts of appeals should come through rulemaking, not judicial decisions. *See Mohawk*, 558 U.S. 100, 113 (2009); *see also id*. at 118-19 (Thomas, J., concurring in part, and concurring in the judgment). If this Court has truly "meant what we have said," *Will*, 546 U.S. at 350, it should grant certiorari—and reverse.

REASONS TO GRANT THE PETITION

I. THIS COURT SHOULD CLARIFY WHETHER COURTS OF APPEALS ALWAYS CAN RESOLVE THE AVAILABILITY OF *BIVENS* REMEDIES IN INTERLOCUTORY QUALIFIED-IMMUNITY APPEALS.

In recent years, lower courts have upended the final judgment rule by allowing officer-defendants to bootstrap challenges to the existence of a *Bivens* cause of action onto interlocutory qualified-immunity appeals. And the Sixth Circuit went even further here: It *sua sponte* ruled out a *Bivens* remedy even though respondent did not raise the *Bivens* issue in his interlocutory appeal of the district court's denial of qualified immunity. On its own, the Sixth Circuit ordered supplemental briefing on *Bivens* and then resolved respondent's interlocutory appeal on that basis, never reaching qualified immunity—the only issue respondent appealed and the only issue over which the court in that posture actually had appellate jurisdiction.

The Sixth Circuit's disregard of the final judgment rule exemplifies, in extreme form, a pervasive pattern in the courts of appeals. Increasingly as of late, the circuits have routinely resolved *Bivens*-remedy questions in qualified-immunity appeals even when *Bivens* is not "directly implicated by the defense of qualified immunity." *Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006) (noting that an open question concerning the elements of the tort of malicious prosecution implicated both the availability of a *Bivens* remedy and the qualified-immunity defense); *see also*

Wilkie, 551 U.S. at 549 n.4 (citing *Hartman*). In particular, courts have interpreted *Wilkie* as creating a categorical free pass to consider the availability of a *Bivens* remedy in *any* interlocutory qualified-immunity appeal—without needing to establish how the *Bivens* question is inextricable from the qualified-immunity collateral order or otherwise properly before the court of appeals given § 1291's final-judgment constraints.

This widespread bootstrapping defies decades of this Court's jurisprudence on the final judgment rule. As troubling as that disobedience is in the abstract, it also sets two distinct precedents that this Court ought to correct. First, it reflects the type of ad hoc, improvised judicial expansions of interlocutory-appellate jurisdiction this Court prohibited in *Swint*. 514 U.S. at 45, 48 (emphasizing that Congress empowered this Court to clarify which decisions are "final" through rulemaking under 28 U.S.C. § 2072, not by "expand[ing] the list of orders appealable on an interlocutory basis"). Second, and more fundamentally, it effectively expands the "small category" of interlocutorily appealable collateral orders that this Court has zealously policed: It would put a merits-remedy ruling that can be challenged on appeal from final judgment on par with a qualified-immunity denial that is conclusive because immunity from suit is irrevocably lost when litigation erroneously proceeds to trial. *See id.* at 41-43; *see also, e.g.*, *Mohawk*, 558 U.S. at 106 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46

(1949)); *Digit. Equip. Corp.*, 511 U.S. at 868. To prevent lower courts from continuing to undermine the final judgment rule, this Court should grant the petition and provide much-needed guidance on the proper scope of interlocutory jurisdiction in *Bivens*-related qualified-immunity appeals.

A. The Opinion Below Reflects Circuits' Pervasive Bootstrapping Of *Bivens* Merits Questions Onto Immunity-Related, Collateral-Order Appeals.

This Court has long recognized the narrow scope of statutorily defined jurisdictional grants and cautioned against ad hoc expansions of appellate jurisdiction. *See, e.g.*, *Swint*, 514 U.S. at 45, 48; *see also Mohawk*, 558 U.S. at 106; *Cohen*, 337 U.S. at 545-47. In particular, this Court has warned that loosening jurisdictional requirements on multi-issue appeals would "encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Swint*, 514 U.S. at 49-50 (discussing the dangers of expanding jurisdiction through exercises of so-called "pendent appellate jurisdiction"). Yet that is precisely what happened in the court below—and what is happening with increasing frequency in the courts of appeals whenever federal officers interlocutorily appeal denials of qualified immunity.

