No. 23-324

IN THE

Supreme Court of the United States

GERALD L. FERREYRA, ET AL.,

Petitioners,

v.

NATHANIEL HICKS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Federal Law Enforcement Officers Association (FLEOA) is a nonpartisan, nonprofit professional association that exclusively represents federal law enforcement officers throughout the United States. FLEOA is a volunteer organization and represents more than 32,000 federal law enforcement officers from over 65 agencies. Since its inception in 1977, FLEOA's primary purpose has been to provide legal assistance to the federal law enforcement community.

Amicus has a strong interest in this case because the Fourth Circuit's opinion exposes its members to new, judicially created *Bivens* suits. Such an unwarranted expansion of *Bivens* endangers both the public and the officers who protect it. *Amicus* thus urges the Court to grant the petition and reverse the decision below.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971), this Court recognized a right of action for damages against Federal Bureau of Narcotics officers who subjected Bivens to an invasive "stem to stern" warrantless search of his apartment and (still without a warrant) arrested and shackled him in front of his wife and children. *Bivens* has been criticized as "a relic of the heady days in which this Court assumed common-law powers to create causes of action." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). In the half century since it was decided, this Court has adopted a "far more cautious course" in allowing recovery under a judicially created cause of action. *Ziglar v. Abbasi*, 582 U.S. 120, 132 (2017). Indeed, the Court has "consistently rebuffed requests to add to the claims allowed" under *Bivens*. *Hernández v. Mesa*, 140 S. Ct. 735, 743 (2020).

In doing so, the Court has repeatedly "caution[ed]" the lower courts against applying *Bivens* to new contexts. *Egbert v. Boule*, 596 U.S. 482, 491 (2022). The warning was clear—if a lower court finds even "a single 'reason to pause before applying *Bivens* in a new context,'" it should do so. *Id.* Congress, after all, "is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf." *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (internal quotation marks omitted).

Ignoring this warning, the Fourth Circuit massively expanded *Bivens* liability to all "warrantless-search-and-seizure" claims involving

"routine criminal law enforcement." Pet. App. 12. In this case, Officers Ferreyra and Phillips—two U.S. Park Police officers—briefly detained Nathaniel Hicks—a Secret Service agent—after finding him sleeping in his work vehicle with a holstered gun in plain view near the National Security Agency. The officers allowed him to remain in his car while they called a supervisor and verified his identity. According to the court below, *Bivens* applied because there was no meaningful difference between *Bivens* and this case. No matter that this case involved only a brief roadside detention and routine traffic stop while *Bivens* concerned an invasive warrantless search and seizure. No matter that this was a different claim against officers who operate in a different sphere under a different "legal mandate." *Abbasi*, 582 U.S. at 139-40. The Fourth Circuit's decision sweeps far beyond the scope of *Bivens*, conflicts sharply with this Court's warning against applying *Bivens* in new contexts, and is incompatible with the Court's effort to limit *Bivens* and its progeny.

As a practical matter, expanding *Bivens* to impose liability on officers in such routine circumstances will result in significant negative consequences for federal law enforcement officers and the agencies that employ them. Opening new and expansive avenues of liability will deter federal law enforcement officers from acting promptly and effectively in carrying out their duties. It may also expose those officers to personal financial liability. Those costs would discourage talented candidates from joining and staying on the force. At a time when law enforcement departments are critically short staffed and under immense public pressure,

increased liability would significantly deter officers from acting, resulting in harm to those who depend on them.

If left uncorrected, the Fourth Circuit's expansion of *Bivens* would harm federal law enforcement officers and the public they are sworn to protect. The Court should grant the petition and reverse the decision below.

ARGUMENT

I. The Fourth Circuit's expansion of liability conflicts with this Court's efforts to limit *Bivens*.

For 50 years, this Court has "consistently rebuffed" attempts to expand liability for federal law enforcement officers under *Bivens*. *Hernández*, 140 S. Ct. at 743. In the decades following *Bivens*, it has only twice fashioned new causes of action under the Constitution. *See Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment's Due Process Clause); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment's Cruel and Unusual Clause). And it "has consistently refused to extend *Bivens* to any new context or new category of defendants." *Abbasi*, 582 U.S. at 135. As the Court has repeatedly explained, "creating a cause of action is a legislative endeavor." *Egbert*, 596 U.S. at 491. Thus courts must proceed with the utmost caution when considering even a modest expansion of *Bivens*.

Despite acknowledging that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity," the court below ignored the guardrails this Court has

placed on *Bivens*. Pet. App. 9. Instead, the court extended *Bivens* to a whole new class of federal officers and to a sweeping range of conduct that does not come close to resembling the events in *Bivens*. That expansion defies this Court's "caution toward extending *Bivens* remedies into any new context"—"a caution consistently and repeatedly recognized for [many] decades." *Malesko*, 534 U.S. at 74.

