No. 23-7008

In the United States Court of Appeals for the Tenth Circuit

DONALD LOGSDON, JR., Plaintiff-Appellant,

v.

UNITED STATES MARSHAL SERVICE, ET AL., Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Oklahoma-Muskogee, Case No. 6:21-CV-00253-KHV-TJJ (Hon. Kathryn H. Vratil)

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protections for individual liberty. Central to that mission is our goal of promoting accountability to the Constitution for government officials and other state actors. IJ is a leading advocate against doctrines that impede the vindication of constitutional rights, including forms of governmental immunity.

IJ litigates cases (e.g., *Brownback v. King*, 141 S. Ct. 740 (2021)), files amicus briefs in the Supreme Court and federal circuit courts (e.g., Brief of Amicus Curiae Institute for Justice in Support of Respondent, *Egbert v. Boule*, No. 21-147 (S. Ct. Jan. 26, 2022)), publishes scholarship (e.g., Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How Tanzin v. Tanvir, Taylor v. Riojas, and McCoy v. Alamu Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105 (2022)), and conducts groundbreaking

[1] No party counsel authored any portion of this brief, and no party, party counsel, or person other than Amicus or its counsel paid for this brief's preparation or submission. All parties have consented to the filing of this brief.

research on nationwide issues (e.g., Institute for Justice, *Constitutional GPA* (June 30, 2022), https://ij.org/report/constitutional-gpa/).

IJ's mission includes removing barriers to the enforcement of individual rights. To accomplish that goal, the Institute for Justice launched its Project on Immunity and Accountability, which is devoted to a simple idea: If we the people must follow the law, our government must follow the Constitution. As such, IJ has an interest in excessive-force Fourth Amendment *Bivens* cases like this which serve to define the scope of legal accountability for constitutional violations by government actors.

SUMMARY OF ARGUMENT

In *Egbert v. Boule*, the Supreme Court updated its framework for evaluating the availability of claims under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). 142 S. Ct. 1793 (2022). The analysis now focuses on congressional action and intent. *Id.* at 1803 (explaining the necessity of "utmost deference to Congress' preeminent authority" in providing a damages remedy); *see also id.* at 1809 (emphasizing that a court's inquiry now "boils down to a 'single question'") (Gorsuch, J., concurring). If an act of Congress authorizes a *Bivens* claim, the inquiry is over; Congress has made the definitive determination, and a court cannot invade that decision. *See id.* at 1803. Only when Congress has not spoken does the inquiry proceed to whether Congress or the courts are better positioned to recognize a remedy. *Id.* The fundamental question under *Egbert*, therefore, is whether Congress has approved a given cause of action. In this case, contrary to the district court's decision, Congress has spoken clearly by endorsing Donald Logsdon's Fourth Amendment claims.

Through the Westfall Act, Congress ratified the availability of *Bivens* claims as they existed prior to 1988. Federal Employees Liability

Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. § 2679(b)) (Westfall Act); *Hernandez v. Mesa*, 140 S. Ct. 735, 748 n.9 (2020) (noting that when Congress enacted the Westfall Act, it "left *Bivens* where it found it."). That included *Bivens* itself, where a plaintiff brought a Fourth Amendment claim arising from an individual instance of law-enforcement overreach by rank-and-file police. Congress knew about the facts of *Bivens* when, in Section 2679(b)(2), it codified the existence of the *Bivens* claim. That very claim is at issue here: a pure "individual instance[] of . . . law enforcement overreach" by everyday law enforcement officers. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017).

Because Logsdon's Fourth Amendment claims would have survived under the *Bivens* regime as it existed in 1988, Congress's enactment of the Westfall Act ensures that they are still available today. *Egbert*, 142 S. Ct. at 1805. The district court erred in concluding that the officers' motion to dismiss should be granted.

ARGUMENT

This is a quintessential *Bivens* case**:** an American citizen trying to hold domestic police accountable for violating his Fourth Amendment

rights. Three Deputy United States Marshals were executing an arrest warrant when one of the Deputy Marshals secretly ran up behind Logsdon and kicked him in the head, incapacitating him. While Logsdon was unconscious, the officers took turns stomping on his body. The district court's decision to deny Logsdon a *Bivens* remedy stands in direct contravention of *Egbert* and Congress's intent in passing the Westfall Act.

I. In *Egbert*, the Supreme Court established a one-part test for evaluating *Bivens* claims centered around congressional action and intent.

In *Egbert*, the Supreme Court made it clear that in determining whether a *Bivens* claim should be allowed to proceed, "[a] court faces only one question: whether there is any rational reason (even one) to think that Congress is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" 142 S. Ct. at 1805.

