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

PETITION FOR WRIT OF CERTIORARI

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September 22, 2023

QUESTIONS PRESENTED

Because "recognizing a *Bivens* cause of action is 'a disfavored judicial activity,'" it is settled that no *Bivens* action exists 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 (2022) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 135, 136 (2017)). To guide lower courts, this Court has identified "several examples of new [*Bivens*] contexts" where "a court is not undoubtedly better positioned than Congress to create a damages action." *Id.* Two such examples are when the "legal mandate under which the officer was operating" or "the constitutional right at issue" differs from that in *Bivens*, which involved federal narcotics officers conducting a warrantless search and arrest inside a home without probable cause. *Abbasi*, 582 U.S. at 140.

The questions presented are:

1. Whether a cause of action exists under *Bivens* for Fourth Amendment claims against federal officers operating under a different legal mandate than the narcotics officers in *Bivens*.

2. Whether a cause of action exists under *Bivens* for Fourth Amendment claims not involving a search or arrest inside a home.

PARTIES TO THE PROCEEDING

Petitioners Gerald L. Ferreyra and Brian A. Phillips were the defendants in the district court and appellants in the Fourth Circuit.

Respondent Nathaniel Hicks was the plaintiff in the district court and the appellee in the Fourth Circuit.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Ferreyra v. Hicks*, No. 23A133 (U.S.) (granting application for extension of time to file a petition for certiorari, issued on August 15, 2023);
- *Hicks v. Ferreyra*, No. 22-1339 (4th Cir. May 26, 2023) (denying rehearing en banc and affirming judgment for plaintiff);
- *Hicks v. Ferreyra*, No. 22-1339 (4th Cir. Mar. 29, 2023) (opinion affirming judgment below); and
- *Hicks v. Ferreyra,* No. 8:16-cv-02521-PWG, (D. Md. Jan. 28, 2022) (denying defendants' post-trial motions for judgment as a matter of law).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioners Gerald L. Ferreyra and Brian A. Phillips respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 64 F.4th 156 and reproduced at App.1–36. The opinion of the district court is reported at 582 F. Supp. 3d 269 and reproduced at App.37–86.

JURISDICTION

The Fourth Circuit affirmed the judgment on March 29, 2023, App.1, and denied rehearing en banc on May 26, 2023, App.89. On August 15, 2023, the Chief Justice extended the time to file a petition for writ of certiorari to and including September 22, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition raises exceptionally important questions about the scope of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* created a damages action against federal narcotics officers for certain Fourth Amendment violations occurring inside the plaintiff's home. *Id.* at 395–96. This Court initially expanded *Bivens* to create remedies for sexual discrimination by a member of Congress, *Davis v. Passman,* 442 U.S. 228 (1979), and abuse by federal prison officials, *Carlson v. Green,* 446 U.S. 14 (1980). Over the last four decades, however, the Court has all but shut the door on new *Bivens* actions, "declin[ing] 11 times to imply

a similar cause of action" in other contexts. *Egbert v. Boule*, 142 S. Ct. 1793, 1799 (2022). The Court's retreat from *Bivens* is unmistakable.

Approving *any* new *Bivens* action is now "a disfavored judicial activity," *Egbert*, 142 S. Ct. at 1803 (quotation marks omitted), and if "called to decide *Bivens* today, [the Court] would decline to discover any [*Bivens*] causes of action" at all, *id.* at 1809. Driving home this message, the Court "has consistently refused to extend *Bivens* to any new context or new category of defendants." *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017) (quotation marks omitted). Under faithful application of this Court's teachings, no *Bivens* action should exist "in most every case." *Egbert*, 142 S. Ct. at 1803.

While some courts of appeals have heeded this Court's message, others—including the Fourth Circuit below—have disregarded it. This case raises two new contexts identified by this Court in *Abbasi*: It involves U.S. Park Police officers enforcing a different "legal mandate" and a traffic stop implicating a different legal standard for the "constitutional right at issue." 582 U.S. at 140. Yet the Fourth Circuit brushed aside these distinctions, deeming this case "a replay" of *Bivens* and blessing an eyebrow-raising $730,000 judgment against Petitioners. App.7, App.14 (quotation marks omitted).

By casually expanding *Bivens* to two new contexts, the Fourth Circuit deepened two entrenched circuit splits. The circuits are divided 4-3 on whether *Bivens* extends to Fourth Amendment claims against non-narcotics officers. And they are divided 4-2 on whether *Bivens* extends to Fourth Amendment claims

that arise outside of a home. These splits implicate immensely important questions that affect tens of thousands of federal law enforcement officers every day.

Only this Court can provide uniformity in this critically important area. Federal law enforcement officers—especially those with a national security mission, like U.S. Park Police officers—must be able to act decisively, without the risk of life-changing personal liability clouding their judgment. This Court should grant certiorari and limit *Bivens* to its proper scope.

