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 Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit**

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF FOR PETITIONERS

The Fourth Circuit's decision exacerbates two deep circuit splits regarding *Bivens*' scope. Respondent can tell the Court that these splits are "invented," "manufactured," and "imagined," BIO 15, 18, 22, only by misreading the cases.

As Petitioners explained, each circuit asks whether an officer's non-narcotics mandate or outside-the-home conduct—among other factors—is a "meaningful" distinction from *Bivens*. *Ziglar v. Abbasi*, 582 U.S. 120, 139 (2017). Some circuits hold that these distinctions are no bar to *Bivens* relief because they do not create a new *Bivens* context. Others hold the opposite, explaining that these distinctions are "meaningful enough to make a given context a new one" and that Congress is better suited to decide on any remedy. *Id.*

Respondent protests that the circuits have not announced a "narcotics-officers-only" or "home-or-bust" "on-off switch," BIO 14, 15, 21, but the effect is the same. In circuits where an officer's non-narcotics mandate or outside-the-home conduct is not considered a new context, those distinctions will not bar *Bivens* relief. But in circuits where those distinctions do create a new context, no such *Bivens* claims will be recognized because, as Respondent admits, "*Abbasi* effectively stopped *Bivens* from spreading to 'new contexts,'" BIO 23. The circuits are therefore divided on whether these distinctions are a bar to *Bivens* relief.

Respondent's brief further confirms that review of these important questions is warranted. Like the

divided circuits, the parties fundamentally disagree over the interpretation of *Abbasi*. According to Respondent, the Court blessed *Bivens* claims in *all* "run-of-the-mill search-and-seizure" cases not implicating national security, regardless of whether a case involves narcotics officers or in-the-home conduct. BIO 23. Petitioners, in contrast, submit that the Court meant what it said when it limited the *Bivens* remedy to only the "search-and-seizure context *in which it arose*." *Abbasi*, 582 U.S. at 134 (emphasis added). The question affects tens of thousands of federal law-enforcement officers, who make split-second decisions every day in fear of protracted *Bivens* lawsuits. This Court's answer is urgently needed.

## I. The Courts of Appeals Are Deeply Divided on Both Questions Presented

The decision below deepens a 4-3 circuit split on whether *Bivens* extends to claims against non-narcotics officers and a 4-2 circuit split on whether *Bivens* extends to claims arising outside the context of a search or arrest inside a home. Pet. 8–18.

Respondent primarily contends that no split exists because all the circuits applied "a totality-of-the-circumstances analysis" that denied (or recognized) *Bivens* relief for multiple reasons. *See* BIO 10, 12–22. But no circuit limited its holding to a case-specific "totality of the circumstances." Rather, each circuit denying *Bivens* relief found a new context for multiple *independent* reasons—including the officer's non-narcotics mandate or outside-the-home conduct—and heeded this Court's admonition against recognizing *Bivens* actions in new contexts. There is no reason to think any of these courts would extend

*Bivens* to these two new contexts. Indeed, Respondent agrees that "*Abbasi* effectively stopped" the practice of extending *Bivens* to new contexts. BIO 23.

The circuits, in short, are deeply and intractably divided on whether an officer's non-narcotics mandate or outside-the-home conduct is a bar to *Bivens* relief. Certiorari is needed.

### A. The 4-3 Split on Whether *Bivens* Extends to Claims Against Non-Narcotics Officers Warrants Review

1. Respondent does not dispute that the Third, Fifth, Ninth, and D.C. Circuits would have rejected his *Bivens* claim. That is because these circuits have held that claims against non-narcotics officers present a new *Bivens* context for which Congress should create any remedy. Pet. 8–12.

Respondent's contention (at 12, 18) that these circuits have not adopted "bright-line rule[s]" is incorrect. The Fifth Circuit has repeatedly held that "the context is new"—and no *Bivens* relief is warranted—where a claim involves "'different officers from a different agency.'" *Oliva v. Nivar*, 973 F.3d 438, 443 (5th Cir. 2020) (quoting *Cantú v. Moody*, 933 F.3d 414, 423 (5th Cir. 2019)); *see id.* at 444 (explaining that Congress's failure to provide a remedy "is itself a special factor" precluding *Bivens* relief). So has the Ninth Circuit. *See Mejia v. Miller*, 61 F.4th 663, 668 (9th Cir.), *as amended* (Mar. 2, 2023) (refusing to extend *Bivens* where officers lacked "the same mandate as agencies enforcing federal anti-narcotics law" because a *Bivens* action could cause

"systemwide consequences for [the agency's] mandate" (quotation marks omitted)).

