No. 23-384

IN THE
Supreme Court of the United States

MICHAEL BORESKY,

Petitioners,

v.

JEREMY GRABER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should allow *Biven*-only decisions to be immediately appealable through an unprecedented expansion of the collateral order doctrine despite the fact that doing so would be contrary to this Court's precedent, no circuit split exists, and Petitioner could have had this issue reviewed alongside a qualified immunity appeal had he not waived it.

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INTRODUCTION

Congress vested courts of appeals with jurisdiction over "appeals from all *final* decisions of the district courts." 28 U.S.C. § 1291 (emphasis added). This Court has identified "a narrow class of decisions that do not terminate the litigation," but "should nonetheless be treated as final." *Will v. Hallock*, 546 U.S. 345, 347 (2006). But the Court has "repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). In other words, this Court has held that § 1291 requires claims of a right to an immediate appeal through the collateral order doctrine to be viewed "with skepticism, if not a jaundiced eye." *Id.* at 873.

And yet, Petitioner asks this Court to expand the collateral order doctrine to include orders on *Bivens* that are not coupled with an appeal on qualified immunity (as is the usual, appealable, posture of these issues). And he does so despite the lack of a circuit split: the only two courts of appeals to have addressed this question (the Third and the Sixth) have concluded that a *Biven*-only appeal is not properly brought within the narrow set of collateral orders. The Ninth Circuit, which Petitioner has stretched to place on the opposite side of the split, has not yet opined on this issue.

It is unlikely that a split will develop, because this Court has been so clear about not just the narrowness of the collateral order doctrine, but the obvious inapplicability of the doctrine to *Bivens* rulings. In *Will*, this Court took as a given that the collateral order doctrine was inapplicable—and inadvisable—when a federal officer loses a motion to dismiss under *Bivens*. 546

U.S. at 353-54. And *Will* is equally clear in its rejection of the "burdens of litigation" argument Petitioner puts forth. The Court in *Will* observed that accepting "the avoidance of litigation for its own sake" and an interest in "simply abbreviating litigation troublesome to Government employees" would mean that "collateral order appeal[s] would be a matter of right" not just on *Bivens* orders, but "whenever the Government lost a motion to dismiss under the Tort Claims Act, . . . or a state official was in that position in a case under 42 U.S.C. § 1983 or *Ex parte Young*." *Id.* at 353-54. In short, this Court recognized that exploding the final judgment rule as Petitioner asks would unnecessarily open the floodgates for federal defendants to challenge the substance of any claim filed in federal court through an interlocutory appeal.

The cases that Petitioner tries to rely on—*Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Wilkie v. Robbins*, 551 U.S. 537 (2007); and *Hartman v. Moore*, 547 U.S. 250 (2006)—are inapplicable. The courts had jurisdiction in those cases to address the *Bivens* question because they already had jurisdiction over a properly-brought interlocutory appeal based on qualified immunity (as would have been the case here had Petitioner not waived his appeal on qualified immunity). But those cases do not help Petitioner in his quest to get *Bivens* decisions designated as collateral orders on their own.

Not only is this issue splitless and meritless, but Petitioner's invocation of separations of powers concerns in this case has got it exactly backwards. Congress limited appellate courts' jurisdiction with the final judgment rule in § 1291, and then in 1990 amended the Rules Enabling Act to authorize this

Court to adopt rules to "define when a ruling of a district court is final for purposes of appeal under section 1291." 28 U.S.C. § 2072(c). This congressional move gives "special force" to the Court's reluctance to expand the scope of the collateral order doctrine, since Congress "designated rulemaking, not expansion by court decision, as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 113 (2009) (cleaned up).

In addition to being splitless, meritless, and ill-advised, the Court need not trouble itself with the question presented because it rarely comes up. That is because qualified immunity and *Bivens* usually travel together, and will allow for most federal defendants to take up the *Bivens* issue alongside qualified immunity. What's more, qualified immunity is hard to overcome, and will dispose of many such cases—including possibly this one, after some limited discovery—because of the protectiveness of the doctrine. Ultimately, Petitioner expresses serious concerns with the correctness of the district court's *Bivens* decision, but he could have raised that alongside his interlocutory appeal on qualified immunity (had he pursued it), and will get an opportunity to do so after final judgment, should that become necessary. But now is not the time.

The Court should deny certiorari.

STATEMENT OF THE CASE

I. Factual Background

In 2016, Philadelphia hosted the Democratic National Convention. Pet. App. 3a. The Secret Service announced that certain areas around the Convention would be a "restricted area" surrounded by an eight-foot fence. *Id.* Only those with authorization could access the restricted area. *Id.* During the three-day convention, thousands gathered in political protest outside the vast restricted area which encompassed the convention site (the Wells Fargo Center) and segments of the adjacent streets. Pet. App. 36a; *see also* Pet. App. 3a n.1 (setting out borders of restricted area).

On July 27, 2016, Respondent Jeremy Graber, a fulltime paramedic, joined the protests, as well as to serve as a volunteer medic. Pet. App. 3a & n.2. At one point during the evening, six protesters breached the perimeter around the restricted area. Pet. App. 3a-4a; Pet. App. 36a. The six individuals who crossed into the restricted area were immediately arrested by law enforcement and placed in a Philadelphia Police patrol wagon. Pet. App. 4a; Pet. App. 36a-37a. At the time the fence was breached, Respondent was standing outside the restricted area. Pet. App. 5a; Pet. App. 36a; Pet. App. 47a. At no time did Respondent pass into the restricted area or assist any of the six individuals who did so. Pet. App. 5a; Pet. App. 36a; Pet. App. 47a.

