No. _____

In The
Supreme Court of the United States

HAMDI MOHAMUD,

Petitioner,

v.

HEATHER WEYKER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Hamdi Mohamud is "trying to hold a rogue law-enforcement officer responsible for landing [her] in jail through lies and manipulation." Pet. App. 2a. The officer, Respondent Heather Weyker, was denied qualified immunity because "a reasonable officer would know that deliberately misleading another officer into arresting an innocent individual to protect a sham investigation is unlawful." Pet. App. 81a. But applying the test from *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), the Eighth Circuit held that Mohamud did not have a cause of action against Weyker under the Constitution because the facts of Mohamud's case do not "exactly mirror" those of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 7a–8a (cleaned up).

To resolve the growing circuit split on the application of *Ziglar* v. *Abbasi*, the question presented is:

Whether a constitutional remedy is available against federal officers for individual instances of law enforcement overreach in violation of the Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is plaintiff Hamdi Mohamud. Respondents are defendant Heather Weyker and plaintiff Hawo Ahmed.

RELATED PROCEEDINGS

U.S. District Court for the District of Minnesota:

Mohamud v. *Weyker*,
No. 17-CV-2069 (Sept. 18, 2018)

consolidated with

Ahmed v. *Weyker*,
No. 17-CV-2070 (Sept. 18, 2018)

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

Ahmed v. *Weyker*,
No. 18-3461 (Dec. 23, 2020),
reh'g denied (Mar. 16, 2021)

consolidated with

Mohamud v. *Weyker*,
No. 18-3471 (Dec. 23, 2020),
reh'g denied (Mar. 16, 2021)

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PETITION FOR A WRIT OF CERTIORARI

This petition asks the Court to resolve the growing circuit split over the application of *Ziglar* v. *Abbasi* to search-and-seizure claims against federal police.[1]

In *Abbasi*, the Court announced a two-step test to determine the availability of constitutional remedies against federal officers. 137 S. Ct. 1843, 1857–1860 (2017). The first step asks whether a case presents a "new *Bivens* context." *Id.* at 1859. If the case is not meaningfully different from *Bivens*, the answer is no, and a constitutional remedy is available. But if the answer is yes, the inquiry continues to step two. The second step asks whether there are "special factors counselling hesitation" against extending *Bivens* to a new context. *Id.* at 1857 (citation omitted). If no factors exist, a constitutional remedy is available. But if special factors suggest that "the Judiciary is [not] well suited * * * to consider and weigh the costs and benefits of allowing a damages action to proceed," a constitutional remedy is unavailable. *Id.* at 1858.

Before announcing this test, *Abbasi* stressed: "[I]t must be understood that this opinion is not intended to cast doubt on the continued force, or even the

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[1] Petitioner's counsel, the Institute for Justice, also represents Kevin Byrd in his concurrently filed petition for certiorari on the same issue. Pet. for Cert., *Byrd* v. *Lamb*, No. 21-___ (S. Ct. Aug. 6, 2021). Closely related issues are also presented in Pet. for Cert., *Egbert* v. *Boule*, No. 21-147 (S. Ct. July 30, 2021), and were presented in Pet. for Cert., *Oliva* v. *Nivar*, No. 20-1060 (S. Ct. June 17, 2021), denied ___ S. Ct. ___ (2021), reh'g denied (Aug. 2, 2021); see also pp. 24–26 & n.18, *infra*.

necessity, of *Bivens* in the search-and-seizure context in which it arose." 137 S. Ct. at 1856. In *Bivens*, the Court held that "a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible agents." *Hernandez* v. *Mesa*, 140 S. Ct. 735, 741 (2020). *Abbasi* explicitly retained *Bivens* "in this common and recurrent sphere of law enforcement." 137 S. Ct. at 1857.

Despite *Abbasi*'s clear message, the circuit courts have split on its application to cases challenging "individual instances of * * * law enforcement overreach." *Abbasi*, 137 S. Ct. at 1862. In most circuits, courts have held that "run-of-the-mill challenges to 'standard law enforcement operations' * * * fall well within [the established context of] *Bivens* itself" and allow such claims to move forward. *Jacobs* v. *Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019); see also Section I(A), *infra*. The Ninth Circuit has held that minor factual distinctions present a new context but still allows a *Bivens* remedy for "conventional Fourth Amendment excessive force claim[s] arising out of actions by rank-and-file" officers. *Boule* v. *Egbert*, 998 F.3d 370, 387 (9th Cir. 2021); see also Section I(B), *infra*. And the Fifth and Eighth Circuits have held that claims present a new context unless they involve the precise facts of *Bivens*. *Oliva* v. *Nivar*, 973 F.3d 438, 442–443 (5th Cir. 2020). In these circuits, "new context = no *Bivens* claim." *Byrd* v. *Lamb*, 990 F.3d 879, 883 (5th Cir. 2021) (per curiam) (Willett, J., concurring); see also Section I(C), *infra*.