A. Factual Background

Petitioners Gerald Ferreyra and Brian Phillips are U.S. Park Police officers. App.2. Their agency is the National Park Service, a component of the Department of the Interior, *see* 54 U.S.C. § 100301. U.S. Park Police officers "maintain law and order and protect individuals and property" within all federal parks. *Id.* § 102701(a)(1); *see* Designation of Officers or Employees, 41 Fed. Reg. 44,876, 44,876 (Oct. 13, 1976) (designating U.S. Park Police officers for this function). As part of this charge, U.S. Park Police officers perform important national-security functions: They police "sensitive location[s]" that raise national-security concerns, *Buchanan v. Barr*, 71 F.4th 1003, 1009 (D.C. Cir. 2023), including the areas around the White House, the Statue of Liberty, and other "National Icons" in Washington, D.C. and New York, Nat'l Park Serv., U.S. Park Police, *Homeland Security Division*, NPS.gov (Oct. 16, 2015), https://www.nps.gov/subjects/uspp/hs.htm. They also provide "Presidential security and dignitary escorts,"

id., which require them to conduct traffic stops and take other investigative steps based on reasonable suspicion.

Early one morning in July 2015, Officer Ferreyra found Respondent Nathaniel Hicks asleep in a vehicle parked on a federal expressway, I-295, near the headquarters of the National Security Agency. App.3–4, App.17 n.3. There was "a handgun in a 'holstered case'" on the front passenger seat. App.4. Seeing the gun, Officer Ferreyra yelled and pointed his service weapon at Respondent, who said that he was an on-duty Secret Service agent waiting to join a motorcade carrying a Cabinet Secretary. App.4. The Secret Service had not previously notified the U.S. Park Police of this motorcade. App.93. Officer Ferreyra called for back-up, Officer Phillips arrived, and the two officers continued to detain Respondent for about an hour until their supervisor confirmed Respondent's on-duty status. App.4–5. During the stop, neither Respondent nor his car was searched, and Respondent was allowed to remain in his car with his phone and car keys. *See* App.5. After he drove away, he was pulled over and again detained in his car for "a few minutes" by Officer Phillips. App.5–6.[1]

B. Procedural History

1. In 2016, Respondent filed a *Bivens* claim against Petitioners alleging that the one-hour welfare

[1] The Fourth Circuit repeatedly asserted, incorrectly, that both Petitioners are White. App.3–4, App.28. In fact, Officer Ferreyra is Cuban and Puerto Rican. App.96–97.

check and brief traffic stop violated his Fourth Amendment rights. App.6.

After the district court denied Petitioners' motion to dismiss, this Court issued its decision in *Ziglar v. Abbasi*, 582 U.S. 120 (2017). *Abbasi* emphasized how this Court "ha[d] consistently refused to extend *Bivens* to any new context or new category of defendants," 582 U.S. at 135 (quotation marks omitted), and instructed lower courts that "a case presents a new *Bivens* context" when the "legal mandate under which the officer was operating" or "the constitutional right at issue" differs from *Bivens*, *id.* at 139–40. *Bivens* involved a suit against narcotics agents for violating the plaintiff's "rights of privacy" when they allegedly "entered his apartment" without a warrant, searched it from "stem to stern," "manacled [him] in front of his wife and children," took him into custody and "strip search[ed]" him, "and threatened to arrest the entire family." 403 U.S. at 389–90.

On appeal from the denial of summary judgment, Petitioners argued to the Fourth Circuit that *Bivens* should not be extended to the new context of this case. *See Hicks v. Ferreyra*, 965 F.3d 302, 309 (4th Cir. 2020). But that court held that "this argument [wa]s forfeited on appeal" for purposes of summary judgment because it had not been first raised with the district court. *Id.* at 309–12. In dicta, the Fourth Circuit added that it viewed this case as "not an extension of *Bivens* so much as a replay," *id.* at 311—even though *Bivens* involved officers with a different legal mandate (enforcement of narcotics laws rather than protection of federal property and its occupants) and a different constitutional standard (probable

cause for a search and an arrest inside a home rather than reasonable suspicion for a traffic stop and a brief detention). The Fourth Circuit equated this case with *Bivens* because, at a high level of abstraction, "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." *Id.*

At trial, a jury awarded Respondent $730,000 in compensatory and punitive damages on his *Bivens* claim, including $305,000 against Officer Ferreyra and $425,000 against Officer Phillips. App.7, App.87–88. The district court denied Petitioners' motions for judgment as a matter of law, holding that the case "do[es] not present either a new [*Bivens*] context or a new category of defendants." App.54; *see* App.61. Despite recognizing Petitioners' different legal mandate, the court found no new category of defendants because "the defendants in *Bivens* were line-level federal officers, as are the Defendants in this case." App.54. And despite recognizing that traffic stops "are factually different" and implicate a "reasonable suspicion" standard, the court found no new context because the case "involves a Fourth Amendment warrantless seizure." App.54–55.

