No. 23-384

IN THE
Supreme Court of the United States

MICHAEL BORESKY,
Petitioner,
v.
JEREMY GRABER,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The brief in opposition confirms that the decision below departs from this Court's precedent, deepens a circuit split, lacks a coherent basis in the law, and implicates an exceptionally important separation-of-powers question warranting review.

This Court has repeatedly held that it possesses jurisdiction in interlocutory appeals to consider "whether to devise a new *Bivens* damages action." *Wilkie* v. *Robbins*, 551 U.S. 537, 549 & n.4 (2007). Respondent's theory—that this reasoning applies only where the defendant separately challenges qualified immunity on appeal—makes no sense. Whether to devise a new cause of action under *Bivens* is "antecedent" to any qualified immunity question. *Hernandez* v. *Mesa*, 582 U.S. 548, 553 (2017) (per curiam) (quotation marks omitted). As Judge Hardiman explained, the same reasons for treating denials of qualified immunity as immediately appealable apply with greater force to decisions extending *Bivens*. The latter threaten the same public values as the former while additionally threatening the separation of powers. Respondent's hyperbole about undermining the final-judgment rule rings hollow given his concession that these same judgments are *already appealable* to resolve the *same threshold Bivens question*.

Respondent disputes the circuit split by ignoring the Ninth Circuit' reasoning. The Ninth Circuit rejected an argument about "pendent jurisdiction" much like the argument the panel below and the Sixth Circuit accepted. In any event, Respondent concedes that the question presented is pending in three courts of

appeals. The split is guaranteed to deepen, and Respondent provides no reason for this Court to wait. The case involves an issue of law, and the arguments on both sides have already been well ventilated. This case could be resolved this Term; it is an excellent vehicle; and awaiting a future case would subject Special Agent Boresky to years of devastating litigation before he obtains appellate review.

The question presented is exceptionally important, as evidenced by *amicus* briefs submitted by leading organizations representing federal law enforcement officers. As these briefs explain, *Bivens* litigation can undermine officials' job performance, wreak havoc on their personal lives, and threaten national security—harms that cannot be undone when officials prevail on appeal after a final judgment.

There is no reason to subject defendants to years of life-upending litigation before they can obtain appellate review virtually guaranteed to hold that no *Bivens* cause of action exists. This Court should grant certiorari. Alternatively, given the harms to the Executive Branch, this Court may wish to call for the views of the Solicitor General.

ARGUMENT

I. DISTRICT COURT ORDERS EXTENDING *BIVENS* ARE IMMEDIATELY APPEALABLE.

1. This Court has repeatedly exercised jurisdiction over interlocutory appeals to determine whether a *Bivens* cause of action exists. *See Ashcroft* v. *Iqbal*, 556 U.S. 662, 673 (2009); *Wilkie*, 551 U.S. at 550 n.4; *Hartman* v. *Moore*, 547 U.S. 250, 257 n.5 (2006). That practice is unsurprising: As Judge Hardiman

explained, whenever a district court extends *Bivens*, it " 'so imperils' the separation of powers as to justify immediate appeal as of right." Pet. App. 30a (Hardiman, J., dissenting) (quoting *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 108 (2009)). Decisions extending *Bivens* usurp legislative power, impose severe institutional harms on the Executive Branch, chill federal officials' performance of their duties, and impose devastating financial hardship on *Bivens* defendants. These harms "cannot be undone even if the officer is acquitted" at trial or the erroneous *Bivens* decision is overturned after final judgment. *Id*. at 26a. The only way to remedy these harms is to correct immediately decisions extending *Bivens*—which will be wrong in "most every case." *Egbert* v. *Boule*, 596 U.S. 482, 492 (2022).

2. Respondent agrees that federal defendants can seek immediate appellate review of orders extending *Bivens*. But, Respondent says (at 28), defendants can appeal the *Bivens* question only by piggybacking on a qualified-immunity appeal.

Respondent offers no coherent explanation for this formalism. It makes no sense to require the government to incant a qualified-immunity challenge to secure appellate review of the antecedent *Bivens* question. Courts review judgments, not opinions, and all agree that the District Court's summary-judgment order was immediately appealable. Respondent cannot explain when—or why—that appealable order and the *Bivens* issue contained therein became *unappealable* because the Department of Justice chose not to press an immunity argument in its appellate brief.