Respondent ignores both courts' reasoning, which would bar *Bivens* claims against all non-narcotics officers. And while he points (at 15) to an earlier Ninth Circuit case allowing a *Bivens* claim against IRS agents, that case did not address the defendants' status as non-narcotics officers. *See Ioane v. Hodges*, 939 F.3d 945 (9th Cir.), *as amended* (Sept. 19, 2019).

Respondent's attempts to recast the holdings of the D.C. and Third Circuits fare no better. Unlike the decision below, the D.C. Circuit denied *Bivens* relief against Park Police officers for alleged Fourth Amendment violations. *Buchanan v. Barr*, 71 F.4th 1003 (D.C. Cir. 2023). Respondent contends that the officers' "identity as Park Police officers—and not narcotics officers—played no material role in the court's analysis." BIO 15–16. Respondent omits, however, that *Buchanan* "h[e]ld that [the] claims arise in a new context" because the challenged action "[wa]s notably different from an unlawful *search and arrest by federal narcotics officers*." 71 F.4th at 1008 (emphasis added). The court's special-factors analysis also focused on how the Park Police's "actions implicate national security." *Id.* at 1009.

Respondent wrongly assumes (at 16) that such national-security concerns are case-specific. This Court has made clear that the key inquiry is "whether a court is competent to authorize a damages action not just against [individual officers] but against [officers employed by the agency] generally." *Egbert v. Boule*, 596 U.S. 482, 496 (2022). Accordingly, the Park Police's mandate to protect "sensitive location[s],"

71 F.4th at 1009, bars *Bivens* claims against all Park Police officers. The pre-*Abbasi* decision that Respondent cites is not to the contrary, as it merely "assum[ed] a *Bivens* claim was cognizable against Park Police officers," BIO 16.

Respondent similarly tries to diminish the conflict between the decision below and the Third Circuit, contending that the Third Circuit has "focused on the identities of the defendants because of what they were . . . , not what they were not (narcotics officers)." BIO 13. But in *Xi v. Haugen*, that court described the officers in *Bivens* as "federal narcotics agents" before holding that the case involved "a new category of defendant: a federal counterintelligence agent." 68 F.4th 824, 834 (3d Cir. 2023) (cleaned up). The relevant "distinction" was that the officers enforced a different legal mandate. *Id.* The court viewed national-security concerns as special factors, *see id.* at 836–37; but even absent those concerns, the Third Circuit would not extend *Bivens* to the new context of non-narcotics officers, given that court's focus "on the context in which [the claim] is brought," *id.* at 836.

2. Respondent concedes that the Fourth, Sixth, and Tenth Circuits allow *Bivens* claims against non-narcotics officers where the "claims aris[e] out of routine (non-narcotics-related) law-enforcement encounters." BIO 17. It is irrelevant that these circuits "deny *Bivens* claims" in certain other contexts. BIO 17–18 (emphasis omitted; citing cases).[1] These

[1] The cases Respondent cites (at 17–18 & n.5) are far afield. They either did not involve Fourth Amendment claims, *see*

circuits conflict with the four circuits addressed above by treating an officer's non-narcotics mandate as no bar to a *Bivens* remedy.

### B. The 4-2 Split on Whether *Bivens* Extends to Searches and Seizures Outside of a Home Also Warrants Review

1. The Fifth, Eighth, Ninth, and D.C. Circuits have rejected *Bivens* claims involving outside-the-home conduct. Respondent again denies that this split exists, but his effort to explain it away is unpersuasive.

The Fifth Circuit has refused to extend *Bivens* where a case "arose in a government hospital, not a private home." *Oliva*, 973 F.3d at 442–43. Respondent ignores *Oliva*'s relevant reasoning, which makes outside-the-home *Bivens* claims categorically unavailable because the existence of the Federal Tort Claims Act is a "special factor" that precludes *Bivens* relief. *Id.* at 444; *see also Cantú*, 933 F.3d at 423 (refusing to extend *Bivens* to case where officers did not "enter[ ] [defendant's] home" given "the existence

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*Bulger v. Hurwitz*, 62 F.4th 127 (4th Cir. 2023) (Eighth Amendment); *Tate v. Harmon*, 54 F.4th 839 (4th Cir. 2022) (same); *Elhady v. Unidentified CBP Agents*, 18 F.4th 880 (6th Cir. 2021) (Fifth Amendment); did not involve law-enforcement officers, *see Doe v. Meron*, 929 F.3d 153, 169 (4th Cir. 2019) (military officers "operating under naval regulations"); *Tun-Cos v. Perrotte*, 922 F.3d 514, 524 (4th Cir. 2019) ("ICE agents were not enforcing the criminal law"); or did not consider the defendant's status, *see Dyer v. Smith*, 56 F.4th 271 (4th Cir. 2022); *Annappareddy v. Pascale*, 996 F.3d 120 (4th Cir. 2021); *Attkisson v. Holder*, 925 F.3d 606 (4th Cir.), *as amended* (June 10, 2019).

of a statutory scheme for torts committed by federal officers" even where there was no statutory "remedy for this [particular] context").