With its decision below, the Eighth Circuit joined the Fifth in the split and departed from *Abbasi*. Although Petitioner Hamdi Mohamud alleged Fourth Amendment "search-and-seizure" claims against a federal task force officer "in th[e] common and recurrent sphere of law enforcement," *Abbasi*, 137 S. Ct. at 1856–1857, the Eighth Circuit denied Mohamud a constitutional remedy because the facts of her case do not "exactly mirror" *Bivens*. Pet. App. 7a–8a (cleaned up).

Mohamud petitions for this Court's review of the Eighth Circuit's judgment. The decision below exacerbates the growing split on this important issue. Mohamud's claim did not proceed because the Eighth Circuit decided her case. Had the First, Second, Third, Fourth, Sixth, Ninth, or Eleventh Circuits decided her case, her *Bivens* claim would have moved forward. For that reason—and because the constitutional violations alleged were so obvious that Weyker was denied qualified immunity—Mohamud's case is a good vehicle for this Court to address the split on this important issue. See Section II, *infra*.

OPINIONS BELOW

The opinion of the Eighth Circuit, Pet. App. 1a, is reported as *Ahmed* v. *Weyker*, 984 F.3d 564 (8th Cir. 2020). The opinion of the United States District Court for the District of Minnesota, Pet. App. 24a, is not reported but is available electronically as *Mohamud* v.

Weyker, Nos. 17-CV-2069, 17-CV-2070, 2018 WL 4469251 (D. Minn. Sept. 18, 2018).

JURISDICTION

The Eighth Circuit entered its decision below on December 23, 2020, and denied rehearing on March 16, 2021. Through its COVID-19 order, dated March 19, 2020, this Court extended the deadline to file a petition for a writ of certiorari to 150 days from the date of the denial of rehearing. Mohamud timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV.

STATEMENT

Respondent Heather Weyker is a St. Paul, Minnesota, Police Officer. Between 2010 and 2014, Weyker was also deputized as a Special Deputy U.S. Marshal. Pet. App. 48a.

Beginning in 2008, Weyker set to work fabricating an interstate crime ring involving a group of Somali refugees. See *United States* v. *Fahra*, 643 Fed. Appx. 480, 481–483 (6th Cir. 2016). Weyker cultivated Muna Abdulkadir as a witness, Pet. App. 3a, "exaggerated or fabricated important aspects of this story," and "misstated facts in the reports, adding to and omitting things." *Fahra*, 643 Fed. Appx. at 482. Weyker was caught "lying to the grand jury," lying "during a detention hearing," lying to provide compensation for one of her witnesses, and "endorsing the validity of [a] forged birth certificate." *Ibid.*

Because of Weyker's investigation, thirty people were indicted. *United States* v. *Adan*, 913 F. Supp. 2d 555, 558–559, 567 (M.D. Tenn. 2012). Only nine were tried. *Fahra*, 643 Fed. Appx. at 483. All were acquitted. *Id.* at 484.

* * *

In 2011, Petitioner Hamdi Mohamud and her friends, Respondent Hawo Ahmed and Ifrah Yassin, were unaware of Weyker's investigation. Pet. App. 2a–3a, 25a. On June 16, the witness Weyker was cultivating—Abdulkadir—attacked the girls. *Id.* at 25a. Brandishing a knife, Abdulkadir smashed the windshield of Ahmed's car and struck Yassin. *Id.* at 3a. The girls called 911, and Abdulkadir fled to a neighbor's apartment, where she hid and phoned Weyker. *Id.* at 3a, 26a.

Weyker first contacted Minneapolis Police Officer Anthijuan Beeks, who had responded to the 911 call. Pet. App. 3a. Weyker told Beeks that she had "information and documentation" that Mohamud and her friends "had been actively seeking out Abdulkadir" in an effort "to intimidate" her for cooperating in a federal investigation. *Ibid.* But Weyker was lying. She had no information or documentation. She just wanted to shield Abdulkadir from arrest to encourage her continued participation in Weyker's investigation. *Ibid.* The plan worked. Beeks arrested Mohamud, Ahmed, and Yassin on suspicion of tampering with a federal witness. *Ibid.*

Weyker was not finished. The next day, she filed a criminal complaint. Pet. App. 3a. Once again, Weyker fabricated facts, gave false information, and withheld exculpatory evidence—all with the intention that Mohamud, Ahmed, and Yassin would continue to be detained for crimes Weyker knew the girls had not committed. *Id.* at 3a–4a. That plan worked too. Mohamud, a minor, spent just short of 25 months in federal custody, and Ahmed gave birth in prison while awaiting trial. *Id.* at 4a. The government eventually dismissed the case against Mohamud, and a jury acquitted Ahmed and Yassin. *Id.* at 4a, 65a.

Mohamud—along with Ahmed, Yassin, and many others[2]—sued Weyker.[3]

Because of Weyker's dual status as a state and federal officer, Mohamud and Ahmed brought Fourth Amendment claims against Weyker as a city police officer under 42 U.S.C. 1983 and as a federal marshal under *Bivens*. Pet. App. 4a. Weyker sought dismissal of the claims, asserting that she was entitled to qualified immunity; was not liable under Section 1983 because she was acting under color of federal law; and was not liable under *Bivens* because her actions were not identical to those in *Bivens*. See *id.* at 25a.