Respondent's arguments wither under scrutiny. Respondent endorses (at 21-22) the panel's view that

only immunity appeals implicate a "statutory or constitutional right not to stand trial." But Judge Hardiman explained that labeling a defense an "immunity" is neither necessary nor sufficient to give rise to an appealable collateral order. Pet. App. 21a (Hardiman, J., dissenting). The question is instead whether "a potentially dispositive pretrial defense" is at issue implicating "a sufficiently important public value." *Id*. at 17a. Protecting the separation of powers from the wrongful extension of *Bivens* is precisely such a value.

Even if immunity were dispositive, this Court's *Bivens* jurisprudence protects values similar to—but more compelling than—qualified immunity. Both protect the Executive Branch and its officers from "the burden and demand of litigation" that may prevent officials "from devoting the time and effort required for the proper discharge of their duties." *Ziglar* v. *Abbasi*, 582 U.S. 120, 141 (2017). And *Bivens* additionally implicates bedrock separation-of-powers principles.

Respondent, like the panel, relies on an out-of-context sentence in *Will* v. *Hallock*, 546 U.S. 345 (2006), which Respondent concedes (at 23) is "dicta." Judge Hardiman did not "put as much stock" as the majority in this "drive-by dictum" given the "substantive points *Will* made," which militate strongly in favor of an immediate appeal here. Pet. App. 19a (Hardiman, J., dissenting). *Will* stressed that an order is unreviewable if it threatens "compelling public ends" such as "the separation of powers," hinders "governmental functions," or inhibits "able people from exercising discretion in public service." *Will*, 546 U.S. at 352 (cleaned up). This Court has repeatedly made clear

that decisions extending *Bivens* meet all these criteria—a point Respondent does little to dispute.

In one sentence, *Will* stated that a collateral appeal should not be available every time a government official "lost a motion to dismiss" "on a *Bivens* action." *Id.* at 353-354. This sentence suggests that defendants cannot take an immediate appeal from a decision holding that a plaintiff plausibly alleged a *Bivens* claim. Nothing about this sentence, however, bars defendants from appealing the threshold legal question whether an implied *Bivens* cause of action exists in the first place. If there were any doubt, this Court's subsequent decisions in *Wilkie* and *Iqbal* made clear that defendants can appeal *both* the existence of a *Bivens* cause of action, and the denial of qualified immunity. To the extent any confusion remains, this Court should grant review to clarify its precedent.

Respondent claims that the first and second collateral-order criteria are not met—an argument not even the panel below endorsed. Respondent maintains (at 19) "a *Bivens* ruling does not necessarily conclusively determine the availability of a *Bivens* action" because a district court might revisit its order in light of an intervening decision from this Court. But lower courts *always* follow opinions of a higher court. If the mere possibility of intervening precedent made an order inconclusive, no order would *ever* be appealable under the collateral-order doctrine.

Respondent is equally wrong (at 20) that a *Bivens* action is inseparable from the merits because the *Bivens* question involves "a fact-specific inquiry" "inherently intertwined with the merits." This Court rejected that precise objection in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). Even though resolution of the

qualified-immunity question "will entail consideration of the factual allegations that make up the plaintiff's claim for relief" qualified-immunity decisions are immediately appealable notwithstanding the "factual overlap." *Id*. at 528, 529 n.10. And *Bivens* appeals are even more distinct from the merits than qualified-immunity appeals.

Respondent is wrong (at 24) that adopting Judge Hardman's view will lead to immediate appeals whenever an interlocutory order involves the government "or its employees." When Congress authorizes suit against the government or its officers, Congress has weighed "the costs and benefits" and concluded that the final-judgment rule should apply. *Egbert*, 596 U.S. at 496 (quotation marks omitted). But that's precisely what Congress has *not* done here. Thus, authorizing an interlocutory appeal in the *Bivens* context will do nothing to open the floodgates to interlocutory appeals in other cases, as Judge Hardiman noted when he highlighted the need to "police the parameters of the collateral order class stringently." Pet. App. 20a (cleaned up).

Respondent cites (at 19, 27) an amendment to the Rules Enabling Act permitting the Court to define orders as "final" for purposes of appeal through rulemaking. But Special Agent Boresky does not seek to define a new category of appealable orders; the *Bivens* issue here is "on all fours with orders" "previously" "held to be appealable under the collateral order doctrine" in *Hartman*, *Wilkie*, and *Iqbal*. *Mohawk*, 558 U.S. at 113, 115 (Thomas, J., concurring in part and concurring in the judgment). *Bivens* was a remedy created by this Court, and it is this Court's role to ensure that the remedy is properly confined.

