No. 23-____

IN THE
Supreme Court of the United States

MICHAEL BORESKY,
Petitioner,
v.
JEREMY GRABER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
Counsel of Record
WILLIAM E. HAVEMANN
NATHANIEL A.G. ZELINSKY
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

QUESTION PRESENTED

Whether a district court decision fashioning a new implied cause of action under *Bivens* is immediately appealable.

PARTIES TO THE PROCEEDING

Michael Boresky, petitioner on review, was the defendant-appellant below.

Jeremy Graber, respondent on review, was the plaintiff-appellee below.

Joel Dales and four John Does were defendants in the district court.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Third Circuit:

- *Graber* v. *Boresky,* No. 21-1407 (3rd Cir.).

U.S. District Court for the Eastern District of Pennsylvania:

- *Graber* v. *Boresky*, No. 2-18-cv-03168 (E.D. Pa.).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

IN THE

Supreme Court of the United States

No. 23-

MICHAEL BORESKY,
Petitioner,

v.

JEREMY GRABER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Michael Boresky respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's opinion is reported at 59 F.4th 603 and reproduced at Pet. App. 1a-34a. The order denying rehearing is not reported, and is reproduced at Pet. App. 67a-68a. The District Court's opinions are reported at 511 F. Supp. 3d 594 and 2019 WL 4805241 respectively, and are reproduced at Pet. App. 35a-66a.

JURISDICTION

The Third Circuit entered judgment on February 10, 2023. Petitioner filed a timely petition for rehearing en banc, which was denied on May 10, 2023. On June 7, 2023, Justice Alito granted an extension of the period to file this petition until October 7, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3056(e)(1) provides:

> When directed by the President, the United States Secret Service is authorized to participate, under the direction of the Secretary of Homeland Security, in the planning, coordination, and implementation of security operations at special events of national significance, as determined by the President.

INTRODUCTION

This Court has sent lower courts a clear message: Stop authorizing new implied causes of action under the Constitution. *See Egbert* v. *Boule*, 142 S. Ct. 1793, 1802 (2022); *see also Ziglar* v. *Abbasi*, 582 U.S. 120, 134-135 (2017). Some lower courts, however, have failed to heed the message. This case is representative, as the District Court below extended *Bivens* to confer a remedy in an entirely new constitutional setting, and in one implicating national-security concerns to boot. The question presented is whether federal *Bivens* defendants may immediately appeal such a decision, or whether they must be subjected to discovery and even a trial before obtaining appellate

review. This is an exceptionally important issue, and one in which the circuit courts are in conflict.

The District Court below fashioned a novel *Bivens* cause of action for an alleged violation of the Warrant Clause, which this Court has never held to confer an implied cause of action. The District Court allowed that implied cause of action to survive a motion to dismiss and summary judgment in a case against a Secret Service Special Agent, Petitioner Michael Boresky, who was not even present at the scene of any arrest. And the District Court held that this cause of action was available to challenge Special Agent Boresky's conduct in the context of a "National Special Security Event," even though discovery could assist potential attackers in developing and executing an attack.

Special Agent Boresky appealed the District Court's decision fashioning a new *Bivens* remedy. Over Judge Hardiman's emphatic dissent, the Third Circuit held that it lacked jurisdiction and remanded the case for discovery and possibly a trial.

The Third Circuit's decision is profoundly wrong. This Court has made clear that when a *Bivens* defendant immediately appeals a district court's decision denying qualified immunity, the appellate court has "jurisdiction" to address the threshold "recognition of the entire cause of action" under *Bivens*. *Wilkie* v. *Robbins*, 551 U.S. 537, 549 n.4 (2007); *see also Ashcroft* v. *Iqbal*, 556 U.S. 662, 673 (2009); *Hartman* v. *Moore*, 547 U.S. 250, 257 n.5 (2006). Whether a *Bivens* claim exists is " 'antecedent' to"—and dispositive of—the qualified-immunity question. *Hernandez* v. *Mesa*, 582 U.S. 548, 553 (2017) (per curiam) (quoting *Wood* v. *Moss*, 572 U.S. 744, 757 (2014)). For that

reason, this Court has unequivocally held that appellate courts may exercise jurisdiction in collateral appeals to address "whether to devise a new *Bivens* damages action." *Wilkie*, 551 U.S. at 549.

This Court's precedent should have resolved the jurisdictional question below. As Judge Hardiman explained in his persuasive dissent, a decision fashioning a new *Bivens* remedy is immediately appealable under the collateral-order doctrine because it conclusively resolves an important legal question that is separate from the merits and effectively unreviewable on appeal from the final judgment. Pet. App. 23a-27a (Hardiman, J., dissenting). Indeed, decisions fashioning new causes of action under *Bivens* warrant immediate appellate review no less—*if not more*—than decisions denying qualified immunity. When a judge creates "a cause of action against federal officers," it places "great stress on the separation of powers," "disrupts effective governance," and subjects "officers to the same distraction from duty that qualified immunity is meant to foreclose." *Id.* at 26a (Hardiman, J., dissenting) (quotation marks omitted). Just as decisions denying qualified immunity are immediately appealable, so are orders fashioning a new *Bivens* cause of action.

The question presented is exceptionally important. Under the Third Circuit's approach, a federal official may challenge an erroneous *Bivens* decision only after final judgment or by piggybacking on a qualified-immunity appeal. That formalistic approach strains the separation of powers and raises serious practical problems for federal officials named as defendants in *Bivens* cases. Federal officials should not be forced to wait months or years until final judgment to obtain

appellate review. Nor should the Solicitor General be forced to authorize a dubious immunity appeal to obtain appellate review of the threshold *Bivens* question, particularly because district court decisions extending *Bivens* will be wrong in all but the most extraordinary cases.

This Court's review is warranted. The Third Circuit's decision deepens a circuit split—with the Third and Sixth Circuits erroneously holding that decisions extending *Bivens* are not immediately appealable, and the Ninth Circuit holding the opposite. Thus, had this case arisen in the Ninth Circuit, it would already be over. This Court will need to resolve the question, and it should do so as soon as possible given the exceptional importance of the question presented for federal officials who will be forced to endure harmful litigation until this Court intervenes. This Court should grant the petition.