The district court rejected Weyker's arguments, concluding that her actions violated clearly established law and that Mohamud and Ahmed had a cause of action against Weyker. Pet. App. 5a. Because the court had concluded, in Yassin's case, that Weyker's

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[2] Weyker's investigation resulted in 24 lawsuits. See Pet. App. 84a–86a.

[3] Although Mohamud, Ahmed, and Yassin filed separate complaints, the substance of their allegations and Fourth Amendment claims is nearly identical. For that reason, the lower courts consolidated Mohamud's and Ahmed's cases, and those cases refer to Yassin's, which was consolidated with several cases filed by others charged in Weyker's investigation. See, *e.g.*, Pet. App. 5a ("Just last year, we decided a nearly identical case that also involved Weyker." (citing *Farah* v. *Weyker*, 926 F.3d 492 (8th Cir. 2019))); *id.* at 14a ("On this point, *Farah* once again does much of the heavy lifting."). In the district court, Judge Ericksen presided over Mohamud's, Ahmed's, and Yassin's claims. *Id.* at 36a, 58a. In the Eighth Circuit, different panels decided the instant case and *Farah*, but Judge Stras authored both opinions of the court. *Id.* at 2a, 65a.

actions fell within an established context for *Bivens*, the court "discerned no need to decide whether the proper vehicle for the plaintiff's claims is a § 1983 or *Bivens* cause of action." *Id.* at 36a (cleaned up). Weyker appealed.

In a 2–1 decision, the Eighth Circuit dismissed the *Bivens* claims. The majority held that Mohamud's and Ahmed's claims presented a new context for *Bivens* and that special factors counseled hesitation against extending a constitutional remedy. Pet. App. 6a–16a. The court applied *Abbasi*'s two-step test: "Under step one, if a case presents one of the three *Bivens* claims the Supreme Court has approved in the past, it may proceed." *Id.* at 7a (cleaned up) (quoting *Farah* v. *Weyker*, 926 F.3d 492, 498 (8th Cir. 2019)). If it does not, the Court moves to step two, where "the question is whether 'any special factors counsel hesitation before implying a new cause of action.'" *Ibid.*

At step one, the Eighth Circuit held that because *Bivens* did not "exactly mirror[] the facts and legal issues presented" in this case, Mohamud's and Ahmed's claims presented a new context. Pet. App. 7a–8a (citing *Farah*, 926 F.3d at 498). The Eighth Circuit observed that in *Bivens* "federal law-enforcement officers had threatened to arrest Bivens's entire family as they shackled him; searched his apartment from stem to stern; and after booking and interrogating him, subjected him to a visual strip search"—all without probable cause. *Id.* at 8a (cleaned up); *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

Mohamud's and Ahmed's cases did not fall within the established context of *Bivens*, the Eighth Circuit determined, because:

(1) The "sorts of actions being challenged" are different. Pet. App. 9a. The court identified the "focus in *Bivens*" as "an invasion into a home" and observed that "Weyker did not enter a home, even if the actions she allegedly took * * * were just as pernicious." *Ibid.*

(2) "Weyker's role in the arrests was different." *Id*. at 10a. "[S]he did not arrest anyone herself, nor was she even on the scene when the arrests occurred." *Ibid.*

(3) "[T]he mechanism of injury" is different. *Id.* at 11a. The court acknowledged that Mohamud and Ahmed suffered the same injuries as Bivens, but it concluded that the direct causal chain was missing in Mohamud's and Ahmed's cases because "[m]ultiple 'independent legal actors'—Officer Weyker, Officer Beeks, and even prosecutors—played a role." *Ibid.*

(4) The "type of showing" is different. *Ibid.* Mohamud and Ahmed would have to show that Weyker lied and Beeks relied on those lies to establish probable cause, and according to the court, "*Bivens* did not require this type of fact-checking and conscience-probing." *Id.* at 11a–12a.

At step two, the Eighth Circuit found "reason[s] to pause" before allowing Mohamud and Ahmed to

pursue *Bivens* claims in a new context. Pet. App. 7a (quoting *Hernandez*, 140 S. Ct. at 743), 13a–14a. Noting that "[i]t does not take much," the court identified two separation-of-powers concerns. *Id.* at 14a (quoting *Farah*, 926 F.3d at 500). First, having "a trial would 'risk . . . burdening and interfering with the executive branch's investigative . . . functions.'" *Ibid.* And second, Congress created "other remedies" for *some* criminal defendants "who prevail against 'vexatious, frivolous, or . . . bad[-]faith' positions taken by the government." *Id.* at 14a–15a (alteration in original) (quoting 18 U.S.C. 3006A note). Although these remedies do not apply to false-arrest charges against police, the Eighth Circuit concluded they provided "a convincing reason" not to extend *Bivens*. *Id.* at 15a (quoting *Abbasi*, 137 S. Ct. at 1858). Based on these special factors, the Eighth Circuit barred Mohamud and Ahmed from pursuing Weyker under *Bivens*.[4]