Swint itself illustrates the bootstrapping problem. In *Swint*, the court of appeals properly exercised jurisdiction over the district court's denial of qualified

immunity to officers sued under 42 U.S.C. § 1983. *Id.* at 38. But this Court held that the court of appeals lacked jurisdiction to resolve an additional question: whether the co-defendant county was liable for the same event under the theory that the sheriff who participated in the challenged acts was the county's final policymaker. *Id.* at 41, 51. Unlike the individual defendants in *Swint*, whose interlocutory appeal involved a denial of an immunity from suit, the county's argument instead was "a 'mere defense to liability'" that could be appealed only following the district court's entry of a final judgment. *See id.* at 43, 51 (quoting *Mitchell*, 472 U.S. at 526).

Claims that victims of constitutional violations may not bring a damages cause of action under *Bivens* are, like the policymaker argument asserted by the county in *Swint*, mere defenses to liability on the merits and not immunities from litigation altogether. Yet the court below bootstrapped that liability question onto respondent's interlocutory qualified-immunity appeal. *Id.* 10a-14a. And the Sixth Circuit did so even though respondent made no attempt to raise the *Bivens*-liability question on his own. *Id.* 4a; *id.* 15a (Rogers, J., dissenting).

In petitioner's case, therefore, it was not respondent but the Sixth Circuit itself that wrongly "parlay[ed]" a "*Cohen*-type collateral order"—the denial of respondent's summary-judgment motion based on qualified immunity—into a "multi-issue interlocutory appeal ticket[.]" *See Swint*, 514 U.S. at 50. And it then ignored the collateral order on

qualified immunity over which jurisdiction existed under § 1291, holding instead that no *Bivens* remedy exists for petitioner's claim. Pet. App. 10a-14a. Moreover, it did so in a case in which the only panel member to even discuss the qualified-immunity question would have affirmed the district court's denial of summary judgment on that issue. *Id.* 19a-20a (Rogers, J., dissenting).

In attempting to justify its *sua sponte* consideration of the *Bivens* question, the Sixth Circuit purported to rely on *Wilkie*, 551 U.S. at 549 n.4, along with a grab-bag of sources—none of which concerned interlocutory jurisdiction over qualified-immunity appeals. *See* Pet. App. 7a-8a (citing *Hernandez I*, 137 S. Ct. 2003, *Carlson*, 446 U.S. at 17 n.2, and Vermeule, *supra*, at 1948-49 & n.20). As such, none of that authority spoke to, much less alleviated, the jurisdictional concerns identified by this Court in cases like *Swint* and *Mohawk*—concerns that the Sixth Circuit's *sua sponte* expansion of its interlocutory jurisdiction squarely trigger. *See* Pet. App. 7a-8a.

The Sixth Circuit is not alone in loosening the reins on finality to sweep *Bivens*-liability issues into interlocutory, qualified-immunity appeals. The opinion below reflects, in extreme form, an increasingly prevalent—and problematic—trend in the courts of appeals, which have routinely assumed interlocutory jurisdiction over *Bivens*-liability issues as part of qualified-immunity appeals, relying on a range of rationales—or no rationale at all.

Some nod at pendent appellate jurisdiction. *See Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1083 (8th Cir. 2005) ("Although the lack of a *Bivens* remedy would not entitle the defendants to qualified immunity, the issue is 'analytically antecedent to, and in a sense also pendent to, the qualified immunity issue.'" (quoting *Drake v. Scott*, 812 F.2d 395, 399 (8th Cir. 1987)). Others suggest that the collateral order doctrine suffices because *Bivens*-liability analysis is always implicated in a qualified-immunity appeal. *See, e.g.*, *Mack v. Yost*, 968 F.3d 311, 318 (3d Cir. 2020) (viewing availability of *Bivens* as a "threshold question" in interlocutory qualified-immunity appeals).

Similarly, other courts, like the Sixth Circuit below, cite the jurisdictional footnote in *Wilkie*, 551 U.S. at 549 n.4, seemingly assuming, without any need for explanation, that the footnote authorizes bootstrapping every *Bivens*-liability issue onto every interlocutory qualified-immunity appeal. *See, e.g.*, *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 856 (10th Cir. 2016) (citing *Wilkie* for the proposition that "the court has jurisdiction over the question of whether a *Bivens* remedy exists because it was sufficiently implicated by the qualified immunity defense"); *see also* Pet. App. 7a.