STATEMENT

A. Legal Background

1. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that a victim of an unlawful search and seizure could sue for damages under the Fourth Amendment. In the decade immediately following *Bivens*, this Court created two more constitutional causes of action, "first, for a former congressional staffer's Fifth Amendment sex-discrimination claim; and second, for a federal prisoner's inadequate-care claim under the Eighth Amendment." *Egbert*, 142 S. Ct. at 1802 (citing *Davis* v. *Passman*, 442 U.S. 228 (1979); *Carlson* v. *Green*, 446 U.S. 14 (1980)).

Bivens and its two progeny were a product of an " '*ancien regime*,' " *Abbasi*, 582 U.S. at 131-132 (quoting *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001)), in which "the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary.' " *Id.* (citation omitted). This Court has now "come to appreciate more fully the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power." *Egbert*, 142 S. Ct. at 1802 (quotation marks omitted). The Court has not "dispense[d] with *Bivens* altogether," but has stressed that "even a single sound reason to defer to Congress is enough to require a court to refrain from creating such a remedy." *Id*. at 1803 (cleaned up). The Court has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Abbasi*, 582 U.S. at 135 (quotation marks omitted); *see Egbert*, 142 S. Ct. at 1799 ("Over the past 42 years, however, we have declined 11 times to imply a similar cause of action for other alleged constitutional violations.").

2. Qualified immunity is a defense to *Bivens* liability, *see Butz* v. *Economou*, 438 U.S. 478, 500 (1978), and a district court's denial of qualified immunity on legal grounds is immediately appealable, *see Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985). In such interlocutory appeals, this Court has repeatedly recognized that courts have the authority and responsibility to resolve the threshold question whether a *Bivens* cause of action is available in the first place.

In *Hartman*, 547 U.S. at 252, a plaintiff alleged a retaliatory prosecution. The federal defendants appealed at summary judgment, and the court of appeals affirmed. This Court granted certiorari to review that

interlocutory decision and determine whether the plaintiffs stated a *Bivens* claim. *See id*. This Court held that the threshold question was "properly before [this Court] on interlocutory appeal." *Id*. at 257 n.5. The Court then ruled for the federal defendants on that basis, without addressing qualified immunity.

In *Wilkie*, 551 U.S. at 548-549, this Court granted certiorari to review an interlocutory *Bivens* appeal. Addressing jurisdiction, the Court explained that the "same reasoning" adopted in *Hartman* meant that "the recognition of the entire cause of action" was "directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal." *Id.* at 549 n.4 (quotation marks omitted). The Court therefore held that "the Court of Appeals had jurisdiction" to consider the question whether to extend *Bivens*, "as do we." *Id.* On the merits, the Court declined "to devise a new *Bivens* damages action," such that there was "no reason to enquire further into the merits of [the] claim or the asserted defense of qualified immunity." *Id.* at 549, 567.

In *Iqbal*, 556 U.S. at 666, this Court again exercised jurisdiction over an interlocutory appeal to determine whether the plaintiff's *Bivens* complaint adequately stated a claim. The Court rejected the plaintiff's argument that jurisdiction existed only "to determine whether his complaint avers a clearly established constitutional violation" for purposes of qualified immunity but not "to pass on the sufficiency of his pleadings." *Id.* at 672-673. As the Court noted, "appellate jurisdiction is not so strictly confined." *Id*. at 673. Just like the question whether to recognize a new *Bivens* cause of action in *Wilkie*, the question whether the plaintiff adequately stated a claim was "clearly within

the category of appealable decisions." *Id.* The district court's order denying defendants' motion to dismiss was therefore "a final decision under the collateral-order doctrine over which the Court of Appeals had, and this Court has, jurisdiction." *Id*. at 674-675.

B. Factual Background

1. This case involves a lower court's extension of *Bivens* to a suit challenging the federal government's security protocols at a National Special Security Event, which is defined by statute as a "special event[] of national significance, as determined by the President." 18 U.S.C. § 3056(e)(1).

Once the federal government designates an event as a National Special Security Event, "the United States Secret Service is authorized to participate, under the direction of the Secretary of Homeland Security, in the planning, coordination, and implementation of security operations." *Id*. An event's designation as a National Special Security Event reflects unique national security risks, such as the presence of high ranking government officials or the increased possibility of a terrorist attack. Cong. Rsch. Serv., R43522, *National Special Security Events: Fact She*et (2021), https://tinyurl.com/4d5cmk8m.

2. The 2016 Democratic National Convention was designated a National Special Security Event, and the Secret Service was placed in charge of security. Attendees included then-President Obama, then-Vice President Biden, former President Bill Clinton, and former Secretary of State Hilary Clinton, who was at the time the presumptive Democratic nominee for President. As part of its mission, the Secret Service erected an 8-foot-high fence around the convention

site and restricted access within the security perimeter. Pet. App. 3a.

During the multi-day convention, thousands of protestors gathered. *Id.* at 36a. On the evening of July 27, 2016, a protestor cut the Secret Service security fence with bolt cutters, and protesters rushed into the gap. *Id*. 3a-4a, 36a. Then-President Obama was on-site at the time of the breach. D. Ct. Dkt. 45-1, at 3.

Local Philadelphia police apprehended Respondent Jeremy Graber and six other individuals. Graber alleges that he did not participate in the breach. Pet. App. 47a. Instead, he claims that he remained in the crowd near the fence, but that Philadelphia police took him into the restricted section and arrested him there. *Id*. at 47a-48a. No one disputes that Philadelphia police searched Graber, confiscated several knives, and transported him to a federal detention center. *See id*. at 36a-37a.

3. Petitioner is Secret Service Special Agent Michael Boresky. Special Agent Boresky had nothing to do with Graber's arrest. *See id*. at 37a. Instead, Special Agent Boresky was at home that evening. *Id*. After Graber's arrest, however, a supervisor instructed Special Agent Boresky to serve as an affiant for Graber's federal arrest warrant. *Id*. at 37a-38a. Special Agent Boresky was informed that Graber was found with other protestors inside the restricted area. Based on that information about the security breach, Special Agent Boresky served as the affiant on the warrant application. *Id*.