Following the arrest of the six individuals, Philadelphia Police Inspector Joel Dales forcibly grabbed Respondent as he was standing in the crowd with hundreds of protesters outside the restricted area.

Pet. App. 36a. Inspector Dales searched Respondent and quickly pulled him through the crowd with the assistance of several other Philadelphia Police officers. *Id*. Respondent was then taken by the Philadelphia Police through the security fence and into the restricted area controlled by federal agents. *Id.*

Once inside the restricted area, Respondent was handcuffed and searched a second time. *Id*. During the second unlawful search police went through Respondent's medical bag. C.A. App. 22. As a certified paramedic and volunteer medic, Respondent carried first-aid items in a bag that included gauze pads, cravat bandages, tape, gloves, and other items used to provide medical assistance in the event someone was injured or becomes ill during the protest. C.A. App. 20; *see also* Pet. App. 3a n.2. In addition, Respondent carried three small decorative knives attached to his belt that he used to cut gauze, tape, clothing, and bandages. Pet. App. 36a; C.A. App. 20. During this search, officers took Respondent's inhaler. C.A. App. 22.

Following the second search, Respondent was placed inside a Philadelphia Police wagon along with the six individuals who had crossed over into the restricted area. Pet. App. 36a-37a. Eventually, Respondent was transported by the Philadelphia Police to the Federal Detention Center. Pet. App. 37a. Upon arrival at the Federal Detention Center, Respondent was sent to the Special Housing Unit, locked in a six-by-twelve-foot, two-person cell with no ability to communicate,

and no explanation as to why he was arrested. C.A. App. 22.[1]

Petitioner, Secret Service agent Michael Boresky, was at home the night of Respondent's arrest and detention. Pet. App. 37a. However, while Respondent was being held as a federal detainee, a supervisor informed Petitioner of the arrests and told him that the arrestees were to be charged with violating 18 U.S.C. § 1752, and that Petitioner would serve as the affiant for the criminal complaint (as he had done the night before for four other individuals arrested for unlawfully entering the restricted area). Pet. App. 4a & n.4. The next morning, Special Agent Aaron McCaa emailed Petitioner a synopsis of the events leading to the arrests, as well as photographs of the fence and evidence seized from the arrestees. Pet. App. 4a. The Philadelphia Police Department did not prepare any paperwork for Respondent's arrest. *Id.*

Petitioner appeared before a Magistrate Judge and signed an affidavit identifying Respondent as one of the seven individuals arrested inside the restricted area. *Id.* Petitioner swore that there was "probable cause to believe that" Respondent "knowingly entered the restricted grounds . . . in violation of 18 U.S.C. § 1752(a)(1), Pet. App. 37a, and asserted that the contents of the affidavit were based upon his "personal knowledge, experience and training," "information developed during the course of his investigation," and

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[1] The Special Housing Units are housing units in federal prisons where individuals are separated from the general prison population and may be housed either alone or with another person. 28 C.F.R. § 541.21.

"information . . . imparted to [him] by other law enforcement officers." Pet. App. 4a.[2] However, Petitioner later admitted that he was neither present for the arrest, nor did he write the affidavit; rather he reviewed it for accuracy based on the information provided in McCaa's synopsis. Pet. App. 4a-5a. Petitioner did not view any video evidence before swearing out the affidavit. Pet. App. 5a.

The following day, July 28, 2016, Respondent was brought before a magistrate and, based on Petitioner's affidavit, was charged with one count of knowingly entering or remaining in any restricted building or grounds without lawful authority to do so, pursuant to 18 U.S.C. § 1752(a)(1). Pet. App. 4a; Pet. App. 37a. The government moved for pretrial detention and, again, based on the affidavit presented by Petitioner, Respondent was ordered held at the Federal Detention Center until trial. Pet. App. 37a. Following the detention hearing, Respondent was returned to the Special Housing Unit, where he experienced a panic attack. C.A. App. 24.

On July 29, 2016, Respondent was released from custody after defense counsel provided the government with an open-source video taken by a local Fox 29 television crew. Pet. App. 5a. The television news video confirmed that Respondent had not entered the restricted area prior to being grabbed by Inspector Dales and taken into custody by law enforcement; in

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[2] With only three years of experience as a Secret Service agent, Petitioner asserted in the affidavit that his primary assignment was investigating "financial fraud, counterfeiting crimes and protective statutes." C.A. App. 22.

other words, the video confirmed that the sworn factual statements made by Petitioner regarding Respondent's actions at the convention were false. *Id.* Eventually, the government dismissed the charges against Respondent. *Id.*

II. Procedural History

As relevant here, Respondent sued Petitioner under *Bivens* for false arrest, unlawful detention, and false charges. Pet. App. 5a. Petitioner moved to dismiss, arguing that Respondent could not pursue his Fourth Amendment claim against Petitioner under *Bivens*. *Id.*

Applying the Court's two-step analytical framework from *Ziglar v. Abbasi*, 582 U.S. 120 (2017), the district court allowed Respondent's *Bivens* claims to go forward. Pet. App. 55a. The court observed that Respondent's claims "challenge precisely the kind of core, run-of-the-mill Fourth Amendment activity for which a *Bivens* cause of action has always been thought to be available—the seizure of a person without probable cause by a federal agent, just as in *Bivens* itself." Pet. App. 53a. It noted some factual differences between the present case and that of *Bivens*, and concluded that "[w]hether these differences are 'meaningful'" within the meaning of *Abbasi* "is a close call." Pet. App. 54a. For example, the fact that the officers involved were from a different agency was "insufficient to constitute a new context"—after all, "the federal agency whose officers were sued in *Bivens* no longer exists" and "a different agency name on the back of an officer's windbreaker, standing alone, seems insufficient to constitute a new context." Pet. App. 55a. The court ultimately concluded that even if Respondent's claim was different enough from *Bivens* to be called a

new context, special factors did not counsel a hesitation to apply *Bivens*. *Id.*