And others say nothing at all about the source of jurisdiction and just consider *Bivens*-liability questions alongside qualified immunity without further comment. *See, e.g.*, *Tun-Cos v. Perrotte*, 922 F.3d 514, 517-18 (4th Cir. 2019) (addressing the

availability of a *Bivens* remedy in an interlocutory appeal of the denial of qualified immunity without discussing why the court had jurisdiction to resolve the *Bivens* question). Yet, these *same* courts continue to abide by the principle that a district court's recognition of a *Bivens* cause of action is not *itself* an immediately appealable interlocutory order. *See, e.g.*, *Himmelreich v. Fed. Bureau of Prisons*, 5 F.4th 653, 659 (6th Cir. 2021) (holding that a district-court ruling recognizing a *Bivens* cause of action is not an immediately appealable collateral order and no court has ever held that it is). None of these cases have even attempted to reconcile this tension.

Nor have these cases accounted for appeals not involving *Bivens*, in which the same courts of appeals have typically obeyed *Swint*'s admonition and resisted addressing other questions—even ones that would bring the litigation to a close—as part of interlocutory qualified-immunity appeals. For example, courts of appeals have rejected defendants' attempts to press statute-of-limitations defenses in interlocutory qualified-immunity appeals. *See, e.g.*, *DeCrane v. Eckart*, 12 F.4th 586, 601-02 (6th Cir. 2021) (holding that a statute-of-limitations issue could not be considered in a qualified-immunity interlocutory appeal because "[a] a statute of limitations is not an immunity from suit; it is a defense to liability" and "has nothing to do with a qualified immunity defense"); *Garnier v. Rodriguez*, 506 F.3d 22, 25 (1st Cir. 2007) (holding that on interlocutory appeal of both denial of qualified immunity and denial of motion to dismiss on

statute-of-limitations grounds, the court of appeals had jurisdiction only over qualified-immunity appeal); *cf. Sanchez v. Hartley*, 810 F.3d 750, 752 (10th Cir. 2016) (declining jurisdiction over statute-of-limitations issue in qualified-immunity interlocutory appeal). *But see Randall-Speranza v. Nassim*, 107 F.3d 913, 916-17 (D.C. Cir. 1997) (noting, in immunity-based International Organizations Act appeal, that court would exercise pendent jurisdiction over statute-of-limitations defense to "both economize on judicial resources and avoid resolving their claims of immunity").

Other non-immunity defenses have been treated the same way. *See, e.g.*, *Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 497 n.2 (7th Cir. 1993) (rejecting interlocutory appellate jurisdiction over standing and statute of limitations); *Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n*, 273 F.3d 337, 344 (3d Cir. 2001) (same for res judicata and statute of limitations in a sovereign-immunity interlocutory appeal). Thus, in general, courts of appeals have acknowledged and heeded their jurisdictional limits in interlocutory qualified-immunity appeals—except when *Bivens* liability is also at stake. It would be one thing if this growing exception for *Bivens* claims were tied to some analytically coherent explanation for why *Bivens* remedies are part of a qualified-immunity appeal—whether always, or in specific cases—when other issues are not. But as in the Sixth Circuit's decision below, no such explanation has been provided.

This Court's intervention is therefore essential to protect the final judgment rule and decades of this Court's precedents drawing bright-line distinctions between immunity rulings subject to immediate interlocutory appeals and mere denials of defenses that can be appealed only following entry of final judgment. Even if recognition of *Bivens* remedies has become a "disfavored" judicial activity, *Abbasi*, 137 S. Ct. at 1857, that is no warrant for abandoning long-settled principles of appellate jurisdiction. If this Court has meant what it has said, time and again, about the need to circumscribe the scope of collateral-order appeals, the petition should be granted.