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[4] The Eighth Circuit concluded the decision below with an attempt to ameliorate its harsh outcome. The court suggested that Mohamud and Ahmed *may* be able to proceed under Section 1983: "[I]f the district court determines on remand that Weyker was acting under color of *state* law, their section 1983 claims may proceed." Pet. App. 15a. But as dissenting Judge Kelly pointed out, "the district court has already determined in a related case [Yassin's] that, on the date in question, Officer Weyker was acting as a federally deputized officer, not under color of state law, making a § 1983 claim unavailable." Pet. App. 23a n.7 (citing *Yassin* v. *Weyker*, No. 16-CV-2580, 2020 WL 6438892, at *4–5 (D. Minn. Sept. 30, 2020); see also Pet. App. 49a–50a (citing, among others, *King* v. *United States*, 917 F.3d 409, 433 (6th Cir. 2019), rev'd in part on other grounds *sub nom. Brownback* v. *King*, 141 S. Ct. 740 (2021)).

Judge Kelly dissented. Citing cases from the Fourth and Sixth Circuits, she argued that Mohamud's and Ahmed's false arrest claims fall "squarely within the cause of action recognized by *Bivens* itself," Pet. App. 19a, which the Supreme Court "has continued to recognize in *Abbasi* and *Hernandez*," *id.* at 23a.[5] Judge Kelly did "not see the differences the court does." *Id.* at 20a. Responding to the four identified by the majority, Judge Kelly explained:

> (1) The sort of actions being challenged are the same. Both *Bivens* and this case involve an arrest unsupported by probable cause. *Ibid.*
>
> (2) Weyker's role in the arrest was the same. Both *Bivens* and this case involve "actions by law enforcement officers." *Ibid.*
>
> (3) The mechanism of injury is the same. "Officer Weyker is alleged to have lied to Officer Beeks about the basis for probable cause to arrest plaintiffs, and Officer Beeks arrested plaintiffs based on that false information." *Ibid.*[6]
>
> (4) The type of showing is the same. "In any challenge to a warrantless arrest, the

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[5] Judge Kelly agreed with the majority that *Farah* foreclosed Mohamud's and Ahmed's claims based on Weyker's submission of a false affidavit to the district court. Pet. App. 17a–18a (citing *Farah*, 926 F.3d at 498, 500–502).

[6] Judge Kelly also contested the majority's statement that prosecutors were involved as "independent legal actors." Pet. App. 11a. "On my read, the only legal actors involved in the arrest were Officer Weyker and Officer Beeks." *Id.* at 18a n.5.

> person claiming a violation of her Fourth Amendment rights must show that the facts known to the officers involved did not provide a reasonable probability of criminal activity." *Id.* at 20a–21a.

Recognizing that *Abbasi* did "not intend[] to cast doubt on the continued force, or even the necessity of *Bivens* in the search-and-seizure context in which it arose," Judge Kelly would have allowed Mohamud and Ahmed to proceed under *Bivens*. Pet. App. 23a (alteration in original) (quoting *Abbasi*, 137 S. Ct. at 1856).

REASONS FOR GRANTING THE PETITION

I. The circuit courts are split over the availability of a constitutional remedy against federal officers for individual instances of law enforcement overreach in violation of the Fourth Amendment.

Since this Court's decision in *Abbasi*, the circuits have split over the availability of a *Bivens* remedy against federal police who—like the defendants in *Bivens*—engage in unreasonable searches and seizures. In the First, Second, Third, Fourth, Sixth, and Eleventh Circuits, courts have held that Fourth Amendment claims against federal police fall within the original *Bivens* context and a remedy is available. The Ninth Circuit has held that any factual distinctions from *Bivens* present a new context but still extends a remedy against federal police. And the Fifth and Eighth Circuits have held that any factual

distinctions from *Bivens* present a new context and "new context = no *Bivens* claim." *Byrd*, 990 F.3d at 883 (Willett, J., concurring).

A. In six circuits, courts have held that Fourth Amendment claims against federal police fall within the original *Bivens* context and a remedy is available.

Abbasi referred to a "sphere of law enforcement" that is "common and recurrent." 137 S. Ct. at 1857. In doing so, *Abbasi* confirmed the existence of *Bivens* claims for search-and-seizure violations committed by federal police.[7] Six circuit courts have taken *Abbasi* at its word and approved Fourth Amendment claims in the law enforcement space: the First, Second, Third, Fourth, Sixth, and Eleventh Circuits. The Fourth and Sixth Circuits have spoken most clearly on this point. See *Hicks* v. *Ferreyra*, 965 F.3d 302 (4th Cir. 2020); *Jacobs* v. *Alam*, 915 F.3d 1028 (6th Cir. 2019). (Judge Kelly cited both in her dissent below. Pet. App. 19a.)

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[7] *Abbasi* also noted that "no congressional enactment has disapproved" of *Bivens* and suggested that the Westfall Act ratified the availability of a claim against federal agents "brought for a violation of the Constitution," 137 S. Ct. at 1856 (citing 28 U.S.C. 2679(b)(2)(A)). The Court reconfirmed the Westfall Act's application to *Bivens* in *Hernandez*. 140 S. Ct. at 748 n.9 (2020); see also *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 491 (2020) ("In 1988 the Westfall Act foreclosed common-law claims for damages against federal officials, 28 U.S.C. 2679, but it left open claims for constitutional violations[.]").

