No. 23-324

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 a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners continued their unlawful seizure of Respondent for over an hour after they learned his identity and knew that he was lawfully carrying a firearm—all while spitting mad, cursing and taunting him, causing him to fear for his life. If that were not enough, Petitioner Phillips then unlawfully seized Respondent a *second* time, knowing full well who he was and later lying to the jury as to why he made the stop. Respondent sued for these unlawful, warrantless seizures under the Fourth Amendment.

In *Ziglar v. Abbasi*, 582 U.S. 120 (2017), the Court explained that "this opinion is not intended to cast doubt on the continued force, or even necessity, of *Bivens* in the search-and-seizure context in which it arose." *Id.* at 134. Of particular relevance, in cases involving the "common and recurrent sphere of law enforcement," it described the doctrine as "settled law." *Id.* And Petitioners have not argued that *Bivens* should be overruled.

The question presented is:

Whether the Fourth Circuit correctly determined that Respondent had a cognizable *Bivens* claim when Petitioners, line-level officers acting in a routine law enforcement context, executed two unlawful warrantless seizures of Respondent—seizures that a jury found violated Respondent's Fourth Amendment rights and were undertaken by Petitioners with malice or reckless indifference.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

STATEMENT OF THE CASE

I. Factual Background

In July of 2015, Respondent Nathaniel Hicks sat parked on the shoulder of the Baltimore-Washington Parkway (I-295) in Maryland. Pet. App. 3. It was around six in the morning. *Id.* Mr. Hicks—a Black Special Agent for the United States Secret Service—was waiting to join a motorcade. Pet. App. 3-4.

Petitioner Gerald Ferreyra is a United States Park Police (USPP) officer. Pet. App. 3. He is a line-level officer whose responsibilities include patrolling the B-W Parkway "to, basically, enforce traffic laws and help people as needed." JA 401. That morning, Petitioner Ferreyra saw Respondent's vehicle and stopped to perform a "welfare check." Pet. App. 3. Looking through the vehicle's passenger-side window, Petitioner Ferreyra saw Respondent, who appeared to be asleep, in the driver's seat. Pet. App. 3-4; Pet. App. 41. Petitioner Ferreyra also saw Respondent's service weapon, which was secured in a "holstered case" on the passenger seat. Pet. App. 4. Petitioner Ferreyra pointed his gun at Respondent and screamed at him, ordering him not to reach for the holster. Pet. App. 4.

Respondent promptly complied. Pet. App. 4. He raised his hands in the air, identified himself as a law enforcement officer, and (upon request) showed Petitioner Ferreyra his badge and credentials, which included a photograph. Pet. App. 4; JA 120-21; *see also* Pet. App. 41-42 (jury finding that Respondent did not reach for the gun). Respondent also explained his reason for parking on the side of the road: the upcoming motorcade. Pet. App. 4.

Despite Respondent's compliance and explanation, Petitioner Ferreyra was still "very agitated to the point of . . . spitting at the mouth while he was shaking profusely with the handgun pointed in [Respondent's] direction." Pet. App. 4. Petitioner Ferreyra removed Respondent's service weapon from the vehicle. *Id*. He repeatedly cursed at Respondent, telling him to shut the "f" up and exclaimed that he, Petitioner Ferreyra, was not an "f[in]g rookie." *Id*.

At this point, Petitioner Ferreyra had no justification for continuing the seizure; after examining Respondent's credentials, Petitioner Ferreyra knew who Respondent was and had confirmed that Respondent was authorized to carry a firearm. Pet. App. 4; Pet. App. 42. However, instead of releasing Respondent, Petitioner Ferreyra called for backup. Pet. App. 4.

Petitioner Brian Phillips was the next USPP officer to arrive on the scene. Pet. App. 4. Like Petitioner Ferreyra, Petitioner Phillips is a line-level officer who described his job as that of routine law enforcement: "It's pretty simple. We're just basically the law enforcement portion for the B/W Parkway between Route 50 and 175." JA 507. Petitioner Phillips knew Respondent was not a suspect in a criminal matter. Pet. App. 4. Nevertheless, Petitioner Phillips interrogated Respondent. Pet. App. 4-5. He ordered that Respondent "sit still and [not] move," and was "very belligerent and upset." Pet. App. 5.

Petitioner Ferreyra told Respondent he was not allowed to "go[] anywhere" until a USPP supervisor arrived. *Id*. Although Petitioner Ferreyra testified at trial that he was following USPP practice in continuing the unlawful seizure of Respondent, the

jury (in a special interrogatory) found that not to be the case. Pet. App. 5; Pet. App. 42.

Sometime after 6:40 a.m, a USPP supervisor, Sergeant Wallace, finally arrived. Pet. App. 5. Sergeant Wallace spoke with Respondent's supervisor on Respondent's cell phone, and informed Respondent he was free to leave. *Id*. Petitioner Ferreyra returned Respondent's gun and credentials. *Id*. In total, Petitioners unlawfully seized Respondent for about an hour after Petitioner Ferreyra confirmed Respondent was authorized to carry his service weapon. *Id*. Respondent drove away. Pet. App. 5.

But Respondent's freedom was short lived. Mere minutes after driving away, Petitioner Phillips pulled up behind Respondent and initiated a *second* seizure. *Id*. Petitioner Phillips later testified that he stopped Respondent because he saw the car swerve and he saw the driver talking on a phone. *Id*. At trial, however, the jury rejected Petitioner Phillips's account, finding in a special interrogatory that Petitioner Phillips did *not* observe Respondent driving erratically or talking on his mobile phone. Pet. App. 5-6; Pet. App. 42.

Petitioner Phillips approached the car and immediately told Respondent he was being "mouthy." Pet. App. 6. Despite having spoken with Respondent just minutes before, Petitioner Phillips demanded Respondent's license and registration. *Id*. The jury found that Petitioner Phillips recognized Respondent before demanding his license—in fact, it found that Petitioner Phillips knew it was Respondent before pulling him over. Pet. App. 42-43. Ultimately, after initiating this second unlawful seizure, Petitioner Phillips released Respondent after a few minutes, without issuing a citation. Pet. App. 6.