B. The Sixth Circuit Lacked Jurisdiction To Consider Whether A *Bivens* Remedy Was Available.

The Sixth Circuit lacked authority to ignore the qualified-immunity question that was the subject of respondent's appeal and to decide, instead, that no *Bivens* remedy was available to petitioner. Respondent never appealed the district court's contrary *Bivens* determination, and understandably so: There was no final judgment below and respondent never claimed that the *Bivens*-liability ruling was a collateral order independently appealable under 28 U.S.C. § 1291. Nor was the *Bivens* question "directly implicated" by respondent's assertion of qualified immunity—unlike in *Hartman*, in which uncertainty as to an element of the constitutional cause of action impacted *both* analyses. 547 U.S. at 257 n.5. The Sixth Circuit

therefore lacked interlocutory appellate jurisdiction over the *Bivens* issue on which the totality of its analysis rested.

1. The Sixth Circuit impermissibly prioritized efficiency interests over its subject-matter jurisdiction.

The court of appeals relied heavily on an efficiency rationale in attempting to justify its *sua sponte* consideration of the *Bivens* question—and only the *Bivens* question. Pet. App. 8a-10a. But that is not how subject-matter jurisdiction works. In *Steel Co. v. Citizens for a Better Environment*, for instance, this Court expressly rejected the practice in which courts of appeals were reaching the existence of a cause of action *before* deciding whether they had jurisdiction. As Justice Scalia explained for the Court, such "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." 523 U.S. at 101; *see also id*. ("Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.").

Notwithstanding *Steel Co.*'s admonition, the court of appeals dismissed any need to analyze qualified

immunity—the only issue over which it had jurisdiction—calling it an "unnecessary exercise" and a "hypothetical" conclusion if at the end of the day *Bivens* liability was unavailable. Pet. App. 8a-9a (citing *Hernandez I*, 137 S. Ct. at 2007). But it was the Sixth Circuit's *Bivens* ruling that was a "hypothetical judgment," *Steel Co.*, 523 U.S. at 101, because the court of appeals lacked jurisdiction to reach it. Neither *Hernandez I* nor any other decision of this Court stands for the proposition for which the Sixth Circuit cited it—that a court of appeals's interlocutory appellate jurisdiction over a qualified-immunity appeal necessarily extends to the existence of a *Bivens* remedy in all cases. *See* Pet. App. 7a-8a.

Indeed, in *Hernandez I* itself, the matter reached the Fifth Circuit on appeal from a final judgment—a context in which the *Bivens* and qualified-immunity issues were *both* properly before the court of appeals. *See* 137 S. Ct. at 2005; *see also Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (en banc). By contrast, as the dissent pointed out below, "[i]n civil litigation generally there is no requirement, and certainly no Article III requirement in a federal court, that any non-jurisdiction threshold legal issue—for instance whether a statute of limitation has run, or whether a defendant has some sort of immunity—must be decided before a merits issue, or vice versa." Pet. App. 19a (Rogers, J., dissenting).

In short, then, under this Court's precedents, the Sixth Circuit erred by exercising interlocutory appellate jurisdiction over the existence of a *Bivens*

remedy on appeal from a district court's denial of qualified immunity.

2. The collateral order doctrine should not be judicially expanded to encompass a ruling recognizing a *Bivens* remedy.

The Sixth Circuit made no attempt to justify its departure from this Court's precedents as an appropriate expansion of the collateral order doctrine to encompass *Bivens*-remedy rulings. Nor could it. This Court has been adamant, time and again, that the collateral order doctrine is a narrow exception to the "final judgment" rule codified in § 1291—a rule that prevents what might otherwise be a deluge of interlocutory appeals that would unduly burden the courts of appeals, undermine the case-management authority of the district courts, and inevitably tilt civil litigation toward the party with greater financial resources. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

As this Court has explained in *Cohen* and its progeny, § 1291 encompasses only "judgments that 'terminate an action'" and "a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.'" *Mohawk*, 558 U.S. at 106 (quoting *Cohen*, 337 U.S. at 545-46). "That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal

from the final judgment in the underlying action." *Swint*, 514 U.S. at 42. This category is of "modest scope," *Will*, 546 U.S. at 350, and must "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Digit. Equip.*, 511 U.S. at 868 (citation omitted).

In particular, the collateral order doctrine is not driven by the type of efficiency considerations the court below invoked while expanding its interlocutory jurisdiction. "That a ruling 'may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . has never sufficed'" to justify appellate jurisdiction. *Mohawk*, 558 U.S. at 107 (quoting *Digit. Equip.*, 511 U.S. at 872 (alterations in *Mohawk*)).