2. The Fourth Circuit affirmed, holding that the initial welfare check was lawful, but that "significantly prolonging the initial stop" and "initiating a second, unjustified stop" violated the Fourth Amendment. App.2. The court of appeals acknowledged this Court's "severe narrowing of the *Bivens* remedy" in *Abbasi*. App.12. But whereas *Abbasi* had limited *Bivens* to the specific "search-and-

seizure context in which it arose," 582 U.S. at 134, the Fourth Circuit stretched *Bivens* to encompass the *entire* "warrantless-search-and-seizure context of routine criminal law enforcement," App.12.

Consistent with its expansive view of *Bivens*, the Fourth Circuit again deemed this case "a replay" of *Bivens*. App.14 (quoting *Hicks*, 965 F.3d at 311). The court dismissed the distinctions between Petitioners and the narcotics officers in *Bivens*, reasoning that both cases involved officers "engaged in routine law enforcement measures." App.16. The court also rejected the distinction between the home search and arrest requiring probable cause in *Bivens* and the temporary detention requiring "a lesser showing" in this case because—in its view—this distinction "does not alter the constitutional right at issue or its application to the routine enforcement of criminal laws." App.15–16. And the court found it of "no relevance" that Petitioners were protecting an area "'near the headquarters of the National Security Agency.'" App.17 n.3. Accordingly, the court concluded, there was no "reason to conclude that Congress might be better equipped to determine whether to allow this civil action." App.16–17 (quotation marks omitted).

The Fourth Circuit subsequently denied rehearing en banc. App.89.

REASONS FOR GRANTING THE PETITION

This Court's recent *Bivens* jurisprudence has unmistakably signaled that the door is all but closed on recognizing new *Bivens* actions. While some courts of appeals have heard that message loud and clear,

others have not. The Fourth Circuit is a prime example. In the decision below, that court viewed this Court's retreat from *Bivens* actions as somehow "*not* signal[ing] an intent to prohibit [*Bivens*'] application in cases involving *less* egregious" alleged violations. App.16 (emphases added).

The decision below deepened two circuit splits regarding the availability of *Bivens* claims. There is a sharp 4-3 split on whether *Bivens* extends to Fourth Amendment claims against non-narcotics officers and a 4-2 split on whether *Bivens* extends to Fourth Amendment claims that arise outside the context of a search or arrest inside a home. The two questions presented affect tens of thousands of federal law enforcement officers, who—despite this Court's efforts to clarify the strictly limited availability of *Bivens* claims—still find themselves required to make split-second decisions every day under fear of being sued.

This case presents an ideal opportunity for the Court to restore uniformity in *both* areas and to do so, uniquely, in the context of a $730,000 personal judgment that demonstrates the real-world costs of allowing *Bivens* actions to proceed. The Court should grant certiorari now before more courts follow the Fourth Circuit's example.

I. The Fourth Circuit's Decision Deepens Two Intractable Circuit Splits

A. The Circuits Are Split 4-3 over Whether *Bivens* Extends to Claims Against Non-Narcotics Officers

The circuits are deeply divided on whether a *Bivens* remedy exists against officers operating under

a different legal mandate than the narcotics officers in *Bivens*. Four circuits have said "no." Three circuits, including now the Fourth Circuit, have said "yes." Certiorari is needed to resolve this intractable conflict.

1. Four circuits have squarely rejected *Bivens* claims against various non-narcotics officers, holding that those claims present a new context that warrants relief crafted by Congress, not a court.

The Third Circuit has repeatedly rejected requests to extend *Bivens* beyond narcotics officers. That court denied *Bivens* relief against line-level counterintelligence officials from the Federal Bureau of Investigation because they were "a new category of defendant." *Xi v. Haugen*, 68 F.4th 824, 834 (3d Cir. 2023) (cleaned up). Hewing to this Court's directive to focus on the officers' legal mandate, the Third Circuit held that counterintelligence agents, unlike narcotics officers, "protect the nation from threats of foreign espionage," *id.*, and that "judicial intrusion" into the field therefore "would be both harmful and inappropriate," *id.* at 836; *see also Vanderklok v. United States*, 868 F.3d 189, 207 (3d Cir. 2017) (denying *Bivens* relief against Transportation Security Administration screeners in part because their mandate is to "secur[e] our nation's airports and air traffic").

