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 United States Court of Appeals for the
Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a cause of action for a use of excessive force in violation of the Fourth Amendment exists "in this case," Pet. i, where a line-level officer of the Drug Enforcement Administration allegedly punched in the face several times an individual who was not resisting arrest.

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INTRODUCTION

In recent years, this Court has provided detailed guidance on whether and when to recognize a cause of action against a federal official accused of violating the Constitution. Although the Court has emphasized the narrow judicial role in this area, it has also refused "to cast doubt on the continued force, or even the necessity, of *Bivens* [*v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)] in the search-and-seizure context in which it arose." *Ziglar v. Abbasi*, 582 U.S. 120, 134 (2017). In *Egbert v. Boule*, the Court again declined an invitation to overrule *Bivens*. *See* Petition for Writ of Certiorari at i, *Egbert v. Boule*, No. 21-147, 2021 WL 3409109, at *i (asking the Court to overrule *Bivens* as Question 3), *cert. granted in part by* 142 S. Ct. 357 (2021) (granting certiorari "limited to Questions 1 and 2"). And just a few months ago, confronted with a claimed circuit split centering on the location of an unlawful seizure—one of the same issues presented here—the Court denied certiorari. *See Ferreyra v. Hicks*, 144 S. Ct. 555 (2024).

In the face of all of this, Petitioner asks this Court to superintend the precise scope of the original core of *Bivens*. Respondent Donald Snowden alleges that Petitioner Jeremy Henning, a line-level drug enforcement agent, "pushed him to the ground and—unprovoked—punched him several times in the face," causing "two black eyes and a left orbital fracture." Pet. App. 2a. The Seventh Circuit, in a careful, narrowly drawn opinion by Chief Judge Sykes, could "identify no meaningful difference between Snowden's case and *Bivens* to suggest that he should not be able

to pursue [an] excessive force claim." Pet. 15a. That ruling was as sound as it was unexceptional, and it does not warrant this Court's attention.

The purported circuit splits that are the basis for Petitioner's request are illusory. The first one, concerning the location of the search or seizure giving rise to a *Bivens* claim, is the same alleged split this Court declined to review a few months ago, and remains grounded on a misreading of several decisions. The second asserted split likewise does not exist, is based on a similar misreading, and relies principally on unpublished decisions.

As the court of appeals correctly recognized, the path for *Bivens* claims is "narrow" but not non-existent, and this case is in the "heartland of *Bivens*." Pet. App. 13a, 15a; *see also* Pet. App. 15a–19a. This case has little in common with those this Court has previously considered it necessary to review, involving national security decisions in the aftermath of 9/11, *see Abbasi*, 582 U.S. at 142–43, cross-border shootings, *see Hernandez v. Mesa*, 589 U.S. 93, 96 (2020), and agents responsible for policing the border and enforcing the nation's immigration laws, *see Egbert v. Boule*, 596 U.S. 482, 496 (2022). As far as the allegations and claims in this case are concerned, Agent Henning is materially indistinguishable from the six federal narcotics agents who used excessive force against Webster Bivens in the course of arresting him. The court of appeals' conclusion that this case falls within the heartland of *Bivens* does not merit further review.

STATEMENT

1. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court recognized an implied damages remedy against federal officers who committed an unreasonable search and seizure. *Bivens* involved an action against line-level narcotics agents for their unreasonable use of force during an arrest, as well as their unlawful search of the plaintiff's home and person—all in violation of the Fourth Amendment. *Bivens*, 403 U.S. at 389.

Since the *Bivens* decision, this Court has observed, "arguments for recognizing implied causes of action for damages began to lose their force," with the Court cautioning that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Abbasi*, 582 U.S. at 132, 135 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). At the same time, the Court has reaffirmed "the continued force, [and] even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Abbasi*, 582 U.S. at 134. The Court has called *Bivens* a "settled" and "fixed principle of law" in the "common and recurrent sphere of law enforcement," and recognized "powerful reasons to retain it." *Id.*

Under the Court's modern *Bivens* jurisprudence, "a court's analysis of a proposed *Bivens* claim" proceeds "in two steps." *Egbert*, 596 U.S. at 492. A court first asks "whether the case presents 'a new *Bivens* context'—*i.e.*, is it 'meaningfully' different from the three cases in which the Court has implied a damages action." *Id.* (cleaned up) (quoting *Abbasi*, 582 U.S. at 139). This Court has guided the lower

courts with an "instructive" set of examples of what differences might be "meaningful" for purposes of establishing a new context, including differences in the "rank of the officers involved," the "extent of judicial guidance as to how an officer should respond to the problem," and the "statutory or other legal mandate under which the officer was operating." *Abbasi*, 582 U.S. at 139–40. Only when a court finds that a case presents a new context should it "proceed to the second step and ask whether there are any 'special factors that counsel hesitation' about granting [an] extension." *Hernandez*, 589 U.S. 102. (cleaned up) (quoting *Abbasi*, 582 U.S. at 140).

2. On September 12, 2019, Respondent Donald Snowden was lodging at the Quality Inn Hotel in Carbondale, Illinois. Pet. App. 4a.[1] Around noon that day, he answered a call from a hotel desk clerk who asked Mr. Snowden to come to the front desk, which he did. Pet. App. 4a. Waiting for Mr. Snowden in the lobby was an agent of the Drug Enforcement Administration ("DEA"), Jeremy Henning, who had a warrant for Mr. Snowden's arrest. Pet. App. 4a.