Nor has this Court welcomed improvised expansions of the collateral order doctrine by the courts of appeals. As this Court emphasized in *Will*, "we have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." 546 U.S. at 350. This Court has made clear that courts of appeals instead should heed Congress's determination that any expansions of appellate jurisdiction come through rulemaking, not through judicial interpretation. *See Mohawk*, 558 U.S. at 113-14 (discussing Congress's grant of rulemaking power regarding the definition of final judgments and scope of interlocutory appeals not otherwise provided for under § 1292 as the proper mode of expanding appellate jurisdiction); *see also id.* at 115 (Thomas, J.,

concurring in part and concurring in the judgment) (interlocutory appeals should be limited to orders "on all fours with orders we previously have held to be appealable under the collateral order doctrine," unless they have been approved through the rulemaking process).

Even if there were *ever* an appropriate circumstance for judicial expansion of the collateral order doctrine, this is not it. A ruling on the existence of a *Bivens* cause of action lacks virtually all of the qualities of immediately appealable collateral orders, such as a denial of qualified immunity. After all, qualified immunity affords not only an immunity from liability, but also an immunity from suit. *Mitchell*, 472 U.S. at 526-27. As such, it falls within the small group of claims that "cannot be effectively vindicated after the trial has occurred" and thus qualifies as an appealable collateral order. *Id.* at 525. This small subset includes appeals of qualified immunity, "side orders rejecting absolute immunity," states' immunity under the Eleventh Amendment, and adverse double jeopardy rulings for criminal defendants. *Will*, 546 U.S. at 350-51 (collecting cases and noting that, "[i]n each case, the collaterally appealing party was vindicating or claiming a right to avoid trial," and "unless the order to stand trial was immediately appealable, the right would be effectively lost").[1] These

[1] This Court has rejected extending the collateral order doctrine to claims "that the district court lacks personal jurisdiction, that the statute of limitations has run, that the movant has been denied his Sixth Amendment right to a speedy

appeals all concern "not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest," *Will*, 546 U.S. at 353, an indisputably high bar—even if the bar were still subject to adjustment by case law, rather than rulemaking.

Although this Court has long cautioned against "play[ing] word games with the concept of a 'right not to be tried,'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989), case law has ultimately coalesced around a relatively stable distinction, focusing on whether the "immunity" at issue is, in essence, a right possessed by the defendant to not stand trial at all. Even the most complete defenses will not satisfy this exacting standard if they merely establish the defendant's right "not to be subject to a binding judgment of the court," as opposed to the right to avoid being haled into court in the first place. *See, e.g.*, *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527

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trial, that an action is barred on claim preclusion principles, that no material fact is in dispute and the moving party is entitled to judgment as a matter of law, or merely that the complaint fails to state a claim." *Digit. Equip.*, 511 U.S. at 873 (internal citations omitted); *see also*, *e.g.*, *Mohawk*, 558 U.S. at 103 (holding the collateral order doctrine is not available to disclosure orders adverse to the attorney-client privilege); *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 795, 801 (1989) (holding the collateral order doctrine not applicable to an alleged violation of Federal Rule of Criminal Procedure Rule 6(e), which "prohibits public disclosure by Government attorneys of 'matters occurring before the grand jury' except in certain circumstances." (quoting FED. R. CRIM. P. 6(e))); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 501 (1989) (declining to extend the collateral order doctrine to allow an interlocutory appeal of an adverse forum selection holding).

(1988); *see also Will*, 546 U.S. at 353 ("Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was.").

Whether a *Bivens* remedy is available in a specific case will almost never fall within this small category. First, the existence of a *Bivens* remedy is central to, not separate from, the merits of the case. Whether the law provides a judicial mechanism for enforcing the underlying right is in no respects "collateral" to the underlying litigation. Even more importantly, a holding that a *Bivens* remedy exists is a determination that the defendant could be liable for damages; it has nothing to do with immunity from suit, and therefore an objection to a *Bivens* remedy is not "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526.[2] Because any error in a trial court's determination on the availability of a *Bivens* remedy can be cured by an appeal following a final judgment, the *Bivens* question cannot properly be the subject of an interlocutory appeal *itself* under any of this Court's criteria. No court of appeals has held

[2] Many defendants in *Bivens* cases will assert qualified immunity and may avoid a trial on that basis if a plaintiff cannot establish a violation of clearly established constitutional rights. Indeed, the district court granted summary judgment on that basis to all of the defendants here except respondent, against whom the district court concluded there was sufficient evidence to create a genuine, material dispute on that question. Pet. App. 21a-22a.

otherwise. *See Himmelreich*, 5 F.4th at 659 (surveying courts).