The Fifth Circuit takes the same approach and routinely denies *Bivens* claims against "different officers from a different agency." *Oliva v. Nivar*, 973 F.3d 438, 443 (5th Cir. 2020) (quotation marks omitted). *Oliva* held that claims against Veterans Affairs officers "manning a metal detector, not making a warrantless search for narcotics," "involve[d] [a]

different legal mandate[ ]" and hence a new *Bivens* context. *Id.* That case followed this Court's practice of "consistently rebuff[ing] requests to add [new *Bivens*] claims" and denied *Bivens* relief. *Id.* (quoting *Hernández v. Mesa*, 140 S. Ct. 735, 743 (2020)). The Fifth Circuit likewise has denied *Bivens* relief against Internal Revenue Service agents because "clearly" such claims "bear little resemblance to" the *Bivens* claims this Court long ago endorsed and "implying a cause of action would risk disrupting the IRS's agency decisions and collection efforts." *Canada v. United States*, 950 F.3d 299, 307, 311 (5th Cir. 2020) (quotation marks omitted).

Since being reversed in *Egbert*, the Ninth Circuit has heeded this Court's teachings and has consistently rejected attempts to expand *Bivens* to new types of officers. That court has denied *Bivens* claims against line-level officers from the Bureau of Land Management (BLM), a component of the Department of the Interior just like the U.S. Park Police, because BLM officers do not have "the same mandate as agencies enforcing federal anti-narcotics law" and because *Bivens* actions in this area could cause "'systemwide consequences' for BLM's mandate to maintain order on federal lands." *Mejia v. Miller*, 61 F.4th 663, 668 (9th Cir.), *as amended* (Mar. 2, 2023) (quoting *Egbert*, 142 S. Ct. at 1803–04). The Ninth Circuit has rejected *Bivens* claims against Federal Protective Service officers from the Department of Homeland Security for similar reasons, including that "[t]he legal mandate under which [they] act[ ] . . . differ[s] from that of the agents in *Bivens*." *Pettibone v. Russell*, 59 F.4th 449, 455 (9th Cir. 2023).

The D.C. Circuit, as well, now denies *Bivens* claims against non-narcotics officers. Despite once extending *Bivens* to U.S. Park Police officers, *see Martin v. Malhoyt*, 830 F.2d 237, 263 (D.C. Cir. 1987), that court has since recognized that its earlier "cases have been overtaken" by this Court's more restrictive precedents, *Loumiet v. United States*, 948 F.3d 376, 382 (D.C. Cir. 2020). The D.C. Circuit thus recently denied *Bivens* relief against U.S. Park Police officers who cleared protestors from a public park near the White House. *See Buchanan v. Barr*, 71 F.4th 1003 (D.C. Cir. 2023). The court emphasized that the U.S. Park Police officers' actions "[were] notably different from an unlawful search and arrest by federal narcotics officers" and that Congress should design any remedy against Park Police officers because their actions can "implicate national security." *Id.* at 1008–09. *Loumiet* similarly denied *Bivens* relief against officers from the Office of Comptroller of the Currency in part because "the legal mandate under which [they] were operating [wa]s different" from that in *Bivens*. 948 F.3d at 382.

Accordingly, four circuits follow this Court's directives and hold that a different "legal mandate under which the officer was operating" presents a new *Bivens* context for which Congress is better suited to provide a remedy. *Abbasi*, 582 U.S. at 140. Had Respondent been detained in any of these circuits, his *Bivens* claim would have failed at the outset. Instead, because Respondent brought this suit in the Fourth Circuit, Petitioners have had the burdens of litigation and the threat of personal liability hanging over their heads for seven years—and now face a crippling judgment.

2. Three circuits, in contrast, have approved *Bivens* claims against non-narcotics officers. Disregarding this Court's directive to exercise "caution" before recognizing a new *Bivens* action, *Egbert*, 142 S. Ct. at 1803 (quotation marks omitted), these circuits lump together *all* federal law enforcement officers—no matter their agency or legal mandate.

In this case, the Fourth Circuit reached the opposite conclusion from the D.C. Circuit in *Buchanan* by holding that there is no meaningful distinction between U.S. Park Police officers and the narcotics officers in *Bivens*. Whereas the D.C. Circuit recognized the U.S. Park Police's different legal mandate, the Fourth Circuit found a "replay" of *Bivens* solely because both types of officers "engage[ ] in routine law enforcement measures." App.14–16 (quotation marks omitted). And whereas the D.C. Circuit recognized the U.S. Park Police's role in protecting national security, the Fourth Circuit deemed this role of "no relevance"—even though this case occurred "'near the headquarters of the National Security Agency.'" App.17 n.3. The Fourth Circuit's broad view unabashedly expands *Bivens* to encompass all claims for "warrantless searches and seizures by line officers performing routine criminal law enforcement duties." App.13.