The Eighth and Ninth Circuits, too, have refused to extend *Bivens* outside the home. *See* Pet. 15–16 (discussing *Ahmed v. Weyker*, 984 F.3d 564 (8th Cir. 2020), and *Mejia*, 61 F.4th 633). Although these cases "mentioned a *series* of differences," BIO 20, that does not change that both courts deemed outside-the-home conduct "meaningfully different from *Bivens*" because it does not present the same sort of "invasions that were at the heart of *Bivens*," *Ahmed*, 984 F.3d at 568; *see Mejia*, 61 F.4th at 668 ("unlike *Bivens*, none of the events in question occurred in or near Mejia's home"). Respondent's speculation (at 20) that the Ninth Circuit might allow *Bivens* actions for traffic stops ignores that *Mejia* involved a "stop . . . for a traffic violation." 61 F.4th at 665.

Respondent insists that "*Buchanan* turned out the way it did . . . because [the events] occurred in front of the President's home." BIO 21. But the D.C. Circuit did not mention the White House in holding that the claims "arise in a new context." *Buchanan*, 71 F.4th at 1008 (explaining that "the clearing of protestors *from a public park* by federal law enforcement officers is notably different from [the] unlawful search and arrest" in *Bivens* (emphasis added)). And because the D.C. Circuit "heed[s] [this] Court's admonition" against approving new *Bivens* contexts, *id.* at 1009, there is no reason to think it would ever endorse a *Bivens* claim involving outside-the-home conduct.

2. Respondent acknowledges (at 21–22) that the Fourth and Seventh Circuits allow *Bivens* claims for outside-the-home conduct. Whether these circuits have "green-light[ed] all future *Bivens* case[s] arising outside the home," BIO 21, is a strawman; of course they haven't. The point is that these circuits treat outside-the-home conduct as no bar to *Bivens* relief, in conflict with the above four circuits.

## II. The Decision Below Is Wrong

Respondent's brief underscores why this Court's review is needed. Like the Fourth Circuit below, Respondent believes that *Bivens* broadly extends to *all* "run-of-the-mill search-and-seizure" cases that do not implicate national security. BIO 23; *see* App. 12. Petitioners, backed by other circuits, believe that this Court meant what it said when it limited *Bivens* to the specific "search-and-seizure context *in which it arose*." *Abbasi*, 582 U.S. at 134 (emphasis added). This sharp dispute reflects the circuits' disagreement about how to interpret *Abbasi*. Having created the *Bivens* remedy, only this Court can resolve that basic disagreement about its scope.

Respondent's brief, in fact, confirms that the decision below is wrong. The mere fact that an individual 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." *Egbert*, 596 U.S. at 495. Respondent offers no reason to believe the Judiciary is well-suited to fashion a damages remedy for traffic stops. There are few similarities between *Bivens* and this case, and the fact that Petitioners were Park

Police officers patrolling federal highways for suspicious vehicles, not narcotics officers pursuing suspected drug dealers in their homes, should have provided clear reasons to recognize that Congress is better suited to craft any relief. *See* Pet. 19–20; BIO 22–27 (not addressing this point).

Indeed, Respondent concedes that, given the Park Police's national-security functions, *Bivens* claims against "*other* Park Police officers" could "implicate national security—and would likely therefore yield a different answer under *Bivens*" than the decision below. BIO 26 n.9. That concession is fatal: The relevant question is "whether a court is competent to authorize a damages action not just against [Petitioners specifically] but against [Park Police officers] generally." *Egbert*, 596 U.S. at 496. Under Respondent's own concession, "[t]he answer, plainly, is no," *id.*, and the decision below is incorrect.

