No. 23-976

In the Supreme Court of the United States

JEREMY HENNING, Petitioner,

v.

DONALD V. SNOWDEN, *Respondent*.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The question presented is:

Whether the court of appeals erred in allowing a *Bivens* remedy in this case, where the claim arises from an arrest made outside the home, in a place open to the public, pursuant to a warrant.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF")[1] is a nonprofit founded in 1981 by Phyllis Schlafly. Eagle Forum ELDF has long advocated to support the Constitution's separation of powers and to oppose implied rights of federal action in this and other contexts. *Amicus* Eagle Forum ELDF thus has a strong interest in the issues implicated here to argue against judicially created federal remedies that Congress has never enacted.

STATEMENT OF THE CASE

Amicus Eagle Forum ELDF adopts the facts as stated by petitioner Jeremy Henning, a Drug Enforcement Administration agent. *See* Pet. 8. In brief, Agent Henning executed an arrest warrant against Donald Snowden in a hotel lobby, with the arrest allegedly involving excessive force. *Id.*

SUMMARY OF ARGUMENT

The Court should overrule *Bivens*, which was based not only on a subsequently rejected implied-right-of-action theory (Section II.B.2), but also on an implausibly broad interpretation of federal-question jurisdiction that would empower federal courts to fashion any remedy for any federal question (Section I.A.1). This reading of federal-question jurisdiction would render the seminal Civil Rights Act of 1871—

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[1] *Amicus* files this brief with 10 days' written notice. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

specifically, 42 U.S.C. § 1983—superfluous (Section I.A.2). Whatever the principles that justify *stare decisis*, they do not justify the Due Process violation of applying a plainly wrong *Bivens* holding to a *Bivens* non-party like Agent Henning (Section I.B). Moreover, no factors warrant retaining *Bivens* as a precedent under *stare decisis* because: (i) *Bivens* is unworkable, badly reasoned, and inconsistent not only with this Court's rejection of implying causes of action but also with amendments to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 ("FTCA"); and (ii) no party reasonably relies on *Bivens* in either taking action or ordering their affairs (Section I.C). Finally, Congress has not ratified *Bivens* (Section I.C.4).

If this Court nonetheless reviews this action under *Bivens*, this Court should not expand *Bivens* to this case because Mr. Snowden had an adequate alternate remedy under the FTCA (Section II.A) and special factors—such as executing the warrant in a public place and the separation-of-powers violation inherent in *Bivens*—counsel against extending *Bivens* further (Section II.B).

ARGUMENT

I. THIS COURT SHOULD ABANDON *BIVENS*.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). But *stare decicis* sometimes must give way to other considerations: "'*Stare decisis* is not an inexorable command.'" *Id.* at 828 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119

(1940)); *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) (*stare decisis* "is not inflexible" and "[w]hether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided"). This is one of the times when *stare decisis* should not allow an obviously wrong precedent to stand.

A. *Bivens* is plainly wrong.

This Court has politely called *Bivens* "a relic of the heady days in which this Court assumed common-law powers to create causes of action" and an "*ancien regime* [under which] the Court assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose." *Hernandez v. Mesa*, 140 S.Ct. 735, 741, 750 (2020) (interior quotation marks omitted) ("*Hernandez II*"). *Bivens* is much worse than a mere "relic." *Bivens* was wrongly decided in 1971, and it fares even worse today under the changes this Court has adopted since 1971 on implied private rights of action.

1. *Bivens* rests on misinterpreting federal-question jurisdiction.

The Court's post-*Bivens* decisions not to extend *Bivens* have focused on Article III courts' lack of common law or legislative power to create causes of action implied by a substantive provision such as the Fourth or Fifth Amendment. *Hernandez II*, 140 S.Ct. at 742. But *Bivens* relied on two ingredients to fashion its damages remedy: not only the Fourth Amendment but also federal-question jurisdiction. While this Court has withdrawn from implying causes of action, the Court also should recognize that the *Bivens* view of federal-question jurisdiction is deeply flawed.