II. THE COURTS OF APPEALS ARE SPLIT.

Respondent agrees (at 14) that the Third and Sixth Circuits have concluded "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.' " But Respondent disputes that the Ninth Circuit has ruled to the contrary, observing that in *Pettibone* v. *Russell*, 59 F.4th 449 (9th Cir. 2023), the *Bivens* defendant challenged on appeal both the extension of *Bivens* and the denial of qualified immunity.

Respondent fails to engage *Pettibone*'s reasoning, which flatly contradicts the reasoning of the court below. In *Pettibone*, as here, a *Bivens* defendant appealed from a district court ruling addressing "both qualified immunity and the lack of a *Bivens* cause of action." *Id.* at 452. Relying on Ninth Circuit precedent, the plaintiff argued that the court of appeals could "consider the *Bivens* issue only if" there was "pendent appellate jurisdiction over it—that is, only if it [was] 'inextricably intertwined' with or 'necessary to ensure meaningful review of' " the qualified immunity decision. *Id.* (quotation marks omitted). The Ninth Circuit rejected that argument, explaining that each of the decisions the plaintiff cited "predated the Supreme Court's decision in *Wilkie*." *Id.* As the court noted, *Wilkie* "did not apply the pendent appellate jurisdiction test" in "explaining why there was appellate jurisdiction to decide whether a *Bivens* cause of action existed." *Id.* at 453. Instead, because the existence of a *Bivens* remedy is "directly implicated" by qualified immunity, it is "properly before" the court "on

interlocutory appeal." *Id.* (quotation marks omitted). Respondent here, like the plaintiff in *Pettibone*, effectively argues that courts of appeals can address the *Bivens* issue only if they have pendent jurisdiction by virtue of a qualified immunity appeal. That is the argument *Pettibone* rejected.

Respondent notes (at 16) that Judge Hardiman observed no appellate court had held that *Bivens*-only rulings are immediately appealable. But the decision below was published only eight days after *Pettibone*. It is unsurprising that Judge Hardiman did not account for that late-breaking development.

Finally, as Respondent concedes (at 16-17), three courts of appeals are considering whether *Bivens*-only rulings are immediately appealable. The split is therefore guaranteed to deepen. Two of these cases are tentatively scheduled for argument from March to May 2024. *See* Order, *Mohamed* v. *Jones*, No. 22-1453 (10th Cir. Sept. 8, 2023); *Garraway* v. *Ciufo*, Dkt. 30, No. 23-15482 (9th Cir. Nov. 30, 2023). Given that this Court already has thorough opinions addressing both sides of the question presented, no purpose would be served by accepting Respondent's plea for further percolation—particularly since this case could be heard this Term. Delaying this Court's review would serve only to subject Special Agent Boresky to the unnecessary burdens attendant to this unconstitutional lawsuit. And it will create a dangerous cloud around this issue for other federal officials, as *amici* make clear.

III. THE QUESTION PRESENTED IS EXTREMELY IMPORTANT.

Respondent's attempts to downplay the importance of the question presented fail.

First, Respondent argues (at 31 n.10) that the harms that flow from the "risk of personal liability" are "overblown."

Respondent does not mention, let alone attempt to refute, the *amicus* briefs submitted by four leading organizations of federal law enforcement officers describing the "effectively unreviewable harms" caused by protracted *Bivens* litigation. *Amici* detail their "first-hand experience" confirming the "risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Amicus Br. of Federal Law Enforcement Officers Association and the National Border Patrol Council at 6, 9 & n.9 ("FLEOA Br.") (quoting *Egbert*, 596 U.S. at 499). The threat of liability can have "a chilling effect on life and death decisions" officials must make. Amicus Br. of Council of Prison Locals C-33 at 15 ("CPL Br."). Officers are often placed "on leave during *Bivens* lawsuits," which burdens their colleagues. *Id.* at 2-3. And *Bivens* litigation can "interfere with administrative remedial schemes created by Congress and the Executive" to address legitimate claims of federal employee misconduct. FLEOA Br. at 20.