The clarity of the Court's "test for determining whether a case presents a new *Bivens* context" underscores the Fourth Circuit's departure from it. *Abbasi*, 582 U.S. at 139. "If the case is different in a meaningful way from previous *Bivens* cases decided by th[e] Court, then the context is new," *id.*, and "a court may not recognize a *Bivens* remedy." *Egbert*, 596 U.S. at 492 (internal citation omitted). This is so even if the claim "is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Hernández*, 140 S. Ct. at 743. "A case might differ in a meaningful way," however, based on several factors, including "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action;" "the statutory or other legal mandate under which the officer was operating;" or "the presence of potential special factors that previous *Bivens* cases did not consider." *Abbasi*, 582 U.S. at 139-40. And again, if it differs in any of these "meaningful way[s]," there is no *Bivens* claim. *Id.* at 139.

Yet the Fourth Circuit treated this test as a suggestion. And it discounted the meaningful differences at play. Abstracting to a level of generality that obscures those differences, the court concluded

that Respondent Hicks sought "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." Pet. App. 53. That claim, as the Fourth Circuit framed it, was just like *Bivens*. *Id.* And thus the court concluded the myriad differences present here did "not constitute a meaningful difference for [its] purposes." Pet. App. 15 n.2.

But a brief roadside detention by Park Police arising from a routine traffic stop presents a new context meaningfully different from *Bivens*. Although this case involves a Fourth Amendment claim arising from a warrantless search-and-seizure, the brief roadside detention is different from the actions in *Bivens* in both degree and kind. *Bivens* involved an excessive force claim against Federal Bureau of Narcotics agents who pursued drug dealers. Those agents allegedly entered Bivens' home without a warrant, "manacled" him in front of his family, ripped his home apart "stem to stern," and strip searched him at a federal courthouse. *Bivens*, 403 U.S. at 389.

The officers here, by contrast, are U.S. Park Police, who operate in a different sphere under a different "legal mandate." *Abbasi*, 582 U.S. at 139-40. Rather than tracking down drug dealers in their homes, Park Police "maintain law and order" at federal parks and "protect individuals and property" within those parks. 54 U.S.C. §102701(a)(1). This includes patrolling federal highways for suspicious persons or vehicles in "sensitive location[s]" like the National Security Agency. *Buchanan v. Barr*, 71 F.4th 1003, 1009 (D.C. Cir. 2023). As the court below

acknowledged, "Hicks's home was not searched, and the officers did not arrest Hicks or use excessive force against him." Pet. App. 12. Instead, Officers Ferreyra and Phillips conducted a commonplace traffic stop on a federal highway, outside of a federal agency, where privacy interests are significantly diminished. *See Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals."); *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 464 (1952) ("However complete [the] right of privacy may be at home, it is substantially limited" when an individual "travels on a public thoroughfare.").

All these differences are meaningful here. And they are enough to establish that this is a "new context." In fact, this Court has declined to extend *Bivens* liability to cases with "almost parallel circumstances" to *Bivens*. *Egbert*, 596 U.S. at 495. In those excessive force cases, the Court called the similar "mechanism of injury" "superficial" at best and determined *Bivens* did not apply. *Id.* These officers and these actions are a far cry from those facts.

While the factual differences alone are enough to foreclose a *Bivens* action, "the presence of potential special factors" also counsels against expanding *Bivens* here. *Abbasi*, 582 U.S. at 139-40. A court "may not recognize a *Bivens* remedy" "[i]f there is even a single 'reason to pause before applying *Bivens* in a new context.'" *Egbert*, 596 U.S. at 492 (quoting *Hernández*, 140 S. Ct. at 743).

Several reasons exist here. To start, "the decision to recognize a damages remedy requires an

assessment of its impact on governmental operations systemwide." *Abbasi*, 582 U.S. at 136. That is a job for Congress. "[E]ven in a particular case, a court likely cannot predict the 'systemwide' consequences of recognizing a cause of action under *Bivens*." *Egbert*, 596 U.S. at 493. "That uncertainty alone is a special factor that forecloses relief." *Id.*; *see Hernández v. Mesa*, 885 F.3d 811, 818 (5th Cir. 2018) (en banc) ("The newness of this 'new context' should alone require dismissal."). Indeed, extending *Bivens* liability to any unreasonable search or seizure found to violate the Fourth Amendment—no matter where the violation occurs, or what type of officer is responsible for the violation—significantly expands the scope of personal liability for federal law enforcement officers. This dramatic expansion of *Bivens* liability will inevitably affect federal law enforcement officers and how they carry out their duties. *See infra* part II. Congress, not the court, should decide whether and how to balance expansive new *Bivens* liability with the resulting negative effects on federal law enforcement.