At no point did Mr. Snowden resist arrest. Pet. App. 4a. Yet "Agent Henning rushed at him, pushing him into a door and onto the ground." Pet. App. 4a. Agent Henning then "punched [Mr. Snowden] several times in the face." Pet. App. 4a. Mr. Snowden "suffered two black eyes and a fractured left eye socket during the arrest." Pet. App. 4a. Mr. Snowden

[1] The facts presented here are based on the factual allegations in the complaint, which must be treated as true at the motion to dismiss stage. *See Iqbal*, 556 U.S. at 678.

maintains that there is "video evidence confirming his account"; he sought this video evidence in discovery but the district court denied his request as "premature." Pet. App. 4a n.2.

3. Proceeding *pro se*, Mr. Snowden filed a lawsuit on December 2, 2019 in the U. S. District Court for the Southern District of Illinois. Pet. App. 4a; *see also* C.A. Short App. 15. In addition to claims against other defendants, Mr. Snowden alleged that Agent Henning's "grossly excessive force" violated the Fourth Amendment and Illinois state law. Pet. App. 4a. The district court screened the complaint under the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915A, and allowed it to proceed, construing the Fourth Amendment count as a claim for relief under *Bivens*. Pet. App. 4a.

On March 3, 2021, the district court granted Agent Henning's motion to dismiss. Pet. App. 21a. The district court described the facts alleged by Mr. Snowden as "similar" to *Bivens*. Pet. App. 26a. It nonetheless concluded that the case presented a new *Bivens* context because "*Bivens* involved six federal drug agents" while this case involves a "single" agent, and the officers in *Bivens* "enter[ed] a home without a warrant" while Agent Henning arrested Mr. Snowden "in public pursuant to a warrant." Pet. App. 26a–27a. The district court also viewed the issue in *Bivens* as limited to "the constitutionality of the home entry, arrest, and search without a warrant," while this case involves "the amount of force that can reasonably be used during an arrest." Pet. App. 27a. Having concluded at step one that the case presented a new *Bivens* context, the district court decided that the

Federal Tort Claims Act ("FTCA") is an alternative remedy that counsels hesitation, and thus declined to extend *Bivens* at step two. Pet. App. 29a.

Mr. Snowden timely appealed the district court's order dismissing his *Bivens* claim. Pet. App. 6a–7a.

4. In a unanimous opinion authored by Chief Judge Sykes, a panel of the Seventh Circuit reversed. Pet. App. 3a. The court of appeals began by recognizing that "extending the *Bivens* cause of action is a 'disfavored judicial activity,'" and introduced this Court's "two-step framework for evaluating *Bivens* claims" as "guard[ing] against encroachments on legislative authority." Pet. App. 2a (quoting *Abbasi*, 582 U.S. at 120). It further took heed of this Court's decision in *Egbert* as "emphasiz[ing] just how narrow the path is for a *Bivens* claim to proceed." Pet. App. 15a.

Nonetheless, the court of appeals explained, this Court has "stopped short" of overruling *Bivens*. Pet. App. 8a. The Seventh Circuit recognized that it was bound by "the current state of the doctrine," including this Court's instruction that its "recent decisions are 'not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose.'" Pet. App. 15a (quoting *Abbasi*, 582 U.S. at 134).

The court of appeals "focus[ed]" on "the first step" of the analysis. Pet. App. 8a. Discussing at length this Court's decisions in *Ziglar v. Abbasi*, *Hernandez v. Mesa*, and *Minneci v. Pollard*, 565 U.S. 118 (2012), the court explored what "differences" qualify as "meaningful" for purposes of creating a new *Bivens*

context. Pet. App. 8a–15a. Applying this Court's instructions, it "identif[ied] no meaningful difference between Snowden's case and *Bivens* to suggest that he should not be able to pursue this excessive force claim." Pet. App. 15a.

The court of appeals explained that Mr. Snowden's complaint involved "run-of-the-mill allegations of excessive force during an arrest" as was the case in *Bivens*. Pet. App. 18a. Both Agent Henning and the officers in *Bivens* "operated under the same legal mandate," *i.e.*, "the enforcement of federal drug laws," and both were also "the same kind of line-level federal narcotics officers." Pet. App. 15a. The court further explained that *Bivens* was not only about a warrantless search and seizure; Agent Henning "overlooked that the claim in *Bivens* specifically included an allegation that 'unreasonable force was employed in making the arrest,'" just as Mr. Snowden alleged in his case. Pet. App. 17a (quoting Pet'r's C.A. Br.).

Nor did the "narrow factual differences" that Agent Henning pointed to establish a meaningful difference, in the court of appeals' view. Pet. App. 17a. The court explained that "[h]otel or home, warrant or no warrant—the claims here and in *Bivens* stem from run-of-the-mill allegations of excessive force during an arrest." Pet. App. 18a. Because the court of appeals could not "decline to apply 'the settled law of *Bivens*' unless Snowden's case is meaningfully different," and there is "no such difference here," it reversed the district court's threshold dismissal of Mr. Snowden's

Fourth Amendment excessive force claim. Pet. App. 19a.[2]

5. The Seventh Circuit denied Agent Henning's petition for rehearing and rehearing *en banc*, with no judge requesting a vote. Pet. App. 33a. Agent Henning did not move the Seventh Circuit for a stay of its mandate, and the case was accordingly remanded to the district court. Represented by different counsel before the district court than in his petition to this Court, Agent Henning moved the district court to stay proceedings, which that court denied. Dist. Ct. Dkt. 49, 56. Discovery is now ongoing. Dist. Ct. Dkt. 58.