In particular, the court rejected Petitioner's invocation of national security concerns. Respondent's suit did not challenge Secret Service procedures, "or even case-specific decisions like the chosen location of the secure perimeter outside the Convention." Pet. App. 56a. Rather, Respondent's "claims do not implicate government policy at all" because he "is merely challenging the constitutionality of a one-off arrest." *Id.* "In other words, this is a straightforward case against a single low-level federal officer." *Id.* (cleaned up). "At this early stage of [Respondent's] lawsuit," the district court concluded, Respondent's claim "appeare[d] to land squarely within" the category of claims that *Abbasi* blessed when it emphasized "the continued force, [and] even the necessity, of *Bivens* in the search-and-seizure context in which it arose." Pet. App. 59a (quoting *Abbasi*, 582 U.S. at 134).

The district court also concluded that Respondent adequately alleged a Fourth Amendment violation and that Petitioner's invocation of qualified immunity could not be resolved at the motion to dismiss stage. Pet. App. 6a. The court noted that the legality of Petitioner's seizure of Respondent turned on whether the officer on whose statements Petitioner relied in preparing the affidavit had probable cause himself. *Id.* And even if there was not probable cause to arrest Respondent, Petitioner would not face liability if it were objectively reasonable for him to believe, on the basis of the statements, that probable cause existed. Pet. App. 62a. "That inquiry, however, necessarily requires examining the content of the statements on

which [Petitioner] relied" and because those statements were "not in the record at this stage, it is not possible to say whether it was objectively reasonable for [Petitioner] to rely on them." Pet. App. 63a. Thus, although the court was "mindful that qualified immunity" is best resolved "as early as possible," it concluded that "it appears that at least some discovery will be required to answer this question." *Id.*

After Petitioner filed an answer to the complaint, the district court held a scheduling conference under Federal Rule of Civil Procedure 16. Pet. App. 40a. At the Rule 16 conference, Petitioner argued that discovery should be limited to only what Petitioner heard and what he relied on for his affidavit. *Id.* The district court rejected what it described as "this extreme limitation, noting that other evidence, such as the circumstances leading to the arrest, may be relevant to allow [Respondent] to challenge [Petitioner's] claim to qualified immunity." *Id.* The court went on to note that challenges to discovery were best handled through the Rules of Civil Procedure and Petitioner could ask the Court to issue a protective order based on specific discovery requests made by Respondent. *Id.*; C.A. App. 225, 234.

Six weeks after the Rule 16 conference—and before Respondent had served any discovery requests or interrogatories—Petitioner served on Respondent a proposed statement of facts and a limited set of documents. Pet. App. 40a. These documents included emails with Petitioner, and declarations by Petitioner and two other Secret Service agents. Pet. App. 40a-41a. The documents did not include declarations of Agent McCaa or any agent who was directly involved in Respondent's arrest. Pet. App. 41a.

The parties attempted to negotiate the scope of discovery. Petitioner first proposed to limit discovery to one deposition (his own). C.A. App. 164. Respondent rejected this proposal immediately. C.A. App. 164-65. Petitioner countered with an offer to add the depositions of two additional agents (the declarants), neither of whom was present at the scene of Respondent's arrest. Pet. App. 41a; C.A. App. 165. Respondent declined this offer, which would have substantially undermined his ability to develop his claim. Pet. App. 41a.; C.A. App. 165-66.

After Respondent declined this offer, before discovery had been completed and two months before the discovery deadline even closed, Petitioner moved for summary judgment on the basis of qualified immunity, and to stay of discovery. Pet. App. 41a; *see also* Pet. App. 6a. No discovery related to Petitioner had occurred. Pet. App. 41a. Respondent opposed the motion for summary judgment and moved for additional discovery. *Id.*

The district court started by noting that "the summary judgment process presupposes the existence of an adequate record" and that a court "is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery." Pet. App. 41a-42a. As a result, if discovery is incomplete, "a district court is rarely justified in granting summary judgment, unless the discovery request pertains to facts that are not material." Pet. App. 42a. Moreover, the court continued, discovery may be necessary before the issue of qualified immunity can be resolved. Pet. App. 43a. In that situation, discovery should be tailored specifically to the question of a defendant's entitlement to qualified immunity. *Id.*

The district court observed that, here, qualified immunity turned on whether it was objectively reasonable for Petitioner to believe that there was probable cause to arrest respondent, which "cannot be determined without considering evidence surrounding the statements and communication upon which [Petitioner] relied, and cannot be opposed without an opportunity to conduct discovery related to the arrest." Pet. App. 43a. Here, the court noted, Respondent "has not been provided the opportunity to conduct *any* discovery." Pet. App. 44a. As a result, "[i]t would be wholly inequitable to permit [Petitioner] to rely upon affidavits and communications to which he, and not [Respondent], has access, and deny [Respondent] the ability to request additional relevant documents or test the declarations through depositions." Pet. App. 45a.

The court ultimately denied without prejudice Petitioner's motion for summary judgment, to allow for discovery. Pet. App. 45a. Discovery, however, would "remain[] limited as to what is necessary to determine the issue of qualified immunity, and [Petitioner] may challenge any discovery request as provided by the Federal Rules of Civil Procedure." Pet. App. 45a.

