

No. _____

In the
Supreme Court of the United States

OFFICER GERALD L. FERREYRA, in his individual capacity;
OFFICER BRIAN A. PHILLIPS, in his individual capacity,

Petitioners,

v.

NATHANIEL HICKS,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

**APPLICATION TO CHIEF JUSTICE JOHN G. ROBERTS, JR.
FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR WRIT OF CERTIORARI**

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August 11, 2023

**TO: THE HONORABLE JOHN G. ROBERTS, JR.,
CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE
FOR THE FOURTH CIRCUIT**

Pursuant to Supreme Court Rule 13.5, Petitioners Gerald Ferreyra and Brian Phillips respectfully request a 29-day extension of the time to file a petition for a writ of certiorari up to and including September 22, 2023. The United States Court of Appeals for the Fourth Circuit issued its decision on March 29, 2023, *see* Attachment A, and denied rehearing en banc on May 26, 2023, *see* Attachment B. Absent an extension, a petition for certiorari would be due on August 24, 2023. This application is timely because it has been filed more than ten days before the date on which the petition is otherwise due. S. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

1. Because recognizing a *Bivens* action “is ‘a disfavored judicial activity,’” it is settled that no *Bivens* claim may lie where “there is *any* rational reason . . . to think that *Congress* is better suited to ‘weigh the costs and benefits of allowing a damages action to proceed.’” *Egbert v. Boule*, 142 S. Ct. 1793, 1803, 1805 (2022) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 135, 136 (2017)). Two such reasons that create a new *Bivens* context and foreclose *Bivens* relief are when “the constitutional right at issue” or “the statutory or other legal mandate under which the officer was operating” meaningfully differs from *Bivens* itself, which involved a warrantless home search by federal narcotics officers. *Ziglar*, 582 U.S. at 140. The decision below deepens two already entrenched circuit splits concerning whether a court can extend *Bivens* to Fourth Amendment claims that do not concern the search of a home, or to

Fourth Amendment claims against officers of an agency operating under a different legal mandate. This Court’s review of these important issues is urgently needed.

2. Petitioners are two U.S. Park Police officers who detained Respondent Nathaniel Hicks in July 2015 during both an hour-long “welfare check” and a brief traffic stop lasting “a few minutes.” *Hicks v. Ferreyra*, 64 F.4th 156, 163 (4th Cir. 2023). The first detention occurred after Petitioner Gerald Ferreyra found Respondent asleep in a vehicle parked along a highway near the headquarters of the National Security Agency, with a “handgun in a ‘holstered case’” on the front passenger seat. *Id.* at 162, 168 n.3. Respondent explained that he was an on-duty Secret Service agent waiting in an unmarked car to join a motorcade carrying a Cabinet-level Secretary, and Petitioners detained him until their supervisor could confirm his Secret Service status. *Id.* at 162–63. Then, after Agent Hicks drove away, he was pulled over and briefly detained by Officer Phillips. *Id.* at 163.

3. Respondent subsequently brought a *Bivens* claim against Petitioners, alleging that they violated his Fourth Amendment rights by unlawfully prolonging the welfare check and conducting the brief traffic stop. *Id.* During a jury trial, the district court denied Petitioners’ Rule 50(a) motion for judgment as a matter of law, which argued that a *Bivens* action was not available and that Petitioners were entitled to qualified immunity. *Id.* at 164. The jury awarded Respondent \$730,000 in compensatory and punitive damages: \$305,000 against Officer Ferreyra and \$425,000 against Officer Phillips. *Id.* In denying Petitioners’ post-trial motions, the district court ruled that this case “do[es] not present either a new [*Bivens*] context or

a new category of defendants,” notwithstanding that the alleged violations occurred during a welfare check and traffic stop, not during a warrantless home search as in *Bivens*, and that Petitioners are U.S. Park Police officers, not narcotics officers like those in *Bivens*. *Hicks v. Ferreyra*, 582 F. Supp. 3d 269, 283 (D. Md. 2022).

4. The Fourth Circuit affirmed. It too failed to find a meaningful distinction between the welfare check or stop of Respondent’s vehicle and the warrantless home search in *Bivens*. Despite recognizing the different legal standards that apply to those different contexts, the court concluded there was no new *Bivens* context because the different standards “do[] not alter the constitutional right at issue or its application to the routine enforcement of criminal laws.” *Hicks*, 64 F.4th at 168. The court of appeals likewise failed to draw any distinction between U.S. Park Police and narcotics officers, but instead categorically asserted that any conduct involving “line officers performing routine criminal law enforcement duties” does not create a new *Bivens* context. *Id.* The court of appeals subsequently denied Petitioners’ motion for rehearing en banc. *See* Attachment B.

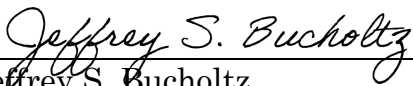
5. Petitioners intend to file a petition for a writ of certiorari. The Fourth Circuit’s decision deepens two deep and intractable circuit splits regarding the availability of *Bivens* actions. One circuit split concerns whether a *Bivens* action is available to remedy Fourth Amendment violations occurring outside the context of a home search. The second circuit split concerns whether a *Bivens* action is available against officers operating under a different legal mandate than the narcotics officers in *Bivens*. These issues are immensely important. Given the frequency of traffic

stops and the ubiquity of federal officers who enforce laws that are meaningfully different from federal narcotics laws, upholding the *Bivens* action in this case would “entail[] substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties” in broad swathes of cases. *Egbert*, 142 S. Ct. at 1807 (citation omitted).

6. Petitioners respectfully request an extension of 29 days, to and including September 22, 2023, to prepare a petition for certiorari. An extension is necessary to enable undersigned counsel, who are newly retained, to review and analyze the record below and to coordinate closely with other counsel. The requested extension would not cause material delay, as this Court could still hear the case during the upcoming Term.

7. Counsel for Respondent does not oppose the requested extension.

Respectfully submitted,



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