REASONS FOR DENYING THE PETITION

I. There Is No Circuit Split Concerning the Precise Scope of the Original *Bivens* Context.

Although the Seventh Circuit noted that "*Bivens* may one day be reexamined," Pet. App. 19a, Petitioner does not ask the Court to reexamine *Bivens* here. Instead, Petitioner seeks fact-bound error correction, asking the Court to review "[w]hether the court of appeals erred in allowing a *Bivens* remedy *in this case*." Pet. i (emphasis added). This Court does not

[2] The court of appeals also rejected Agent Henning's reliance on the FTCA, pointing to this Court's recent reaffirmation that "Congress made clear [in the FTCA] that it was not attempting to abrogate *Bivens*." Pet. App. 17a (quoting *Hernandez*, 589 U.S. at 749 n.9). Because "[t]his case does not present a new *Bivens* context," the court of appeals concluded, the FTCA "does not come into play." Pet. App. 17a.

generally grant plenary review to decide whether a court of appeals has misapplied a settled legal standard "in this case." There is no good reason to make an exception to review the Seventh Circuit's application of this Court's established *Bivens* framework to allegations that a federal narcotics officer making an arrest punched an individual in the face without provocation.

In order to claim that the Seventh Circuit's unexceptional decision warrants review, Petitioner manufactures two circuit splits concerning the precise scope of the recognized *Bivens* context for unconstitutional searches and seizures. The first posits a difference in the treatment of searches and seizures outside the home. In some circuits, according to Petitioner, a search or seizure outside the home is a meaningful difference that establishes a new *Bivens* context, whereas in other circuits, a search or seizure outside the home is not a meaningful *Bivens* difference. The second purported split concerns the treatment of searches and seizures pursuant to a warrant. In some circuits, according to Petitioner, the existence of a warrant is a meaningful difference that establishes a new *Bivens* context, whereas in other circuits, the existence of a warrant is not a meaningful *Bivens* difference.

None of this accurately describes how the courts of appeals analyzed the *Bivens* claims before them. Rather than applying automatic, *per se* rules, the courts of appeals have weighed multiple factual considerations and applied this Court's *Bivens* framework to the cases as a whole. Indeed, the Seventh Circuit specifically addressed some of the key

cases that Petitioner now claims give rise to a split, without suggesting any disagreement with them. Only by overreading or misidentifying the holdings of various decisions can Petitioner assert that "square and acknowledged circuit conflicts" have emerged. Pet. 4.

In painting with such a broad brush, Petitioner misses the narrowness of this case, involving only "run-of-the-mill allegations of excessive force during an arrest." Pet. App. 18a. In a *Bivens* case focused on an unconstitutional *search*, it might or might not be a meaningful difference whether the search involved the home, an automobile, a government building, or some other public place. Similarly, a claim that a search is unconstitutional because of improper conduct in procuring a warrant may or may not be meaningfully different from a claim that a search is unconstitutional because there was no warrant. But no court of appeals has endorsed Petitioner's position for why no cause of action is available "in this case," Pet. i, *i.e.*, that there is something meaningfully different from *Bivens* where a federal narcotics officer punches in the face someone who is not resisting arrest, just because the officer happened to conduct his unprovoked assault in a hotel lobby and while holding a warrant.

A. There Is No Circuit Split Regarding Whether Arrests Outside the Home Categorically Present a New *Bivens* Context.

Petitioner's claim of a "home / not-home" circuit split is not original. Just this past Term, two Park

Police officers asked this Court to review "[w]hether a cause of action exists under *Bivens* for Fourth Amendment claims not involving a search or arrest inside a home." Petition for Writ of Certiorari at i, *Ferreyra v. Hicks*, No. 23-324, 2023 WL 6367653, at *i (Sept. 22, 2023). The basis of that request was an assertion that "[t]he circuits are split 4-2 over whether *Bivens* extends to searches and seizures outside of a home." *Id.* at 14. This Court denied review. *Ferreyra v. Hicks*, 144 S. Ct. 555 (2024). No split warranting review existed then, and none exists now.

1. Petitioner suggests that the First, Fifth, Eighth, and Ninth Circuits have adopted a categorical rule that when a search or seizure occurs outside the home, it necessarily arises in a new *Bivens* context. Pet. 4. But none of these cases in fact announce any such categorial rule. Instead, in each case, the location of the conduct was only one of a collection of factors mentioned by the court—and in none of these cases did the court hold that any arrest outside the home categorically establishes a new *Bivens* context, much less that a *use of excessive force during arrest* outside of the home is necessarily a new *Bivens* context.

First Circuit: Emblematic of Petitioner's error is his misreading of *Quinones-Pimentel v. Cannon*, 85 F.4th 63 (1st Cir. 2023). In that case, an internet and network communications company sued an array of defendants, including federal prosecutors and employees of rival companies. *Id.* at 67. They alleged that the defendants violated the Fourth Amendment by searching the company's corporate offices and data center in a manner that exceeded the scope of a search

warrant, exposing sensitive trade secrets and intellectual property. *Id.* at 67–68. The First Circuit held that "the differences in the challenged conduct——including the issuance of a warrant, which ran against a business—and in the defendants—including the prosecutors and private, corporate employees—suffice (when viewed collectively) to show that this case differs meaningfully from *Bivens* and therefore presents a new context." *Id.* at 71.

The focus of the First Circuit's holding is not changed by a passing reference to the fact that "no one was handcuffed or arrested and no one's home nor their person (naked or otherwise) was searched . . . ." *Id.*. That observation, limited to whether someone's "home . . . was searched," says nothing about whether it matters to an *excessive force* claim that an arresting officer engages in unprovoked violence in a home or outside it. But even more to the point, the court expressly limited itself to holding that "*all* the differences identified above, when viewed in the *aggregate*," establish a new context. *Id.* at 71 n.5 (emphasis added). Petitioner flatly misreads *Quinones-Pimentel* by suggesting that it holds that any claim of excessive force outside of a home necessarily constitutes a new *Bivens* context.