As the *Bivens* majority made clear, *Bivens* held what *Bell v. Hood*, 327 U.S. 678 (1946), prefigured: "'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" *Bivens*, 403 U.S. at 396 (quoting *Bell*, 327 U.S. at 684). And *Bell* made clear that the entire enterprise was based on federal-question jurisdiction: "Whether the petitioners are entitled to recover depends upon an interpretation of [the federal-question statute] and on a determination of the scope of the Fourth and Fifth Amendments' protection[.]" *Bell*, 327 U.S. at 684-85. The rationale behind *Bivens* is as breathtakingly broad as it is simple:

> Our authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in our general jurisdiction to decide all cases "arising under the Constitution, laws, or treaties of the United States."

Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (quoting 28 U.S.C. § 1331); *accord Schweiker v. Chilicky*, 487 U.S. 412, 420-21 (1988); *Bush v. Lucas*, 462 U.S. 367, 378 (1983) ("federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation"); *Bivens*, 403 U.S. at 398-99 (Harlan, J., concurring in the judgment). In short, the gist of *Bivens* is that—when Congress enacted the federal-question statute in 1875—Congress authorized federal courts to adopt any remedy for any federal question.

That cannot be right. While our legal generation is accustomed to federal-question jurisdiction, it was not until 1875 that Congress gave federal district courts jurisdiction over federal questions. *Merrell Dow Pharm., Inc. v. Thompson,* 478 U.S. 804, 807 (1986). Nothing has happened since 1875 to expand the scope of the statutory grant of jurisdiction to the lower courts: "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 227 (1957). So *Bivens* rests in part on the assumption that federal courts can infer any remedy for cases within federal-question jurisdiction.

2. *Bivens* renders 42 U.S.C. § 1983 mere surplusage.

Other than overstating the congressional grant of federal-question jurisdiction, *see* Section I.A.1, *supra*, a second problem is that *Bivens* renders seminal civil-rights legislation mere surplusage:

> [T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young,* established the modern framework for federal protection of constitutional rights from state interference.

Perez v. Ledesma, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. § 1331. *Id.* The problem is that, if a plaintiff needed only § 1331 to sue federal violators of constitutional rights, then a plaintiff plainly does not need § 1343(3) and § 1983 to

sue state or local violators of constitutional rights. *Bivens* would make a key provision of the Civil Rights Act of 1871 a nullity.

Indeed, this Court has recognized the possibility that *Bivens* could have expanded "until it became the substantial equivalent of 42 U.S.C. §1983." *Ziglar v. Abbasi*, 582 U.S. 120, 132 (2017) (interior quotation marks omitted). Although that expansion did not happen because this Court ceased implying private rights of action, the possibility that it *could have* happened highlights a fatal defect in the *Bivens* interpretation of the federal-question statute.

As Justice Sotomayor has explained, traditional equity review under federal question jurisdiction and *Young* differs from Section 1983 and implied rights of action:

> Suits for redress designed to halt or prevent the constitutional violation rather than the award of money damages seek traditional forms of relief. By contrast, a plaintiff invoking §1983 or an implied statutory cause of action may seek a variety of remedies—including damages—from a potentially broad range of parties. Rather than simply pointing to background equitable principles authorizing the action that Congress presumably has not overridden, such a plaintiff must demonstrate specific congressional intent to *create* a statutory right to these remedies. For these reasons, the principles that we have developed to determine whether a statute creates an implied right of action, or is

> enforceable through §1983, are not transferable to the *Ex parte Young* context.

Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 340 (2015) (Sotomayor, J., dissenting) (interior quotation marks, citations, and alterations omitted, emphasis in original). And yet *Bivens* would find all that remedy-creating power tucked away in federal-question jurisdiction.