Petitioner appealed. In response to Petitioner's appeal, the Third Circuit ordered the parties to first address the question of the court's jurisdiction. C.A. Dkt. 3. Following submissions by the parties on the question of jurisdiction, the Third Circuit ordered briefing on the merits, announcing that it would address jurisdiction and the merits simultaneously. C.A. Dkt. 22.

On appeal, Petitioner waived qualified immunity. Pet. App. 2a-3a, 7a. Still, he argued that the court of

appeals nevertheless had jurisdiction to address the district court's decision on *Bivens*. Pet. App. 3a.

At the outset, the court of appeals noted that it would have had jurisdiction to review an interlocutory appeal of the district court's qualified immunity order, under the collateral order doctrine—and Respondent's *Bivens* claim alongside qualified immunity. Pet. App. 7a & n.8. But because Petitioner "no longer challenges the qualified immunity ruling," the court was required to determine whether it could review the district court's *Bivens* "ruling untethered from a challenge to a qualified immunity ruling." Pet. App. 8a.

Courts of appeals have jurisdiction over "appeals from all final decisions of the district courts." Pet. App. 8a (quoting 28 U.S.C.§ 1291). The question before the Third Circuit was whether the *Bivens* decision was one of "a small class of rulings" that was immediately appealable under the collateral order doctrine. Pet. App. 8a. The court of appeals answered that question in the negative: "a *Bivens* ruling can be effectively reviewed after final judgment because, unlike various immunity doctrines" designated as collateral orders, "a *Bivens* ruling is not meant to protect a defendant from facing trial." Pet. App. 9a. Rather, *Bivens* "is a judicially created cause of action that allows a plaintiff to sue a federal officer for damages for constitutional violations." Pet. App. 10a-11a.

The Third Circuit noted that this "Court itself has recognized this difference and the impact it has on the ability to seek immediate review of a *Bivens* ruling." Pet. App. 11a. In *Will v. Hallock*, 546 U.S. 345 (2006), this Court stated that "if simply abbreviating litigation troublesome to Government employees were important enough for [collateral order] treatment, [then]

collateral order appeal would be a matter of right whenever the Government lost a motion to dismiss under the Tort Claims Act, or a federal officer lost one on a *Bivens* action, or a state official was in that position in a case under 42 U.S.C. § 1983, or *Ex parte Young*." Pet. App. 11a (quoting *Will*, 546 U.S. at 353-54). The Third Circuit observed that the Sixth Circuit had similarly concluded that a *Bivens* ruling on its own was not a collateral order in *Himmelreich v. Federal Bureau of Prisons*, 5 F.4th 653 (6th Cir. 2021). Pet. App. 13a. Ultimately, because the court of appeals concluded that a *Bivens* ruling "is not an order that falls within the small class of orders that are immediately appealable under the collateral order doctrine," it lacked jurisdiction to review the district court's *Bivens* ruling and dismissed Petitioner's appeal. Pet. App. 13a-14a. Judge Hardiman dissented. *See* Pet. App. 16a.

Petitioner sought rehearing en banc, which was denied. Pet. App. 68a. He now seeks certiorari, which this Court should deny.

REASONS FOR DENYING THE PETITION

I. The Petition Fails To Identify A Circuit Split.

1. There is no circuit split on the question presented. Rather, the two courts of appeals to have addressed the issue—the Third and the Sixth—have both concluded that they lack jurisdiction over an interlocutory appeal on the availability of a *Bivens* cause of action "untethered from a challenge to a qualified immunity ruling." Pet. App. 8a. In the decision below, the Third Circuit held that such an order does not meet this Court's "stringent" test for ensuring that

the collateral order doctrine does not "overpower the substantial finality interests § 1291 is meant to further." Pet. App. 8a-9a (quoting *Will v. Hallock*, 546 U.S. 345, 349-50 (2006)). The Sixth Circuit has also concluded that "[w]here a defendant has not appealed the denial of qualified immunity, the appellate court does not have jurisdiction under the collateral order doctrine to address an underlying claim" and assess the availability of a *Bivens* cause of action. *Himmelreich v. Fed. Bureau of Prisons*, 5 F.4th 653, 661 (6th Cir. 2021).

2. Petitioner puts the Ninth Circuit on the opposite side of his purported split—but, no. Pet. 29. In *Pettibone v. Russell*, 59 F.4th 449 (9th Cir. 2023), the court of appeals was asking a different question. There, the district court had denied the defendant's motion to dismiss, which argued that no *Bivens* remedy was available and that he was entitled to qualified immunity, and the defendant, unlike in this case, appealed *both* rulings. *See id.* at 452. The Ninth Circuit concluded that, when faced with an appeal from a denial of qualified immunity, over which it had proper interlocutory jurisdiction, it also "necessarily ha[s] jurisdiction to decide whether an underlying *Bivens* cause of action exists." *Id.* at 453; *see also Yoshikawa v. Seguirant*, 74 F.4th 1042, 1045 n.2 (9th Cir. 2023) (citing *Pettibone* for proposition that where defendant "appeals from the district court's denial of qualified immunity" the court "retain[s] jurisdiction in [the] interlocutory appeal to decide the underlying cause of action").