<u>Fifth Circuit</u>: The trio of Fifth Circuit cases that Petitioner raises—*Oliva v. Nivar*, 973 F.3d 438 (5th Cir. 2020); *Byrd v. Lamb*, 990 F.3d 879 (5th Cir. 2021); and *Cantú v. Moody*, 933 F.3d 414 (5th Cir. 2019)—similarly found new *Bivens* contexts based on multiple distinctions from the facts in *Bivens*, without articulating a bright-line rule categorically excluding

any unconstitutional search or seizure outside of a home.

In *Oliva*, a visitor to a Veteran's Affairs ("VA") hospital sued VA police officers, alleging that the officers violated his Fourth Amendment rights. The plaintiff had attempted to enter the facility but refused to show identification or place all of his items into an inspection bin, leading to a physical confrontation. *Oliva*, 973 F.3d at 440–41. The Fifth Circuit found a new context because, comparing the case to *Bivens*, "Oliva's 'claim involves different conduct by different officers from a different agency.'" *Id.* at 443 (quoting *Cantú*, 933 F.3d at 423). Among several other differences, the court of appeals briefly noted that "[t]his case arose in a government hospital, not a private home." *Id.* at 442–43. But the Fifth Circuit did not clearly hold that this difference was meaningful on its own. And it certainly did not hold that *any* location outside the home establishes a new context. The most that *Oliva* could be read to suggest is that searches and seizures in "a government hospital" present a new context. *Id.* at 443.

In *Byrd*, the former romantic partner of the son of a Department of Homeland Security agent sued the agent, alleging that the agent brandished a gun, verbally assaulted him, and facilitated an unlawful arrest by the local police department. *Byrd*, 990 F.3d 880–81. As in *Oliva*, the Fifth Circuit listed a number of distinctions from *Bivens*, including not only that the conduct took place "in a parking lot," but also that it arose from suspicions that the plaintiff was "harassing and stalking [the agent's] son, not a narcotics investigation." *Id.* at 882. As with *Oliva*,

Byrd at most suggests that "prevent[ing] [the plaintiff] from leaving the parking lot" was a new context, *id.*—not that any search or seizure outside the home is categorically a new context.

In *Cantú*, "forty-five law enforcement officers descended on [a] vehicle" and searched a cooler sitting on the passenger seat, which contained two kilograms of drugs. 933 F.3d at 417. Although Cantú claimed that he "never touched the cooler," "two federal agents swore otherwise in affidavits," and that triggered Cantú's Fourth Amendment claim: that the officers "falsified affidavits" "to induce prosecutors to charge him." *Id.* at 423. The court began by noting that Cantú did not "allege the officers entered his home without a warrant or violated his rights of privacy," but then proceeded to discuss the stark differences from *Bivens* in a case involving "falsified affidavits" and a "connection between the officers' conduct and the injury [that] involves intellectual leaps that a textbook forcible seizure never does." *Id.* Neither *Cantú* nor any other Fifth Circuit case holds that "run-of-the-mill allegations of excessive force during an arrest" would present a new context based only on taking place outside of a home. Pet. App. 12a.

<u>Eighth Circuit</u>: The Eighth Circuit's decision in *Ahmed v. Weyker* concerned an interstate criminal investigation that was "plagued with problems." 984 F.3d 564, 565 (8th Cir. 2020). The plaintiff alleged that a deputized United State Marshal knowingly and falsely accused the plaintiff of intimidating a federal witness and fabricated statements in a criminal complaint and sworn affidavit. *Id*. at 566. The court of appeals concluded that the case differed from

Bivens in “four ways”: the conduct being challenged, the officer’s alleged role in the arrest, the attenuated causal chain, and the need to examine the officer’s state of mind. *Id.* at 568–70. In the course of discussing “the sorts of actions being challenged,” the court mentioned that *Bivens* involved “an invasion into a home” as a contrast with “manufacturing evidence and lying,” which are “simply not the same as the physical invasions that were at the heart of *Bivens*.” *Id.* at 569. Nowhere did the court suggest that a claim of excessive force in a routine law-enforcement context—which is plainly a “physical invasion” of the victim’s bodily autonomy—would fall outside of “the heartland of *Bivens*.” Pet. App. 13a.

<u>Ninth Circuit</u>: *Mejia v. Miller* similarly involved a number of distinctions from the original *Bivens* context. 61 F.4th 663 (9th Cir. 2022). That case involved a “high-speed chase in Joshua Tree National Park,” culminating in gunshots fired by a “senior law enforcement officer” in the Bureau of Land Management (“BLM”) who had been called in to “assist.” *Id.* at 665, 668. The Ninth Circuit noted the absence of Supreme Court decisions involving a “*Bivens* excessive force claim against a BLM officer,” and that “none of the events in question occurred in or near Mejia’s home,” but instead “occurred on public lands managed by BLM and the National Park Service . . . .” *Id.* at 668. And as part of its step-two analysis, the Ninth Circuit elaborated on how such a claim could have “‘systemwide consequences’ for BLM’s mandate to maintain order on federal lands.” *Id.* at (quoting *Abbasi*, 582 U.S. at 136). Reading *Mejia* as a whole, the court did not articulate a bright-line rule against *Bivens* claims outside the home. *Id.*

at 668 (emphasis added). Rather, the court focused on the specific location at issue (a national park) and the unique mandate of the federal agency charged with maintaining order in that location.

2. None of the cases discussed above holds that *any* Fourth Amendment search-or-seizure claim arising outside a home is categorically a new *Bivens* context. There is accordingly nothing to the contrary in either the decision below or in the Fourth and Tenth Circuit cases that Petitioner characterizes as being on the opposite side of the purported split.