The Sixth Circuit takes the same approach. That court has recognized a *Bivens* claim against Deputy U.S. Marshals on the basis that they were "individual line officers . . . carrying out their routine police duties." *Jacobs v. Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019). The Deputy U.S. Marshals there had argued

that the "different federal agency" created a new *Bivens* context and that the "impact on [the Marshals Service's] system wide operations"—which includes "apprehending fugitives, providing judicial security, [and] enforcing sex offender registration laws"—foreclosed *Bivens* relief. Br. of Defendants-Appellants at 26, 30, *Jacobs*, No. 18-1124 (6th Cir. May 21, 2018), ECF 32. The Sixth Circuit nevertheless held that the "action presents no . . . novel circumstances." *Jacobs*, 915 F.3d at 1038. The court was able to reach that conclusion only by overlooking this Court's admonition to compare new putative *Bivens* cases to "previous *Bivens* cases decided by *this Court*." *Abbasi*, 582 U.S. at 139 (emphasis added). Instead, the Sixth Circuit looked to its own case law, most of which predates this Court's recent clarifications of *Bivens*' narrow scope, declaring that "garden-variety *Bivens* claims" previously recognized *by a circuit court* continue "to be viable post-[*Abbasi*]." *Jacobs*, 915 F.3d at 1038–39; *see id.* at 1038 ("we have recognized . . . every one of plaintiff's *Bivens* claims").

The Tenth Circuit also has recognized *Bivens* claims against non-narcotics officers, including Animal and Plant Health Inspection Services agents. *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853 (10th Cir. 2016). Like the Fourth and Sixth Circuits, the Tenth Circuit recognized a *Bivens* action because the alleged warrantless entry was "a garden-variety constitutional violation." *Id.* at 864. The court did not hesitate to extend *Bivens* to non-narcotics officers because *Bivens* "ha[s] been routinely applied to the conduct of [other] federal officials in a variety of contexts." *Id.*

Absent this Court's intervention, this sharp circuit split will persist and deepen. The Fourth and Sixth Circuits do not intend to revisit their decisions, as rehearing en banc was denied here and in *Jacobs*. *See* App.89; Order, *Jacobs*, No. 18-1124 (6th Cir. Mar. 12, 2019), ECF 49-1. Nor is the Tenth Circuit likely to revisit its decision in *Big Cats*. Though predating *Abbasi*, that decision anticipated *Abbasi*'s framework by holding that the case was "hardly a new context" for *Bivens* actions. *Big Cats*, 843 F.3d at 864. Accordingly, the circuit split is entrenched, and certiorari is needed to resolve it.

B. The Circuits Are Split 4-2 over Whether *Bivens* Extends to Searches and Seizures Outside of a Home

The decision below also exacerbates a circuit split as to whether *Bivens* extends to Fourth Amendment claims that arise outside the context of a search or arrest inside a home. Four circuits have held that *Bivens* cannot be extended in this manner, while two circuits—including the Fourth Circuit below—have held it can. Only this Court can resolve this entrenched conflict.

1. Four circuits reject Fourth Amendment *Bivens* claims that do not involve a search or arrest inside the home, holding that those claims raise a new *Bivens* context for which Congress should create any remedy.

The Fifth Circuit has repeatedly rejected *Bivens* claims involving conduct outside the home. *Oliva*, for example, refused to extend *Bivens* to a case that "arose in a government hospital, not a private home," because that difference was "meaningful" under this Court's

precedent. 973 F.3d at 442–43. Another case, which involved false affidavits allegedly used to induce unjustified charges, declined to create a *Bivens* remedy for similar reasons. *Cantú v. Moody*, 933 F.3d 414, 423 (5th Cir. 2019). *Cantú* emphasized that "[c]ourts do not define a *Bivens* cause of action at the level of the Fourth Amendment or even at the level of the unreasonable-searches-and-seizures clause." *Id.* at 422 (cleaned up). Because the plaintiff there "d[id] not allege the officers entered his home without a warrant," the Fifth Circuit held that his claim "meaningfully differe[d] from the Fourth Amendment claim at issue in *Bivens*" and denied *Bivens* relief, noting "legion 'special factors' counseling that result." *Id.* at 423.

The Eighth Circuit also has closed the door on Fourth Amendment *Bivens* claims that arise outside the home. As that court has explained, "[t]he focus in *Bivens* was on an invasion into a home and the officers' behavior once they got there." *Ahmed v. Weyker*, 984 F.3d 564, 568 (8th Cir. 2020). Where an officer "d[oes] not enter a home," a case is "meaningfully different from *Bivens*" because it does not present the same sort of "physical invasions that were at the heart of *Bivens*." *Id.* The court went on to deny *Bivens* relief for similar reasons, observing that "a trial would risk . . . burdening and interfering with the executive branch's investigative . . . functions." *Id.* at 570–71 (quotation marks omitted).