This is especially so given the far-reaching implications of applying *Bivens* to commonplace police conduct. If left to stand, the Fourth Circuit's expansive reading of *Bivens* may permit damages suits whenever a warrantless search or seizure occurs, exposing law enforcement officers conducting routine stops to *Bivens* liability. *Terry* stops, for example, like the one here by Officer Phillips, involve the brief detention of potential suspects. Officers routinely conduct these stops. And litigants often challenge these stops as unwarranted or unduly prolonged. *See United States v. Sharpe*, 470 U.S. 675 (1985);

Rodriguez v. United States, 575 U.S. 348 (2015); *United States v. Leon*, 80 F.4th 1160 (10th Cir. 2023); *United States v. Davies*, 768 F.2d 893 (7th Cir. 1985); *Embody v. Ward*, 695 F.3d 577 (6th Cir. 2012). Yet under the Fourth Circuit's decision, every defendant who was briefly stopped could bring a *Bivens* suit.

Leaving the Fourth Circuit's decision untouched "would invite an onslaught of *Bivens* actions" allowing litigants to sue officers for simply detaining them for a time that plaintiffs believe is a few minutes too long. *See Wilkie*, 551 U.S. at 562. Such a massive expansion of liability cannot possibly co-exist with this Court's limitations. *E.g.*, *Hartman v. Moore*, 547 U.S. 250, 267 (2006) (Ginsburg, J., dissenting) (observing that *Bivens* is a remedy in "'rare cases'"). Simply put, the Fourth Circuit's rule transforms *Bivens* from a rare remedy for extreme misconduct to a commonplace remedy for minor grievances.

II. Left uncorrected, the Fourth Circuit's expansion of *Bivens* liability will harm law enforcement officers and the public they serve.

Allowing the Fourth Circuit's immense expansion of *Bivens* would have detrimental consequences for federal law enforcement officers and the public they serve. "[T]he public interest requires" prompt "decisions and action to enforce laws for the protection of the public." *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974). But the threat of personal liability can deter and distract officers from the "effective performance of their [] public duties." *Briscoe v. LaHue*, 460 U.S. 325, 343 (1983). Indeed, such liability could "seriously

cripple the proper and effective administration of public affairs as entrusted to" law enforcement. *Spalding v. Vilas*, 161 U.S. 483, 498 (1896).

This Court has long recognized that allowing damage suits against government officials "entail[s] substantial social costs" that threaten the public good. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). From the start, the common law "recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer*, 416 U.S. at 239; *see also Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) ("As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability."). That immunity rests on two principles: "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 239-40. Of course, "[i]mplicit in the idea that officials have some immunity" for their acts, "is a recognition that they may err." *Id.* at 242. But the entire "concept of immunity assumes" that "it is better to risk some error and possible injury from such error than not to decide." *Id.*

Expanding *Bivens* liability—as the Fourth Circuit did here—would discourage law enforcement officers from acting promptly and effectively. Fearing potential liability, officers "may delay their actions,

may become formalistic by seeking to 'build a record' with which subsequently to defend their actions, or may substitute 'safe' actions for riskier, but socially more desirable, actions." Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 652 (1987) (citation omitted). Worse still, officials may "'hesitate to exercise their discretion" *at all*—"even when the public interest required bold and unhesitating action.'" *Puerto Rico Aqueduct Sewer Auth. v. Metcalf Eddy*, 506 U.S. 139, 149 (1993) (Stevens, J., dissenting) (internal citation omitted); *Carlson*, 446 U.S. at 21 n.7. As Judge Learned Hand recognized a half-century ago: "[T]o submit all officials ... to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Mateo*, 360 U.S. 564, 571 (1959) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). It is simply wrong to "subject those who try to do their duty to the constant dread of retaliation." *Barr*, 360 U.S. at 572 (quoting *Gregoire*, 177 F.2d at 581).

Such threats are incompatible with "the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978). To start, damages suits against officers "consume time and energies which would otherwise be devoted to governmental service." *Barr*, 360 U.S. at 571. Just "the specter of a long and contentious legal proceeding," would itself "inhibit government officials from exercising their authority with the freedom and independence necessary to serve the public interest." *Puerto Rico Aqueduct Sewer*

Auth., 506 U.S. at 150. The "time and administrative costs" of discovery and trial are often "significant." *Abbasi*, 582 U.S. at 134.

And the time and costs are magnified given the size of the federal workforce. In 2020, the federal government employed 136,815 full-time federal law enforcement officers across 90 agencies. *See* Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, *Federal Law Enforcement Officers, 2020 – Statistical Table*, at 9 (Sept. 2022), perma.cc/3HZN-6A4H. With tens of millions of law enforcement encounters with the public each year, many of those officers could spend more time in the courtroom or defending themselves in depositions than doing their jobs.