Respondent testified that from the beginning of the first encounter with Petitioner Ferreyra—when Petitioner Ferreyra pointed his gun at Respondent while "very agitated" and "spitting" and "shaking profusely"—he feared for his life. Pet. App. 4, 28. As the unlawful seizure extended, Respondent felt "terrified," "alone," "belittled" and "helpless" because of Petitioners' behavior. Pet. App. 28. The incident was the first time in Respondent's 20-year career that he was unable to complete an assignment. *Id*. The aftereffects lingered: Respondent continued to be upset, which caused him to have trouble sleeping. *Id*. The trauma impaired his relationships with his family members and colleagues. *Id*. Respondent also feared for his family's safety; he was frightened to think about what might have happened if his son or daughter had been stopped by the officers, and how the incident could have escalated had he not remained calm. *Id*. As a result of the incident, Respondent sought psychological counseling for the first time in his life. *Id*.

The jury also heard testimony from a witness who corroborated Respondent's emotional distress. Pet. App. 28-29. A former supervisor testified to seeing Respondent six weeks after the encounters, and observing that his appearance and demeanor had changed: he had lost weight, and was distressed and subdued, with "a look of anguish on his face." Pet. App. 29. When Respondent's supervisor asked what was wrong, Respondent described Petitioners' actions. *Id*. The supervisor later observed "a further decline" in Respondent's "demeanor and emotional state," and testified that the emotional toll "was weighing on [Respondent] more and more as time went on." *Id*.

II. Procedural History

Respondent filed a lawsuit against Petitioners Ferreyra and Phillips under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 2. He alleged Petitioners violated his Fourth Amendment rights when first, both Petitioners unlawfully seized Respondent without justification during the initial encounter; and second, Petitioner Phillips unlawfully seized Respondent during the unjustified traffic stop. Pet. App. 2, 6.

The district court denied Petitioners' motion for summary judgment asserting qualified immunity. *Hicks v. Ferreyra*, 396 F. Supp. 3d 564 (D. Md. 2019). Petitioners filed an interlocutory appeal challenging the immunity ruling. Pet. App. 6. And they raised, for the first time, an argument that no *Bivens* claim was available under *Abbasi.* The U.S. Court of Appeals for the Fourth Circuit dismissed this first appeal for lack of jurisdiction because Petitioners disputed factual matters rather than legal issues. *Hicks v. Ferreyra*, 965 F.3d 302, 313 (4th Cir. 2020). The Fourth Circuit also held that Petitioners had forfeited their argument that no *Bivens* remedy was available for Respondent's claims because they had not first presented that argument to the district court. *Id.* at 309. There was no excuse for not doing so since "the case on which they chiefly rely, *Ziglar v. Abbasi*, was decided over a year before they submitted their summary judgment briefs to the district court." *Id.* at 311. The court also declined, in the interest of justice, to excuse this forfeiture, noting that "along every dimension the Supreme Court has identified as relevant to the inquiry, this case appears to present not an extension of *Bivens* so much as a replay." *Id.*

Back in the district court, the matter went to trial before a jury. Pet. App. 7. During trial, Petitioners moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), again asserting qualified immunity and that a *Bivens* remedy was unavailable. *Id*. The district court denied Petitioners' motion and submitted the case to the jury. *Id*.

The jury found for Respondent. *Id*. It concluded that both Petitioners, acting under color of law, violated Respondent's Fourth Amendment rights during the first unlawful seizure. *Id*. And the jury determined Petitioner Phillips violated Respondent's Fourth Amendment rights in conducting the second unlawful seizure. *Id*. Based on the three days of witness testimony during trial, the jury also made specific factual findings via a set of special interrogatories, including that:

- Petitioner Ferreyra did not observe Respondent reaching for his weapon;
- Petitioner Ferreyra knew Respondent was a Secret Service Agent after he verified his credentials;
- Petitioner Ferreyra did not follow customary practice within USPP when he requested a supervisor come to the scene;
- Petitioners' actions were not reasonably necessary at the scene of the first encounter;
- Petitioner Phillips did not see a motorist driving erratically and talking on his phone before initiating the second seizure of Respondent;

- Petitioner Phillips realized it was Respondent driving prior to initiating the second seizure; and
- Petitioner Phillips realized it was Respondent driving prior to demanding his license at that second seizure.

Pet. App. 41-43.

The jury awarded Respondent compensatory damages for his emotional distress, and found that Petitioners acted "with malice or reckless indifference" to Respondent's rights. Pet. App. 7, 29-30; Pet. App. 40-41.

Petitioners filed a series of post judgment motions—for judgment as a matter of law and for a new trial or remittitur. Pet. App. 7. The district court denied Petitioners' motions and entered the jury's verdict as final judgment against Petitioners. Pet. App. 8. The officers again appealed to the Fourth Circuit. *Id.*

The Fourth Circuit first addressed Petitioners' argument that the district court had erred in concluding that Respondent presented a viable claim under *Bivens*. *Id.* In a thorough analysis, the circuit court resolved the *Bivens* question at the first step of the inquiry this Court set out in *Ziglar v Abbasi*, 582 U.S. 120 (2017). Pet. App. 12. That is, the Fourth Circuit held that Respondent's claim did not present a "new context" because it fell within the *Bivens* heartland: line-level officers committing a warrantless seizure in the context of routine criminal law enforcement. Pet. App. 13. It observed that this Court in *Abbasi* "took great care" in making clear "that its 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." Pet. App. 12. Specifically, this Court in *Abbasi* "emphasiz[ed] that its holding restricting the availability of a *Bivens* remedy was 'not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose.'" Pet. App. 12-13 (quoting *Abbasi*, 582 U.S. at 134). The Fourth Circuit noted that this Court in *Abbasi* described *Bivens*'s application in this "common and recurrent sphere of law enforcement" as "settled law." Pet. App. 13. "To highlight this point," the court contrasted the situation at hand to that in one of its recent cases, *Annappareddy v. Pascale*, 996 F.3d 120, 133 (4th Cir. 2021), where the Fourth Circuit had concluded that no *Bivens* claim existed. Pet. App. 13. *Annappareddy* arose in the "context of searches authorized by a warrant, which 'implicate[] a distinct Fourth Amendment guarantee'" from the warrantless-search-and-seizure claims in *Bivens* itself; not so here. Pet. App. 13-14.

