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

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

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The Court's recent decision in *Egbert* v. *Boule*, No. 21-147 (June 8, 2022), does not "confirm that the Petition in this case should be denied." Resp. 2d Supp. Br. 1. Quite the opposite. It is *the* reason why the Petition in this case must now be granted.

As demonstrated by Respondent's Second Supplemental Brief, *Egbert* is now being read as implicitly overturning *Bivens*. *Id.* at 1–2. But by its own admission, the Court did no such thing. It left a *Bivens* remedy in place in cases where "a court is . . . undoubtedly better positioned than Congress to create a damages action." *Egbert* Slip. Op. 8; see also *Egbert* v. *Boule*, 142 S. Ct. 457 (2021) (mem.) (declining to consider on certiorari "[w]hether the Court should reconsider *Bivens*"). When there is no "reason to think that Congress might be better equipped to create a damages remedy," there is no reason to deny *Bivens*. *Egbert* Slip. Op. 7.

This is a case on point. Respondent Lamb, using his federal badge and his gun, but carrying out no official "mandate," *id.* at 10, threatened petitioner with deadly force and caused him to be detained by local police, Pet. 7–8. Lamb's actions are a pure "individual instance[] of * * * law enforcement overreach," which is difficult to address except by way of damages in actions after the fact." Pet. 28–29 (quoting *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017)). It has no "systemwide consequences of recognizing a cause of action under *Bivens*." *Egbert* Slip. Op. 8. There is no "uncertainty" here. *Ibid.* If federal courts are allowed to

continue adjudicating cases like this—involving ordinary excessive force violations committed by federal officers—it will not create new species of litigation or cause unintended results. Pet. 22, 28–29. And we have hundreds of years of evidence to prove it. See, *e.g.*, 3 W. Blackstone, Commentaries on the Laws of England 127 (1768).

But if the Court disagrees that this case should be allowed to proceed under *Bivens*, then respondent is right and *Bivens* is no more. In that case, the Court should simply say so. It should not be "leav[ing] a door ajar," holding out "the possibility that someone, someday might walk through it even as it devises a rule that ensures that no one . . . ever will." *Egbert* (Gorsuch, J., concurring) Slip. Op. 3 (cleaned up); see also *id.* ("In fairness to future litigants and our lower court colleagues we should not hold out that kind of false hope, and in the process invite still more 'protracted litigation destined to yield nothing.'") In that case, the Court must grant certiorari here and explicitly overrule *Bivens*, so Congress can get to work and amend Section 1983 by including federal officials within its framework. But see 28 U.S.C. 2679(b)(2)(A) (already providing for the availability of "a civil action against an employee of the Government * * * which is brought for a violation of the Constitution of the United States").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

June 10, 2022

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