The Ninth Circuit likewise refuses to extend *Bivens* to claims arising outside of a home. In denying *Bivens* relief in *Mejia*, the court underscored that "unlike *Bivens*, none of the events in question occurred

in or near Mejia's home"; rather, they all "occurred on public lands" in which Mejia did not have the same "expectation of privacy." 61 F.4th at 668. "[G]iven this new context," the court added, "special factors counsel against implying a cause of action," as *Bivens* claims in this context could diminish BLM's ability "to maintain order on federal lands." *Id.*

The D.C. Circuit takes this approach as well. *Buchanan* refused to extend *Bivens* to a claim involving the "clearing of protestors from a public park" because that context "notably differ[s] from [the] unlawful search and arrest" in *Bivens*. 71 F.4th at 1008. "[H]eeding [this] Court's admonition" against recognizing new *Bivens* actions, the D.C. Circuit held that the location of the challenged conduct counseled against *Bivens* relief. *Id.* at 1009 (explaining that "officers in the area surrounding the White House and the President must be able to act without hesitation").

Accordingly, four circuits have followed this Court and held that searches and seizures outside a home implicate a new *Bivens* context for which any remedy must come from Congress. *Abbasi*, 582 U.S. at 140. Had Respondent been temporarily detained in any of these circuits, no *Bivens* remedy would have been available.

2. Two circuits, in contrast, have approved Fourth Amendment *Bivens* claims that did not involve a search or arrest inside the home. Like the circuits that recognize *Bivens* actions against non-narcotics officers, these circuits have flouted this Court's teachings by taking a blunt approach that groups together all warrantless searches and seizures—no

matter where they occur and no matter what level of suspicion is required.

The Fourth Circuit held below that traffic stops do not constitute a new *Bivens* context. App.15–16 & n.2. Despite acknowledging that the reasonable-suspicion standard applicable to such "temporary detention[s]" differs from the probable-cause standard at issue in *Bivens*, the court held that this difference "does not alter the constitutional right at issue or its application to the routine enforcement of criminal laws." App.15–16. In the Fourth Circuit, *every* "warrantless seizure of a person"—no matter the context—is "a replay" of *Bivens*. App.14 (quotation marks omitted).

The Seventh Circuit likewise accepts Fourth Amendment *Bivens* claims that arise outside a home. *See Snowden v. Henning*, 72 F.4th 237 (7th Cir. 2023). The district court in *Snowden* had denied a *Bivens* claim alleging excessive force during an arrest in a hotel lobby, reasoning that "the location of the arrest" differed from *Bivens* and hence the claim did not involve "the 'rights of privacy' implicated in" *Bivens*. *Id.* at 240–41. The Seventh Circuit reversed, however, holding that the case involved "a straightforward application of *Bivens* itself." *Id.* at 239. Citing the Fourth Circuit's decision here, the Seventh Circuit viewed the distinction between "[h]otel or home" as "trivial" because the claim "stem[med] from run-of-the-mill allegations of excessive force during an arrest." *Id.* at 247 (quotation marks omitted).

Here, too, this Court's intervention is urgently needed. The 4-2 circuit split is deep, ripe, and will persist, given the Fourth Circuit's refusal to revisit the issue en banc. Federal officers across the country will

be deterred from conducting traffic stops while they face the risk of enormous personal liability if they happen to be in the wrong jurisdiction. Indeed, had Respondent been stopped on I-295 just a few miles south in Washington, D.C., his *Bivens* claim would have been barred. But because Respondent happened to be stopped on the Maryland side of the state line, Petitioners now face personal judgments of $730,000 for conducting a one-hour welfare check and a few-minute traffic stop. Federal law enforcement officers should not face such widely varying exposure to personal liability based on geographic fortuities.

II. The Decision Below Is Wrong

The Fourth Circuit's decision rejected this Court's recent limitations on *Bivens*. This Court has not recognized a new *Bivens* cause of action in more than 40 years. Yet the decision below took this Court's "severe narrowing" of *Bivens*, App.12, as an invitation to extend *Bivens* to large numbers of federal officers and to wide-ranging conduct bearing little resemblance to the search and arrest inside a home in *Bivens*. At each step, the Fourth Circuit rendered this Court's directives toothless.

Take the Court's instructions on when a case presents a new *Bivens* context. In *Abbasi*, this Court established in no uncertain terms that "a case presents a new *Bivens* context" when any one of several different circumstances is present. 582 U.S. at 139. Among the "differences that are meaningful enough to make a given context a new one" are when the "legal mandate under which the officer was operating" or "the constitutional right at issue" differs from *Bivens* itself. *Id.* at 139–40. As this Court later

underscored, these are precisely the "situations in which a court is not undoubtedly better positioned than Congress to create a damages action." *Egbert*, 142 S. Ct. at 1803.