The Fourth Circuit also addressed Petitioners' other arguments on appeal, which they do not press in their Petition. The court rejected Petitioners' assertion that the district court erred in denying their claim of qualified immunity. *See* Pet. App. 17-22. The jury's findings in the special interrogatories, the court noted, "make plain the officers' violation of [Respondent's] Fourth Amendment rights," Pet. App. 19-20, and those rights were clearly established by the caselaw, Pet. App. 22.

The Fourth Circuit next addressed Petitioners' argument that they allegedly suffered from prejudice because the jury heard information about their indem-

nification. Pet. App. 23. The Court of Appeals observed that it was Petitioners' counsel who had "opened the door" to the indemnification issue by claiming that Respondent was "seeking to put a vacuum cleaner up to [Petitioners'] bank account[s]." Pet. App. 24, 26-27. The Fourth Circuit concluded that the district court did not abuse its discretion when—after Petitioners' "counsel's statements improperly 'appeal[ed] to the jury for sympathy'"—it allowed Respondent's counsel to read into the record Petitioners' relevant discovery response which reflected Petitioners' belief that the government would cover any liability against the Petitioners as long as they were acting within the scope of their employment during the violation. Pet. App. 25-27.

Finally, the Fourth Circuit addressed Petitioners' arguments related to damages. *See* Pet. App. 27-36. First, it rejected Petitioners' claim that the evidence was insufficient to support the award of compensatory damages, noting that "[t]he jury heard [Respondent] describe that he feared for his life when he saw [Petitioner Ferreyra's] gun pointed at him, and when [Petitioner] continued to do so after [Respondent] provided his Secret Service credentials." Pet. App. 33. Second, the Court of Appeals rejected Petitioners' claims that the punitive damages award was constitutionally excessive. *See* Pet. App. 33-36. Petitioners seized Respondent "'unnecessarily and deliberately," and "used 'abusive language, belittling and demeaning remarks,' and demonstrated 'spiteful, harassing behavior.'" Pet. App. 35 (quoting district court). Petitioner Phillips "continued his malicious conduct during the unlawful second stop, telling [Respondent] he

was being 'mouthy' and demanding to see [Respondent's] license, despite knowing that [Respondent] was a Secret Service agent properly authorized to operate his vehicle." *Id.* In sum, the Fourth Circuit affirmed the district court's refusal to lower the jury-determined damages award because "the record supports the court's determination that the officers acted 'with malice.'" *Id.*

Petitioners sought rehearing *en banc* on the *Bivens* issue, which was denied without a single judge requesting a poll under Federal Rule of Appellate Procedure 35. Pet. App. 89.

REASONS FOR DENYING THE PETITION

I. Petitioners fail to identify a circuit split. A. There is no circuit split about whether *Bivens* cases can arise solely against narcotics officers. That is, no circuit has articulated a bright-line rule to *only* allow *Bivens* claims against narcotics officers, and no circuit has held that it will *always* allow such claims against non-narcotics officers. Rather, following this Court's direction, the courts of appeals all assess the claims before them on a case-by-case basis and find the availability (or not) of *Bivens* causes of action based on a number of factors.

B. There is likewise no circuit split about whether *Bivens* cases can arise solely in the home. Rather, yet again, the courts of appeals all address the cases that come before them on the totality of their factual circumstances, and have not created any bright line rules in this area.

II. The court of appeals' decision below is correct and is entirely consistent with this Court's prece-

dents. In *Abbasi*, the Court made clear that "this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." 582 U.S. at 134. The Court described *Bivens* as "settled law . . . in this common and recurrent sphere of [federal] law enforcement." *Id.* And although this Court in *Egbert v. Boule*, 596 U.S. 482 (2022), recently declined to recognize a *Bivens* cause of action, that decision was based on the "national security context" raised by the suit against a Border Patrol agent that arose more or less *on the border* with Canada.

Contrary to Petitioners' claims, the decision below does not extend *Bivens*, a decision that for half a century has put line-level federal law enforcement officers on notice that they can be held liable for constitutional violations in the warrantless-search-and-seizure context. Critically, this case does not raise national security concerns, and any arguments Petitioners now conjure up after the fact must be rejected.

III. Finally, this issue is relatively unimportant and this case presents an awkward vehicle. The Fourth Circuit's opinion will not meaningfully impact the day-to-day work of federal law enforcement officers. After all, these officers are instructed—and expected—to follow this Court's Fourth Amendment jurisprudence, just like their state and local peers and, at any rate, many federal defendants who violate the Constitution will be protected from liability by qualified immunity. Petitioners claim that the decision implicates a "specter" of personal liability, without acknowledging that this jury actually learned that the government would likely indemnify Petitioners. Should a circuit split develop, this Court can always

grant a case that does not raise the vehicle issues present here, including that the case proceeded to a jury trial and that the jury concluded that Petitioners maliciously violated Respondent's Fourth Amendment rights.

The Court should deny certiorari.