Graber alleges that subsequent video evidence corroborated his account, and the charges against him were dropped. *See id.* at 5a.

C. Procedural Background

1. Graber filed this action against four Philadelphia police officers involved in his arrest at the Convention site. Respondent also sued Special Agent Boresky under *Bivens*. *Id*. at 39a, 48a-49a.

Special Agent Boresky moved to dismiss on the ground that implying a cause of action in this context would be an impermissible extension of *Bivens*. The District Court rejected that argument and held that the *Bivens* action should proceed. The District Court recognized that Graber's "constitutional claim is viable only if a *Bivens* cause of action exists—if, in other words, the Court implies a private right of action directly under the Constitution." *Id*. at 51a. The District Court then acknowledged the multiple factors that made this a new *Bivens* context:

> Defendant Boresky was the affiant on the arrest warrant, not the on-scene arresting officer; he is a Secret Service agent, not a federal narcotics agent; and, Defendant Boresky argues, Plaintiff's arrest outside the Convention—an event attended by the President, Vice President, and Democratic presidential nominee—has a national-security dimension that the typical Fourth Amendment *Bivens* claim lacks.

Id. at 54a.

The District Court nonetheless denied the motion to dismiss. According to the District Court "[s]eeking an arrest warrant from a magistrate judge is different from personally handcuffing a suspect, but *both are part and parcel of the seizure of a person*." *Id*. (emphasis added). The District Court likewise held that Special Agent Boresky's status as a Secret Service agent

did not make this a new *Bivens* context, because "the federal agency whose officers were sued in *Bivens* no longer exists" and "a different agency name on the back of an officer's windbreaker" is "insufficient to constitute a new context." *Id*. at 55a.

The District Court concluded that "the special factors counselling hesitation" advanced by Special Agent Boresky were "not persuasive." *Id*. Although "judicial intrusion into matters of national security raises separation-of-powers concerns," the court believed that separation-of-powers concerns exist only in cases challenging "national security *policy*," whereas this case does "not implicate government policy at all." *Id*. at 55a-56a. And the District Court rejected the argument that extending *Bivens* to Secret Service agents like Boresky could "chill[] decisive action in the course of protecting Presidents." *Id*. at 57a.

The District Court separately denied Special Agent Boresky qualified immunity. The court recognized that "Boresky was not at the scene when Plaintiff was arrested," and would "be entitled to qualified immunity if it were objectively reasonable for him to believe, on the basis of" the representations of law enforcement officers on the scene, "that probable cause for the arrest existed." *Id*. at 61a-62a (quotation marks omitted). But the court concluded that discovery was necessary to determine "the content of the statements on which [Special Agent] Boresky relied." *Id*. at 62a.

2. After the District Court declined to dismiss the complaint, Special Agent Boresky requested that the District Court limit the scope of discovery to information pertaining to what he had "heard and what he relied on for his affidavit." *Id*. at 40a (quotation marks omitted). The District Court rejected that request. *Id*.

After further unsuccessful efforts to narrow the scope of discovery, Special Agent Boresky moved for summary judgment, reiterating that Graber lacked a cause of action under *Bivens* and that qualified immunity foreclosed Graber's claims.

At summary judgment, a senior Secret Service official provided a sworn declaration explaining that the "Secret Service has grave concerns if its law enforcement sensitive protective techniques, methodologies, and sources regarding protectees, including the President of the United States, are disclosed." *Id*. at 76a. "Our adversaries are constantly seeking to gather information that could assist them" in harming "our Nation's leaders." *Id*. at 77a. "Any release of sensitive information" during discovery or trial "could be one piece of information that could be combined with others to better understand our protective methods and their strengths and weaknesses." *Id*.

The District Court denied Boresky's motion for summary judgment, holding that Graber was entitled to document discovery and depositions. *Id*. at 45a.

3. Special Agent Boresky noticed an appeal of the order denying summary judgment. His brief on appeal challenged the District Court's ruling that Graber could assert a *Bivens* claim in this new context, but did not challenge the District Court's denial of qualified immunity. Over Judge Hardiman's dissent, the Third Circuit held that a "*Bivens* ruling is not a final decision and is not appealable under the collateral order doctrine," and that the court therefore lacked "jurisdiction to consider that interlocutory ruling." *Id*. at 3a.

The majority recognized that "appellate courts have jurisdiction over interlocutory appeals challenging a

Bivens ruling in a qualified immunity appeal." *Id*. at 7a n.8 (citing *Wilkie*, 551 U.S. at 549 n.4.). But the majority held that it could not review the District Court's extension of *Bivens* because Special Agent Boresky had not piggybacked the *Bivens* challenge on a challenge to the District Court's qualified immunity ruling.

The majority held that it could exercise jurisdiction over the *Bivens* question standing alone only if a decision extending *Bivens* constitutes an immediately appealable collateral order—that is, if it "(1) 'conclusively determine[s] the disputed question'; (2) 'resolve[s] an important issue completely separate from the merits of the action'; and (3) [is] 'effectively unreviewable on appeal from a final judgment.' " *Id*. at 8a (quoting *Will* v. *Hallock*, 546 U.S. 345, 349 (2006)). According to the majority, a ruling extending *Bivens* fails the final element of that test. The majority asserted that "a *Bivens* ruling can be effectively reviewed after final judgment because, unlike various immunity doctrines, a *Bivens* ruling is not meant to protect a defendant from facing trial." *Id*. at 9a. In the majority's view, *Bivens* "is not an immunity doctrine," and so does not qualify for immediate review by a court of appeals. *Id*. at 10a.

4. Judge Hardiman dissented, explaining his belief that this Court would "allow interlocutory appeals in cases like this one—where the constitutional separation of powers is imperiled." *Id*. at 16a (Hardiman, J., dissenting). He recognized that courts "must police the parameters of the collateral order class 'stringently.' " *Id*. at 20a (alteration omitted). But he maintained that decisions extending *Bivens* satisfy the requirements for an immediate appeal because

they "imperil a particular value of a high order and substantial public interest: the Constitution's separation of the legislative and judicial powers." *Id*. at 23a (cleaned up).

