

No. 21-184

In The
Supreme Court of the United States

—◆—
KEVIN BYRD,

Petitioner,

v.

RAY LAMB,

Respondent.

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

—◆—
**SUPPLEMENTAL BRIEF
IN SUPPORT OF CERTIORARI**

—◆—
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**SUPPLEMENTAL BRIEF
IN SUPPORT OF CERTIORARI**

Petitioner Kevin Byrd files this supplemental brief to call the Court’s attention to the government’s statements made at oral argument in *Egbert v. Boule*, No. 21-147. Based on those statements, the government agrees with Byrd that *Bivens* permits claims against federal law-enforcement officers in “routine, run-of-the-mill Fourth Amendment case[s].” *Egbert* Tr. 34:25–35:2. The government’s representations to this Court about the broad scope of *Bivens* in the search-and-seizure context are contrary to the decision below and the Eighth Circuit’s decision in *Ahmed v. Weyker*, 984 F.3d 564 (8th Cir. 2020), cert. pending *sub nom. Mohamud v. Weyker*, No. 21-187 (Aug. 6, 2021). They further underscore the need for this Court’s review of Byrd’s petition.

While the government does not represent Agent Lamb in this case, its views, as Lamb’s employer, are nonetheless extremely significant. As the government explained in *Egbert*, “[t]he United States has a substantial interest” in *Bivens* suits since they “are brought against federal officials and have the potential to affect how they perform their duties.” *Egbert* Mot. for Div. Arg. 2. This interest is manifested in the fact that, with only one exception, the government has participated at the merits stage of every case that has squarely presented a *Bivens* question to this Court.¹

¹ See *Egbert v. Boule*, No. 21-147 (amicus curiae supporting petitioner); *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (amicus curiae supporting respondent); *Ziglar v. Abbasi*, 137 S. Ct. 1843

Moreover, in cases where this country’s interests are at stake, the Court relies on the government—represented at this level by the Office of the Solicitor General—to voice “the common interests of the Government, and therefore of all the people.” *United States v. Providence J. Co.*, 485 U.S. 693, 706 (1988).

In *Egbert*, a border protection agent grabbed and shoved down an innkeeper in his driveway to question the inn’s guest, despite knowing that the guest was in the country legally. At oral argument, the government argued that while *Bivens* claims are generally available against line-level federal police sued for individual instances of law-enforcement overreach, the agent in *Egbert* cannot be sued because of the national security implications of border protection.

(2017) (counsel for some petitioners); *Minneci v. Pollard*, 565 U.S. 118 (2012) (amicus curiae supporting petitioners); *Hui v. Castaneda*, 559 U.S. 799 (2010) (amicus curiae supporting petitioners); *Wilkie v. Robbins*, 551 U.S. 537 (2007) (counsel for petitioners); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (amicus curiae supporting petitioner); *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994) (counsel for petitioner); *McCarthy v. Madigan*, 503 U.S. 140 (1992) (counsel for respondents); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (counsel for petitioners); *United States v. Stanley*, 483 U.S. 669 (1987) (petitioner); *Bush v. Lucas*, 462 U.S. 367 (1983) (counsel for respondent); *Chappell v. Wallace*, 462 U.S. 296 (1983) (counsel for petitioners); *Carlson v. Green*, 446 U.S. 14 (1980) (counsel for petitioners); *Stafford v. Briggs*, 444 U.S. 527 (1980) (amicus curiae supporting petitioners). The one case where the government did not appear was *Davis v. Passman*, 442 U.S. 228 (1979). However, the government did appear as amicus curiae supporting defendant-appellant in the court below. See *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc).

In other words, according to the government, *Bivens* claims are generally available in the context of domestic policing, even when the official is not employed by the DEA. In fact, it's the FBI and federal marshals who are "right at the heart of *Bivens*." *Egbert* Tr. 27:1–19. The government also admitted that "a Border Patrol agent who's just investigating--you know, assisting with local law enforcement to perform routine law enforcement functions" is subject to *Bivens*. *Id.* at 26:1–7. When asked by the Court to provide a "hypothetical case where your office would say *Bivens* permits a cause of action," *id.* at 34:3–5, the government responded: "[A] case involving an FBI agent or * * * the Marshals Service * * * that is a routine domestic search-and-seizure claim or a[n] excessive force claim[.]" *Id.* at 34:6–12. It is "in that sort of routine, run-of-the-mill Fourth Amendment case by an FBI agent," the government explained, that *Bivens* enjoys its continued force. *Id.* at 34:25–35:2.

The government's position supports Byrd's petition and his argument that he has a remedy under *Bivens*. After all, Byrd's case involves the very "routine domestic search-and-seizure claim or a[n] excessive force claim" the government approved. *Id.* at 34:6–12. Wielding his gun, Agent Lamb "verbally and physically threatened [Byrd] * * * to facilitate an unlawful seizure." Pet. App. 1a. That is it. There were no national security implications of any kind, the encounter did not involve the border, and there is nothing else to distinguish this case from countless such cases brought against state and local law enforcement. Just one

federal agent, brandishing his weapon, and threatening to kill an innocent man. Pet. 7. If this is not a “routine, run-of-the-mill Fourth Amendment case,” *Egbert* Tr. 34:25–35:2, nothing is.

The government’s discussion at oral argument in *Egbert* indicates that the Fifth Circuit—along with the Eighth in *Ahmed*—has not only split from a majority of its sister circuits but now, apparently, the Executive Branch as well. These developments reinforce the need for the Court’s review of the decision below.

◆

CONCLUSION

The petition for a writ of certiorari should be granted.

March 10, 2022

Respectfully submitted,

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