In *Hicks v. Ferreyra*, the Fourth Circuit addressed a "seizure[] in violation of the Fourth Amendment committed by federal 'line' officers conducting routine police work," finding no new context in a traffic stop. 64 F.4th 156, 162 (4th Cir. 2023). The fact that this seizure took place outside the home was apparently seen as unexceptional before the Fourth Circuit, meriting only a brief mention in a footnote in the court's opinion. *See id.* at 167 n.2.

Petitioner's only other case, aside from the decision below, is the Tenth Circuit's recent decision in *Logsdon v. U.S. Marshal Service*, 91 F.4th 1352 (10th Cir. 2024). There, however, the court of appeals *declined* to recognize a *Bivens* remedy, because the case involved "a new category of defendant," specifically agents of the U.S. Marshal Service. *Id.* at 1358. Before reaching that dispositive factor, the court noted that it would give "little weight" to the "location of the arrest" outside of the plaintiff's friend's home. *Id.* at 1357.

In dicta, *Logsdon* discussed *Mejia* and *Byrd*, which it perceived as indicating that "a new context arises when the violation does not occur in the plaintiff's home." *Id.* But the Tenth Circuit expressly declined to "dwell" on these perceived "differences," because "there are other sufficient grounds for holding that Mr. Logsdon has no claim under Bivens in this case." *Id.* at 1358. Had the Tenth Circuit needed to dwell on this question further, it might have reached the conclusion that *Mejia* and *Byrd* do not adopt any such categorical rule, for the reasons explained above. *Supra* pp. 13–16. In any event, since *Logsdon* held that there were "sufficient" alternative reasons for denying a *Bivens* remedy, its discussion of the location of the arrest was dicta. *Id.* at 1358. It is at a minimum premature to say that there is any established rule in the Tenth Circuit on this point.

The Seventh Circuit's opinion in the present case also confirms the lack of any circuit split. Far from disagreeing with any other circuit's conclusions, the Seventh Circuit specifically discussed some of the key cases invoked by Petitioner. The court of appeals favorably cited the Ninth Circuit's decision in *Mejia*, interpreting that decision as finding a "new context because '[t]he entire incident occurred on public lands managed by BLM and the National Park Service, a place where [the plaintiff] had no expectation of privacy.'" Pet. App. 14a (quoting *Mejia*, 61 F.4th at 668–69). And it devoted a paragraph to Petitioner's reliance on the Fifth Circuit's decision in *Oliva*. Pet. App. 18a. Distinguishing *Oliva*, the Seventh Circuit explained how "[t]he threat of a damages award against VA security officers could cause more lax enforcement of safety protocols in a government

building. In other words, the circumstances in *Oliva* implicated the kind of policy balancing better left to Congress. Snowden's *Bivens* claim raises no such distinctions." *Id.*

3. The lack of a true circuit split is further confirmed by the novel arguments Petitioner presents here. For instance, Petitioner posits that arrests outside the home present an unusual "risk to bystanders," that "[t]he home is a place of special solicitude," and that these are the reasons the difference between an arrest in the home and one in any possible location outside the home is meaningful. Pet. 17. But tellingly, not one of Petitioner's authorities adopted this reasoning as the basis for any *per se* rule.

Instead, Petitioner grounds his claim of a circuit split on plucking out single sentences from opinions contrasting a particular location (for example, a government hospital, a parking lot, or national park lands) with the facts of *Bivens*. Had any court of appeals intended to articulate a bright-line rule that only Fourth Amendment violations inside a home fall within the recognized *Bivens* context, it would presumably have discussed the reasons making that distinction "meaningful." *Abbasi*, 582 U.S. at 139–40. Only because no court of appeals has done so has Petitioner found it necessary to offer, for the first time in his petition to this Court, the novel argument that bystander risk makes the home / not-home distinction meaningful. That theory is wrong, *see infra* pp. 25–26, but more important for present purposes is its novelty, underscoring that no court of appeals decision

that Petitioner raises has adopted the rule that he claims warrants review.

B. There Is No Circuit Split Regarding Whether an Excessive Force Claim Presents a New *Bivens* Context When the Arrest Was Conducted Pursuant to a Warrant.

Petitioner's purported second circuit split, over "whether a warrant makes the context new," Pet. 20, is equally non-existent. In support of this alleged split, Petitioner identifies fewer cases—most of which are unpublished dispositions that do not set any circuit precedent. Further, Petitioner continues to lump together any search-or-seizure case. Even if the presence of a warrant could be considered a meaningful difference with respect to certain Fourth Amendment claims—ones focused, for instance, on the lawfulness of a search—it does not follow that the presence of a warrant would have any bearing on "run-of-the-mill allegations of excessive force during an arrest." Pet. App. 18a; *see also infra* p. 27. That is the only relevant question here, and there is no circuit split on that question.

1. Petitioner asserts that the First, Sixth, and Ninth Circuits "all agree" that the mere existence of a warrant gives rise to a new *Bivens* context. Pet. 20. But the only published decision Petitioner cites does not come close to establishing the categorical rule Petitioner alleges. The First Circuit's *Quinones-Pimentel* decision, described above, relied on a number of factual differences from *Bivens* "in the aggregate." 85 F. 4th at 71 n.5. Only one of those

differences involved the presence of a warrant, with the First Circuit pointing out that "there was a warrant, which was issued against a business, not against an individual or the individual's home." *Id.* at 71. It is far from clear that the First Circuit would have regarded a warrant "against an individual or the individual's home" as a meaningful difference when considered in the "aggregate" with other differences—much less if that were the *only* difference. Indeed, the court expressly declined to decide whether any of the differences it identified would "individually . . . suffice to make [the case] a new context." *Id.*

Even more fundamentally, *Quinones-Pimentel* involved no allegations of excessive force. In fact, the First Circuit pointed to the allegations of "excessive force" in *Bivens* to *distinguish* the case before it, which "involve[d] Fourth Amendment claims against prosecutors, federal line-level investigative officers, and private, corporate employees acting under color of federal law, who are alleged to have jointly fabricated evidence in support of warrants to search a business investigated for copyright and money laundering violations, seized physical evidence (which was returned), and twice exceeded the scope of those warrants." *Id.* It may be reasonable to conclude that a claim of fabricating evidence in order to obtain a warrant to search a business, and then exceeding the scope of that warrant, establishes a meaningful difference from *Bivens*. Such a conclusion would say nothing, however, about an excessive force claim, where the amount of force that can be used in effecting an arrest has no necessary connection to the presence or absence of a warrant. *See infra* p. 27.