Notably, the rule set out in *Pettibone* is also the rule in the Third Circuit—and "every other circuit to have considered that question." *Pettibone*, 59 F.4th at

453 (collecting cases, including *Vanderklok v. United States*, 868 F.3d 189, 197 (3d Cir. 2017)). The decision below explained just that. If Petitioner *had* "challenge[d] the qualified immunity ruling," the court of appeals observed, it "would have had jurisdiction to review an interlocutory appeal," including the "legal conclusion that *Bivens* is available in this context." Pet. App. 7a-8a & n.8. But because Petitioner "waiv[ed] his challenge to the qualified immunity ruling," that rule did not apply. Pet. App. 7a. In other words, with different litigation decisions, Petitioner could have gotten his *Bivens* appeal heard alongside a qualified immunity appeal, and would have nothing now to complain about.

But instead he seeks certiorari on whether a *Bivens* appeal can go up *on its own* before a final judgment—a question *Pettibone* does not answer or even glancingly address. The dissenting opinion below acknowledged that Petitioner asked the Third Circuit "to be the first appellate court to hold that an order denying a motion for summary judgment that challenges the existence of a *Bivens* cause of action is appealable before a final judgment is entered." Pet. App. 16a (Hardiman, J., dissenting). Petitioner would not have been asking the Third Circuit to be the "first appellate court" to rule his way if the Ninth Circuit had already done so. *Id.*

However, as the petition notes, the question presented *is* actually at issue in a different case pending in the Ninth Circuit, and in cases in the Tenth and

Eleventh Circuits. Pet. 30.[3] Perhaps one of these courts will go the way he wants and create a circuit split; perhaps not.[4] If and when a circuit split actually materializes, this Court could grant certiorari. But as of right now the only two circuits to have addressed the issue have appropriately declined to blow open the doors on the collateral order doctrine to allow *Bivens*-only appeals before a final judgment. Petitioner's circuit split is invented.

II. The Decision Below Is Correct.

1. The Third Circuit was correct in its refusal to expand the collateral order doctrine to subsume an appeal from a *Bivens* ruling alone. Courts of appeals generally have jurisdiction only over "appeals from all final decisions of the district courts." 28 U.S.C. § 1291. Denials of motions to dismiss are not final orders. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) ("A party generally may not take an appeal under § 1291 until there has been a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." (cleaned up)).

There is, however, "a narrow class of decisions that do not terminate the litigation," but "should nonetheless be treated as final." *Will*, 546 U.S. at 347 (cleaned up). For the collateral order doctrine to apply, the order must "[1] conclusively determine the disputed

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[3] The fact that the question presented is hotly debated in a pending Ninth Circuit case is just further proof that *Pettibone* does not mean what Petitioner thinks it means. Pet. 30.

[4] In all three cases on the question presented pending in the courts of appeals, briefing is underway, but not completed, and argument has yet to be scheduled.

question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Id.* at 349. Courts determine the applicability of the collateral order doctrine "for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted by a prompt appellate court decision." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (cleaned up).

Unless the courts are "stringent" about classing orders as collateral and immediately appealable, "the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further." *Will*, 546 U.S. at 349-50. Indeed, this Court has "repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip.*, 511 U.S. at 868 (cleaned up); *see also* Pet. App. 16a (Hardiman, J., dissenting) (noting this "Court's careful policing of the expansion of the collateral order doctrine"). This Court has "not mentioned" the doctrine "without emphasizing its modest scope." *Will*, 546 U.S. at 350. Ultimately, "although the Court has been asked many times to expand the 'small class' of collaterally appealable orders," it has "instead kept it narrow and selective in its membership." *Id.*

The narrowness of the collateral order doctrine is no accident. "Permitting piecemeal, prejudgment appeals," this Court has explained, "undermines 'efficient judicial administration' and encroaches upon the

prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). As a result, our court system "routinely require[s] litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system." *Id.* at 108-09. "This admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Id.* at 113; *see also* 28 U.S.C. § 2072 (1990 amendment to Rules Enabling Act authorizing this Court to adopt rules "defin[ing] when a ruling of a district court is final for purposes of appeal under section 1291").

2. A decision allowing a *Bivens* claim to go forward does not meet any of the elements of the collateral order test. *First*, a *Bivens* ruling does not necessarily conclusively determine the availability of a *Bivens* action. An order fails to satisfy this conclusiveness requirement if "a district court ordinarily would expect to reassess and revise such an order in response to events occurring 'in the ordinary course of litigation.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988). The proceedings in *Himmelreich* are telling. After the Sixth Circuit concluded that the collateral order doctrine did not apply, *see supra* at 15, the district court reconsidered its *Bivens* ruling in light of this Court's decision in *Egbert v. Boule*, 596 U.S. 482 (2022), and determined that the plaintiff did *not* have a cognizable *Bivens* claim, and entered judgment in the defendant's favor. *Himmelreich v. Fed. Bureau of Prisons*, No. 4:10-cv-02404, 2022 WL

6156942, at *3 (E.D. Ohio Oct. 7, 2022). The same thing might happen here; because of Petitioner's attempt at an interlocutory appeal, the district court has not had an opportunity to consider the impact, if any, of *Egbert* on its *Bivens* ruling.

Second, the question of whether a *Bivens* cause of action exists is not completely separate from the merits because it "require[s] significant inquiry into the facts and legal issues." *Van Cauwenberge*, 486 U.S. at 529. To assess whether a *Bivens* action is available, courts must ask if the case is "meaningfully different" from one of this Court's prior *Bivens* cases. *Egbert*, 596 U.S. at 492. A case might be meaningfully different "because of the rank of the officers involved" or because of "the constitutional right at issue." *Ziglar v. Abbasi*, 582 U.S. 120, 140 (2017). This is a fact-specific inquiry; courts must look not just to whether the case before it has "similar allegations" to one of this Court's prior cases, but also whether the *specific context* of the claims is similar. *Egbert*, 596 U.S. at 495. A context might be different because different standards apply to the merits of the claim. *See Abbasi*, 582 U.S. at 148 (comparing standard that would apply to the claims there to the standard that applied in *Carlson v. Green*, 446 U.S. 14 (1980)). These are questions that are inherently intertwined with the merits—they relate to the who (defendants), what (constitutional provision), when/where (context), and how (standard) of a claim.[5]

[5] Here, for example, the district court looked at the complaint's allegations relating to Boresky's role and agency, the form of the seizure, the site of the arrest, and the "concrete actions [Respondent] challenges in this case." Pet. App. 53a-57a.