Nor should this Court expect federal law enforcement officers to "pinch-hit for counsel" in determining whether their decisions may result in *Bivens* claim against them. *Oregon v. Elstad*, 470 U.S. 298, 316 (1985). Doing so would charge officers "with a responsibility for making sophisticated [c]onstitutional judgments, in the heat of action, about questions which divide lawyers and judges even after they have had the benefit of scholarly arguments and leisurely deliberations." *Federal Tort Claims Act: Hearing on S. 1775 Before the Subcomm. on Agency Admin. of the S. Comm. on the Judiciary*, 97th Cong. 144 (1982) (written statement of Donald J. Devine, Director, Office of Personnel Management). "This Court should 'decline to place officers … in the untenable position of having to consider, often in a matter of seconds, whether to risk … incurring personal liability in order to 'neutralize'" a difficult,

dangerous, or "volatile situation confronting them." U.S. Amicus Br., *Chavez v. Martinez*, 538 U.S. 760, 2002 WL 31100916, at *25 (quoting *New York v. Quarles*, 467 U.S. 649, 657-58 (1984)).

Moreover, extending liability to situations like those here would hinder an agency's ability to attract and retain quality law enforcement officers. *See Harlow*, 457 U.S. at 814 (explaining that extensive liability imposes social costs, including "the deterrence of able citizens from acceptance of public office."). Officer retention is already a nationwide problem; there is "a shortage of police officers across the country." Associated Press, *The U.S. is Experiencing a Police Hiring Crisis*, NBC (Sept. 6, 2023), perma.cc/L2VB-U6GV. "Fewer people are applying to be police officers," and more and more officers are resigning or eligible for retirement. *Id.; see also* Police Exec. Rsch. F., *The Workforce Crisis, And What Police Agencies Are Doing About It* 8 (Sept. 2019). In 2019, 41 percent of police departments reported worsening personnel shortages. *Id.* at 19-20. This is in no small part due to "the exposure to liability." Nicolas Dubina, *Police Departments Struggling to Recruit New Officers Amid Shortages*, WETM (May 18, 2023), perma.cc/6L3Z-DGYZ. According to one estimate, more than a quarter of law enforcement officers have been sued at least once. *See* Larry K. Gaines, Victor E. Kappeler & Zachary A. Powell, Policing in America 341 (9th ed. 2021). And due to the sheer number of police interactions, damage suits "'could be expected with some frequency.'" *Briscoe*, 460 U.S. at 343 (internal citation omitted). The threat of expansive *Bivens* liability thus

adds risks to an already-risky job. Those risks may, in turn, discourage talented individuals from joining the force at all and deter good officers from staying on.

The threat of personal financial liability also contributes to low morale and affects officer recruitment and retention. Since the 1980s, there has been an "increasing frequency" of plaintiffs "filing suits seeking damage awards against … government officials." *Harlow*, 457 U.S. at 817 n.29. While an agency may indemnify an officer, "there is no right to compel indemnification from the United States or an agency thereof in the event of an adverse judgment." Dep't of Justice, *Tort Litigation*, perma.cc/F5LX-A84F. And even if indemnification is possible, it is generally not available until *after* a judgment or settlement. *Id.* (citing 28 C.F.R. §50.15 (c)(3)). Thus, at best, *Bivens* leaves officers wondering whether the government will cover their legal costs. At worst, it represents "a wholesale exposure of Federal officials to personal ruin based upon actions taken in the performance of their duties." Devine, *supra*, at 140-41.

And even if the government ultimately indemnifies an officer, large damage awards can still divert public resources and deplete the public fisc. Those costs add up and "threaten[] the vitality of the Government." *Id.* The disproportionate damages awarded here are telling. A jury awarded Respondent Hicks a staggering $730,000 for sitting through a welfare check and traffic stop. Hicks remained seated in his vehicle, there was no physical injury to his person or property, neither he or his car were searched, and the whole encounter lasted for just over an hour. In total, Hicks was compensated roughly

$11,231 for each minute that he sat in his car—based solely on the alleged "humiliation, embarrassment, and other emotional harm" of being briefly detained, despite no "accompanying physical or economic injuries." Pet. App. 31. That is a far cry from *Bivens*, where the plaintiff settled for $1,000 after officers allegedly "entered his apartment" without a warrant, "manacled" him in front of his family, ripped his home apart "stem to stern," and strip searched him at a federal courthouse. 403 U.S. at 389; Lyle Denniston, *Webster Bivens' Story – An Update After a Half-Century*, Nat. Const. Ctr. (Oct. 12, 2016), perma.cc/5XZT-FAHG. Extending *Bivens* and allowing disproportionate damage awards will encourage more lawsuits and make officers think twice about acting.

In short, allowing the decision below to stand would expose tens of thousands of federal law enforcement officers to newfound liability. That liability would have disastrous consequences for law enforcement officers and the public they serve.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

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