Without the First Circuit's inapposite opinion, Petitioner is left with two non-binding, unpublished dispositions. And at least one of them has the same problem for Petitioner as *Quinones-Pimentel*: it does not say anything about whether the presence of a warrant is meaningful for an excessive force claim. The Ninth Circuit's bare-bones memorandum disposition in *Massaquoi v. FBI* does not even discuss the nature of the alleged Fourth Amendment violation. *See* No. 22-55448, 2023 WL 5426738, at *2 (9th Cir. Aug. 23, 2023). As summarized by the district court, however, *Massaquoi* was not an excessive force case. Rather, the plaintiff complained that the FBI "executed a search warrant at Plaintiff's home, and seized certain of Plaintiff's belongings." *Massaquoi v. FBI*, No. 2:21-cv-08569-SVW, 2022 WL 2234961, at *1 (C.D. Cal. Mar. 15, 2022).

The Sixth Circuit's summary order in *Cain v. Rinehart* is similarly unpublished, and, therefore, sets no circuit precedent. No. 22-1983, 2023 WL 6439438, at *3–4 (6th Cir. July 25, 2023); *see Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277, 283 (6th Cir. 2016) (unpublished decisions "not binding precedent" in the Sixth Circuit). And that case did not involve the presence of a warrant as the only asserted difference from *Bivens*, but also involved a new category of defendant. *Cain*, 2023 WL 6439438, at *3–4.

2. On the other side of the purported split, Petitioner points to just two cases—the decision below and *Logsdon*. Both of these decisions addressed the relevance of a warrant in the excessive-force context. For example, the Seventh Circuit emphasized that

this case involved "run-of-the-mill allegations of excessive force during an arrest" by a line-level officer. Pet. App. 18a. And in *Logsdon*, where the Tenth Circuit gave the presence of a warrant "little weight" (before declining to "dwell" on the issue and finding a new *Bivens* context for other reasons, *see supra* p. 17), the allegations likewise involved excessive force. 91 F.4th at 1356.

3. As with his first alleged split, Petitioner's claim of a "warrant / no-warrant" split is undermined by the absence of discussion of his legal theory from the decisions on which he relies. To argue that the presence of a warrant is a categorically meaningful difference, Petitioner contends that officers with a warrant operate under a different "legal mandate" because a warrant is a court order to conduct a search or seizure. Pet. 22–23. But just like Petitioner's argument about bystander risk, *supra* pp. 18–19, none of the court of appeals decisions on which he relies adopts his construction of "legal mandate" as the reason why the presence of a warrant is always a meaningful difference. This again underscores the illusory nature of the split Petitioner alleges.[3]

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[3] The Sixth Circuit's unpublished order in *Cain* quotes two unpublished district court decisions linking the issuance of a warrant to the officer's "legal mandate." 2023 WL 6439438, at *3 (citations omitted). Although the Sixth Circuit order cited those decisions as "cases [that] have found that the existence of a warrant creates a new context for *Bivens* purposes," it did not appear to adopt the "legal mandate" rationale as its own. *Id.*

II. The Decision Below Is Correct.

1. The Seventh Circuit correctly identified and faithfully applied the *Bivens* framework laid out in this Court's recent cases. It recognized this Court's admonition that expanding *Bivens* is a "disfavored judicial activity," Pet. App. 7a (quoting *Abbasi*, 582 U.S. at 135), and that there is only a "narrow . . . path . . . for a *Bivens* claim to proceed," because "creating new causes of action is the prerogative of Congress, not the federal courts," Pet. App. 15a. At the same time, the court of appeals correctly recognized this Court's affirmation of the "continued force . . . of *Bivens* in the search-and-seizure context in which it arose." Pet. App. 15 (quoting *Abbasi*, 582 U.S. at 134). The Seventh Circuit thus applied this Court's two-step framework, and in particular focused on the first step, asking whether "[Mr.] Snowden's *Bivens* claim ar[ose] in a 'new context'" that was "different in a meaningful way from previous *Bivens* cases' decided by the Supreme Court." Pet. App. 8a (quoting *Abbasi*, 582 U.S. at 139).

Adhering closely to the considerations identified in *Abbasi* and the way the Court has applied the standard in other cases, the Seventh Circuit concluded that there were no meaningful differences "to suggest that [Mr. Snowden] should not be able to pursue this excessive force claim." Pet. App. 15a. Both the narcotics agents in *Bivens* and Petitioner were line-level officers operating in a "common and recurrent sphere of law enforcement." *See Abbasi*, 582 U.S. at 134. Indeed, Petitioner operates under precisely the same legal mandate as the defendants in *Bivens*: the enforcement of federal drug laws. Pet.

App. 15a. Both Mr. Snowden and the plaintiff in *Bivens* sought damages for violations of their Fourth Amendment right to be free of unreasonable force during an arrest. Pet. App. 15a–16a. And as the court of appeals correctly noted, the legal landscape governing such excessive-force claims has been "well settled" for decades. Pet. App. 15a (collecting cases from the Supreme Court and Seventh Circuit). In short, this case arose in the "heartland of *Bivens*" because it involved "run-of-the-mill allegations of excessive force during an arrest" by a line-level narcotics officer. Pet. App. 13a, 18a.