The Sixth Circuit's decision in *Jacobs* v. *Alam* involved federal marshals[8] searching a home for a fugitive and shooting the plaintiff. 915 F.3d at 1033–1034. The plaintiff sued under *Bivens*, and the marshals argued that the case presented a new context, "mak[ing] much out of factual differences between *Bivens* * * * and this case."[9] *Id.* at 1038. The Sixth Circuit rejected the marshals' distinctions. Noting that in *Abbasi* "the Court took great care to emphasize the 'continued force' and 'necessity[ ] of *Bivens* in the search-and-seizure context in which it arose,'" *id.* at 1037 (alteration in original) (quoting *Abbasi*, 137 S. Ct. at 1856), *Jacobs* held that the plaintiff's Fourth Amendment claims were "run-of-the-mill challenges to 'standard law enforcement operations' that fall well within *Bivens* itself," *id.* at 1038; see also *id.* at 1038–1039 ("find[ing]

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[8] The officers in *Jacobs* were, like Weyker, local police officers deputized as federal officers to work on a task force. 915 F.3d at 1033. See also *King*, 917 F.3d at 432–434 (approving a *Bivens* claim against a local police officer federally deputized as a task force member).

[9] The marshals noted that *Bivens* "involve[d] claims against a different federal agency, based upon a completely different set of facts." Defendants-Appellants' Br. at 26, *Jacobs* v. *Alam*, 915 F.3d 1028 (6th Cir. 2019) (No. 18-1124), 2018 WL 2331732. The marshals also sought to limit *Bivens* to in-home narcotics-related searches: "[T]he specific 'context' of *Bivens* was Federal Bureau of Narcotics agents entering a private residence without a warrant to execute a search for narcotics, and then handcuffing the occupant during the warrantless search." *Ibid.* The marshals argued the case against them differed from *Bivens* because "U.S. Marshals Service deputies * * * had legally entered a residence by consent in the pursuit of a fugitive." *Ibid.*

plaintiff's garden-variety *Bivens* claims to be viable post-[*Abbasi*] and *Hernandez*").

Similarly, in *Hicks* v. *Ferreyra*, the Fourth Circuit permitted Fourth Amendment claims brought by a Secret Service agent against U.S. Park Police officers who twice stopped his vehicle without justification. *Hicks*, 965 F.3d at 306. The officers argued that the case presented a new context,[10] but the Fourth Circuit concluded that "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." *Id.* at 311. The court explained, "[j]ust as in *Bivens*, Hicks seeks to hold accountable line-level agents of a federal criminal law enforcement agency, for violations of the Fourth Amendment, committed in the course of a routine law-enforcement action." *Ibid.* (citing *Abbasi*, 137 S. Ct. at 1860).[11]

Four other circuits have—like the Fourth and Sixth—permitted Fourth Amendment claims against federal police for instances of law enforcement overreach, despite factual distinctions from *Bivens*. The

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[10] The officers pointed to the fact that the plaintiff was, himself, a federal law enforcement officer and argued that "a *Terry* stop of a vehicle * * * is a *de minimis* constitutional intrusion compared to the warrantless home invasion, arrest and strip-search in *Bivens*." Defendants-Appellants' Reply Br. at 7–8, *Hicks* v. *Ferreyra*, 965 F.3d 302 (4th Cir. 2020) (No. 19-1697), 2019 WL 5789882.

[11] But cf. *Annappareddy* v. *Pascale*, 996 F.3d 120, 134–137 (4th Cir. 2021) (relying on *Farah* and *Ahmed* to deny a *Bivens* claim for the submission of false information to secure search and arrest warrants and an indictment); note 5, *supra*.

First Circuit allowed a case to proceed against FBI agents who fabricated an emergency to search a home and computer. *Pagán-González* v. *Moreno*, 919 F.3d 582 (1st Cir. 2019). The Second Circuit allowed a case against a U.S. Forest Service officer who unjustifiably prolonged a traffic stop. *McLeod* v. *Mickle*, 765 Fed. Appx. 582 (2d Cir. 2019) (summary order). The Third Circuit allowed a case against a Customs and Border Protection officer searching the cabin of a cruise ship. *Bryan* v. *United States*, 913 F.3d 356 (3d Cir. 2019). And the Eleventh Circuit allowed a case against a postal inspector who barred access to a storage unit. *Harvey* v. *United States*, 770 Fed. Appx. 949 (11th Cir. 2019) (per curiam).

B. The Ninth Circuit has held that any factual distinctions from *Bivens* present a new context but still extends a remedy against federal police.

The Ninth Circuit takes a unique approach. It has held that cases diverging from the precise facts of *Bivens* present a "new context," but the court still extends a remedy under *Abbasi*'s second step if a case involves a Fourth Amendment claim against a federal law enforcement officer. *Boule*, 998 F.3d 370.