Judge Hardiman explained that a decision extending *Bivens* readily satisfies the first two requirements of the collateral-order doctrine—a point the majority did not dispute. A "decision authorizing a *Bivens* cause of action resolves an important question of law separate from the claim's merits" because whether a federal officer committed a constitutional violation "is legally distinct from whether [the] claim is cognizable under *Bivens*." *Id*. at 27a-28a. And "a decision authorizing a *Bivens* cause of action conclusively determines whether the claim can be maintained." *Id*. at 29a.

As for the final requirement of the collateral-order doctrine, Judge Hardiman explained that an order is effectively unreviewable if it "denies a potentially dispositive pretrial defense that implicates a sufficiently important public value." *Id*. at 17a. In Judge Hardiman's view, "protecting the constitutional command of separation of powers against the impermissible assertion of authority by the federal courts is an imperative worthy of immediate enforcement." *Id*. at 24a-25a (cleaned up). He added that the majority erred in treating as dispositive that *Bivens* is not an immunity doctrine. Not "every denial of an immunity defense warrants interlocutory review," and "not every collateral order denies an immunity claim." *Id*. at 21a. To the extent the analogy to immunity matters, however, he explained that this Court's *Bivens* jurisprudence furthers the same principles underlying immunity. Unwarranted extensions of *Bivens* "disrupt[] effective

governance, subjecting officers to the same 'distraction from duty' that qualified immunity is meant to foreclose." *Id*. at 26a (quoting *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 881 (1994)).

Given his conclusion that the extension of *Bivens* was immediately appealable, Judge Hardiman proceeded to explain why the District Court's "decision to authorize [a] *Bivens* cause of action" in this case contradicted multiple "recent Supreme Court decisions." *Id*. at 34a. This "Court has repeatedly refused to extend *Bivens* beyond the *specific clauses* of the specific amendments for which a cause of action has already been implied." *Id*. at 32a (quotation marks omitted). But the District Court extended *Bivens* to an entirely new constitutional provision—the Warrant Clause of the Fourth Amendment. *See id*. If "that weren't enough, [the] intrusion into the Secret Service's management of the government's response to security breaches occurring at National Special Security Events would also disrupt the workings of the political branches." *Id*. at 32a. And "multiple special factors counsel hesitation." *Id*. at 33a. Congress has legislated in this specific arena—individuals may file complaints regarding the Secret Service with an Inspector General, who has the power to "investigate alleged civil rights abuses." *Id*. Additionally, authorizing a *Bivens* remedy here would "interfere with sensitive Executive-branch functions" and raise significant national-security concerns. *Id*.

Special Agent Boresky sought *en banc* review, which the Third Circuit denied. This petition follows.

REASONS FOR GRANTING THE PETITION

This Court has recently and emphatically made clear that "recognizing a cause of action under *Bivens* is a disfavored judicial activity" and that if "there is even a single reason to pause before applying *Bivens* in a new context, a court may not recognize a *Bivens* remedy." *Egbert*, 142 S. Ct. at 1803 (quotation marks omitted). "[C]reating a cause of action is a legislative endeavor." *Id*. at 1802. "It has no place in federal courts charged with deciding cases and controversies under existing law." *Id*. at 1810 (Gorsuch, J., concurring in the judgment).

Many lower courts, however, have not heeded that message. This petition presents the question whether district court decisions erroneously extending *Bivens* can be corrected immediately on appeal, or whether federal officials must await the outcome of discovery or trial before obtaining appellate review. The question is recurring, it has divided the courts of appeals, it presents an exceptionally important separation-of-powers question, and this case is an ideal vehicle to address it. This Court should grant the petition.

I. THE DECISION BELOW IS WRONG.

This Court has repeatedly held that courts of appeals have jurisdiction over interlocutory appeals to address whether a *Bivens* cause of action exists. *See Iqbal*, 556 U.S. at 673; *Wilkie*, 551 U.S. at 549 n.4; *Hartman*, 547 U.S. at 257 n.5. That uncontroversial practice follows from the fact that decisions extending *Bivens* fit the collateral-order doctrine hand-in-glove.

A. This Court Has Repeatedly Exercised Jurisdiction Over Interlocutory *Bivens* Decisions.

On multiple occasions, this Court has exercised jurisdiction over interlocutory appeals to review decisions extending *Bivens*.

In *Hartman*, this Court rejected the argument that it "exceed[ed]" its "appellate jurisdiction" by addressing what elements the plaintiff was required to prove to prevail in a *Bivens* case. 547 U.S. at 257 n.5. Even though that question did not involve qualified immunity per se, the "definition of an element of the tort" was "directly implicated by the defense of qualified immunity and properly before [this Court] on interlocutory appeal." *Id*.

In *Wilkie*, the Court held that federal appellate courts may hear interlocutory appeals of decisions erroneously creating a new *Bivens* cause of action—the exact type of decision at issue in this case. In an interlocutory appeal, the Court held that it possessed jurisdiction to consider "whether to devise a new *Bivens* damages action." *Id.* at 549. The Court added that the "same reasoning" it had applied in *Hartman* "applies to the recognition of the entire cause of action" under *Bivens*. *Id*. at 549 n.4. That meant "the Court of Appeals had jurisdiction over" the question whether to extend *Bivens* into a new context, as did this Court. *Id*.

This Court's decision in *Iqbal* followed suit. Before reaching the question whether the plaintiffs there adequately stated a *Bivens* claim, this Court held that it possessed jurisdiction to decide the interlocutory appeal "under the collateral-order doctrine." 556 U.S. at

671. The Court explained that its jurisdiction to review an immediate appeal of orders denying qualified immunity permitted the Court to address the threshold question whether the complaint stated a claim. *See id*. at 673. The Court rejected the argument that its jurisdiction extended to deciding *only* whether a "complaint avers a clearly established constitutional violation" for purposes of qualified immunity. *Id*. Instead, there is a "category of appealable decisions" which are "both inextricably intertwined with, and directly implicated by, the qualified-immunity defense," and may be the subject of an interlocutory appeal. *Id*. (quotation marks omitted). Thus, the "District Court's order denying petitioners' motion to dismiss [was] a final decision under the collateral-order doctrine over which the Court of Appeals had, and this Court ha[d], jurisdiction." *Id*. at 675.