Instead, the Sixth Circuit, and other courts of appeals, have breezily asserted that *Hartman* and *Wilkie* authorize consideration of *Bivens*-remedy questions in all interlocutory qualified-immunity appeals. But even a cursory inspection of those opinions belies that conclusion. In *Hartman*, this Court held that it was proper for the court of appeals to determine whether the absence of probable cause was an essential element that a plaintiff must prove to bring a retaliatory-prosecution *Bivens* claim. *Hartman*, 547 U.S. at 255. The Court explained that it had jurisdiction over the question because probable cause was an element of the tort "directly implicated by the defense of qualified immunity," meaning the Court could not determine whether a constitutional violation occurred without addressing whether probable cause was required to bring the *Bivens* claim. *Hartman*, 547 U.S. at 257 n.5. In that situation—where the availability of a *Bivens* remedy would *necessarily* be implicated by the qualified-immunity analysis—it was proper for the court of appeals to address the *Bivens* issue. *See id.*

Wilkie, which courts of appeals routinely wave as a free pass to consider *Bivens* questions in qualified-immunity appeals, is, if anything, even less supportive of that practice than *Hartman*. It certainly did not justify the Sixth Circuit's perfunctory assumption of jurisdiction here. In *Wilkie*, this Court pointed to *Hartman*, stating in a footnote that "the same

reasoning" that justified the exercise of interlocutory jurisdiction over the definition of an element of a claim "directly implicated by the defense of qualified immunity" applies also to "the recognition of the entire cause of action." 551 U.S. at 549 n.4.

But the *Wilkie* Court did not elaborate on the permissible limits of that statement or the circumstances under which other considerations pertinent to a *Bivens* question might be "directly implicated by the defense of qualified immunity."[3] *See id.* Nor did it need to; in *Wilkie*, the *Bivens* issue had been decided by the Tenth Circuit on appeal after final judgment. *See Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002) (noting that appellant was appealing district court's grant of appellees' motion to dismiss).

Between them, *Hartman* and *Wilkie* stand for the unexceptional point that, in *some* interlocutory appeals, the qualified-immunity and *Bivens* analyses will be inextricably intertwined—because both turn on the scope of the constitutional right allegedly violated. *See Hartman*, 547 U.S. at 1702 n.5 ("[O]ur holding does not go beyond a definition of an element of the tort, directly implicated by the defense of qualified immunity and properly before us on an interlocutory appeal."). That understanding is consistent with *Swint* itself, which contemplated circumstances in

[3] Further, it makes sense that *Wilkie* did not dive extensively into this jurisdictional question, because this Court would have had jurisdiction under 28 U.S.C. § 1254 even without a final judgment from the district court—a marked contrast to the more limited jurisdiction conferred on courts of appeals by § 1291.

which it might be logically impossible for a court of appeals to resolve one collateral-order issue without resolving another issue over which jurisdiction would not otherwise exist. 514 U.S. at 50-51.

But whereas *Hartman* and *Wilkie* are the exception, the Sixth Circuit's analysis used them to swallow the rule. Pet. App. 7a (citing *Wilkie*, 551 U.S. at 549 n.4). In the instant case—as in many other *Bivens* claims—the qualified-immunity analysis is clearly distinct from the *Bivens*-availability analysis. There is no unknown element or comparable uncertainty about the scope of petitioner's conditions-of-confinement claim that pervades *both* the *Bivens*-remedy question *and* the qualified-immunity analysis—and respondent never suggested that there was.