In *Boule* v. *Egbert*, an innkeeper brought a Fourth Amendment claim against a border patrol agent who shoved him down in his driveway. 998 F.3d at 386. The Ninth Circuit found that Boule's case presented a new context "in that Agent Egbert is an agent of the border

patrol rather than of the F.B.I."[12] *Id.* at 387. But the court noted that *Abbasi* cited "powerful reasons" to retain *Bivens* in the "sphere of law enforcement," *Boule*, 998 F.3d at 385 (quoting *Abbasi*, 137 S. Ct. at 1857), and approved a constitutional remedy because the case involved "a conventional Fourth Amendment excessive force claim arising out of actions by a rank-and-file" officer, *id.* at 387.[13]

C. The Fifth and Eighth Circuits have held that any factual distinctions from *Bivens* present a new context and no remedy is available against federal police.

The Fifth and Eighth Circuits have interpreted the *Abbasi* framework to mean that *any* factual distinction—no matter how small—is a meaningful difference. And, relying on a separation-of-powers label, those circuits have precluded search-and-seizure *Bivens* claims against federal police for "individual

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[12] The defendants in *Bivens* were not FBI agents, but rather agents of the now-defunct Federal Bureau of Narcotics.

[13] Although rehearing was denied in *Boule*, a dozen judges dissented, with three writing separately. Judge Bumatay's 22-page dissent brings into sharp relief the disagreement among circuit judges on *Abbasi*'s application. Arguing it should have been an "easy call" to deny Boule a Fourth Amendment claim, *Boule*, 998 F.3d at 382, Judge Bumatay observed: "As federal judges, it is not within our power to create a cause of action for Robert Boule, no matter how convinced we are that he deserves one." *Id.* at 384. Compare, generally, *Boule*, 998 F.3d at 373 (Bumatay, J., dissenting), and *id.* at 384 (Bress, J., dissenting), with *Byrd*, 990 F.3d at 882 (Willett, J., concurring). See also note 17, *infra*.

instances of * * * law enforcement overreach." *Abbasi*, 137 S. Ct. at 1862. Like the Ninth Circuit, the Fifth and Eighth Circuits identify *any* factual distinction from *Bivens* as a new context. But in the Fifth and Eighth Circuits, when the context is new, no remedy is available against federal police. The result is that *Bivens* is "practically a dead letter" in these circuits: "If you wear a federal badge, you can inflict excessive force on someone with little fear of liability." *Byrd*, 990 F.3d at 884 (Willett, J., concurring).

At step one of the *Abbasi* test, the Fifth and Eighth Circuits rely on trivial factual distinctions to establish a new context for *Bivens*. As the Fifth Circuit explained, "[v]irtually everything" presents a new context unless it involves "narcotics officers" "manacling the plaintiff in front of his family in his home and strip-searching him." *Oliva*, 973 F.3d at 442–443; accord *Byrd*, 990 F.3d at 882. Using a similar formulation, the Eighth Circuit finds a new context unless a case "exactly mirrors" *Bivens*. Pet. App. 7a; *Farah*, 926 F.3d at 498. Thus, these circuits will distinguish practically every case from *Bivens*, regardless of whether it falls within the "common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1857.

In *Oliva*, for instance, a 70-year-old Vietnam veteran was choked and assaulted by federal police in an unprovoked attack at the entrance of a Veterans Affairs hospital. *Oliva*, 973 F.3d at 440–441. The Fifth Circuit relied on the following as "meaningful" differences from *Bivens*:

(1) "This case arose in a government hospital, not a private home." *Id.* at 442–443.

(2) "The VA officers were manning a metal detector, not making a warrantless search for narcotics." *Id.* at 443.

(3) "The dispute that gave rise to Oliva's altercation involved the hospital's ID policy, not a narcotics investigation." *Ibid.*

(4) "The VA officers did not manacle Oliva in front of his family or strip-search him." *Ibid.*

(5) "Contrariwise the narcotics officers did not place Webster Bivens in a chokehold." *Ibid.*

The court found similarly trivial distinctions "meaningful" in *Byrd*. In that case, a Department of Homeland Security agent held Kevin Byrd at gunpoint to prevent him from investigating the involvement of the agent's son in an apparently drunken car crash. *Byrd*, 990 F.3d at 880. The agent tried to smash the window of Byrd's car and threatened to "put a bullet through his f—king skull" before using his federal authority to have local police detain Byrd for nearly four hours. *Ibid.* Using language strikingly similar to that in *Oliva*, *Byrd* identified a new context because:

(1) "This case arose in a parking lot, not a private home." *Id.* at 882.

(2) "Agent Lamb prevented Byrd from leaving the parking lot; he was not making a

warrantless search for narcotics in Byrd's home." *Ibid.*

(3) "The incident * * * involved Agent Lamb's suspicion of Byrd harassing and stalking his son, not a narcotics investigation." *Ibid.*

(4) "Agent Lamb did not manacle Byrd in front of his family, nor strip-search him." *Ibid.*

Likewise, the Eighth Circuit below found a new context because:

(1) "Weyker did not enter a home, even if the actions she allegedly took * * * were just as pernicious." Pet. App. 9a.

(2) "[S]he did not arrest anyone herself, nor was she even on the scene when the arrests occurred." *Id.* at 10a.