Indeed, in the immediate aftermath of *Bivens*, "it was widely assumed among lower courts and commentators that *Bivens* remedies would be available for all constitutional rights." Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1139-1140 (2014) (citing Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STANFORD L. REV. 809, 822 (2010)). Again, that cannot be right. This Court should not read the Judiciary Act of 1875 as rendering key parts of the Civil Rights Act of 1871 superfluous.

B. Applying *Bivens* to a *Bivens* non-party violates Due Process.

While Mr. Snowden may feel wronged by this Court's overruling *Bivens* in his case, Agent Henning has an even stronger Due Process entitlement to have this Court consider his claims independent of the holding for Mr. Bivens half a century ago. Quite simply, the law changed in that interval, and each party has a Due Process right to his or her day in court

today, based on all the legal arguments available *today*.[2]

This Court has recognized an "institutional bias inherent in the judicial system against the retrial of issues that have already been decided," on which the "doctrines of *stare decisis*, res judicata, the law of the case, and double jeopardy all are based, at least in part." *United States v. Goodwin*, 457 U.S. 368, 376 (1982). With respect to preclusion, this Court has long held that the law is "subject to due process limitations," *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008), so that "extreme applications" of preclusion law "may be inconsistent with a federal right that is 'fundamental in character.'" *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996) (quoting *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 476 (1918)); *Newport*, 247 U.S. at 476 ("opportunity to be heard is an essential requisite of due process of law in judicial proceedings"). Because *stare decisis* applies to non-parties to the earlier litigation, Due Process bars using *stare decisis* as a substitute for issue preclusion: "In no event … can issue preclusion be invoked against one who did not participate in the prior adjudication." *Baker v. Gen'l Motors Corp.,* 522 U.S. 222, 237-38 & n.11 (1998). If today's party seeks to make an argument not reached in the earlier decision, *stare decisis* cannot—consistent with Due Process—doom today's party to yesterday's ruling:

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[2] Mr. Snowden would not be wronged by a wholesale overruling of *Bivens* because Mr. Snowden is not entitled to invoke *Bivens* in the immigration context, even under *Bivens* and its progeny. *See* Section II.B.1, *infra*.

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Cooper Indus. v. Aviall Servs., 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("cases cannot be read as foreclosing an argument that they never dealt with") (plurality). *Stare decisis* should not control issues that the earlier decision never addressed.

In 1971, this Court applied its *Bivens* holding to "six unknown named agents of [the] Federal Bureau of Narcotics." 403 U.S. at 389. There is no basis to think that Agent Henning was one of those agents 50-plus years ago, so *Bivens* cannot apply here by *res judicata*. If *Bivens* applies, it applies under the doctrine of *stare decisis*. Under *stare decicis*, the Court's 1971 holding against those unknown agents applies equally to Agent Henning because that is what the Court held in 1971.

For a decision as spectacularly wrong as *Bivens*, *see* Section I.A, *supra* (overstating federal-question jurisdiction), *stare decisis* should not extend that far:

> [D]istinctions between preclusion by judgment and the use of judgments, or more accurately, decisions, as precedent should be noted. The common law doctrine of stare decisis is a mandate that courts should apply precedent by giving appropriate weight to the prior determinations of courts on issues of law. Preclusion is not a concept

> associated with this doctrine[.] … "A state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party." Care should be taken not to blur the line between the doctrines of preclusion and stare decisis[.]

Katherine C. Pearson, *Common Law Preclusion, Full Faith And Credit, And Consent Judgments: The Analytical Challenge*, 48 CATHOLIC UNIV. L. REV. 419, 446-47 (1999) (footnotes omitted) (quoting *Richards*, 517 U.S. at 805). This Court should not apply *Bivens* to a new party without addressing the flaws of *Bivens*.