Respondent argues (at 26 n.8) that the facts of this case present "no such national security concerns." But that is irrelevant under *Egbert*. *See* 596 U.S. at 496 (explaining that the question is not "whether *Bivens* relief is appropriate in light of the balance of circumstances in the particular case," but whether "more broadly there is any reason to think that judicial intrusion into a given field might be inappropriate" (cleaned up)). Respondent is also wrong: Petitioners were patrolling an area "'near the headquarters of the National Security Agency.'" App. 17 n.3. Congress is better suited to determine whether such sensitive duties should give rise to private lawsuits. *See Egbert*, 596 U.S. at 496–97; *Buchanan*, 71 F.4th at 1009.

Respondent also admits that the Fourth Circuit "looked only to circuit caselaw in . . . noting that the Fourth Circuit and other courts of appeals have applied *Bivens* to similar traffic stops." BIO 27. That was error. "[T]he proper test" is whether a case meaningfully differs "from previous *Bivens* cases decided by this Court," not by the lower courts. *Abbasi*, 582 U.S. at 139. Contrary to Respondent's assumption (at 25), the Fourth Circuit should not have adhered to a circuit-level "status quo" that reflects earlier expansions of *Bivens* inconsistent with this Court's recent decisions.

The Fourth Circuit—like the other circuits on its side of the two splits discussed above—misunderstands how strictly this Court has limited the *Bivens* remedy it created. This Court should grant certiorari to put that persistent question to bed.

## III. This Case Is a Uniquely Good Vehicle for Deciding These Important Questions

1. A ruling in this case would affect up to 92,860 federal law-enforcement officers, across 94 agencies. *See* Pet. 23. If the decision below is allowed to stand, all of those officers could face potential liability for "routine" law-enforcement interactions. The decision below additionally imposes heavy societal costs—including "discourag[ing] [such] law enforcement officers from acting promptly and effectively," FLEOA *Amicus* Br. 10; "hinder[ing] [agencies'] ability to attract and retain quality law enforcement officers," *id.* at 13; forcing officers to "take time away from public safety duties to participate in protracted and expensive discovery, depositions, and potential trial," FOP *Amicus* Br. 18; and posing obstacles for officers

seeking "to obtain mortgage loans and other forms of credit," *id.*

These are not "histrionics." BIO 28. They are the informed predictions of the Federal Law Enforcement Officers Association, the National Fraternal Order of Police, and its U.S. Park Police Labor Committee. No amount of "notice" can erase these enduring harms; nor can the possibility of qualified immunity or indemnification by the government. BIO 27–30. That is because the above harms stem from the prospect of protracted *lawsuits*, in addition to personal liability for out-of-pocket *damages*. Regardless, Respondent admits (at 29) that not all *Bivens* defendants are indemnified—meaning that, absent this Court's intervention, thousands of federal officers will be unable to rule out the very real specter of life-changing *Bivens* liability while protecting this country.

Respondent mistakenly asserts (at 28) that the United States does not "take issue with" extending *Bivens* to these new contexts. To the contrary, the Department of Justice agrees that (1) officers who "wear[ ] a different uniform" and have "unique statutory authority"—like the Park Police—are "a totally new category" of defendants "from the drug-enforcement officers in Bivens," Br. for Appellees at 16, *Logsdon v. U.S. Marshals Serv.*, No. 23-7008 (10th Cir. filed July 5, 2023); and (2) the fact that an "arrest occur[s] outdoors and away from the plaintiff's house (also unlike *Bivens*) demonstrates . . . that this is a new context," *id.* at 8. The United States' brief in *Egbert* was not inconsistent: That brief merely noted that the case did not involve "ordinary domestic law-enforcement functions." BIO 28 (cleaned up). The

brief did not argue that cases that *do* are always subject to *Bivens* claims.

2. Respondent's attempts (at 30–31) to deem this case a "poor vehicle" fail. Law-enforcement officers improperly subjected to years of litigation on unjustified claims are *more*—not *less*—"[ ]worthy of this Court's special protection." BIO 30. And deciding the legal question of whether a *Bivens* claim should be created in the first place hardly "usurp[s] the central role of the jury." BIO 31.

Finally, the "posture of this case" is a virtue, not a vehicle issue. BIO 30. Because the case went to a jury verdict, it has a fully developed record, with none of the potential pitfalls of an interlocutory appeal. The jury awarded $730,000 in damages, even though the bulk of the asserted emotional harms ostensibly arose from Officer Ferreyra's brandishing his gun at the outset of the stop—lawful conduct preceding and separate from the allegedly prolonged detention. *See* BIO 4. The Court should take the opportunity to evaluate the propriety of extending its judicially created remedy in light of the fully developed record in this case.

## CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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