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

REPLY BRIEF IN SUPPORT OF CERTIORARI

ANYA BIDWELL
Counsel of Record
PATRICK JAICOMO
MARIE MILLER
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
abidwell@ij.org

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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Ziglar v. *Abbasi* recognized the "continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose," and said that it should be retained "in that sphere." 137 S. Ct. 1843, 1856–1857 (2017).

Seven circuits interpret *Abbasi* to mean that a *Bivens* remedy is always available for "garden-variety" Fourth Amendment claims against line-level federal police. Pet. 13–16, 27–28. Two circuits interpret *Abbasi* to mean that judicial redress is no longer available for "[v]irtually everything beyond the specific facts of * * * *Bivens*." Pet. App. 9a (cleaned up); Pet. 16–19.

Respondent (at 9, 19) dismisses the seriousness of the split by pointing to minor factual differences between the cases, while at the same time telling the Court that "a clear overruling of *Bivens*—rather than a silent burial" is needed, since the *Abbasi* "test has proven unworkable."

On this latter point, petitioner and respondent agree. As evidenced by the split, the test has indeed proven unworkable, and that is precisely why this Court's guidance is badly needed. Importantly, neither *Ziglar* v. *Abbasi* nor *Hernandez* v. *Mesa*—the Court's most recent *Bivens* decisions—dealt with conventional *Bivens* claims such as the one at issue here and therefore could not provide that guidance. The Court's latest *Bivens* grant—*Egbert* v. *Boule*—is also unlikely to provide it because the question presented is explicitely cabined to immigration-related *Bivens* claims.

It is therefore paramount for this Court to grant certiorari in this case and clarify the *Abbasi* standard as it applies to line-level federal police who violate the Fourth Amendment.

I. The circuits are split on both steps of *Abbasi*.

The decision below splits from its sister courts on both steps of *Abbasi*. It splits from six circuits on step one, holding that a routine Fourth Amendment claim involving line-level federal police is meaningfully different, unless it mirrors the facts of *Bivens*. Pet. 13–19. And it splits from one circuit on step two, holding that the judiciary is not well suited to extend a *Bivens* remedy to such claims. Pet. 22–29. The decision below is doubly wrong.

A. The circuits are split 6–3 over the interpretation of the meaningful differences test.

After *Abbasi*, the Fifth, Eighth, and Ninth Circuits split from six other circuits on the application of *Abbasi*'s meaningful differences test. The Fifth Circuit's side of the split holds that any factual difference, however trivial, is still a meaningful difference, and a claim may proceed only if it satisfies *Abbasi*'s step two. Pet. 16–19. The circuits on the other side of the split hold that search-and-seizure claims against federal police for standard law-enforcement operations are not meaningfully different from *Bivens* and thus can proceed. Pet. 13–16.

Respondent (at 9) argues that there is no split at step one because "[t]he different outcomes across the circuits result from different factual allegations, not

differences in circuit law." But even a cursory look at each case proves the opposite: It is the interpretation of *Abbasi*, not factual distinctions, that drives the different outcomes.

The Sixth Circuit, for example, interprets *Abbasi* as taking "great care to emphasize the continued force and necessity of *Bivens* in the search-and-seizure context in which it arose." *Jacobs* v. *Alam*, 915 F.3d 1028, 1037 (2019) (cleaned up). As a result, "run-of-the-mill challenges to standard law enforcement operations * * * fall well within *Bivens*" in that circuit. *Id.* at 1038 (cleaned up). So, a case against U.S. Marshals who shot a resident while searching a home in pursuit of a fugitive was not meaningfully different from *Bivens* and could proceed.

Under the Fifth Circuit's interpretation of *Abbasi*, however, these facts would be meaningfully different. That circuit reads *Abbasi* to mean that "[v]irtually everything beyond the specific facts of * * * *Bivens*" constitutes a meaningful difference. Pet. App. 9a (cleaned up). There, factual distinctions can be as trivial as the type of investigation undertaken, the location of the officer, or the manner in which the officer exercised excessive force. Pet. 17–18. Because the marshals in *Jacobs*, for example, were not performing a narcotics investigation and did not manacle the plaintiff in front of his family or strip-search him, his *Bivens* claim would have been deemed meaningfully different from *Bivens*. Pet. App. 6a–7a (citing as meaningful differences that "Lamb did not manacle Byrd in front of his family, nor strip-search him" and that respondent was not engaged in a narcotics investigation).