2. Neither the location of Petitioner's unprovoked assault on Mr. Snowden, nor the fact that Petitioner held a warrant when he committed that assault, is a meaningful difference from *Bivens*.

<u>Location:</u> This Court has never suggested that the amount of force that is reasonable in effecting an arrest varies depending on whether the arrest is conducted in someone's home. Instead, the degree of force that is reasonable turns on circumstances such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Petitioner thus misses the point by noting *different* ways in which Fourth Amendment jurisprudence has taken location into account. It is true enough that the "special solicitude" of the home has supported "a firm line at the entrance to the house" for purposes of whether a warrant is

presumptively required in some circumstances. Pet. 17 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)). Tellingly, however, Petitioner has not identified a single case suggesting that this "special solicitude" means that arresting agents are disabled from using the same amount of force when conducting an arrest inside a home as outside it.

Nor does any lack of special solicitude for a Quality Inn lobby make Mr. Snowden reasonably susceptible to being punched in the face despite not resisting arrest. The home may be a "bulwark" against "be[ing] approached by strangers on the street; rub[bing] shoulders on the subway; or bump[ing] into others at the grocery store." Pet. 17. But the Fourth Amendment is a bulwark against violent, unprovoked assault by a line-level law enforcement officer, and that protection is no lower in a hotel lobby than it is in a home.

Nor does an excessive force claim outside the home present a meaningful difference from *Bivens* on the basis of creating "dramatically different risks." Pet. 18. In support of this novel proposition, Petitioner emphasizes that "[c]onfrontations with suspects in public locations can pose immediate threats to bystanders." Pet. 18. Yet he ignores the other side of the coin: "[t]he risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter." *Maryland v. Buie*, 494 U.S. 325, 333 (1990). That is why it is lawful for officers to perform protective sweeps when effectuating in-home arrests, *see id.*, and why it can be necessary for officers to detain occupants of a residence to "minimize[] the

risk of harm to both officers and occupants," *Muehler v. Mena*, 544 U.S. 93, 100 (2005). Indeed, bystander risks were present in *Bivens* itself, where federal agents "manacled [Bivens] in front of his wife and children, and threatened to arrest the entire family." *Bivens*, 403 U.S. at 389. The possible presence of bystanders and associated risks is thus no difference at all, much less a meaningful one, from *Bivens*.

Petitioner's proposed rule also cannot be reconciled with this Court's approach in *Egbert*. The arrest in *Egbert* involved allegations of an excessive use of force outside of a home. *Egbert,* 596 U.S. at 486–90. If that alone were a "meaningful difference" from *Bivens*, the Court had occasion to say so—or at least note it as one of the factors giving rise to a new context. Instead, *Egbert* discussed distinctions that were actually meaningful, such as "the border-security context" and the "national security" risks presented. *Id.* at 494. There would have been no reason to discuss such matters if *Egbert* could have been resolved on the simple ground that the alleged constitutional violation occurred just outside the Smuggler's Inn Lodge.

This is not to say that the location of an arrest, or the risk to officers or bystanders involved, could *never* be a meaningful difference. For instance, the nature and degree of risk might create such a difference in connection with a security screening in an airport, a crowded stadium, or a government facility. But Petitioner suggests that this Court should adopt a *per se* rule that a Fourth amendment excessive force claim is *always* outside the scope of *Bivens* with respect to *any* arrest taking place *anywhere* but inside someone's

home. There is no principled basis for such a rule. Creating it would not be a matter of declining to extend *Bivens*. It would dramatically erode the "heartland of *Bivens*," Pet. App. 13a, within the "common and recurrent sphere of law enforcement" in which it is "settled law." *Abbasi*, 582 U.S. at 134.

Warrant: In arguing that the presence of a warrant is a meaningful difference, Petitioner again disregards this case's "run-of-the-mill allegations of excessive force during an arrest." Pet. App. 18a. The specific Fourth Amendment right that is implicated in the decision below is the right to be free from an excessive use of force that makes a seizure unreasonable, not the separate and distinct right to be free from a warrantless seizure. The presence of a warrant may well have a bearing on whether it is reasonable to arrest someone, but it has no necessary connection to the degree of force that is appropriate in carrying out that arrest. *See Graham*, 490 U.S. at 396. Nothing in a warrant authorizes an officer to punch someone in the face multiple times, causing an orbital fracture, when the individual is not resisting arrest.

Unable to explain what relevance an arrest warrant has to Mr. Snowden's actual excessive force claim, Petitioner contends that an arresting officer acts pursuant to a different "legal mandate" when the officer holds an arrest warrant. Pet. 22 (quoting *Abbasi*, 582 U.S. at 139–40). But courts of appeals applying *Abbasi*'s reference to "legal mandate" have generally focused on the statutory responsibilities of the agencies and officers in question. *See, e.g.*, *Mejia*, 61 F.4th at 668 ("[M]ost federal agencies [do not] have

the same or similar legal mandates," and the Bureau of Land Management does not have the "same mandate as agencies enforcing federal anti-narcotics law[s]."); *Tun-Cos v. Perrotte*, 922 F.3d 514, 524 (4th Cir. 2019) (officers were enforcing federal immigration law rather than federal criminal laws), *cert. denied*, 140 S. Ct. 2565 (2020).

This makes sense. Agents of the Drug Enforcement Administration or Federal Bureau of Investigation typically operate in the "common and recurrent sphere" of traditional law enforcement, *Abbasi*, 582 U.S. at 134, whereas officers of agencies such as the Border Patrol, the Transportation Security Administration, and the Bureau of Land Management perform more specialized roles. The mere presence of a warrant, by contrast, does not plausibly change anything relevant to the damages remedy for the use of excessive force in *Bivens*.