Hartman, *Wilkie*, and *Iqbal* establish that there is a "category of appealable" decisions under *Bivens* not limited to the question whether the plaintiff has adequately averred a clearly established constitutional violation. *Iqbal*, 556 U.S. at 673. That category includes decisions improperly recognizing an "entire" new "cause of action" under *Bivens*. *Wilkie*, 551 U.S. at 549 n.4. Because the existence of a *Bivens* cause of action is " 'antecedent' to" the question of qualified immunity, *Hernandez*, 582 U.S. at 553 (quoting *Wood*, 572 U.S. at 757), appellate courts may hear appeals to consider "whether to devise a new *Bivens* damages action." *Wilkie*, 551 U.S. at 549. The order here is therefore "on all fours with orders" this Court has already "held to be appealable." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 115 (2009) (Thomas, J., concurring in part and concurring in the judgment).

B. A District Court Decision Extending *Bivens* Satisfies The Collateral-Order Doctrine.

It comes as no surprise that this Court has repeatedly exercised jurisdiction over interlocutory *Bivens* decisions. A district court's decision extending *Bivens* meets each requirement for "selective" "membership" in "the class of collaterally appealable orders." *Mohawk*, 558 U.S. at 113 (quoting *Will*, 546 U.S. at 350). As Judge Hardiman explained, such decisions "(1) are conclusive, (2) resolve important questions separate from the merits, and (3) are effectively unreviewable on appeal from the final judgment." Pet. App. 16a-17a (Hardiman, J., dissenting) (quotation marks omitted).

Decisions extending *Bivens* satisfy the first two criteria, as the majority did not dispute. *See id.* at 12a-13a n.12 (majority op.). A "decision authorizing a *Bivens* cause of action resolves an important question of law separate from the claim's merits." *Id*. at 27a (Hardiman, J., dissenting). And "a decision authorizing a *Bivens* cause of action conclusively determines whether the claim can be maintained." *Id*. at 29a (citing *Hernandez* v. *Mesa*, 140 S. Ct. 735, 743 (2020) ("*Hernandez II*")).

Bivens decisions also satisfy the third criterion: An order extending *Bivens* is effectively unreviewable after a final judgment. An order is effectively unreviewable if "delaying review" "would imperil a substantial public interest or some particular value of a high order." *Mohawk*, 558 U.S. at 107 (quotation marks omitted); *see Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring) ("The importance of the right asserted has always been a significant part of our collateral order doctrine."); Pet. App. 20a

(Hardiman J., dissenting) ("The touchstone for that criterion is the importance of the values imperiled by an erroneous ruling."). Important public values warranting immediate appeal include threats to "the separation of powers," disruption of "governmental functions," and the inhibition of federal officers "from exercising discretion in public service." *Will*, 546 U.S. at 352 (quotation marks omitted).

In assessing this criterion, this Court considers "the entire category to which a claim belongs." *Mohawk*, 558 U.S. at 107 (quoting *Digital Equip.*, 511 U.S. at 868). If a "class of claims, taken as a whole" cannot be "adequately vindicated by other means," that class of claims merits an immediate interlocutory appeal. *Id*. As a class, orders fashioning new *Bivens* causes of action threaten important public values and are effectively unreviewable after a final judgment.

An extension of *Bivens* " 'imperils' the separation of powers." Pet. App. 30a (Hardiman, J., dissenting) (quoting *Mohawk*, 558 U.S. at 108). It is Congress's job to weigh "the costs and benefits of" authorizing intrusions into the workings of the Executive Branch. *Egbert*, 142 S. Ct. at 1810 (Gorsuch, J., concurring in the judgment); *see Cummings* v. *Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576 (2022) (Kavanaugh, J., concurring) ("Congress, not this Court, creates new causes of action."). That fundamental separation-of-powers principle explains why this Court no longer implies new "causes of action under the Constitution." *Egbert*, 142 S. Ct. at 1802 (majority op.). Whenever a district court authorizes a new and unwarranted *Bivens* action, the court upsets "the careful balance of interests struck by the lawmakers."

Nestlé USA, Inc. v. *Doe*, 141 S. Ct. 1931, 1938 (2021) (quotation marks omitted).

Such decisions also disrupt the workings of the Executive Branch. The Department of Justice must divert resources to the officer's "defense and indemnification," and bear "the time and administrative costs attendant upon intrusions resulting from the discovery and trial process." *Abbasi*, 582 U.S. at 134. Discovery itself can be deeply damaging to the public interest. In this case, for example, "release of sensitive information" regarding National Special Security Events could assist America's "adversaries" in planning an attack on the homeland. Pet. App. 77a.

Orders extending *Bivens* are also exceptionally disruptive for individual federal officials like Special Agent Boresky. Litigation distracts from their responsibilities and chills their performance of official duties. It likewise chills the initiative of other federal officers, who see their fellow public servants mired in burdensome litigation. *Id*. at 26a (Hardiman J., dissenting) (citing *Digital Equip.*, 511 U.S. at 881). This chilling effect is particularly dangerous in cases implicating "foreign policy and national security." *Egbert*, 142 S. Ct. at 1804-05 (quoting *Haig* v. *Agee*, 453 U.S. 280, 292 (1981)). The "risk of personal damages liability" can "cause an official to second-guess difficult but necessary decisions concerning" the safety of the nation. *Abbasi*, 582 U.S. at 142.

None of these costs can "be undone even if the officer is acquitted," or if the government prevails in a post-judgment appeal. Pet. App. 26a (Hardiman, J., dissenting). In many cases, post-judgment vindication might come years later. By that point, a district court will have already overseen intrusive discovery into

the Executive Branch. And it is impossible to recoup its lost resources or repair the damage to its personnel.

These separation-of-powers costs are all the more unjustifiable because decisions extending *Bivens* will almost always be wrong. In deciding whether a class of orders is immediately appealable, this Court considers whether the orders are "unlikely to be reversed on appeal." *Mohawk*, 558 U.S. at 110. Decisions extending *Bivens* are not just likely to be reversed—they are nearly assured to be reversed. *See Egbert*, 142 S. Ct. at 1803; *see also id.* at 1810 (Gorsuch, J., concurring in the judgment) ("If the costs and benefits do not justify a new *Bivens* action on facts so analogous to *Bivens* itself, it's hard to see how they ever could."). It makes little sense to require federal officials to incur substantial burdens as they await their appeal from final judgment given that appeals will almost always confirm that the case should have been dismissed at the threshold.