Respondent (at 9, 11) argues that the tests in the Fifth and Sixth Circuits are fundamentally the same and that the plaintiff in *Jacobs* would have been allowed to proceed in the Fifth Circuit because the violation happened inside the home like in *Bivens*. Setting aside the fact that *Bivens* itself involved claims that occurred inside a *courthouse*, 403 U.S. 388, 389 (1971), neither the decision below nor the Fifth Circuit's other post-*Abbasi* precedent, *Oliva* v. *Nivar*, emphasize this distinction at all. Instead, in both cases the Fifth Circuit simply asked whether the facts involved "manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment" during a narcotics investigation. Pet. App. 6a (quoting *Oliva* v. *Nivar*, 973 F.3d 438, 442 (5th Cir. 2020)). The Fifth Circuit deems any deviation from that specific scenario a meaningful difference. See, *e.g.*, *Oliva*, 973 F.3d at 442–443 (citing as a meaningful difference that the defendants in *Oliva* used more force than the defendants in *Bivens*). Because marshals shot Jacobs, his claims would have failed to meet that standard even though the violation took place inside the home.

Abbasi too never limited claims against federal police in such a way, explaining that "[s]ome differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context." 137 S. Ct. at 1865. Instead, *Abbasi* spoke of Fourth Amendment violations broadly, grouping them into (1) a "common and recurrent sphere of law enforcement" and (2) a sphere where claims are meaningfully different from standard law-enforcement operations. *Id.* at 1856–1857.

Moreover, even if the invasion of the home were considered meaningfully different and the Sixth Circuit were excluded from the split, five other circuits have permitted *Bivens* claims against federal police for violations that occurred outside the home. In *Hicks* v. *Ferreyra*, for example, the Fourth Circuit specifically rejected the argument of U.S. Park Police that the case against them for an unconstitutional traffic stop was meaningfully different from *Bivens* because it did not involve a warrantless home invasion. 965 F.3d 302 (2020); Pet. 14–15. Instead, the Fourth Circuit concluded that, home invasion or no, "along every dimension the Supreme Court has identified as relevant to the inquiry, this case appears to represent not an extension of *Bivens* so much as a replay." *Hicks*, 965 F.3d at 311. It even cited two other decisions for the proposition that *Bivens* is cognizable for traffic-stop claims. *Id*. at 311–312 (citing, *e.g.*, *Schultz* v. *Braga*, 455 F.3d 470, 479 (4th Cir. 2006); *Martin* v. *Malhoyt*, 830 F.3d 237, 263 (D.C. Cir. 1987)). The Second Circuit likewise approved a *Bivens* remedy for a traffic stop. *McLeod* v. *Mickle*, 765 Fed. Appx. 582 (2d Cir. 2019) (summary order). The First Circuit approved one for an unlawful search of a computer. *Pagán-González* v. *Moreno*, 919 F.3d 582 (1st Cir. 2019). The Third Circuit allowed a *Bivens* claim for the search of cruise-ship cabins. *Bryan* v. *United States*, 913 F.3d 356 (3d Cir. 2019). And in the Eleventh Circuit, a *Bivens* claim could proceed for the seizure of a storage unit. *Harvey* v. *United States*, 770 Fed. Appx. 949 (11th Cir. 2019) (per curiam).

Rather than contend with these five cases, respondent offers reasons to ignore them. For instance,

respondent (at 11) attempts to distinguish the Fourth Circuit's decision in *Hicks* on the ground that "the court found the *Ziglar* issue to have been forfeited," suggesting that the Fourth Circuit's analysis of *Abbasi* is passing dicta. But *Hicks* makes clear that this very analysis is necessary to its forfeiture holding, citing the clear availability of *Bivens* as a reason why "enforcing our standard forfeiture rule works no fundamental injustice." 965 F.3d at 312. Even if *Hicks*'s *Abbasi* analysis were dicta, it would still clearly illustrate the Fourth Circuit's disagreement with the decision below on the interpretation of the meaningful differences test.