I. The Petition Fails To Identify A Circuit Split.

A. There Is No Circuit Split About Whether *Bivens* Cases Can Arise Solely Against Narcotics Officers.

1. Petitioners would have this Court believe that four circuits have "squarely rejected" the availability of *Bivens* in any case involving a non-narcotics officer. That is just not accurate. The examples Petitioners provide are cases in which the courts of appeals have rejected the availability of a *Bivens* remedy *in those particular cases*. But none of these cases profess to articulate some bright-line rule in which *Bivens* suits can *only* be brought against narcotics officers. Rather, these cases all represent a totality-of-the-circumstances analysis of whether the claims and underlying facts are "different in a meaningful way" from that of *Bivens* such that they cannot go forward. *Ziglar v. Abbasi*, 582 U.S. 120, 139 (2017).

The Third Circuit has no bright line rule that *Bivens* suits can only go forward against narcotics officers. In Petitioners' first cited case, *Xi v. Haugen*, 68 F.4th 824, 834 (3d Cir. 2023), the court of appeals rejected a malicious prosecution claim under *Bivens* "aris[ing] from the government's investigation, arrest, and later-dismissed indictment alleging—mistakenly—that [plaintiff] was a 'technological spy' for

China." *Id.* at 828. It did so "[i]n view of evolving Supreme Court precedent declining to extend *Bivens* into the national security realm," and noted that Xi's claims, like the plaintiffs' in *Egbert*, *Abbasi* and *Hernandez*, to name a few, "implicated national security interests." *Id.* at 829, 833.[1] The court noted that the defendant was "a federal counterintelligence agent"—a distinction the court felt was significant *not* because the agent was not a narcotics officer, as Petitioners contend, Pet. 9, but because counterintelligence agents "protect the nation" from security threats, *Xi*, 68 F.4th at 834. The second case Petitioners cite, *Vanderklok v. United States*, 868 F.3d 189 (3d Cir. 2017), is even further afield. In addition to again being focused on the "national security implications" of a suit against a TSA agent, *id.* at 207, the *Bivens* claim under review was a First Amendment retaliation claim. The Third Circuit decided such a claim was not cognizable, recognizing this Court "has never implied" one, *id.* at 198—rightly so, it turns out, as this Court would later explicitly hold in *Egbert* that there is no *Bivens* action for First Amendment retaliation claims. And, like in *Xi*, the court focused on the identities of the defendants because of what they were (TSA agents), not what they were not (narcotics officers). These cases stand for the uncontroversial proposition

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[1] *See Egbert v. Boule*, 596 U.S. 482, 494 (2022) ("[W]e reaffirm that a *Bivens* cause of action may not lie where, as here, national security is at issue"); *Abbasi*, 582 U.S. at 140-41 (noting national security implications of claims arising out of "high-level executive policy created in the wake of a major terrorist attack on American soil"); *Hernandez v. Mesa*, 140 S. Ct. 735, 739 (2020) ("Unlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications.").

that a case implicating national security concerns is not cognizable under *Bivens*. They do not represent some on-off switch related to whether a defendant is a narcotics officer.

The Fifth Circuit does not have a narcotics-officers-only rule, either. In *Oliva v. Nivar*, 973 F.3d 438 (5th Cir. 2020), the Fifth Circuit concluded that the plaintiff's excessive force claim relating to an altercation during a VA hospital's security screening process "differ[ed] from *Bivens* in several meaningful ways." *Id.* at 442. To be sure, the court noted that the claim differed from *Bivens* because it was not relating to "a narcotics investigation," but it also emphasized that the claim at issue involved "different conduct." *Id.* at 443. Indeed, the court brought equal attention to the fact that the defendants in question were "manning a metal detector" during the encounter, which raised a different type of Fourth Amendment violation from *Bivens*. *Id.* In other words, the court in *Oliva* was not—and did not purport to be—following some "routine[]" "approach" of categorically rejecting claims against non-narcotics officers. Pet. 9-10.[2]

Similarly, in declining to recognize a *Bivens* claim relating to a police shooting on public lands, *Mejia v. Miller*, 61 F.4th 663 (9th Cir. 2023), and against a high-ranking officer who "was directing a multi-agency operation to protect federal property and was carrying out an executive order," *Pettibone v. Russell*,

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[2] Petitioners' second case, *Canada v. United States*, 950 F.3d 299 (5th Cir. 2020), contains nary a mention of narcotics officers, and simply (and uncontroversially) concluded that "claims that IRS agents intentionally manipulated a penalty assessment . . . bear little resemblance" to one of this Court's prior *Bivens* cases. *Id.* at 307.

59 F.4th 449, 455 (9th Cir. 2023),the Ninth Circuit has found that a number of factors were relevant to the analysis, *see Pettibone*, 59 F.4th at 455; *Mejia*, 61 F.4th at 668. Again, these cases do not simply turn on whether the defendant was a narcotics officer—as Petitioners well know, since they purport to rely on *Mejia* for their other invented split relating to whether the violation occurred in the home. Pet. 15-16; *but see infra* at 20-21. The Ninth Circuit has also—post-*Abbasi*—*allowed* a Fourth Amendment *Bivens* claim against IRS agents executing a search warrant relating to a criminal tax fraud investigation, *Ioane v. Hodges*, 939 F.3d 945 (9th Cir. 2018), further demonstrating that the Ninth Circuit, too, is engaged in a case-by-case assessment of whether a *Bivens* claim exists. The question of whether someone was (or was not) a narcotics officer was not outcome-determinative.[3]

The D.C. Circuit likewise does not implement a uniform narcotics-officers-only rule. In *Buchanan v. Barr*, 71 F.4th 1003 (D.C. Cir. 2023), the court of appeals declined to recognize a *Bivens* remedy against U.S. Park Police officers, but their identity as Park Police officers—and not narcotics officers—played no

[3] Petitioners may try to argue that *Mejia* overruled *Ioane*. It did not. One three-judge panel cannot overrule a prior decision of that court easily, *U.S. v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2009) ("Generally, a panel opinion is binding on subsequent panels unless and until overruled by an en banc decision of this circuit")—and certainly cannot without citing once to that decision. To the extent *Mejia* and *Ioane* are in tension with each other—and they are not—that is a matter for the Ninth Circuit to work out, not for this Court. It is enough for present purposes to note that the Ninth Circuit has no settled narcotics-officers-only rule for *Bivens*.