Indeed, by including the special-factors analysis, *Bivens* contained the seeds of its own undoing: "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396. Here, separation-of-powers doctrine and a reasonable interpretation of federal-question jurisdiction should cause this Court to reject *Bivens*. Regarding the former, Agent Henning has standing to press the Constitution's structural protections because he has a concrete interest in defending his actions and avoiding tort liability. *Bond v. United States*, 564 U.S. 211, 222-23 (2011). Agent Henning has the Due Process right to challenge *Bivens* for all the reasons that motivated this Court, since 1980, to decline to extend *Bivens*.

C. No factors warrant keeping *Bivens*.

Section I.A, *supra*, explains that *Bivens* was wrongly decided. Section I.B, *supra*, explains that the Due Process Clause forbids applying *Bivens* to Agent

Henning. The present section evaluates *Bivens* under this Court's factors for deciding whether follow *stare decisis*:

> Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of [a prior decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.

Janus v. AFSCME, Council 31, 138 S.Ct. 2448, 2478-79 (2018). None of these factors counsels for continuing *Bivens*, which is untenable as a precedent. Rather than narrow—or expand—*Bivens* to the new factors at issue here, the Court should simply abandon the enterprise.

1. ***Bivens* is unworkable and badly reasoned.**

Bivens fails the first and second *Janus* factors because *stare decisis* does not constrain this Court when "decisions are unworkable or are badly reasoned." *Payne*, 501 U.S. at 827. To the extent that "any departure from the doctrine demands 'special justification'—something more than 'an argument that the precedent was wrongly decided,'" *Kisor v. Wilkie*, 139 S.Ct. 2400, 2422 (2019), the procedural Due Process argument against applying *Bivens* to *Bivens* non-parties supplies a "special justification." *See* Section I.B, *supra*. At bottom, "the Constitution does not conflict with itself by conferring, upon the one hand, a … power, and taking the same power away,

on the other, by the limitations of the due process clause." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). As applied here, that means whatever degree of *stare decisis* is implicit in the Judicial Power in Article III and in Due Process under the Fifth Amendment must yield to the right Agent Henning has to Due Process under the Fifth Amendment, as explained in Section I.B, *supra*.

2. *Bivens* is inconsistent with this Court's decisions on implied rights of action.

Bivens easily fails the third and fourth *Janus* factors because this Court has rejected the idea that Article III courts have the constitutional authority to create causes of action. *Hernandez II*, 140 S.Ct. at 741. Indeed, with respect to the constitutional violations in *Bivens*, Congress has amended the FTCA to allow recovery under the FTCA. *See* Section II.A, *infra* (citing 28 U.S.C. § 2680(h), as amended). Under the circumstances, it is no longer true to say that "it is damages or nothing" under the inferred *Bivens* cause of action. *See Bivens*, 403 U.S. at 410. Unlike in *Bivens*, Mr. Snowden could have invoked the FTCA.

3. Government actors and potential plaintiffs do not rely on *Bivens*.

In the parties' initial tussle, Mr. Snowden did not rely on *Bivens* in a meaningful or reasonable way. First, he likely did not think to himself "if I get into an altercation with Agent Henning, I will be able to sue him under *Bivens*." Second, if he had thought that way, his thinking was unreasonable. *See* Section II, *infra* (*Bivens* does not extend here). Defendants like Agent Henning similarly do not *rely* on *Bivens* in

conducting their jobs. Quite the contrary, if anything, the prospect of *Bivens* liability would tend to make them less willing to do their jobs. But that is not reliance under *Janus*.

4. Congress has not ratified *Bivens*.

Although Congress has been aware of *Bivens* from the start and has *legislated around* it twice—in 1974 and 1988—Congress has never affirmatively *ratified* it. Exercising the judicial power under *Bivens* in lieu of an act of Congress is a *judicial act*. The only way for Congress to ensure a cause of action for these kinds of torts would be to enact an affirmative cause of action. The special-factor analysis that has limited *Bivens* expansions in this Court since 1980 was included in *Bivens* itself, 403 U.S. at 396, so—without an affirmative act by Congress—the judiciary can terminate *Bivens* for its own reasons.