This Court too has recently recognized the preeminence of congressional action in assessing the availability of *Bivens* claims. In *Silva v. United States*, this Court noted that "the Supreme Court appeared to alter the existing two-step *Bivens* framework by stating that 'those steps often resolve to a single question: whether there is any reason to think

that Congress might be better equipped to create a damages remedy.'"[2] 45 F.4th 1134, 1139 (10th Cir. 2022). Although previous cases, such as *Abbasi*, "framed the inquiry as proceeding in two steps," 142 S. Ct. at 1803 (citing *Hernandez*, 140 S. Ct. at 742-43; *Abbasi*, 137 S. Ct. at 1858), "those steps often resolve to a single question." *Id.* at 1803.

This means that if Congress has already approved a damages action, one is available, and a court need not ask whether Congress, in theory, would approve such a remedy. That's exactly the case with Fourth Amendment excessive-force claims by run-of-the-mill law-enforcement officers. A court need not ask whether Congress *would* authorize a damages remedy in this context, as Congress has *already* answered that question definitively by endorsing such a remedy through its enactment of the Westfall Act.

[2] While this Court did not recognize the availability of a *Bivens* claim in *Silva*, that decision was based on the existence of an alternative administrative remedy and the unique considerations at play when it comes to the United States prison system. 45 F.4th at 1141. Unlike in *Silva*, this case does not "arise[] in the federal prison context," but instead arises in the context of an otherwise routine law enforcement interaction on private property, like the one at issue in *Bivens* itself. *Id.* at 1141.

II. When Congress enacted the Westfall Act in 1988, it endorsed excessive force claims like the one at issue here, as they had been established in *Bivens* and other cases issued by circuit courts.

When it passed the Westfall Act in 1988, Congress explicitly preserved the right to bring "a civil action against an employee of the Government [] which is brought for a violation of the Constitution of the United States." Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. § 2679(b)); 28 U.S.C. § 2679(b)(2)(A). This was a direct exception to the Act's exclusivity rule that otherwise made the Federal Tort Claims Act ("FTCA") the sole remedy available for tort claims within the FTCA's scope. *See* 28 U.S.C. § 2679(b)(1). As the Supreme Court recently recognized, by including this exception, Congress "left *Bivens* where it found it," *Hernandez*, 140 S. Ct. at 748 n.9, codifying the availability of these critical constitutional remedies. *See Abbasi*, 137 S. Ct. at 1856–57.[3]

[3] While the Court rejected amicus's broader argument in *Hernandez* that Congress "intended for a robust enforcement of *Bivens* remedies," 140 S. Ct. at 749 n.9, it nonetheless acknowledged that in passing the Act, "Congress made clear that it was not attempting to abrogate *Bivens*," *id.* Since *Hernandez*, the Court has further clarified that, unlike its analysis in *Hernandez*, the "single question" in a *Bivens* inquiry is whether there is "any reason to think Congress might be better

Congress's clear intent in including the constitutional-torts exception within the Westfall Act was to preserve *Bivens* claims as they existed at the time. H.R. Rep. No. 100-700, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949–50.

The Westfall Act's "explicit exception for *Bivens* claims," *Hui v. Castaneda*, 559 U.S. 799, 807 (2010), ratified the existence of these critical constitutional remedies, at least insofar as they had been recognized by the courts at the time of the law's passage. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322-326 (2012). Importantly, when Congress "found" *Bivens* in 1988, the doctrine specifically included the right to seek redress for straightforward excessive force violations by domestic police like the ones raised by Logsdon. *See* 403 U.S. at 397.

After all, *Bivens* itself involved a warrantless arrest by a Bureau of Narcotics officer, which included a manacling and strip-search. The

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equipped" than a court to "create a damages remedy." *Egbert*, 142 S. Ct. at 1803; *see also id.* at 1809 (Gorsuch, J., concurring in the judgment) (noting that the *Bivens* inquiry "boils down to a single question: Is there any reason to think Congress might be better equipped than a court to weigh the costs and benefits of allowing a damages action to proceed?" (internal quotations omitted)).

petitioner in *Bivens*, just like Logsdon here, asserted that everyday law-enforcement officers acting under the color of federal authority violated the Fourth Amendment by using "unreasonable force" during an arrest. *Id.* at 389. In affirming Chief Justice Marshall's declaration that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), the Court held that the petitioner was "entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment." *Bivens*, 403 U.S. at 397. As the Supreme Court noted in *Bivens*, the principle that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition." *Id.* at 395.

In the seventeen years between the Supreme Court's decision in *Bivens* and Congress's enactment of the Westfall Act, courts across the country continued to authorize *Bivens* remedies when federal officers engaged in excessive force or violated the Fourth Amendment—including this very Court. *G. M. Leasing Corp. v. United States*, 560 F.2d 1011, 1013 (10th Cir. 1977); *Schowengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328,

1337 (9th Cir. 1987); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987); *Hernandez v. Lattimore*, 612 F.2d 61, 65-68 (2d Cir. 1979); *Loe v. Armistead*, 582 F.2d 1291, 1294 (4th Cir. 1978); *Norton v. United States*, 581 F.2d 390, 393 (4th Cir. 1978); *Rodriguez v. Ritchey*, 556 F.2d 1185, 1190-92 (5th Cir. 1977) (acknowledging the existence of a *Bivens* claim for Fourth Amendment excessive-force violations but declining to entertain one in case at hand as it was "apparent to a legal certainty that no constitutional violation had been committed as alleged"). In *G. M. Leasing Corp. v. United States*, a case involving the warrantless search and subsequent seizure of a corporation's assets, this Court held that "a cause of action for damages will lie against a federal officer or agent who violates Fourth Amendment rights under color of his authority." 560 F.2d at 1013.