material role in the court's analysis. At the outset, the case was only about the second, "special factors counselling hesitation" prong of the *Bivens* inquiry, not at issue in this case, because "neither party contend[ed] that these claims do not arise in a new context." *Id.* at 1008. And in answering that (different) question in the affirmative, the D.C. Circuit—like the Third Circuit in *Xi* and *Vanderklok* and this Court in *Egbert*—rested its decision principally on the national security concerns inherent in resolving the suit, which related to the clearing of racial justice protestors from Lafayette Park—"across from the White House"—after which President Trump "walked through Lafayette Park to St. John's Church and took a photograph." *Id.* at 1006. And as further evidence that the role of the defendants was not determinative, *Buchanan* did not cite or attempt to distinguish *Martin v. Mayhoyt*, 830 F.2d 237 (D.C. Cir. 1987), the D.C. Circuit's earlier decision assuming a *Bivens* claim was cognizable against Park Police officers, which remains good law.[4]

In sum, none of the cases cited by Petitioners stand for the proposition that whether a defendant was a narcotics officer was the dispositive factor regarding whether a *Bivens* claim existed. Instead, the cases turned principally on other factual differences—including national security implications—that are not present in this case.

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[4] The "overtaken" language from *Loumiet v. United States*, 948 F.3d 376, 382 (D.C. Cir. 2020), that Petitioners cite in an attempt to suggest that *Martin* has been overruled, Pet. 11, does not even remotely stand for that proposition. *Loumiet* neither cited *Martin* nor was discussing the relevant issue. *See id.* (noting "new context" analysis may only consider Supreme Court cases, not Circuit cases).

2. Petitioners then put three circuits in a category of having approved *Bivens* claims against non-narcotics officers, Pet. 12—but these circuits actually do the same thing as the circuits discussed above: review each claim on a case-by-case basis that, occasionally, results in claims against non-narcotics officers going forward.

The examples Petitioners provide from the Fourth, Sixth, and Tenth Circuits all involved Fourth Amendment claims arising out of routine (non-narcotics-related) law enforcement encounters. *See* Pet. App. 12 (*Bivens* suit can go forward "in the warrantless-search-and-seizure context of routine criminal law enforcement"); *Jacobs v. Alam*, 915 F.3d 1028, 1038 (6th Cir. 2018) ("[P]laintiff's claims are run-of-the-mill challenges to 'standard law enforcement operations' that fall well within *Bivens* itself."); *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 856 (10th Cir. 2016) (noting, in case arising from illegal search, *Bivens*'s statement "[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition"). It is not particularly surprising these cases turned out the way they did, given this Court's explicit caution in *Abbasi* "that this opinion is not intended to cast doubt on the continued force, or even necessity, of *Bivens* in the search-and-seizure context in which it arose." 582 U.S. at 134; *see infra* at Section II.

Petitioners cannot claim that these circuits are running amok. Far from it: these circuits routinely *deny Bivens* claims where the facts are sufficiently distinct from this Court's few cases allowing *Bivens* actions. *See, e.g.*, *Elhady v. Unidentified CBP Agents*,

18 F.4th 880 (6th Cir. 2021) (rejecting availability of *Bivens* action for conditions of confinement claim against CBP agents who detained plaintiff). The Fourth Circuit—which Petitioners complain about—does so with particular regularity.[5] Simply put, there is no "split" regarding Petitioners' imagined narcotics-officer-or-no bright-line rule. Rather, quite naturally, these cases have turned out differently based on any number of distinctions in the facts involved, the defendants sued, and the claims alleged.

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[5] *See, e.g.*, *Bulger v. Hurwitz*, 62 F.4th 127 (4th Cir. 2023) (rejecting availability of *Bivens* action for Eighth Amendment claim that BOP officials failed to protect prisoner from attack and failed to intervene to prevent his transfer to a "violent" facility, where he was killed); *Tate v. Harmon*, 54 F.4th 839 (4th Cir. 2022) (same, for Eighth Amendment conditions of confinement claim); *Dyer v. Smith*, 56 F.4th 271 (4th Cir. 2022) (same, for First and Fourth Amendment claims against TSA agents arising from interaction at security checkpoint); *Annappareddy*, 996 F.3d at 135 (rejecting availability of claims relating to falsifying evidence and information in affidavit supporting search warrant because "[w]hat *Bivens* involved was the Fourth Amendment right to be free from unreasonable *warrantless* searches and seizures; this case, by contrast, involves searches and a seizure conducted *with* a warrant"); *Tun-Cos v. Perrotte*, 922 F.3d 514 (4th Cir. 2019) (same, for Fourth and Fifth Amendment claims against ICE agents relating to seizures and warrantless entry); *Doe v. Meron*, 929 F.3d 153 (4th Cir. 2019) (same, for First, Fourth, and Fifth Amendment claims against U.S. Navy and Department of Defense employees who allegedly conspired to seize, interrogate, and batter plaintiff and his three minor children); *Attkisson v. Holder*, 925 F.3d 606 (4th Cir. 2019); (same, for suit by investigative reporter and her family against attorney general, postmaster general, and various other federal agents for alleged intrusions into plaintiffs' electronic devices to conduct unlawful surveillance).

B. There Is No Circuit Split About Whether *Bivens* Cases Can Arise Solely In The Home.

1. There is likewise no split on Petitioners' second issue. Petitioners would, again, have this Court believe that one fact—whether the claim arises in the home—is determinative in these cases. It is not. Rather, yet again, the courts of appeals all address the cases that come before them on the totality of their factual circumstances, and have not created any bright line rules in this area.