Respondent (at 12) similarly contends that the remaining four cases that split from the decision below are inapposite because they do not directly analyze *Abbasi*. Setting aside the fact that the *outcomes* of those cases split from the outcome here, in cases involving damages claims against federal officials, *Bivens* is always addressed even if not directly presented. Pet. App. 4a ("The Supreme Court has stated that 'the *Bivens* question' is 'antecedent' to the question of qualified immunity.") (citing *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2006 (2017)); *Oliva*, 973 F.3d at 443 n.2 (explaining that even if not raised, "a court * * * has a concomitant responsibility" to apply the *Abbasi* test). Nevertheless, the availability of a *Bivens* remedy in these four cases was so unremarkable that neither the parties nor the courts thought it worthy of discussion. Instead, these "garden variety" Fourth Amendment claims were not considered meaningfully different from *Bivens* and allowed to proceed—precisely the opposite of what happened here. Pet. 14–16.

Finally, respondent (at 10) makes *Hernandez* into more than it is by suggesting that some of the cases in the circuit split might have come out differently post-*Hernandez*. But the Court found *Hernandez* to be meaningfully different from *Bivens* because there was a "world of difference" between an "unconstitutional arrest and search carried out in" the United States and a "cross-border shooting." 140 S. Ct. at 744 (citing *Bivens* and *Abbasi*). That same world of difference exists between *Hernandez* and every single one of the cases on both sides of the split, none of which touched anything remotely as sensitive as extraterritorial killings of foreign nationals by federal police.

B. The circuits are split 2–1 over whether the judiciary is well suited to adjudicate Fourth Amendment claims.

The circuits are also split on the meaning of *Abbasi*'s step two. According to the Fifth and Eighth Circuits, recognizing a *Bivens* remedy even in a conventional Fourth Amendment context improperly intrudes on Congress's sphere of authority. Pet. 23–26. But according to the Ninth Circuit, the judiciary is well positioned to weigh the costs and benefits of allowing such an action. Pet. 27–28.

While in *Boule* v. *Egbert* the Ninth Circuit did determine that suing an immigration officer for "grabb[ing] and push[ing] * * * aside" an innkeeper is meaningfully different from *Bivens* suits against "F.B.I. agents," 998 F.3d 370, 386–387 (9th Cir. 2021) (contra BIO 9), it still allowed the case to move forward under step two of *Abbasi* because "any costs imposed by allowing a *Bivens* claim to proceed are

outweighed by compelling interests in favor of protecting United States citizens * * * from unconstitutional activity by federal agents." *Id.* at 389. In its decision below, on the other hand, the Fifth Circuit held that petitioner's claim failed because granting a *Bivens* remedy, even in a conventional Fourth Amendment context, would improperly intrude on congressional authority. Pet. App. 7a.

The decision below is on the wrong side of the split because it overlooks step two's purpose—to prevent the courts from venturing into congressional territory by creating a "new species of litigation" and recognizing a "new substantive legal liability." Pet. 22 (cleaned up). Recognizing a remedy in a traditional Fourth Amendment context would do no such thing. Unlike cases dealing with matters of high-level policymaking, as in *Abbasi*, or situations involving foreign affairs, as in *Hernandez*, this case is nothing more than an "individual instance[] of * * * law enforcement overreach * * * difficult to address except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1862. Far from overstepping judicial authority, permitting *Bivens* claims for such overreach is the judiciary doing its job. Pet. 29.

Respondent (at 16) argues that the judiciary would nonetheless be overstepping, since Congress never made "individual officers statutorily liable for excessive-force or unlawful detention claims." But this is precisely what Congress did by passing the Westfall Act, 28 U.S.C. 2679(b)(2)(A), and acknowledging the availability of "a civil action against an employee of the [Federal] Government * * * which is brought for a violation of the Constitution of the United States."

Pet. 24–25. True, the Westfall Act "left *Bivens* where it found it" in 1988. *Hernandez*, 140 S. Ct. at 748 n.9. But in 1988, *Bivens* was widely available, especially for Fourth Amendment claims. See, *e.g.*, *General Motors Leasing Corp*. v. *United States*, 429 U.S. 338 (1977) (IRS agents seizing property from a business). Moreover, in 1974, when Congress amended the Federal Tort Claims Act to include liability for intentional torts like battery and false imprisonment, it specifically recognized that a similar remedy under *Bivens* already existed and explained that it was creating "parallel, complementary causes of action" through the FTCA. *Carlson* v. *Green*, 446 U.S. 14, 19–20 (1980) (citing S. Rep. No. 93-588, 93rd Cong., 2. Sess. 3 (1973)). Thus, Congress explicitly recognized a *Bivens* remedy in 1974 and 1988, and specifically in cases, like here, involving the use of excessive force. The decision below uses congressional "silence" as a justification to deny a *Bivens* remedy under step two of *Abbasi*. Pet. App. 7a. For that reason alone, it is on the wrong side of the circuit split.