This case illustrates the problem. As Judge Hardiman explained, the District Court's decision extending *Bivens* below was indefensible. The court authorized a cause of action for an entirely new "constitutional provision"; against an officer who was not on scene during an arrest; in ways that intrude into the "Secret Service's management of the government's response to security breaches occurring at National Special Security Events"; when Congress has established an "alternative remedial process." Pet. App. 32a-33a (Hardiman, J., dissenting). It makes no sense to require Special Agent Boresky to litigate this case through discovery and possibly trial only to have the court of appeals years later declare what was clear

from the outset—the novel *Bivens* action never should have proceeded in the first place.

C. The Third Circuit's Approach Is Wrong.

In refusing to exercise jurisdiction over the District Court's unconstitutional extension of *Bivens*, the Third Circuit fundamentally misconstrued this Court's precedent and the separation-of-powers costs associated with extending *Bivens*.

First, the majority erred by reading *Wilkie* as applying a limited theory of pendant jurisdiction that requires a federal defendant seeking to appeal an extension of *Bivens* to piggyback on an appeal of qualified immunity. The majority recognized that it "would have had jurisdiction" to review the district court's extension of *Bivens* if Special Agent Boresky had also challenged "the qualified immunity ruling." Pet. App. 7a-8a & n.8 (citing *Wilkie*, 551 U.S. at 549 n.4). But the majority held that, because Special Agent Boresky's brief did not dispute qualified immunity, the court of appeals lacked pendent jurisdiction to decide the *Bivens* issue.

That logic fundamentally misconstrues this Court's precedent. *Wilkie* "did not apply the pendent appellate jurisdiction test." *Pettibone* v. *Russell*, 59 F.4th 449, 453 (9th Cir. 2023). As this Court has explained, the question whether to recognize the entire cause of action under *Bivens* is " 'antecedent' to" the question of qualified immunity. *Hernandez*, 582 U.S. at 553 (quoting *Wood*, 572 U.S. at 757). An erroneous decision extending *Bivens* is as much a part of the ultimate qualified immunity determination as the question whether the law is clearly established. *See Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). Just as a federal official may choose to contest solely the

question whether the law is clearly established in an interlocutory *Bivens* appeal, the official may similarly contest solely the existence of an underlying *Bivens* claim. In either scenario, the federal official contests the same underlying judgment allowing litigation to proceed against the federal officer—and that judgment is immediately appealable. *See Iqbal*, 556 U.S. at 673.

The Third Circuit's contrary approach makes little sense. It allows courts of appeals to address whether to extend *Bivens* if the federal official also disputes qualified immunity, but prohibits courts of appeals from evaluating the exact same question if the federal official challenges only the extension of *Bivens* and does not separately challenge qualified immunity. This result is particularly incongruous given that the two issues will often be decided in the same judgment. The District Court's summary-judgment order below, for example, rejected both Special Agent Boresky's *Bivens* argument and his claim to qualified immunity. "This Court, like all federal appellate courts, does not review lower courts' opinions, but their judgments." *Jennings* v. *Stephens*, 574 U.S. 271, 277 (2015). Given that the judgment below rejected a claim to qualified immunity, it was undisputedly appealable. Under the Third Circuit's approach, that judgment became non-appealable at some undefined later date, perhaps when the Department of Justice's brief for Special Agent Boresky chose not to challenge qualified immunity.

Second, the majority misunderstood what it means for an order to be effectively unreviewable after final judgment. According to the majority, "a *Bivens* ruling can be effectively reviewed after final judgment

because, unlike various immunity doctrines, a *Bivens* ruling is not meant to protect a defendant from facing trial." Pet. App. 9a. But, as Judge Hardiman explained, "immunity is neither sufficient nor necessary for an order denying a claim to be 'effectively unreviewable on appeal.' " *Id*. at 17a (Hardiman, J., dissenting). Rather, the collateral-order doctrine asks whether "an order denies a potentially dispositive pretrial defense that implicates a sufficiently important public value." *Id*. Decisions fashioning new *Bivens* remedies meet that standard.

Even if immunity were the touchstone for appealability, however, *Bivens* decisions would still qualify for an immediate appeal. This Court's *Bivens* jurisprudence seeks to protect officers against "the same distraction from duty that qualified immunity is meant to foreclose." *Id*. at 26a (Hardiman, J., dissenting) (quotation marks omitted). Indeed, rulings impermissibly extending *Bivens* satisfy the collateral-order doctrine even more clearly than denials of immunity. Rulings extending *Bivens* implicate the same "compelling public ends," "rooted in the separation of powers" as denials of immunity. *Will*, 546 U.S. at 352 (cleaned up). But rulings extending *Bivens* are much more clearly "completely separate from the merits of the action," *id*. at 349 (quotation marks omitted), than denials of qualified immunity, which often overlap with the merits.

Third, the majority below erred by relying on dictum in *Will* to suggest that courts of appeals should not hear interlocutory *Bivens* appeals without an immunity hook. *See* Pet. App. 11a-12a. The proper reading of *Will* only confirms that an interlocutory appeal is warranted here. *Will* addressed the question whether

a district court's "refusal to apply the judgment bar of the Federal Tort Claims Act" in a *Bivens* action may be immediately appealed. 546 U.S. at 347. The judgment bar precludes a subsequent *Bivens* suit after a plaintiff receives a judgment in a tort action against the federal government. *Id*. at 355; *see* 28 U.S.C. § 2676. *Will* held that an order declining to apply the judgment bar did not qualify as an immediately appealable collateral order because the judgment bar is a procedural provision that avoids "duplicative litigation" against the federal government but does not prevent litigation altogether. 546 U.S. at 354. Distinguishing the judgment bar from qualified immunity, the Court explained that the "closer analogy" was "not immunity but the defense of claim preclusion, or res judicata." *Id.*

In sharp contrast, this Court's precedent foreclosing new *Bivens* causes of action protects the separation of powers and prohibits intrusive litigation against the Executive Branch entirely. *Will* itself recognized that orders that threaten "the separation of powers," undermine "the efficiency of government," and chill "the initiative of its officials" are immediately appealable. *Id*. at 352-353. That describes decisions extending *Bivens*.