In short, the Sixth Circuit's decision not only was flatly inconsistent with this Court's precedents defining the final judgment rule and the collateral order doctrine, but also failed to offer—or even attempt to offer—any satisfactory explanation for expanding the latter to encompass the availability of a *Bivens* remedy. And all of this occurred in a context in which the appellant did not even *ask* the court to reach the issue. If that kind of interlocutory appellate bootstrapping is allowed to continue unchecked, it would hardly be limited to *Bivens*—but would instead allow courts of appeals to resolve any number of other claims on interlocutory qualified-immunity appeals that could not be subject to interlocutory appeals by themselves. It is not difficult to see why such an

approach would turn the final judgment rule—and this Court's careful and consistent efforts to protect it—on its head.

II. THIS COURT SHOULD CLARIFY WHETHER BORDER-RELATED *BIVENS* CLAIMS ARE CATEGORICALLY UNAVAILABLE.

Regardless of whether this Court grants the first Question Presented, it can and should grant the second—which challenges the Sixth Circuit's blanket pronouncement that "when it comes to the border, the *Bivens* issue is not difficult—it does not apply." Pet. App. 14a.[4] In the Sixth Circuit's view, *Hernandez II* categorically precludes any *Bivens* claim against a federal officer for conduct arising from any and all border-related duties, without regard to the nature of duties at issue or the factual context giving rise to the claim: "What matters is that both cases [*Elhady* and *Hernandez II*] involve claims against border-patrol officers serving in their capacity as agents protecting the border. In this context, the Supreme Court has spoken: *Bivens* is unavailable." Pet. App. 13a.

That is not, in fact, what this Court said in *Hernandez II*. As the Fifth Circuit observed in *Angulo*

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[4] This Court may review the Sixth Circuit's *Bivens* holding irrespective of whether the court of appeals had interlocutory appellate jurisdiction to reach it, because this Court's jurisdiction under 28 U.S.C. § 1254 runs to the entire "case," and is thus broader than the interlocutory appellate jurisdiction conferred on the courts of appeals by § 1291. *See, e.g.*, *Hohn v. United States*, 524 U.S. 236 (1998).

v. Brown, 978 F.3d 942, 948-49 n.3 (5th Cir. 2020), although *Hernandez II could* be interpreted as imposing a categorical prohibition on border-related causes of action, this Court's analysis relied on more specific concerns about "the international implications of a cross-border shooting" that were "not present here, where the dispute is more similar to standard Fourth Amendment unreasonable seizure cases to which *Bivens* has applied in the past." *See id.* (assuming *Bivens* remedy while resolving qualified immunity). The Ninth Circuit likewise noted the unique complications in *Hernandez II* when recognizing a *Bivens* claim in *Boule v. Egbert*, 998 F.3d 370, 387-89 (9th Cir. 2021), *cert. granted* (No. 21-147)—a case that was submitted following oral argument in this Court on March 2, 2022, and that remains pending as of the filing of this petition.

Unlike the Sixth Circuit, this Court has long been clear that the specific circumstances surrounding a *Bivens* claim matter. Thus, whatever the outcome in *Egbert*, petitioner's distinct conditions-of-detention *Bivens* claim should not have been categorically rejected by the Sixth Circuit simply because the traditional law-enforcement functions at issue took place at the border. As this Court observed in *Abbasi*, "individual instances of discrimination or law enforcement overreach" by "their very nature are difficult to address except by way of damages actions after the fact." 137 S. Ct. at 1862.

Nothing in *Hernandez II* contradicts that basic principle. *See generally* 140 S. Ct. 745. To the contrary, as the dissent below emphasized, "[a]lthough the Court

has recently limited the reach of *Bivens*, it does not necessarily follow that U.S. Citizens have no remedy if they are abused within the United States by their own border patrol officials." Pet. App. 18a (Rogers, J., dissenting); *see also id*. (elaborating that "[t]he facts indicate that Elhady was an American college student who was detained within the United States without any explanation or apparent justification"). If this Court in *Hernandez II* had rejected a *Bivens* claim for the mistreatment of a U.S. citizen on U.S. soil, that would be one thing. But it did not. The Sixth Circuit therefore overread *Hernandez II*—sidestepping the context-specific analysis that should have governed the existence of a *Bivens* cause of action for petitioner's claims. Unless this Court in *Egbert* categorically disavows *Bivens* claims against Customs and Border Protection officers, the Sixth Circuit's cursory, categorical analysis should not be allowed to stand.