There is sharp disagreement among the circuits on both steps of *Abbasi*: Seven circuits allow a *Bivens* remedy for standard Fourth Amendment violations by line-level federal police, and two circuits disallow it. The Court's intervention is needed to settle this disagreement.

II. This important case is a good vehicle.

Petitioner presents a narrow question to the Court: In the post-*Abbasi* world, where the *Bivens* remedy is very limited and rarely granted, can plaintiffs bring damages actions against line-level federal

police for violating the Fourth Amendment? This case, unlike any other the Court has granted, provides the opportunity to answer it.

While *Abbasi* announced the rule, it did not have the opportunity to apply it. Instead, it primarily confronted claims against high-ranking Justice Department officials making decisions implicating national security. Likewise, *Hernandez* confronted issues of international diplomacy and foreign relations in the context of a cross-border shooting. *Egbert* too will be insufficient in guiding the lower courts, as the Fourth Amendment question the Court granted there is limited to "immigration related functions," which courts treat differently than domestic law-enforcement functions. Compare *Tun-Cos* v. *Perrotte*, 922 F.3d 514, 525–526 (4th Cir. 2019), with *Hicks*, *supra*, and *Alvarez* v. *United States Immigr. & Customs Enf't*, 818 F.3d 1194 (11th Cir. 2016), with *Harvey*, *supra*.

This case has none of those problems. Respondent (at 4) acknowledges as much by describing petitioner's claim as alleging a "display of [respondent's] weapon and refusal to let Petitioner drive away." Even by respondent's underplayed characterization of the confrontation—which involved respondent unsuccessfully firing his service weapon at petitioner and threatening to put a bullet through petitioner's "f–ing skull"—this is a classic *Bivens* case: A rank-and-file federal officer used a gun and badge issued to him by the federal government to unreasonably seize a person. The Court's ruling here would provide much-needed guidance to lower courts on how to apply *Abbasi* to these common types of police encounters.

Respondent (at 8) further argues that the decision below is not suitable for review because "[t]his Court recently denied the petition for a writ of *certiorari* in *Oliva v. Nivar*, where the same attorneys sought review of the same question presented in this case." But the fact that this case is coming on the heels of *Oliva* is a feature, not a bug. It shows that *Oliva* was not an aberration and that in the Fifth Circuit nothing other than facts identical to *Bivens* would allow plaintiffs to proceed with their claims. As the concurring judge in the decision below stated, "virtually everything beyond the specific facts" of *Bivens* is now a "new context" in the Fifth Circuit. Pet. App. 9a (cleaned up). "And new context = no *Bivens* claim." *Ibid*. Moreover, the Fifth Circuit has since been joined by the Eighth, which rejected plaintiffs' unreasonable seizure claims under *Bivens*, observing that "no Supreme Court case exactly mirrors the facts and legal issues presented here." *Ahmed* v. *Weyker*, 984 F.3d 564, 568 (8th Cir. 2020) (cleaned up), cert. pending, No. 21-187 (Aug. 6, 2021).

Respondent concludes his brief by acknowledging the need for the Court's guidance (and so a grant in this case). Citing to the Court's opinion in *Edwards* v. *Vannoy*, 141 S. Ct. 1547 (2021), respondent (at 19) points to the lower courts' disagreement over the application of *Bivens* and states that "a clear overruling of *Bivens*—rather than a silent burial" might be what is needed.

In *Edwards*, the Court "ma[de] explicit what has become increasingly apparent to bench and bar over the last 32 years" by overturning the *Teague* watershed exception. 141 S. Ct. at 1560. Petitioner agrees

that here too such an approach would be preferrable to the status quo, where the "*Bivens* doctrine, if not overruled, has certainly been overtaken." Pet. App. 9a. Even if the Court agrees with the Fifth Circuit's evisceration of *Bivens*, it should grant review and say so. At least then there will be no "false hope" that under the current regime any consequences will fall upon federal officers who blatantly abuse their power, *Edwards*, 141 S. Ct. at 1560, and Congress will be forced to step in and ensure that federal officials are not above the law.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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ANYA BIDWELL
Counsel of Record
PATRICK JAICOMO
MARIE MILLER
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
abidwell@ij.org

Counsel for Petitioner