(3) Weyker's involvement of Officer Beeks attenuated the "'direct causal' chain" between Weyker and the girls. *Id.* at 11a (cleaned up) (quoting *Farah*, 926 F.3d at 499).

(4) "Fact-checking" would be needed to prove that probable cause was lacking to arrest the girls. *Id.* at 11a–12a.

But "niggling distinctions like these are not 'meaningful' because they give rise to the identical considerations present when this Court recognized a right of action in *Bivens*." Br. for Prof. Peter H. Schuck as Amicus Curiae Supporting Petitioner at 3, *Oliva* v. *Nivar*,

No. 20-1060 (S. Ct. Feb. 23, 2021), 2021 WL 870556; see also Pet. App. 19a (Kelly, J., dissenting) ("[P]laintiffs' claim falls squarely within the cause of action recognized by *Bivens* itself."). And most circuits would have rejected them. See, *e.g.*, *Hicks*, 965 F.3d at 311; *Jacobs*, 915 F.3d at 1037; Section I(A), *supra*.[14]

Because virtually every factual distinction is a "meaningful" difference according to the Fifth and Eighth Circuits, these courts inevitably reach step two of the *Abbasi* test. And at that step, the Fifth and Eighth Circuits apply an equally impossible standard. There, "the separation of powers is itself a special factor" counseling hesitation against extending *Bivens* in *any* case. *Oliva*, 973 F.3d at 444. So, as concurring Judge Willett explained in *Byrd*, when a case presents a new context, the Fifth and Eighth Circuits will never permit a constitutional remedy. 990 F.3d at 883.

To illustrate this point, the Fifth Circuit in *Oliva* found the existence of the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1)—notwithstanding its inapplicability

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[14] The Fifth and Eighth Circuits' hair-splitting factual analysis also deviates from the many law-enforcement cases in which this Court has not questioned a *Bivens* remedy. See, *e.g.*, *Groh* v. *Ramirez*, 540 U.S. 551 (2004) (Bureau of Alcohol, Tobacco, and Firearms agent conducting a search in a home); *Saucier* v. *Katz*, 533 U.S. 194 (2001) (military police officer using excessive force on an army base); *Wilson* v. *Layne*, 526 U.S. 603 (1999) (federal marshals searching a home with a news crew); *Hunter* v. *Bryant*, 502 U.S. 224 (1991) (per curiam) (Secret Service agent making a warrantless arrest in a home); *Anderson* v. *Creighton*, 483 U.S. 635 (1987) (FBI agents searching a home without a warrant); *General Motors Leasing Corp.* v. *United States*, 429 U.S. 338 (1977) (IRS agents seizing property from a business).

in that case—to be a "special factor" counseling hesitation. *Oliva*, 973 F.3d at 443–444. Drawing upon this decision in *Byrd*, the court reasoned that "Congress did not make individual officers statutorily liable for excessive-force or unlawful-detention claims" and concluded that "the silence of Congress * * * gives us 'reason to pause' before extending *Bivens*."[15] *Byrd*, 990 F.3d at 882 (first quoting *Abbasi*, 137 S. Ct. at 1862, then quoting *Hernandez*, 140 S. Ct. at 743).

The Eighth Circuit applied a similar analysis below, asserting that "other remedies are available 'to address injuries of the sort plaintiffs have alleged[].'" Pet. App. 14a (alteration in original) (quoting *Farah*, 926 F.3d at 501). In this case (and in *Farah*), the court pointed to the availability of attorney fees for vexatious prosecution and damages for wrongful conviction, despite noting (in *Farah*) that these remedies are unavailable to Weyker's victims because appointed counsel represented them in their criminal case and they were never convicted. Pet. App. 77a–78a. Under this damned-if-you-do-damned-if-you-don't application of *Abbasi*, both the presence and absence of a

[15] Neither *Oliva* nor *Byrd* addressed this Court's statement in *Carlson* v. *Green* that it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." 446 U.S. 14, 20 (1980); see also *id.* at 20–21. And relying on *Carlson*, other circuits have held that "the prospect of relief under the FTCA is plainly not a special factor counseling hesitation in allowing a *Bivens* remedy." *Bistrian* v. *Levi*, 912 F.3d 79, 92 (3d Cir. 2018); see also *Boule*, 998 F.3d at 391–392.

statutory remedy justifies denying a *Bivens* remedy. That is directly in conflict with *Boule*. 998 F.3d at 391–392.