The Fourth Circuit treated these express mandates as mere suggestions. Petitioners' status as U.S. Park Police officers patrolling federal highways for suspicious vehicles, not narcotics officers pursuing drug dealers in their homes, should have made this case "notably different" from *Bivens,* providing a clear reason to deny *Bivens* relief. *Buchanan*, 71 F.4th at 1008–09; *see also Xi*, 68 F.4th at 834; *Mejia*, 61 F.4th at 668; *Oliva*, 973 F.3d at 443. Congress is plainly better suited to decide what if any damages remedy should be created in this context, as actions against U.S. Park Police officers can "implicate national security," *Buchanan*, 71 F.4th at 1009, and cause "'systemwide consequences' for [the Park Police's] mandate to maintain order on federal lands," *Mejia*, 61 F.4th at 668 (quoting *Egbert*, 142 S. Ct. at 1803–04) ("That uncertainty alone is a special factor that forecloses relief.").

Yet the fact that Petitioners were "employed by the [U.S. Park Police]" did not give the Fourth Circuit pause. App.16. That court instead rewrote *Abbasi* to except from the new-context test all claims against officers "engaged in routine law enforcement measures," App.16, and all but limited *Egbert* to its facts by ignoring them. After all, *Egbert* was more similar to *Bivens* in involving allegations of excessive force, and it involved precisely the sort of "conventional" claim, *Egbert,* 142 S. Ct. at 1805 (quotation marks omitted), that would justify a *Bivens*

action under the Fourth Circuit's overly broad "routine law enforcement" reasoning, App.16; *cf. Egbert*, 142 S. Ct. at 1811 (Sotomayor, J., dissenting in part) (arguing that the case involved "circumstances [that] are materially indistinguishable from those in *Bivens*"). Moreover, *Egbert* specifically instructed that the mere fact that a case involves a "'conventional' [Fourth Amendment] claim, as in *Bivens*, does not bear on the relevant point," which is that "the Judiciary is comparatively ill suited to decide whether a damages remedy . . . is appropriate." 142 S. Ct. at 1805 (majority op.).

Similarly, Respondent's temporary detention while behind the wheel of an automobile on a federal highway should have alerted the court that different "expectation[s] of privacy" are at issue here and hence there are several reasons to pause before "implying a cause of action." *Mejia*, 61 F.4th at 668; *see also Ahmed*, 984 F.3d at 568; *Oliva*, 973 F.3d at 443–44; *Cantú*, 933 F.3d at 423. As this Court has explained, "the home is first among equals," *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (quotation marks omitted), and gives rise to "significantly different" expectations of privacy, such that "[t]he brief seizure of an automobile can hardly be compared to the intrusive search of the body or the home," *City of Indianapolis v. Edmond*, 531 U.S. 32, 54–55 (2000) (Rehnquist, C.J., dissenting) (quotation marks omitted).

Yet the Fourth Circuit deemed it irrelevant that "a temporary detention can be justified by a lesser showing than probable cause" and that this case involves "less egregious intrusions of an individual's

right to be free from unjustified, warrantless seizures" than *Bivens*. App.15–16. That this case involves *less* egregious alleged constitutional violations than in *Bivens* should have given the Fourth Circuit pause. Instead, where this Court viewed different constitutional standards as closing the door to new *Bivens* claims, the Fourth Circuit flung open the door for all Fourth Amendment *Bivens* claims involving what that court might view as "routine law enforcement measures" by line-level federal agents, regardless of the facts or applicable legal standard. App.15–16.

The breadth of that ruling is sweeping. Virtually *everything* federal officers normally do could be viewed as "routine law enforcement measures." By bringing almost all law-enforcement activity within the scope of *Bivens*, the Fourth Circuit nullified this Court's guidance that *Bivens* should not be extended to new contexts. That result is especially perverse because there was nothing "routine" about *Bivens*, where the officers ransacked the plaintiff's home, arrested and strip-searched him, and threatened his family—all without probable cause or a warrant. *See* 403 U.S. at 389. Today, not even those exceptional facts would warrant an exception to the rule against "discover[ing] . . . implied causes of action." *Egbert*, 142 S. Ct. at 1809. So it was illogical for the Fourth Circuit to create an exception for "*less* egregious" conduct.

The decision below further muted this Court's precedents in two fundamental ways. *Abbasi* made clear that "[t]he proper test for determining whether a case presents a new *Bivens* context" is whether it meaningfully differs "from previous *Bivens* cases

decided by *this Court*." 582 U.S. at 139 (emphasis added). Like the Sixth Circuit in *Jacobs*, however, the Fourth Circuit here found that the context was not new because *its own* prior rulings had "appl[ied] *Bivens* to Fourth Amendment claims arising from police traffic stops like this one." App.16 (quotation marks omitted); *see Jacobs*, 915 F.3d at 1038 ("we have recognized . . . every one of plaintiff's *Bivens* claims"). That flawed approach effectively legitimizes earlier judicial expansions of *Bivens* and empowers courts to continue recognizing *Bivens* actions in other contexts, thereby frustrating this Court's recent decisions retrenching *Bivens*' scope.