Third, a decision allowing a *Bivens* claim to go forward is not "effectively unreviewable on appeal from final judgment," *Digital Equip.*, 511 U.S. at 867, because it is not one of "the limited class of cases where denial of immediate review would render impossible any review whatsoever," *United States v. Ryan*, 402 U.S. 530, 533 (1971). To meet this standard, an order must implicate "a right to avoid trial." *Will*, 546 U.S. at 350. But not just a "generalize[d]" version of this right. *Id.* at 351. The few times this Court has characterized merits orders as collateral—decisions rejecting absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); Eleventh Amendment immunity, *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); and a double jeopardy defense, *Abney v. United States*, 431 U.S. 651 (1977)—this Court identified "right[s] not to stand trial" "*originating in the Constitution or statutes*," *Digital Equip.*, 511 U.S. at 879 (emphasis added), that "would be effectively lost" "unless the order to stand trial was immediately appealable," *Will*, 546 U.S. at 350-51. These are the "rights not to stand trial" that this Court has designated as requiring collateral treatment because "[w]hen a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance," which counsels in favor of considering such issues not "effectively reviewable" upon final judgment. *Digital Equip.*, 511 at U.S. 878-79.

Petitioner makes no attempt to explain why *Bivens* conveys such a "right not to stand trial." And for good

reason. A *Bivens* ruling asks whether a damages remedy is available for a plaintiff against individual federal officers, not whether those defendants have a statutory or constitutional right not to stand trial. *See, e.g.*, *Carlson*, 446 U.S. at 18 ("*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."). This Court has been appropriately wary of breaking open what it considers a "right not to stand trial," because "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Digital Equip.*, 511 U.S. at 873. If that were enough, issues like personal jurisdiction, statutes of limitations, a right to a speedy trial, claim preclusion, "or merely that the complaint fails to state a claim"—motions that "can be made in virtually every case"—would all be immediately appealable. *Id.* As a result, this Court has held that § 1291 requires considering "claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Id.* Indeed, this Court has "repeatedly stressed that the 'narrow' exception" to the final judgment rule "should stay that way and never be allowed to swallow the general rule." *Id.* at 868. Because "[a]n erroneous ruling on" the availability of a *Bivens* action "may be reviewed effectively on appeal from final judgment," it does not meet this test. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 43 (1995).[6]

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[6] Indeed, this Court has reviewed the availability of a *Bivens* claim in just such a posture. *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (holding, on appeal after judgment on jury verdict in favor

3. This Court has already said as much in *Will v. Hallock*. There, this Court addressed whether a refusal to apply the Federal Tort Claims Act's judgment bar—and thus a decision to allow a *Bivens* claim to go forward—was immediately appealable under the collateral order doctrine. 546 U.S. at 347. The Court answered that question in the negative. *Id.* at 355. Of particular relevance here, the Court rejected the idea that the asserted "weighty public objective[s]" at play justified applying the collateral order doctrine. *Id.* at 353. "One can argue, of course, that if the *Bivens* action goes to trial the efficiency of Government will be compromised and the officials burdened and distracted," as is the case for qualified immunity. *Id.* But the judgment bar "preserv[es] the avoidance of litigation for its own sake," and if that were enough for collateral order treatment, the Court explained, "collateral order appeal[s] would be a matter of right whenever the Government lost a motion to dismiss under the Tort Claims Act, *or a federal officer lost one on a Bivens action*, or a state official was in that position in a case under 42 U.S.C. § 1983 or *Ex parte Young*." *Id.* at 353-54 (emphasis added). In effect, this Court concluded, finality "would fade out whenever the Government or an official lost an early round that could have stopped the fight." *Id.* at 354.

Will is doubly instructive. First, even if dicta, it is telling that in *Will* this Court assumed it was uncontroversial that a *Bivens* decision is not a collateral order.

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of plaintiff, that *Bivens* action could not be brought against the defendant).

Second, the passage sets out the downstream consequences that would flow from adopting Petitioner's position. That is, if this Court were to buy Petitioner's argument as to why he absolutely *must* have an immediate appeal now, *see* Pet. 21 (decrying the "disrupti[on]" of *Bivens* litigation), that would potentially open up any number of decisions involving the Government or its employees to immediate appeal, blowing a federal-government-sized hole in § 1291. Indeed, the logic of Petitioner's claim that Executive Branch disruption is sufficient to nose open the door to a collateral appeal extends to *every* suit against an agency or federal government actor. That, to say the least, would not be desirable—or consistent with § 1291. No wonder, then, that no court of appeals has adopted Petitioner's view. *See supra* at 14-16.