The Eighth Circuit alternatively explained that the need for a trial to determine "what Weyker knew, what she did not know, and her state of mind at the time" would preclude extending *Bivens*. Pet. App. 14a. Citing this Court's policy justifications for creating qualified immunity in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814, 816 (1982), the Eighth Circuit concluded: "There are * * * 'substantial costs' associated with requiring public officials to litigate these types of issues." Pet. App. 14a. This even though Weyker was denied qualified immunity; every *Bivens* claim requires litigating *some* sort of factual issue; and *Bivens* itself involved a challenge to the existence of probable cause. See *Bivens*, 403 U.S. at 389.[16]

Under the Fifth and Eighth Circuits' application of *Abbasi*, "*Bivens* today is essentially a relic." *Byrd*,

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[16] Aside from creating a split, the Fifth and Eighth Circuits' decisions rely on distinctions that this Court has never used to reject a *Bivens* claim. Neither *Oliva*, *Byrd*, nor this case involved an international incident (*Hernandez*); high-level national-security policy (*Abbasi*); privately employed defendants (*Minneci* v. *Pollard*, 565 U.S. 118 (2012)); a situation in which state tort claims were available (*Wilkie* v. *Robbins*, 551 U.S. 537 (2007)); a private corporate defendant (*Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61 (2001)); a federal agency defendant (*FDIC* v. *Meyer*, 510 U.S. 471 (1994)); an elaborate administrative scheme (*Schweiker* v. *Chilicky*, 487 U.S. 412 (1988)); a different constitutional provision (*Bush* v. *Lucas*, 462 U.S. 367 (1983)); or matters related to military discipline (*Chappell* v. *Wallace*, 462 U.S. 296 (1983)).

990 F.3d at 884 (Willett, J., concurring).[17] According to the decision below, "[n]one of this should be surprising. After all, the Supreme Court has not recognized a new *Bivens* action 'for almost 40 years.'" Pet. App. 15a (quoting *Hernandez*, 140 S. Ct. at 743). But if *Bivens* is dead, this Court should say so—or else restore the regime of federal accountability that prevailed in the United States at the Founding. See, *e.g.*, *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804); see also *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 493 (2020); *Byrd*, 990 F.3d at 884 & n.11 (Willett, J., concurring).

II. This case is a good vehicle for this Court to resolve the circuit split.

This case is a good vehicle to address the circuit split over the *Abbasi* framework and continued viability of *Bivens*. As in *Bivens*, Mohamud challenges "individual instances of * * * law enforcement overreach, which due to their very nature are difficult to address

[17] With his reluctant concurrence in *Byrd* (required by the Fifth Circuit's precedent in *Oliva*), Judge Willett voiced his "big-picture concern as a federal judge—indeed, as an everyday citizen": If "*Bivens* is off the table * * * and if the Westfall Act preempts all previously available state-law constitutional tort claims against federal officers * * * do victims of unconstitutional conduct have any judicial forum whatsoever?" *Byrd*, 990 F.3d at 883–884. Answering that question, Judge Willett lamented the current "rights-without-remedies regime" in which "federal officials * * * operate in something resembling a Constitution-free zone." *Id.* at 884–885. Thus, although obligated to follow circuit precedent, Judge Willett's concurrence collides with Judge Bumatay's dissent in *Boule*, revealing an even deeper fracture than the one exemplified by the circuit split identified in this petition.

except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1862. And as in *Bivens*, for Mohamud "it is damages or nothing" because she seeks to vindicate a completed constitutional violation. *Ibid.* (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment)). Moreover, Weyker's actions against Mohamud, Ahmed, and Yassin were so clearly unconstitutional that Weyker was denied qualified immunity. Pet. App. 31a–36a; *id.* 82a ("[A] reasonable officer would know that deliberately misleading another officer into arresting an innocent individual to protect a sham investigation is unlawful.").

Emphasizing the importance of this case and the moment it represents, the decision below is one in a growing pattern of post-*Abbasi* cases in which federal police:

- Violated the Fourth Amendment through individual instances of law enforcement overreach; and
- Were denied qualified immunity because their actions violated clearly established law; but
- Were still granted de facto immunity through the misapplication of *Abbasi*.

So far, that has happened in *Ahmed* v. *Weyker* (this case), *Byrd* v. *Lamb*, and *Oliva* v. *Nivar*. *Byrd* is currently pending on a petition for certiorari before this

Court.[18] Added to that, the defendant in *Boule* v. *Egbert* has filed a petition for certiorari, asking this Court to "reconsider *Bivens*" entirely. Pet. for Cert., *Egbert* v. *Boule*, No. 21-147 (S. Ct. July 30, 2021).

This case—alone or consolidated with *Byrd* or *Egbert*—provides a good vehicle for this Court to resolve the growing circuit split over the application of *Abbasi* to individual instances of law enforcement overreach. Members of this Court have expressed both "powerful reasons to retain" *Bivens*[19] and arguments for "discarding the *Bivens* doctrine altogether."[20] Whatever the case may be, it is a question of national importance this Court—not the circuit courts—must decide, and this case presents a good vehicle for this Court to decide it.

[18] Byrd filed his petition concurrently with Mohamud's on August 6, 2021.

[19] *Abbasi*, 137 S. Ct. at 1857 (Kennedy, J., writing for the Court and joined by Roberts, C.J., and Thomas and Alito, JJ.); cf. *Hernandez*, 140 S. Ct. at 758 (Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, JJ.).

[20] *Hernandez*, 140 S. Ct. at 750 (Thomas, J., concurring, joined by Gorsuch, J.).

CONCLUSION

This Court should grant the petition, reaffirm its recognition in *Abbasi* that *Bivens* is "settled law * * * in th[e] common and recurrent sphere of law enforcement," 137 S. Ct. at 1857, and reverse the Eighth Circuit's decision below.

Respectfully submitted,

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