The majority below highlighted a sentence of *Will* stating "that 'if simply abbreviating litigation troublesome to Government employees were important enough for [collateral order] treatment, [then] collateral order appeal would be a matter of right whenever * * * a federal officer lost' " a motion to dismiss "on a *Bivens* action." Pet. App. 11a (quoting *Will*, 546 U.S. at 353-354). As Judge Hardiman explained, the majority "put" too much "stock" in this "drive-by dictum."

Id. at 19a (Hardiman, J., dissenting). *Will*'s "substantive points" strongly support the conclusion that a decision extending *Bivens* is effectively unreviewable after final judgment. *Id*. But if there were any doubt, this Court should grant this petition and clarify its own opinion in *Will*.

Third, the majority below invoked the need to maintain "stringent" limitations on the collateral-order doctrine to ensure that it does not "overpower the substantial finality interests § 1291 is meant to further." Pet. App. 8a (quotation marks omitted). But these interests cut entirely in favor of immediate review where a district court extends *Bivens*. While interlocutory appeals can "unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals," *Mohawk*, 558 U.S. at 112, the immediate appeal of a *Bivens* decision facilitates the speedy and proper resolution of the entire action. *See id*.

Nor is this a case warranting deference to "Congress's designation of the rulemaking process" as the means for determining which orders qualify as immediately appealable. *Id.* at 114-115 (Thomas, J., concurring in part and concurring in the judgment) (quotation marks omitted). Because *Bivens* was a remedy created by this Court rather than Congress, it is this Court's role to establish procedures for ensuring that *Bivens* is not improperly expanded.

II. THE COURTS OF APPEALS ARE SPLIT.

The question whether federal officials may immediately appeal district court decisions expanding *Bivens* has divided the courts of appeals. This split turns entirely on the proper interpretation of this Court's precedent, which only this Court can resolve. The Court

should step in to restore uniformity across the circuits.

1. In addition to the Third Circuit below, the Sixth Circuit has held that a federal officer cannot challenge a decision fashioning a new *Bivens* remedy in an immediate appeal unless the officer piggybacks on a challenge to the denial of qualified immunity.

In *Himmelreich* v. *Federal Bureau of Prisons*, 5 F.4th 653 (6th Cir. 2021), a district court fashioned a new *Bivens* cause of action "for retaliation in violation of the First Amendment." *Id*. at 656. By the time the Sixth Circuit heard the appeal, Sixth Circuit precedent foreclosed First Amendment *Bivens* claims—a holding this Court later endorsed. *See Egbert*, 142 S. Ct. at 1807 ("[T]here is no *Bivens* action for First Amendment retaliation."); *Callahan* v. *Fed. Bureau of Prisons*, 965 F.3d 520, 525 (6th Cir. 2020) (Sutton, J.) (declining "to recognize a new *Bivens* action for free speech claims in prisons").

Instead of following its own *Bivens* precedent and vindicating the separation of powers, however, the Sixth Circuit held that it lacked jurisdiction over the *Bivens* appeal. *Himmelreich*, 5 F.4th at 658-659. According to the Sixth Circuit, a court of appeals may only hear an appeal of a district court's extension of *Bivens* if the appeal is coupled with a challenge to the denial of qualified immunity. The Sixth Circuit found it significant that, in "*Hartman*, *Wilkie*, and *Iqbal*, the appellate courts already had jurisdiction over the appeals challenging the district courts' denial of qualified immunity." *Id*. at 660. While the Sixth Circuit purported to reject the proposition that these cases reflected an application of "pendent appellate jurisdiction," the Court maintained that a court must

"anchor[] its appellate jurisdiction in the defendants' appeal of the district court's denial of qualified immunity." *Id*. at 661.

Like the Third Circuit below, the Sixth Circuit held that decisions fashioning a new *Bivens* remedy were not immediately appealable under the collateral-order doctrine because such decisions are effectively reviewable after a final judgment. According to the Sixth Circuit, "[u]nlike qualified immunity," *Bivens* "does not grant defendants an entitlement not to stand trial," and thus does not merit an immediate appeal. *Id*. at 662.

2. In contrast to the Third and Sixth Circuits, the Ninth Circuit has correctly recognized that courts of appeals have jurisdiction over district court decisions expanding *Bivens*. In *Pettibone*, a federal official appealed a district court decision permitting a *Bivens* cause of action to proceed. *See* 59 F.4th at 452, 455. The Ninth Circuit exercised jurisdiction and reversed, holding that the district court had improperly extended *Bivens*. *Id*. at 453-455.

In the "interlocutory appeal," the federal defendant's "principal argument [was] that no *Bivens* cause of action [was] available here." *Id*. at 452. The defendant also challenged the district court's denial of qualified immunity. *Id.* The plaintiff disputed the Ninth Circuit's jurisdiction over the *Bivens* question, arguing that the court could "consider the *Bivens* issue only if" the court possessed "pendent appellate jurisdiction over it—that is, only if it is inextricably intertwined with or necessary to ensure meaningful review of' " the qualified immunity issue "over which [the Ninth Circuit had] interlocutory jurisdiction." *Id*. (cleaned up). Applying *Wilkie*, the Ninth Circuit disagreed. As

the Ninth Circuit explained, *Wilkie* "did not apply the pendent appellate jurisdiction test." *Id*. at 453. Rather this "Court said, without elaboration, that the recognition of the underlying *Bivens* cause of action was 'directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal.' " *Id*. (quoting *Wilkie*, 551 U.S. at 549 n.4). As a result, the Ninth Circuit possessed "jurisdiction to decide whether an underlying *Bivens* cause of action exists." *Id*.