Bivens litigation can also "cause devasting financial impacts, putting an immense strain on Officers and their families." CPL Br. at 16. The financial uncertainty caused by *Bivens* litigation, including

uncertainty about whether the Department of Justice will approve representation, can be utterly disabling. *Id.* So can the obligation to disclose defendants' "intimate personal information" during discovery—at times to plaintiffs who are convicted criminals. FLEOA Br. at 11 n.6. Ongoing litigation can impede officials from obtaining mortgages or other loans, threaten the prospect of "losing [their] house and savings," and cause "personal rift[s]" within families. *Id.* at 12 n.7 (alteration omitted).

These harms can have serious national-security implications. This case is a prime example: Discovery threatened to reveal "sensitive information" about the Secret Service's techniques for protecting the President. Pet. App. 76a. But national-security concerns arise in other contexts too. As the brief for capitol police officers explains, the threat of *Bivens* litigation "will necessarily affect Officers' decision-making abilities, which can lead to serious national security concerns, as evidenced by the events that took place on January 6th." Amicus Br. of U.S. Capitol Police Labor Committee at 2-3. The National Border Patrol Council has previously submitted "only two briefs before this Court," and it files only "when a case directly impacts its members' ability to fulfill their critical national security mission." FLEOA Br. at 3.

Respondent addresses none of this. The closest he comes is the glib observation (at 31 n.10) that "one way to avoid personal liability is to follow the Constitution." But all of the harms just described arise in cases in which the defendant *has done nothing wrong* and the suit is ultimately dismissed. Federal officials

should not be required to incur these harms as they spend years awaiting vindication in the form of an appeal from final judgment.

Second, Respondent claims (at 28-29) the question presented "[r]arely [m]atters" and calls this case a "one-off." That assertion is impossible to square with Respondent's acknowledgement (at 16-17) that the question presented is currently pending in three circuits. It is increasingly common for defendants to appeal the extension of *Bivens* but not the denial of qualified immunity, especially given this Court's recent decisions underscoring that *Bivens* is unavailable in "most every case." *Egbert*, 596 U.S. at 492.

Respondent does not dispute that *Bivens* defendants may lack a meritorious qualified immunity appeal even in cases where a *Bivens* remedy plainly does not exist. Qualified immunity normally cannot be resolved at the motion-to-dismiss stage, even though the question whether to extend *Bivens* normally must be. In addition, fact-bound denials of qualified immunity are not immediately appealable even at summary judgment. *See Johnson* v. *Jones*, 515 U.S. 304, 313 (1995). And a qualified immunity appeal may be doomed if circuit precedent from the Section 1983 context clearly establishes the violation as alleged—even though no comparable *Bivens* remedy exists.

In other contexts one might expect litigants to raise even meritless qualified-immunity arguments on appeal as a means of obtaining review of the antecedent *Bivens* question. But *Bivens* defendants (like Special Agent Boresky in the District Court) are normally represented by the Department of Justice, and

the Solicitor General must approve the grounds for any appeal. The Solicitor General has sound institutional reasons for declining to raise dubious qualified immunity arguments on appeal simply as a means of smuggling up the *Bivens* question for review.

Third, Respondent argues that this case is a bad vehicle, essentially because he is so likely to lose later. Respondent stresses (at 30-31) that discovery might show that Special Agent Boresky is entitled to immunity after all. And Respondent highlights (at 31) that the District Court has "not yet had an opportunity to consider" *Egbert*.

Nothing about this suit's dim prospects on the merits will interfere with this Court's resolution of the question presented. To the contrary, Respondent's vehicle arguments underscore the importance of review. As Judge Hardiman explained, and as Respondent barely disputes, Respondent's suit involves an extension of *Bivens* to a new constitutional provision (the Warrant Clause), in a new context (an official not present at the arrest), and where special factors counsel hesitation (the national-security implications of discovery regarding the Secret Service's protection of the President). Pet. App. 32a-34a. There is no reason to subject Special Agent Boresky to discovery and possibly trial before he obtains appellate review of a *Bivens* claim destined for reversal.

The District Court here is far from the only one to ignore this Court's admonitions against extending *Bivens*—including in numerous cases decided post-*Egbert*. *See* FLEOA Brief at 22 n.16. This issue will arise with increasing frequency until this Court

resolves it and sends the appropriate signal to lower courts. There is no reason to wait.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed. Alternatively, the Court should call for the views of the Solicitor General.

Respectfully submitted,

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