Petitioners maintain that the Fifth Circuit categorically rejects *Bivens* claims that occur outside the home, but critically, none of the cases they cite in support of that proposition use home-or-not as a dispositive factor. Recall that in *Oliva*, which arose in the context of a government-owned hospital, the court perceived that the "case differ[ed] from *Bivens* in *several* meaningful ways," including the difference in context between metal detector searches and warrantless seizures. 973 F.3d at 442-43 (emphasis added). Had that court been applying a no-*Bivens*-outside-the-home rule it would have just said that and been done with it. Same with *Cantú v. Moody*, 933 F.3d 414 (5th Cir. 2019), where a member of the Texas Mexican Mafia alleged a conspiracy to fabricate evidence and frame him as the intended recipient of two kilos of cocaine. *Id.* at 417. The court declined to recognize his "malicious-prosecution-type-claim" because "by any measure, Cantú's claims are meaningfully different from the Fourth Amendment claim at issue in *Bivens*" along a number of axes—including that "[t]he connection between the officers' conduct and the injury . . .

involves intellectual leaps that a textbook forcible seizure never does." *Id.* at 422-23.

The Eighth Circuit's decision in *Ahmed v. Weyker*, 984 F.3d 564 (8th Cir. 2020), is much the same. There, "[t]he plaintiffs [were] trying to hold a rogue law-enforcement officer responsible for landing them in jail through lies and manipulation." *Id.* at 565. The court, again, mentioned a *series* of differences between that case and *Bivens*, including that the defendant's role was different—she was not at the scene of the seizure—and that she did not directly cause the harm. *Id.* at 569.

So too with the Ninth Circuit's decision in *Mejia*. 61 F.4th 663. At the outset, Petitioners would have *Mejia* stand for the proposition that the Ninth Circuit has implicitly adopted *two* bright-line rules: that *Bivens* is cognizable against only narcotics officers, and that *Bivens* is cognizable only for claims in the home. Pet. 10, 15-16. But to state that proposition is to disprove it. If the court mentioned *both* factors as relevant to the outcome of the case, and did not frame either as independently conclusive, then neither factor can be dispositive. At any rate, on the "location" question, *Mejia* only stands for the notion that when a *Bivens* claim arises in a place where a person "ha[s] no expectation of privacy"—there, "[t]he entire incident occurred on public lands managed by the [Bureau of Land Management] and the National Park Service"—that factor distinguishes the case from *Bivens*. *Id.* at 668. It is unclear what the Ninth Circuit would do with a case like this one, where a person was in their vehicle, where they maintain an expectation of privacy. *See United States v. Jones*, 565 U.S. 400 (2012).

Perhaps the most outlandish attempt to add cases to their purported "split" is to count the D.C. Circuit's decision in *Buchanan* as being a within-the-home-only holding. Pet. 16. *Buchanan* turned out the way it did not because the events occurred outside of the plaintiffs' homes, but because they occurred in front of the President's home. 71 F.4th at 1009 ("Given the nation's overwhelming interest in protecting the safety of its Chief Executive, officers in the area surrounding the White House and the President must be able to act without hesitation." (cleaned up)).[6] In short, no circuits have a home-or-bust bright line rule.

2. The two circuits Petitioners cite that have allowed Fourth Amendment *Bivens* claims for outside-the-home conduct have done so in thoughtful, tailored opinions that do not, as Petitioners suggest, green-light all future *Bivens* case arising outside the home. The decision below, for its part, allowed a *Bivens* claim where the defendants, like in *Bivens*, were "only line-level investigative officers, not high-ranking officials"; "the officers' discrete actions" do "not implicate 'large-scale policy decisions,'" and were instead guided by "principles of criminal law well-informed by decades of judicial guidance regarding the Fourth Amendment prohibition on the warrantless seizure of citizens without reasonable, articulable suspicion or probable

[6] To the extent Petitioners may attempt to rely on *Quinones-Pimentel v. Cannon*, 85 F.4th 63 (1st Cir. 2023), which postdates their Petition, it does not stand for a bright-line home-only rule, either. A number of factors were relevant to the First Circuit's decision, including that "there was a warrant," unlike in *Bivens*, and the defendants were "not just federal line-level investigative officers (as was the case in *Bivens*) but also include[d] federal prosecutors and private, corporate employees allegedly working with the government." *Id.* at 72.

cause." Pet. App. 14-15. In the face of these similarities, the court of appeals reasonably considered irrelevant the fact that respondent did not *also* bring two additional Fourth Amendment claims that appeared in *Bivens*. Pet. App. 15 n.2. In contrast, as noted above, the Fourth Circuit regularly rejects *Bivens* claims that—unlike this case—are insufficiently close to *Bivens*. *See supra* at 18 & n. 5.

The Seventh Circuit, in a similarly fact-specific opinion, concluded that there was "no meaningful difference between [plaintiff's] case and *Bivens*" where a plaintiff sued a line-level narcotics officer for excessive force. *Snowden v. Henning*, 72 F.4th 237, 245-46 (7th Cir. 2023). As such, it noted that the case concerned no risk of "disruptive intrusion" into the "functioning of other branches" any more than *Bivens* itself did. *Id.* at 246 (quoting *Abbasi*, 582 U.S. at 140).

To sum up, both of Petitioners' alleged circuit splits are manufactured, and this Court's review is not warranted. The courts of appeals all faithfully apply this Court's directives on *Bivens* causes of actions based on the facts of each case before them—largely rejecting such claims—and have created no bright-line rules in so doing.

II. The Decision Below Is Correct.

1. The Fourth Circuit's decision below is correct, and is entirely consistent with this Court's precedents. *Abbasi* serves as the start of this Court's modern *Bivens* jurisprudence. There, the Court rejected the *Bivens* claims against three high-level executive officers in DOJ and two wardens arising out of detention conditions of unauthorized immigrants in the wake of 9/11. 582 U.S. at 125, 140. The Court observed

that "*expanding* the *Bivens* remedy is now a 'disfavored' judicial activity," and noted that it has "consistently refused to extend *Bivens* to any *new* context or *new* category of defendants." *Id.* at 135 (emphases added). At the same time, however, the Court made sure to clarify that: "it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Id.* at 134. The Court described *Bivens* as "settled law . . . in this common and recurrent sphere of [federal] law enforcement," and noted society's "undoubted reliance upon it as a fixed principle in law." *Id.* In other words, while *Abbasi* effectively stopped *Bivens* from spreading to "new contexts," it "reaffirmed 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." Pet. App. 13.