Equally alarmingly, the Fourth Circuit cast doubt on this Court's repeated insistence that "a *Bivens* cause of action may not lie where . . . national security is at issue." *Egbert*, 142 S. Ct. at 1805; *accord Hernández*, 140 S. Ct. at 746–47; *Abbasi*, 582 U.S. at 142. Congress is better suited to decide whether to authorize remedies against U.S. Park Police officers because they often perform national-security functions such as protecting "sensitive location[s]," *Buchanan*, 71 F.4th at 1009, and providing "Presidential security and dignitary escorts," *Homeland Security Division*, *supra*; *see also Egbert*, 142 S. Ct. at 1806 ("[W]e ask here whether a court is competent to authorize a damages action not just against Agent Egbert but against Border Patrol agents generally. The answer, plainly, is no."). In this case, Petitioners were patrolling a federally owned expressway "'near the headquarters of the National Security Agency.'" App.17 n.3. The Fourth Circuit's dismissal of these national-security concerns as having "no relevance," App.17 n.3, reveals the

remarkable degree to which that court simply failed to heed this Court's precedent.

III. This Case Is an Ideal Vehicle for Deciding These Exceptionally Important Questions

1. The Fourth Circuit's expansion of *Bivens*—in the teeth of this Court's unequivocal directives—invites intrusion into the critical work performed by scores of federal law enforcement officers each day.

A ruling in this case would affect up to 92,860 federal law enforcement officers, across 94 agencies. *See* Connor Brooks, Dep't of Justice, No. NCJ 304752, Federal Law Enforcement Officers, 2020 – Statistical Tables, at 1, 17 (Sept. 2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fleo20st.pdf. The vast majority of those officers are *not* narcotics officers. Instead, they enforce a different legal mandate for the U.S. Marshals Service (3,747) or for the Departments of Homeland Security (66,215), Veterans Affairs (3,923), Interior (3,019), Treasury (2,502), or some other agency. *See id.* at 4. At stake in this case, therefore, is whether tens of thousands of federal law enforcement officers must continue to fear being subjected to time-consuming litigation and life-changing personal liability through a *Bivens* action. If this Court thought it had solved that problem in *Abbasi* and *Egbert*, the decision below—and the other decisions on the Fourth Circuit's side of the two splits discussed in this petition—unfortunately proves otherwise.

The specter of such personal liability is enormously consequential. Tens of thousands of federal officers—including Park Police officers, Secret

Service agents, and Deputy U.S. Marshals—perform vital work protecting the nation's security. Much of that work involves searches or seizures outside of a home. Officials in these situations must act decisively and without hesitation; yet the decision below compels them to "err always on the side of caution because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quotation marks omitted). This Court should not countenance continuing judicial intrusion by the lower courts that forces officers "to second-guess [such] difficult but necessary decisions." *Abbasi*, 582 U.S. at 142.

Unless this Court intervenes, the decision below threatens an "onslaught of *Bivens* actions." *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007). The Fourth Circuit ignored this Court's express directives, expanded *Bivens* to two new contexts, and eviscerated this Court's recent *Bivens* precedents. That decision has already emboldened other courts to expand *Bivens* to still more—and more problematic—contexts. One case relied on the decision below to hold that a *Bivens* claim against a *military* official who searched a car illegally parked near Arlington National Cemetery—and found a Glock pistol, an AR-15 rifle, 150 rounds of ammunition, bulletproof vests, and a smoke bomb—"do[es] not represent an extension of the doctrine." *Wells v. Fuentes*, No. 1:22-cv-00140 (MSN/IDD), 2023 WL 3791390, at *1, *6–7 (E.D. Va. June 2, 2023). That court concluded that the Fourth Circuit's ruling in this case "makes a *Bivens* remedy available for claims" in *all* cases by plaintiffs alleging that "an officer unreasonably seized their vehicle," even though the factual context and legal standard differ from *Bivens*. *Id.* at *6.

2. This case is an ideal vehicle for resolving both questions presented. *Bivens* actions rarely reach a jury, much less result in a $730,000 judgment in the absence of any bodily injury.[2] This case therefore provides a rare opportunity for the Court to evaluate the propriety of extending *Bivens* in light of its real-world consequences. The questions presented require no factual development, were briefed and clearly decided below, and were outcome-determinative in this case: Petitioners would have been entitled to judgment had the Fourth Circuit concluded that no *Bivens* action is available against non-narcotics officers or for conduct outside the home.

The tide of unwarranted *Bivens* actions brought in disregard of this Court's recent precedents grows every day. If left in place, the decision below will open the floodgates even further. Given the deep and entrenched circuit splits on both questions presented, no further percolation is needed. The Court should grant certiorari now.

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[2] The judgment was approximately six times the median net worth of an American family in 2019. Neil Bhutta et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106 Fed. Rsrv. Bull. 1, 10 (Sept. 2020), https://www.federalreserve.gov/publications/files/scf20.pdf (median family net worth was $121,700 in 2019).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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