This Court assumes congressional awareness of its important decisions, *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985), so it should be no surprise that Congress was indeed aware of *Bivens* when amending the FTCA in 1974 and 1988. But in both instances, Congress did not enact *Bivens* into law. Instead, Congress noted *Bivens*' existence and attempted to get out of the way.

In 1974, Congress amended the FTCA exclusion for intentional torts that had prevented Mr. Bivens' assertion of an FTCA action. PUB. L. NO. 93-253, § 2, 88 Stat. 50 (1974); *compare* 28 U.S.C. § 2680(h) (1970) *with* 28 U.S.C. § 2680(h). In the process, the Senate was aware of the potential effect on *Bivens* and stated how the 1974 amendment "should be viewed":

> [T]his provision should be viewed as a counterpart to the *Bivens* case and its [progeny], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

S. REP. NO. 93-588, at 3 (1973). In waiving the United States' sovereign immunity for its agents' intentional torts, Congress did not want to go on record as getting in the way of judicial action to fashion remedies directly against the individual agents under *Bivens*.

In 1988, when Congress made the FTCA exclusive *vis-à-vis* state torts, Congress again avoided *Bivens*—this time legislatively—by excepting *Bivens*-style actions from the FTCA's new exclusivity clause. *See* PUB. L. NO. 100-694, § 5, 102 Stat. 4563, 4564 (1988); 28 U.S.C. § 2679(b)(2)(A) (FTCA exclusivity "does not extend or apply to a civil action against an employee of the Government … which is brought for a violation of the Constitution of the United States"). In 1988, it was the House that discussed *Bivens* in its report:

> The second major feature of section 5 is that the exclusive remedy expressly does not extend to so-called constitutional torts. *See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S., 388 (1971). Courts have drawn a sharp distinction between common law torts and constitutional or *Bivens* torts. Common law

> torts are the routine acts or omissions which occur daily in the course of business and which have been redressed in an evolving manner by courts for, at least, the last 800 years. … A constitutional tort action, on the other hand, is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution. Since the Supreme Court's decision in *Bivens*, supra, the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. *Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights*.

H. REP. NO. 100-700, at 6 (1988) (emphasis added); *see also* 134 CONG. REC. 15,597, 15,600 (Oct. 12, 1988) ("I would like to emphasize that this bill *does not have any effect* on the so-called *Bivens* cases or Constitutional tort claims.") (emphasis added) (Sen. Grassley). As in 1974, the 1988 FTCA amendment did not foreclose judicial action to fashion a damages remedy directly against individuals under *Bivens*, but Congress also did not *affirmatively* enact a remedy for constitutional torts.

To be sure, this Court has "found it 'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability," *Malesko*, 534 U.S. at 68, but that in no way ratifies—or freezes in place—*Bivens* circa 1971 in the sense of

legislatively mandating *Bivens* remedies in any given case or context. Indeed, Congress lacks constitutional authority to "requir[e] the federal courts to exercise 'the judicial Power of the United States' in a manner repugnant to the text, structure, and traditions of Article III." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 217-18 (1995).[3] But the 1974 and 1988 FTCA actions and inactions did no such thing: Instead, Congress merely left a judicial issue to the judiciary, without any legislative imprimatur or mandate. *Bivens* itself included the "special-factors" narrowing, 403 U.S. at 396, so the congressional action and inaction here leave this Court free to conclude—based on the separation-of-powers issue alone, *see* Section II.B.2, *infra*—that *Bivens* actions no longer are viable.