To be sure, "the strong bias of § 1291 against piecemeal appeals almost never operates without some cost." *Digital Equip.*, 511 U.S. at 872. And as this Court has explained, any number of erroneous rulings in the course of litigation "may burden litigants in ways that are only imperfectly reparable by appellate reversal." *Id.* However, if every such error was immediately appealable "Congress's final decision rule would end up a pretty puny one." *Id.*

This Court has taken "numerous opportunities" to refuse to permit interlocutory appeals, and the court below was right to do so here. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989). Opening up the collateral order doctrine would run contrary to the Court's "increasingly emphatic instructions that the class of cases capable of satisfying [the doctrine's] 'stringent' test should be understood as 'small,' 'modest,' and 'narrow.'" *United States v. Wampler*, 624 F.3d

1330, 1334 (10th Cir. 2010) (Gorsuch, J.) (citing this Court's cases). This is not the "rank formalism" that Petitioner decries, Pet. 32, but the way that the final order doctrine works.

4. In the face of all this, Petitioner's centering of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Wilkie v. Robbins*, 551 U.S. 537 (2007); and *Hartman v. Moore*, 547 U.S. 250 (2006), shows how far he is reaching on the merits. Pet. 3, 6-8, 16-18. In a very carefully drafted sentence, he notes that in this trio of cases the Court "held that courts of appeals have jurisdiction over interlocutory appeals to address whether a *Bivens* cause of action exists." Pet. 16. But he conveniently omits the most significant aspect of those decisions: the posture. The courts had jurisdiction to address the *Bivens* question because they *already* had jurisdiction over a properly-brought interlocutory appeal based on qualified immunity (as was the case in *Pettibone* and would have been the case here had Petitioner not waived his appeal on qualified immunity, Pet. App. 2a-3a, 7a). So those cases are not even remotely on-point for the question presented.[7]

In *Hartman*, the first of these cases, the defendants had moved for summary judgment on the merits of the retaliatory-prosecution *Bivens* claim, and on the basis of qualified immunity. 547 U.S. at 255. This Court rejected the respondent's argument that it (and the court of appeals) lacked jurisdiction to look at the merits of the claim; its holding merely "defin[ed] an element of the tort, directly implicated by the defense of qualified immunity and properly before [the Court]

[7] Notably, the dissent below does not rely on these cases. *See generally* Pet. App. 16a-30a (Hardiman, J., dissenting).

on interlocutory appeal." *Id.* at 257 n.5. Next, in *Wilkie*, this Court directly addressed the availability of a *Bivens* action—but, again, this came up as part of "an interlocutory appeal of the denial of qualified immunity." 551 U.S. at 548. The Court explained that "[b]ecause the same reasoning" as in *Hartman* regarding an element of a claim "applies to the recognition of the entire cause of action, the Court of Appeals had jurisdiction over [the *Bivens*] issue," as did this Court. *Id.* at 549 n.4. Finally, in *Iqbal*, this Court built on *Hartman* and *Wilkie* and held that—on an interlocutory appeal from the district court's denial of qualified immunity—the court of appeals had jurisdiction to review not just "whether [plaintiff's] complaint avers a clearly established constitutional violation," but also "the sufficiency of his pleadings." 556 U.S. at 673. These cases stand for the proposition that an appellate court may review certain issues when it already has jurisdiction over an interlocutory appeal from a denial of qualified immunity. But it doesn't help Petitioner here—where he asks this Court to designate a *Bivens* ruling *on its own* as a collateral order subject to interlocutory appeal.

5. Petitioner's other arguments also fail. Petitioner puts a lot of stake into the idea that *Bivens* is a "threshold" legal issue. *See, e.g.*, Pet. at 6-7, 18. But this Court's diligent policing of the borders of the collateral order doctrine has included refusing to extend its application to a wide range of threshold issues, including subject matter jurisdiction, *Van Cauwenberghe*, 486 U.S. at 526, application of a forum selection clause, *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 501 (1989), and whether a defendant was a policymaker subject to a municipal liability suit, *Swint*, 514

U.S. at 43. Similarly, Petitioner's pleas for an interlocutory appeal because *Bivens* is "antecedent to" the clearly-established-law question and "as much a part of the ultimate qualified immunity determination" as that question, Pet. 23-24, only speaks to why it is appropriate to review *Bivens* (perhaps first) when a qualified immunity question goes up on interlocutory appeal. But it does not explain why *Bivens* decisions should get to go up alone.

Nor is Petitioner's invocation of the "public values" or separation-of-powers concerns relating to *Bivens* enough to cut it. Pet. 20. To start, Petitioner's reliance on "the Constitution's separation of legislative and judicial power," Pet. at 6, is ironic, since he is asking this Court to dynamite Congress's limitation of federal courts' jurisdiction in § 1291. *See Mohawk Indus.*, 558 U.S. at 113 (importance of limiting collateral orders "has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudment orders should be immediately appealable"). Additionally, this Court explained that separation-of-powers concerns required absolute presidential immunity "[b]ecause of the singular importance of the President's duties," *Nixon*, 457 U.S. at 751, and Petitioner would, instead, apply such concerns to every federal defendant. At any rate, this Court firmly settled this question in *Will*, when it observed that allowing a *Bivens* claim to go forward did not "serve such a weighty public objective" to necessitate a collateral order appeal. 546 U.S. at 353. This is consistent with this Court's rejection of the collateral order doctrine to

"disclosure orders adverse to the attorney-client privilege," despite the "importance of the . . . privilege, which 'is one of the oldest recognized privileges for confidential communications.'" *Mohawk Indus.*, 558 U.S. at 103, 108 (quoting *Swindler & Berlin v. United States*, 524 U.S. 399, 403 (1998)).

Petitioner's real beef is with the merits of the district court's *Bivens* ruling, Pet. 22—a ruling that he will have ample opportunity to challenge in an appeal from a final judgment, should Respondent not lose first at summary judgment on the merits or because of qualified immunity. This Court, too, will have a chance to address the merits of the *Bivens* question at that point, should it be necessary. Driving a truck through the collateral order doctrine is surely the fastest way to get there, but not the wisest.