Two terms ago in *Egbert v. Boule*, 596 U.S. 482 (2022), the Court declined to recognize either of the two causes of action arising in the *new* "national-security context" presented by that case, *id.* at 495; *see also id.* at 494 ("The Court of Appeals conceded that Boule's Fourth Amendment claim presented a new context for *Bivens* purposes."). But the border-security issues at play in *Egbert* have zero bearing on this case, and the decision said nothing that undermined the continued availability of *existing Bivens* contexts, like the run-of-the-mill search-and-seizure context (not implicating national security) reaffirmed in *Abbasi*. Indeed, in *Egbert*, the petitioner had sought certiorari on the question of whether "the Court should reconsider *Bivens*," *see* Pet. for Cert. at i, *Egbert*, 596 U.S.

482 (No. 21-147), 2021 WL 3409109, but this Court granted as to the case-specific applications of *Bivens*, and declined to consider overruling the *Bivens* doctrine wholesale. *Egbert v. Boule*, 142 S. Ct. 457 (2021) ("Petition . . . granted limited to Questions 1 and 2 presented by the petition.").[7]

And though this Court has routinely rejected *Bivens* claims when it has seen fit to grant certiorari, the unusual—and decidedly *not* "ordinary law enforcement"—nature of those cases have little similarity with the case at hand. *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 739 (2020) ("Unlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications."); *Egbert*, 596 U.S. at 494 (force applied by border patrol officer acting near the border; "we reaffirm that a *Bivens* cause of action may not lie where, as here, national security is at issue"); *Abbasi*, 582 U.S. at 142 ("They challenge . . . major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security."). This case is quite different.

As the court of appeals observed, both *Bivens* and this case involved (1) line-level officers; (2) engaging in ordinary (3) law-enforcement functions; (4) facing allegations of Fourth Amendment (5) warrantless (6) seizures. *See* Pet. App. 14-15. This is exactly the heartland warrantless "search-and-seizure context"—the "common and recurrent sphere of law enforcement"—that *Abbasi* explicitly left standing, 582 U.S.

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[7] Notably, Petitioners do not attempt this; they do not seek certiorari on whether to overrule *Bivens* or reconsider the doctrine.

at 134, absent unique facts (like in *Egbert*) that remove it from this bucket, 596 U.S. at 495 (noting "national-security context" meant that Congress was better-suited to authorize a damages action, despite "similar allegations of excessive force" in *Egbert* and *Bivens*). In other words, this case does not differ "meaningful[ly]" from *Bivens*. *Egbert*, 596 U.S. at 492.

2. In their quest for certiorari, Petitioners mischaracterize the decision below. They first suggest that the decision "recognized a new *Bivens* cause of action" and, for the first time "extend[s] *Bivens* to large numbers of federal officers and to wide-ranging conduct." Pet. 18, 21. This is inaccurate. The court of appeals did not "extend" *Bivens*; it applied *Bivens* to the facts before it. Specifically, the court of appeals recognized that the case before it was "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" by line-level officers. Pet. App. 14 (internal quotation marks omitted). Indeed, the decision below did not upend the status quo, as Petitioners say, but recognized it. *See Abbasi*, 582 U.S. at 134 (characterizing as "settled law" *Bivens*'s application "in this common and recurrent sphere of law enforcement," and noting "the undoubted reliance upon it as a fixed principle in the law"). And, more broadly, past practice reveals that the Fourth Circuit is perfectly capable of accurately parsing the difference between an "existing" and "new *Bivens*" context and shutting down examples of the latter. *See supra* 18 & n.5.

Petitioners also attempt to dress this case up as raising "national security" concerns, Pet. 19, 22, but it

does not.[8] In fact, when Petitioners tried this tack before the Fourth Circuit, the court noted that this "post-hoc contention" was being asserted "for the first time on appeal" and, at any rate, was "meritless, because it rests purely on coincidental proximity" to the National Security Agency headquarters "with no relevance to the facts" in the record. Pet. App. 17 n.3.[9] There is nothing in the record that would meaningfully separate this case from *Bivens*, such that Congress is better suited to provide for a damages remedy. *See Egbert*, 596 U.S. at 495. Given this Court's proclamation of the continued "force" and "even the necessity" of *Bivens* claims in the ordinary "search-and-seizure context in which it arose," *Abbasi*, 582 U.S. at 134, the Fourth Circuit did not err in allowing a claim to go forward here.

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[8] An amicus provides a "non-exhaustive list of national security installations located within the Fourth Circuit." FOP Amicus Br. at 4. But that list only serves to highlight the facilities and installations that will *not* be impacted by the decision in this case, where no such national security concerns were present. Under this Court's decisions in *Abbasi*, *Egbert*, and *Hernandez*, there is no doubt that the Fourth Circuit would conclude such national-security-related-claims are not cognizable under *Bivens*. *See supra* at 18 & n.5.

[9] Equally disconnected with the facts is Petitioners' new, tweaked, version of their national security argument, in which they rely on their claims about what *other* Park Police officers do in *other* situations. Pet. 22. Those examples actually undermine Petitioners' arguments: they show real factual scenarios that might actually implicate national security—and would likely therefore yield a different answer under *Bivens*. But those situations are a far cry from the admittedly routine traffic-related law enforcement that Petitioners were undertaking when they twice unlawfully seized Respondent.