3. The question presented is at issue in three other pending cases. *See Garraway* v. *Ciufo*, No. 23-15482 (9th Cir.); *Mohamed* v. *Jones*, No. 22-1453 (10th Cir.); *Fleming* v. *FCI Tallahassee Warden*, No. 23-10252 (11th Cir.). In each case, a federal official named as a *Bivens* defendant has appealed from a district court's decision extending *Bivens* but has chosen not to challenge the denial of qualified immunity. One or more of these cases may be resolved by the time this Court considers this petition, in which case the circuit split will be deeper and the need for this Court's review more apparent.

Even if these appeals have not been resolved by the time this Court considers the petition, however, review in this case remains warranted. Because the circuits are already split on this important question, this Court's review will ultimately be necessary regardless of how these courts rule. Further percolation will not aid this Court's consideration given that the arguments on both sides of the question have been fully ventilated. Most importantly, delaying review will impose substantial and undue costs on federal officials like Special Agent Boresky forced to endure unjustified *Bivens* litigation in the meantime.

III. THE QUESTION PRESENTED IS IMPORTANT AND THIS CASE IS AN EXCELLENT VEHICLE.

The question presented is exceptionally important. The Court has repeatedly instructed federal courts to cease creating new *Bivens* causes of action. *See Egbert*, 142 S. Ct. at 1803; *Hernandez II*, 140 S. Ct. at 742; *Abbasi*, 582 U.S. at 134-135. Yet some district courts continue to usurp Congress's role through adventuresome decisions extending *Bivens*.

Immediate appellate review of these erroneous decisions is imperative. When an unnecessary *Bivens* action proceeds, it diverts critical resources and undermines the workings of the Executive Branch. In this very case, disclosure of the Secret Service's protocols for National Special Security Events could assist America's adversaries in planning attacks. *See* Pet. App. 77a. When a federal official cannot appeal until final judgment, the other Branches lose as well. Every *Bivens* case upsets the balance that Congress has struck and allows judicial usurpation of the lawmaking power. *See Nestlé*, 141 S. Ct. at 1938. And unwarranted *Bivens* suits cause district courts to waste scare resources on proceedings, up to an including trial, that have no chance of survival on appeal.

In addition to these institutional costs to all three Branches, unnecessary *Bivens* litigation imposes profound costs on the individuals involved. The federal defendant must live for months or years with the threat of potentially ruinous liability hanging overhead. Even if the defendant ultimately prevails, the litigation's mere existence has damaging consequences. It distracts from the defendant's official duties, deters the defendant in the exercise of his or her job functions, and affects many other aspects of the

defendant's life. A loan application, for example, may ask whether the official is a defendant in civil litigation, impeding the official's ability to buy a car or sign a mortgage.[1] And plaintiffs, too, are harmed when federal officials cannot immediately appeal erroneous *Bivens* decisions. Plaintiffs may waste considerable sums prosecuting a *Bivens* claim through expensive discovery and trial, only for the court of appeals to reverse the matter after a final judgment because there is no cause of action.

It is no answer that the decision below allows federal officers to obtain interlocutory review of *Bivens* decisions, but *only if* they couple their challenge with arguments regarding qualified immunity. That approach is rank formalism. A court of appeals' jurisdiction to correct an erroneous *Bivens* decision should not turn on whether the officer's brief on appeal mentions qualified immunity.

That is especially true given that a qualified-immunity appeal will often be unavailable. The denial of qualified immunity is immediately appealable only "to the extent that it turns on an issue of law." *Forsyth*, 472 U.S. at 530. Fact-bound denials of qualified immunity thus cannot be immediately appealed, even when the threshold *Bivens* question is ripe for resolution. *See Johnson* v. *Jones*, 515 U.S. 304, 313 (1995). Moreover, qualified immunity often cannot be resolved at the motion-to-dismiss stage. *See Jacobs* v. *City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring in part and concurring in

---

[1] *See* Aaron Crowe, *5 Things That Can Sink a Mortgage Application*, Mortgageloan.com, *available at* https://tinyurl.com/ypvyx3zn ("Being a party to a lawsuit makes lenders nervous.").

the judgment) ("Rule 12(b)(6) is a mismatch for immunity and almost always a bad ground of dismissal."). A defendant therefore may have no basis to appeal on the immunity question at the motion-to-dismiss stage, in which case the *only* issue for appeal will be the threshold *Bivens* issue. *See Abbasi*, 582 U.S. at 140 (declining to extend *Bivens* to a new context at the motion-to-dismiss stage). Even in cases where the denial of qualified immunity can be appealed, circuit precedent may foreclose qualified immunity on the merits by clearly establishing the constitutional violation. *See Wilkie*, 551 U.S. at 548 (circuit court found "a clearly established right to be free from retaliation" even where no *Bivens* cause of action existed). In all of these circumstances, a federal official cannot piggyback on a qualified-immunity appeal to obtain review of the threshold *Bivens* question.

The risk that decisions extending *Bivens* will be unreviewable until final judgment is far from hypothetical. *Bivens* defendants are federal officials, and, like Special Agent Boresky, they are almost always represented by the Department of Justice in district court and on appeal. The Solicitor General must authorize an appeal on behalf of the Department from an adverse district court ruling. "Unlike a private litigant who generally does not forego an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors * * * before authorizing an appeal." *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984). The Solicitor General may be reluctant to approve a qualified-immunity appeal for a host of institutional reasons, even though the threshold *Bivens* question plainly warrants immediate review. The growing number of appeals in which the Department has

challenged district court *Bivens* rulings without challenging the denial of qualified immunity confirms as much.

The decision below would "force the Solicitor General" to choose between two problematic options—either "abandon [her] prudential concerns" and lodge dubious immunity appeals to manufacture review of clearly erroneous *Bivens* decisions, or forego interlocutory appeal of erroneous *Bivens* decisions and incur the substantial attendant harms. *See id.* There is no justification for putting the Solicitor General to such an unbefitting choice.

This petition is a clean vehicle to decide the important question presented. The question presented was fully litigated below, and was directly addressed in both a thorough majority and dissenting opinion. Because the Third Circuit chose to publish its decision, the decision will be binding on all future Third Circuit panels. This Court's review is warranted, and there is no reason to wait.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
WILLIAM E. HAVEMANN
NATHANIEL A.G. ZELINSKY
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

OCTOBER 2023