III. This Case Provides An Excellent Vehicle To Resolve Both Questions Presented.

This case cleanly presents an important jurisdictional question: whether the courts of appeals always have authority under 28 U.S.C. § 1291 to bootstrap remedy issues onto interlocutory qualified-immunity appeals. The Sixth Circuit pushed aside whether respondent is entitled to qualified immunity—the only issue respondent actually raised in his interlocutory appeal—and held instead that no cause of action exists under *Bivens* for petitioner's claims. Pet. App. 10a-14a. That is a liability, not immunity,

question. *See supra* Part I.B.2. Because the Sixth Circuit raised *Bivens* liability *sua sponte* and resolved respondent's interlocutory appeal on that basis, the opinion below puts the jurisdictional question front and center, making this case an excellent vehicle in which to assess federal courts' growing practice of wrongly treating *Bivens*-liability questions as fair game in immunity-based interlocutory appeals. *See supra* Part I.A.

This jurisdictional question is important and warrants this Court's review. The Sixth Circuit did not contend that the *Bivens* question implicated subject-matter jurisdiction and *must* be addressed; nor did it suggest that the *Bivens* question itself was independently subject to interlocutory appeal under the collateral order doctrine. *See* Pet. App. 7a-10a. Instead, it did precisely what this Court cautioned against in *Swint*: It parlayed a qualified-immunity-based collateral order into a "multi-issue interlocutory appeal ticket[.]" 514 U.S. at 49-50. If anything, what the Sixth Circuit did was even more problematic; it parlayed respondent's qualified-immunity appeal into an interlocutory appeal ticket on a different issue respondent did not even raise. Pet. App. 15a (Rogers, J., dissenting) (emphasizing that respondent "cho[se] not to raise the issue on appeal," and criticizing majority for *sua sponte* resolving "a difficult question about the reach of *Bivens* that the Government repeatedly declined to ask us to address").

Whether dubbed an exercise of so-called pendent appellate jurisdiction or viewed as an expansion of the historically limited category of collateral orders, the reality is that the decision below—like too many other recent *Bivens* rulings within interlocutory qualified-immunity appeals—reflects ad hoc, judge-made jurisdictional expansion with no obvious stopping point. If that practice is permissible, this Court should say so and articulate why, so that the courts of appeals and litigants understand the jurisdictional boundaries of interlocutory appeals in *Bivens* cases (and others). And if such bootstrapping is not permissible, it is even more incumbent upon this Court to put an end to such bootstrapping before it expands even further. Without this Court's intervention, expansions of interlocutory jurisdiction like the Sixth Circuit's below will continue unchecked, destabilizing not only the final judgment rule, but also the longstanding distinction this Court has drawn between defenses to liabilities and immunities from suit. *See, e.g.*, *Swint*, 514 U.S. at 43.

Moreover, the Sixth Circuit exercised interlocutory appellate jurisdiction it didn't have in order to articulate an indefensibly categorical foreclosure of *all Bivens* claims against federal border-patrol officers—jumping over what the dissenting judge described as "a close question" at the core of the *Bivens* doctrine, Pet. App. 17a (Rogers, J., dissenting). The events in question occurred at the border, but as the dissent emphasized, respondent did not contend that "any national security or foreign relations

circumstances impacted this case in particular." *Id.* at 18a (Rogers, J., dissenting). To the contrary, petitioner "was an American college student detained within the United States without any explanation or apparent justification," and that context, the dissent reasoned, "arguably makes this case more analogous to *Bivens* itself, in which federal agents abused a U.S. citizen in his home and in a court building in New York." *Id.* If the dissent is correct, then certiorari is also imperative to prevent the majority's jurisdiction-less categorical rejection of *Bivens* from being invoked as precedent by other courts.

In all, this Court's intervention is warranted because the decision below will have direct and significant downstream consequences. By exercising interlocutory appellate jurisdiction in a context in which it lacked the power to do so, and by using that jurisdiction to go further than this Court has in categorically foreclosing an entire class of *Bivens* claims, the Sixth Circuit doubly overstepped its authority, flouted this Court's precedents, and created a dangerous model that this Court should ensure other courts of appeals do not follow.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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