Nor was there anything amiss in the Fourth Circuit's methodology. Pet. 22. The court of appeals did not, as Petitioners would have it, recognize a *Bivens* claim here because of its own prior caselaw; rather, it appropriately looked to this Court's precedent in *Bivens*, *Abbasi*, and *Egbert*, among others, and concluded that a *Bivens* remedy was available here. Pet. App. 10-14. It looked only to circuit caselaw in (1) explaining why this case was distinguishable from a prior Fourth Circuit case in which, on "materially different" facts, the court concluded there was no such remedy, Pet. App. 13; *see also supra* at 8; and (2) noting that the Fourth Circuit and other courts of appeals have applied *Bivens* to similar traffic stops, Pet. App. 16.

III. The Issue Is Relatively Unimportant And This Case Is A Poor Vehicle.

1. In addition to not implicating a circuit split and being correct, the Fourth Circuit's opinion will not meaningfully impact the day-to-day work of federal law enforcement officers. In the fifty years since *Bivens* itself, line-level federal law enforcement officers have been on notice that "a violation of" the Fourth Amendment's prohibition on warrantless searches and seizures "by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." *Bivens*, 403 U.S. at 389. And less than a decade ago this Court explicitly reaffirmed this point in *Abbasi*, documenting not just "the continued force" of *Bivens* in this context, but also its "necessity." 582 U.S. at 134. The Court described the application of *Bivens* to "this common and recurrent sphere of law enforce-

ment" as "settled law," and noted "the undoubted reliance upon it as a fixed principle of law." *Id.* In the face of all this, Petitioners' histrionics about the impact of this decision, Pet. 23, cannot be taken seriously. At bottom, this Court's half-century of jurisprudence puts day-to-day federal law enforcement on par with that of state and local officers—nothing more.

Nor does the United States itself appear to take issue with the settled application of *Bivens* in this context. In the United States' brief in *Egbert*, the government explained that Boule's claim in that case was "meaningfully different from the claim recognized in *Bivens*" because "Agent Egbert was not performing *ordinary domestic law-enforcement functions*" like that in *Bivens*. U.S. Br. at 17-18, *Egbert*, 596 U.S. 482 (No. 21-147), 2021 WL 6144118 (emphasis added). The court of appeals had gone wrong in *Egbert*, in the government's view, by "suggesting that" the plaintiff there had what the government termed "a *conventional* Fourth Amendment claim." *Id.* at 10 (emphasis added). In fact, the government pointed to the first panel opinion *in this case* as an example of a claim arising out of one such "ordinary domestic law enforcement function." *Id.* at 18. What is more, none of the "meaningful differences" the government identified in its *Egbert* brief—the defendant's identity as a Border Patrol agent investigating cross-border smuggling and immigration violations; that the events occurred "just steps away from the international border"; the national security implications—apply here. *Id.* at 18-19.

Perhaps the reason the government is relatively unconcerned with the "well-settled" nature of *Bivens*

in the everyday warrantless-search-and-seizure context is because of the doctrine of qualified immunity. *Abbasi*, 582 U.S. at 150-52. That is, since qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), and this Court has "stressed that the 'specificity' of the rule" in the clearly-established law analysis "is 'especially important in the Fourth Amendment context," *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)), the doctrine shields law enforcement officers—be they federal or local—from liability in most cases. This just happens to be one of the rare cases where an ordinary-law-enforcement *Bivens* claim makes it past summary judgment, past qualified immunity (meaning the defendants violated clearly-established law), and to a jury, which found that the federal defendants violated the plaintiff's constitutional rights (here, maliciously so).

2. Petitioners raise the "specter" of "personal liability." Pet. 23. At the outset, personal liability is even a possibility only when a defendant violates a plaintiff's clearly-established constitutional rights. And the federal government appears willing to generally indemnify defendants in such a rare case. *See* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 561, 580 (2020) (concluding, based on study of *Bivens* claims against the Bureau of Prisons over a ten-year period, "in the vast majority of cases (over 95%), individual defendants contributed no personal resources to the resolution of the claims"); Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public*

Officials' Individual Liability Under Bivens, 88 GEO. L. J. 65, 76 (1999) ("The government indemnifies its employees against constitutional tort judgements or settlements (in the rare instances in which a *Bivens* claim results in a monetary liability)."). The facts of this case support the same conclusion. Recall that after Petitioners' trial counsel "opened the door" to the indemnification issue, the jury learned that Petitioners believed that the U.S. government would cover any liability against the Petitioners as long as they were acting within the scope of their employment during the violation. Pet. App. 25-27.

3. Should it turn out that a circuit split develops or the courts of appeals begin running wild authorizing *Bivens* actions, as Petitioners prognosticate, Pet. 24, this Court will (according to Petitioners' logic) have plenty of future opportunities to address the issue. But this case is a poor vehicle for doing so. First, frankly, Petitioners' conduct—which was contrary to clearly-established law and which a jury found was not just unconstitutional but also malicious, Pet. App. 7, Pet. App. 40-41—makes them unworthy of this Court's special protection. Second, the unique posture of this case (*i.e.*, the fact that this case has been up on appeal twice and has gone to trial) makes it not representative of most *Bivens* cases, which generally arise at the motion to dismiss stage or at summary judgment. Indeed, this issue could have been teed up in this more traditional posture in this case—and several years earlier—had Petitioners not forfeited the *Bivens* issue before their first appeal by failing to raise the issue in the district court. This was, as the court of appeals noted, despite the fact that *Abbasi* "was de-

cided over a year before they submitted their summary judgment briefs." *Hicks*, 965 F.3d at 311. Finally, and relatedly, the ultimate factfinder has already discredited the story Petitioners told about what happened that morning on I-295 during *both* encounters. *See supra* at 6-7 (jury's findings in special interrogatories contradict Petitioners' version at trial); Pet. App. 40-43. Undoing that work now would usurp the central role of the jury in resolving legal disputes and risk undermining the Court's credibility with the public. In sum, for several reasons this is a poor vehicle for reviewing a settled issue on which there is no circuit split.

CONCLUSION

The Court should deny certiorari.

Respectfully submitted,

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