D. Overruling *Bivens* would put the onus on Congress to act legislatively.

Although overruling *Bivens* may disadvantage Mr. Snowden or any other plaintiffs with pending *Bivens* actions, a clean break with Bivens would not only benefit the legal system generally but also would benefit future plaintiffs. In addition to the core issue of whether to allow a private right of action at all, a decision overruling Bivens would put the onus on Congress—where it constitutionally belongs—to reach many subsidiary questions of *how* to address constitutional torts—such as limits on attorneys' fees—that only Congress can answer:

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[3] Unlike in *Plaut*, no one is seeking to re-open the *judgment* on remand under which Mr. Bivens presumably recovered. The question is whether the *Bivens* holding can apply prospectively, even if subsequent decisions undermine the holding's validity.

- The Equal Access to Justice Act includes many limits on attorney-fee awards, including an hourly cap of $125—inflation adjusted from 1996—for actions against the United States, whereas civil-rights litigation against state and local government pays market rates, which can exceed $1,000 hourly. *Compare* 28 U.S.C. § 2412(d)(1) *with* 42 U.S.C. § 1988(b); *Murphy v. Smith*, 583 U.S. 220, 227 (2018) ("strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee") (interior quotation marks omitted).
- The FTCA caps attorney-fee awards at 25% for litigation and 20% for settled cases, but there is no limit—apart from ethical standards in the relevant jurisdiction—for *Bivens* actions. *See* 28 U.S.C. § 2678.
- While it has no direct bearing here—because the FTCA provided Mr. Snowden a congressionally enacted alternate remedy—reversing *Bivens* may cause Congress to address the disconnect between FTCA exclusivity *when the FTCA applies* and FTCA exclusivity *when the FTCA does not apply*. The leading precedent on FTCA exclusivity "does not even cite, let alone discuss, the 'shall not apply' language [in the] 'Exceptions' provision." *Simmons v. Himmelreich*, 578 U.S. 621, 628 (2016). While plaintiffs like Mr. Snowden already have an alternate FTCA remedy, future plaintiffs *without* an FTCA remedy would benefit from Congress's revisiting and clarifying whether an inapplicable FTCA can be their only "remedy."

Indeed, the Court need not disadvantage any present plaintiffs—Mr. Showden, included—if the Court announces a prospective rule either against extending *Bivens* to new contexts or overruling *Bivens* outright.

This Court often signals that the constitutionality of a decision or law is in question before later decisions overrule the decision or declare the law unconstitutional. *Compare*, *e.g.*, *Knox v. SEIU, Local 1000*, 567 U.S. 298, 311 (2012) (casting doubt on viability of *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)) *with Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, 2460 (2018) (overruling *Abood*); *compare also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (questioning the constitutionality of the coverage formula of 42 U.S.C. § 1973b (2012)) *with Shelby Cty. v. Holder*, 570 U.S. 529, 556-57 (2013) (finding the coverage formula of 42 U.S.C. § 1973b unconstitutional). Even if the Court does not outright overrule Bivens, the Court should indicate that *Bivens* is on borrowed time.

II. IF THE COURT WILL NOT ABANDON *BIVENS*, THE COURT SHOULD NOT EXTEND *BIVENS*.

If *Bivens* remains extant as a precedent, this Court nonetheless should not extend *Bivens* here because special factors counsel against that extension and Mr. Snowden had alternate remedies:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even

> in the absence of an alternative, a *Bivens* remedy is a subject of judgment: the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.

Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (interior quotation marks and citations omitted). Each inquiry works against Mr. Snowden here.

A. Mr. Snowden had an alternate remedy.

Although the absence of an alternate remedy is no "special factor" for extending *Bivens*, *see United States v. Stanley*, 483 U.S. 669, 683 (1987) ("it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford Stanley … an 'adequate' federal remedy for his injuries"), the presence of an alternate remedy can preclude resort to *Bivens*:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.