As a result, when Congress passed the Westfall Act, it would have understood *Bivens* claims to include generic causes of action for excessive force by rank-and-file law-enforcement agents, especially since this was the very claim at issue in *Bivens* itself. That is the claim brought by

Logsdon here: an uncomplicated, excessive-force Fourth Amendment violation committed by federal law enforcement agents, just as in *Bivens*.

III. Under *Egbert*, Logsdon's claims must be allowed to proceed.

As discussed above, the Supreme Court has made it clear that Congress is "better equipped" than a court to assess the desirability of "a damages remedy." *Egbert*, 142 S. Ct. at 1798. Since Congress explicitly sanctioned damages remedies for existing *Bivens* claims in the Westfall Act, and since excessive force claims like the one at issue here had been well established in *Bivens* and other cases decided prior to 1988, under the new *Egbert* test, Logsdon's claim must be allowed to proceed.

Following *Egbert*, the Fourth Circuit affirmed this approach in *Hicks v. Ferreyra*, 64 F.4th 156 (4th Cir. 2023). In *Hicks*, the plaintiff, a special agent with the U.S. Secret Service, was twice subjected to a traffic stop by the U.S. Park Police. He brought a suit under *Bivens*. *Id.* at 161-63. On appeal, the officers argued that Hicks could not proceed under *Bivens*, as "Hicks' home was not searched," "the officers did not arrest Hicks or use excessive force against him," and Hicks worked for the secret service. In rejecting the officers' argument, the court highlighted that the Supreme Court's "severe narrowing of the *Bivens* remedy in other

contexts does not undermine the vitality of *Bivens* in the warrantless-search-and-seizure context of routine criminal law enforcement." *Id.* The Fourth Circuit reasoned that "the present case involves 'not an extension of *Bivens* so much as a replay' of the same principles of constitutional criminal law prohibiting the unjustified, warrantless seizure of a person." *Id.* at 167. Relying on *Egbert*, the court held that "a *Bivens* remedy remains available to address violations of the Fourth Amendment involving unjustified, warrantless searches and seizures by line officers performing routine criminal law enforcement duties." *Id.* Logsdon's Fourth Amendment claim falls within that exact category.

It is true that in *Mejia*—also issued post-*Egbert* and relied on by the district court—the Ninth Circuit declined to recognize a *Bivens* cause of action for an excessive force violation. *Mejia v. Miller*, 61 F.4th 663, 669 (9th Cir. 2023). However, *Hicks* is a much more persuasive authority for this court to rely on. Unlike *Mejia*, both *Hicks* and *Logsdon* are straightforward Fourth Amendment violations on all fours with *Bivens*: low-ranking domestic police; warrantless search-and-seizure context; routine criminal law enforcement. *Mejia*, on the other hand, involved something that Congress would not have necessarily considered when

passing the Westfall Act: law-enforcement on a public land, with little expectation of privacy and a special mandate for Bureau of Land Management officials to maintain order on federal lands. As *Hicks* and *Logsdon* are virtually indistinguishable, *Hicks*, and not *Mejia*, should guide this Court's decision on whether to allow a *Bivens* remedy here.

***

Because the Supreme Court has expressed the view that Congress is "better equipped" than a court to assess the desirability of "a damages remedy," *Egbert*, 142 S. Ct. at 1798, and because Congress expressly sanctioned *Bivens* remedies for Fourth Amendment violations in the Westfall Act, both the Act and the Court's decision in *Egbert* require lower courts to affirm the scope of this congressionally approved remedy in the exact type of excessive-force case brought by Logsdon here.

As the Court has made clear, under *Egbert*, Congress's "preeminent authority" deserves deference. In the case at hand, deference demands that this Court engage with the Fourth Amendment violation alleged by Logsdon because Congress intended that excessive-force claims of the type endorsed in *Bivens*—and repeated here, with an individual brutally attacked while unconscious in an attempted arrest on private property—

would remain available through the Westfall Act. In 1988, Congress statutorily recognized what would "hardly seem a surprising proposition," *Bivens*, 403 U.S. at 395, that the violation of Logsdon's Fourth Amendment rights warrants redress.

CONCLUSION

The Court should reverse the district court's grant of the officers' motion to dismiss.

Dated: May 12, 2023.

Respectfully submitted,

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Dated: May 12, 2023.

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Dated: May 12, 2023.

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