III. The Question Presented Rarely Matters And This Case Is A Poor Vehicle.

1. The issue is not important because the category of cases that arise in this posture are rare. That is because most federal defendants will raise the unavailability of a *Bivens* cause of action alongside the defense of qualified immunity—as Petitioner did here in the district court. Pet. App. 2a. As Petitioner observes, "the two issues will often be decided in the same judgment." Pet. 24. Should a defendant lose on both issues, they have an immediate right to appeal the qualified immunity decision, and can bring the *Bivens* issue up alongside. *See supra* at 25-26.[8] That is how this Court

[8] Petitioner observes that sometimes qualified immunity cannot be resolved at the motion to dismiss stage. Pet. 32-33. But in this very case the district court deferred the qualified immunity question, because it held that discovery was necessary before ruling

in *Wilkie* came to review—and reject—the availability of a *Bivens* claim. 551 U.S. at 549 n.4 (holding "recognition of the entire cause of action" is "directly implicated by the defense of qualified immunity" that was "properly before [the Court] on interlocutory appeal"). Petitioner had that right here, but chose not to exercise it, and instead waived his appeal as to qualified immunity. Pet. App. 7a & n.8. Petitioner's decision to waive qualified immunity and forego the Court's long-established procedural steps for appellate review should not serve as the basis for this Court's consideration of the drastic remedy proposed by Petitioner in this case.[9]

To be sure, one-off quirks, like in this case, will mean that *occasionally* a defendant will not press qualified immunity together with a *Bivens* question. *See Himmelreich*, 5 F.4th at 661 ("Here, for some unexplained reason, Fitzgerald did not raise qualified immunity as a defense in her motion for summary judgment."); Pet. App. 2a-3a, 7a. But it is only these few "untethered" *Bivens* cases to which the question

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on the issue, *see* Pet. App. 44a-45a, and Petitioner was entitled to an immediate appeal from that decision nonetheless, Pet. App. 7a n.8 (noting availability of interlocutory appeal "[w]here a district court defers ruling on qualified immunity to permit further fact discovery").

[9] Should the *Bivens* issue really need immediate adjudication in any particular case, a defendant can pursue the alternative interlocutory appeal mechanism provided for in 28 U.S.C. § 1292(b). *See Digital Equip.*, 511 U.S. at 883 (describing § 1292(b) as a "safety valve"). Although the court of appeals regarded the existence of § 1292 as "counsel[ing] against" declaring *Bivens* decisions collateral orders, Pet. App. 14a n.14, Petitioner does not address § 1292(b)'s existence, let alone explain why that conclusion was incorrect.

presented applies. Pet. App. 8a. Department of Justice Attorneys have represented that such "[s]tand-alone appeals" on the availability of a *Bivens* remedy "that do not also raise qualified immunity . . . are rare." Brief for Appellants at 18, *Garraway v. Ciufo*, No. 23-15482 (9th Cir.).

2. The doctrine of qualified immunity not only allows defendants to get *Bivens* questions to the court of appeals on an interlocutory basis, but also disposes of many such cases on its own. That is, since qualified immunity is a defense to *Bivens* liability, *see Butz v. Economou*, 438 U.S. 478, 500 (1978), and protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), the doctrine shields federal defendants from damages liability in most cases, *see Himmelreich*, 5 F.4th at 662 ("To the extent that defendants are concerned about litigating meritless cases, qualified immunity more than adequately protects government officials from the burdens of litigation.").

In fact, this case might get resolved on the basis of qualified immunity down the road, making review of the *Bivens* question both premature and unnecessary (and this case a bad vehicle). The district court concluded that because qualified immunity turned on whether it was "objectively reasonable" for Petitioner to believe there was probable cause to arrest Respondent, it was impossible to rule on Petitioner's entitlement to qualified immunity before limited discovery related to the arrest. Pet. App. 43a-45a. That discovery has yet to happen because of Petitioner's attempt at an interlocutory appeal. In other words, qualified

immunity will dispose of many *Bivens* cases—including possibly this one.[10]

3. Relatedly, this case is a poor vehicle because Petitioner may even still win (in the district court) on the availability of *Bivens*. The district court's ruling on that issue, too, was provisional: "[a]t this early stage of [Respondent's] lawsuit, his claim *appears* to land squarely within" the category of *Bivens* claims that are still cognizable. Pet. App. 59a (emphasis added). If Petitioner is so sure that the district court's (pre-*Egbert*) decision is contrary to *Egbert*, he should present that argument to the district court, which has not yet had an opportunity to consider it. *See Himmelreich*, 2022 WL 6156942, at *3 (reconsidering *Bivens* issue on remand in light of *Egbert*, and concluding no *Bivens* claim existed).

And if the district court reaffirms its decision on *Bivens*, Petitioner will have a right to appeal that question to the Third Circuit. Courts of appeals can—and do—"effectively review whether the district court properly recognized a *Bivens* damages action after a final judgment" in a particular case. *Himmelreich*, 5 F.4th at 663. This Court has done so as well. *See F.D.I.C.*, 510 U.S. at 474.

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[10] Relatedly, Petitioner's allegations of harm that flows from the risk of personal liability are overblown. Pet. 21, 31. Such liability is possible only when a defendant violates a plaintiff's clearly-established constitutional rights, so one way to avoid personal liability is to follow the Constitution—or at least get close-ish to doing so. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.").

CONCLUSION

The Court should deny certiorari.

Respectfully submitted,

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