Wilkie, 551 U.S. at 550. An adequate remedy outside *Bivens* is enough for this Court to withhold *Bivens* relief: "if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Ziglar*, 582 U.S. at 137. Certainly, a *Bivens* action "is not an automatic entitlement no matter what other means there may be to vindicate a

protected interest," *Wilkie*, 551 U.S. at 550, and Mr. Snowden could have sued under the FTCA. *Compare* 28 U.S.C. § 2680(h) (1970) (FTCA barred assault suits when Mr. Bivens sued) *with* 28 U.S.C. § 2680(h) (FTCA no longer bars assault suits); PUB. L. NO. 93-253, § 2, 88 Stat. at 50.[4] Mr. Snowden elected to proceed under *Bivens*, avoiding the FTCA's limitations. That is reason enough to decline to extend *Bivens*.

B. Special factors counsel against extending *Bivens*.

While no factors counsel for continuing *Bivens* as a precedent, *see* Section I.C, *supra*, and the remedy that Congress provided Mr. Snowden is reason enough to deny him a *Bivens* remedy, *see* Section II.A, *supra*, it is fatal to Mr. Snowden's *Bivens* claim that special factors counsel against this Court's extending *Bivens* here.

1. Warrants and a public locus are special factors against extension.

Amicus Eagle Forum ELDF joins Agent Henning's arguments that the facts here differ materially from the *Bivens* facts. *See* Pet. 15-28. This case involves a

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[4] Ironically, because the FTCA now includes a damages claim for the type of Fourth Amendment claims at issue in *Bivens*, this Court should not even extend *Bivens* circa 1971 to *Bivens* today. To be sure, this Court rejected the idea that the 1974 amendment displaced a *Bivens* claims on the *Bivens* facts: "We … found it 'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability." *Malesko*, 534 U.S. at 68 (quoting *Carlson v. Green*, 446 U.S. 14, 19-20 (1980)). But the history on which *Carlson* relied was inconclusive. *See* Section I.C.4, *supra*.

warrant executed in a public place. *Bivens* involved a warrantless search and seizure in Mr. Bivens' home. *See Bivens*, 403 U.S. at 389-90. The stark difference in the factual setting cautions against extending *Bivens*, assuming *arguendo* that *Bivens* was correctly decided in the first place.

2. Separation of powers is a special factor against extension.

Although it applies in *every* decision on whether to extend *Bivens*, the separation of powers doctrine is another special factor that counsels against extension: "When evaluating whether to extend *Bivens*, the most important question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" *Hernandez II*, 140 S.Ct. at 750 (interior quotation marks omitted). The twin facts that the question always arises and that the "correct answer most often will be Congress," *id.* (interior quotation marks omitted), does not make the separation-of-powers factor any less special.

Under the always-present separation-of-powers factor, this Court should borrow from *Sandoval*, 532 U.S. 287, and announce that the bar is closed. *Bivens* should not be extended further without legislation that creates a private remedy. *See id.* at 286-87. The sole issue is whether "Congress intended to make a remedy available." *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979). "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979). In taking *Bivens* as it found it, *see* Section I.C.4, *supra*, Congress did not affirmatively or even impliedly

create a private remedy. Congress merely got out of this Court's way. That is not enough.

Extending *Bivens* undermines our governmental system, which requires the political branches to resolve political issues. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 311-12 (2014). The failure to extend *Bivens* further after 1980 reflects a concern about the separation of powers: "when a court recognizes an implied claim for damages on the ground that doing so furthers the 'purpose' of the law, the court risks arrogating legislative power." *Hernandez II*, 140 S.Ct. at 741. There is no reason for this Court to continue the practice without Congress taking the hint and enacting legislation allowing or barring such actions: "Having sworn off the habit of venturing beyond Congress's intent," the Court should no longer "accept respondents' invitation to have one last drink." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Recognizing the separation-of-powers conflict inherent in *Bivens* as a special factor would justify a decision either overruling *Bivens* entirely or refusing to extend it further. To ask the question "who should decide," *Hernandez II*, 140 S.Ct. at 750, is to answer it: Congress.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

April 4, 2024

Respectfully submitted,

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