Even taken at face value, Petitioner's characterization of the effect of a warrant on an officer's legal mandate is overstated. It is true that, in the context of defining the boundaries of the exclusionary rule, this Court has referred to a warrant as creating an "obligation." *Utah v. Strieff*, 579 U.S. 232, 240 (2016). But in other contexts the Court has stressed that even where a legal instrument says a law enforcement officer "shall arrest" someone, there is no "truly" mandatory duty that overrides the "well established tradition of police discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760–61 (2005).

The only reason an arrest warrant empowered Petitioner to do anything is his ultimate statutory

authority. The relevant "statutory or other legal mandate" here, *Abbasi*, 582 U.S. at 140, was Petitioner's responsibilities for enforcing federal drug laws, including that he "may" "execute and serve . . . arrest warrants," *and* "make arrests without [a] warrant" in certain circumstances. 21 U.S.C. § 878(a). In other words, Petitioner's legal mandate includes making arrests with or without a warrant—just like the Bureau of Narcotics agents that preceded him. *See* Nat'l Archives, *Records of the Drug Enforcement Administration (DEA)*, https://perma.cc/Y4MX-LSS5 (archived June 16, 2024) (explaining that the DEA succeeded the Bureau of Narcotics).

3. Petitioner also faults the Seventh Circuit for failing to consider "alternative remedies," though this purported error has nothing to do with the circuit splits Petitioner alleges. Pet. 25. In any event, it is Petitioner, not the Seventh Circuit, who misunderstands the governing two-step *Bivens* framework. The question of alternative remedies generally arises at step two: when a case presents a new context, the availability of alternative remedies may be a reason counseling hesitation before creating a new remedy. *See Abbasi*, 582 U.S. at 144–45 (discussing alternative remedies at step two); *see also Egbert*, 596 U.S. at 497–98 (same). Indeed, in the court of appeals, Petitioner raised his alternative remedy argument only in the context of step two. Pet. App. 16a n.4. It is therefore unsurprising, and certainly not erroneous, that the Seventh Circuit did not consider the FTCA relevant to its resolution of the case at step one.

Petitioner's discussion of the FTCA is equally misguided. This Court has never retreated from its holding that Congress was "crystal clear that [it] views [the] FTCA and *Bivens* as parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980). Indeed, although the defendant in *Egbert* invoked the FTCA as an alternative remedy, this Court notably did not rely on it, focusing instead on Border Patrol grievance mechanisms. *See Egbert*, 596 U.S. at 524 n.7 (Sotomayor, J., concurring in part).

4. Finally, and again without connecting his argument to any purported circuit split, Petitioner accuses the Seventh Circuit of not addressing "whether a *legislature* could think that some factual or legal differences might alter 'the costs and benefits of implying a cause of action.'" Pet. 28 (quoting *Egbert*, 596 U.S. at 491, 496). That is simply not a fair reading of the court of appeals' opinion, which repeatedly recognized that the creation of a cause of action "is primarily a legislative task," and framed the new context inquiry in a way that was consistent with this understanding. Pet. App. 2a. What the court of appeals referred to as a "familiar mode of judicial reasoning," Pet. 28 (quoting Pet. App. 12a), was "to determine if the case before us fits within the Court's still-valid—but now quite limited—precedent, with special solicitude to the separation-of-powers concerns identified by the Court." Pet. App. 12a. That is a perfectly accurate understanding of the judicial role under this Court's governing jurisprudence.

III. This Case Is a Poor Vehicle for Review.

Even if the issues raised by Petitioner merited review, this case would be a poor vehicle for several reasons.

First, this Court regularly denies certiorari where, as here, the case remains in an "interlocutory posture." *Seattle's Union Gospel Misson v. Woods*, 142 S. Ct. 1094 (2022) (statement of Alito, J., respecting the denial of certiorari). That consideration applies with particular force in light of Petitioner's decision not even to ask the Seventh Circuit to stay issuance of its mandate. As a result, the case is proceeding into discovery, potentially clarifying the issues beyond where they stand at the pleadings stage.

Second, review of the question presented would be complicated by Petitioner's forfeiture of an argument that is now central to his case. In order to claim that arrests outside the home categorically present a new context, Petitioner emphasizes the risk to bystanders in such arrests. *See e.g.*, Pet. 17–19. But Petitioner did not raise that argument below, and thus forfeited it. *See United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari . . . when the question presented was not pressed or passed upon below.") (citation and internal quotation marks omitted).

Third, to the extent this case implicates any issue that might warrant further review in the future, the Court would benefit from allowing such issues time to percolate. This Court decided *Egbert*, its most recent *Bivens* decision, only two years ago. Courts are just beginning to apply that decision to different fact

patterns. Nor has any court of appeals adopted the core theories Petitioner now presents to this Court, relying on claims of bystander risks and the purported mandatory nature of arrest warrants. Pet. 17–19, 22–23. As this Court regularly reiterates, it is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Although Petitioner's new theories lack merit, the Court should at a minimum wait for them to be vetted by the courts of appeals before entertaining them.

Finally, Petitioner has not substantiated his assertion that district courts are confronting *Bivens* claims "with alarming frequency." Pet. 29; *see also* 29–31 (presenting no relevant statistics). But if that were true, there would be no shortage of vehicles available for this Court to review these issues in the future. As it stands now, there is no compelling reason for the Court to so quickly wade back into the *Bivens* doctrine to review a narrow decision in the "heartland of *Bivens*" concerning "run-of-the-mill allegations of excessive force during an arrest." Pet. App. 13a, 18a.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

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