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

REPLY FOR PETITIONER

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This case presents two entrenched, open, and acknowledged circuit conflicts over when putative *Bivens* claims present a "new context." In the decision below, the Seventh Circuit found no meaningful difference between the *warrantless*, *in-home* search and seizure at issue in *Bivens*, and a *warranted* arrest *in a place open to the public*. As the Tenth Circuit has observed, many circuits hold to the "contrary." *Logsdon* v. *U.S. Marshal Serv.*, 91 F.4th 1352, 1357 (10th Cir. 2024). Multiple "circuits have said that a new *Bivens* context exists when federal officials execute a valid warrant." *Ibid.* Still others "have said that a new context arises" where the asserted constitutional "violation does not occur in the plaintiff's home." *Ibid.*

Snowden's effort to deny the conflict reimagines the contrary authority as applying ad-hoc balancing tests that

"weig[h] multiple factual considerations." Br.in.Opp.9. That is fanciful. Those courts properly apply this Court's instruction that a case presents a new context so long as it "is different in *a* meaningful way"—"even one"—from this Court's previous *Bivens* cases. *Ziglar* v. *Abbasi*, 582 U.S. 120, 139 (2017) (emphasis added); *Egbert* v. *Boule*, 596 U.S. 482, 496 (2022). One meaningful difference is all it takes. And each of those cases identifies the warrant or outside-the-home setting as rendering the context "new."

Besides, if Snowden were right that lower courts misunderstand this Court's precedents as calling for multifaceted balancing, that would only underscore the need for review: Even a single meaningful difference should be enough. And if lower courts need multifactor balancing to decide whether *the home* or *warrants* are "meaningful" to Fourth Amendment *Bivens* claims, the need for this Court's intervention is dire.

On the merits, Snowden repeats the Seventh Circuit's view that the differences between this case and *Bivens*—outside the home vs. inside the home, warrant vs. no warrant—are not "meaningful" to "'run-of-the-mill allegations of excessive force.'" Br.in.Opp.10 (quoting Pet.App.18a). Snowden conflates the new-context inquiry with whether *courts* might find differences relevant to the claim's *merits*. The new-context inquiry asks whether there is any difference *legislators* might find relevant, as a *policy* matter, when deciding whether to *create a damages remedy*. *Egbert*, 596 U.S. at 491.

On that point, Snowden has little to say. He ignores amicus Federal Law Enforcement Officers Association (FLEOA), which explains why arrests outside the home present risks to officers and bystanders that in-home arrests may not. Nor does he deny that warrants give officers authority that officers without warrants lack. Con-

gress plainly could think those differences counsel against a damages remedy that might deter officers from carrying out their duties in dangerous situations, pursuant to a court order.

Snowden's effort to paint the petition as seeking "fact-bound error correction," Br.in.Opp.8, blinks reality. The question here is whether the Seventh Circuit erred in recognizing a *Bivens* remedy given two highly significant circumstances: "the claim arises from an arrest made outside the home," and the defendant acted "pursuant to a warrant." Pet.i. The petition thus presents crisp *legal* questions that have divided the circuits. Because of those circuit conflicts, federal law-enforcement officers face different risks of personal liability depending on where in America they serve the American people.

I. THE CIRCUITS ARE DIVIDED

A. The Circuits Are Divided Over Whether Conduct Outside the Home Presents a New *Bivens* Context

1. The First, Fifth, Eighth, and Ninth Circuits hold that claims arising outside the home present a new context from the in-home conduct in *Bivens*. Pet.15-20. Snowden urges that those courts merely consider location as "one of a collection of factors" to be "weighed" in a multifactor *Bivens* balancing test. Br.in.Opp.9, 11. But those decisions simply reflect that claims may differ from this Court's past *Bivens* cases in *multiple* meaningful ways—*each* of which suffices to render the context "new."

The claim in *Oliva* v. *Nivar*, 973 F.3d 438 (5th Cir. 2020), cert. denied, 141 S. Ct. 2669 (2021), thus differed from *Bivens* in "several meaningful ways." *Id.* at 442. But the Fifth Circuit made clear that "'the context is new'" so long as a claim "'is different in *a* meaningful way from [this Court's] previous *Bivens* cases.'" *Ibid.* (quoting *Ziglar*,

582 U.S. at 139) (emphasis added). And the *first* "meaningful" difference *Oliva* recognized was that the claim did "not [arise in] a private home." *Id.* at 442-443. The same was true in *Byrd* v. *Lamb*, 990 F.3d 879, 882 (5th Cir. 2021), cert. denied, 142 S. Ct. 2850 (2022), where the claim "arose in a parking lot, not a private home," and *Cantú* v. *Moody*, 933 F.3d 414, 423 (5th Cir. 2019), cert. denied, 141 S. Ct. 112 (2020), where the plaintiff did "not allege the officers entered his home without a warrant."

The contention that *Oliva* and *Byrd* suggest only that "'parking lot[s]'" or "'government hospital[s]' present a new context," Br.in.Opp.13-14, is frivolous. The court found those locations made the context "new" because they were "not a private home," *Oliva*, 973 F.3d at 442-443; *Byrd*, 990 F.3d at 882—like the hotel lobby here.

Snowden's reimagining of other cases likewise fails. That the defendant in *Ahmed* v. *Weyker* "did not enter a home" was not a stray observation, but the very "[f]irst" "meaningfu[l] differen[ce] from *Bivens*" the Eighth Circuit identified. 984 F.3d 564, 568 (8th Cir. 2020). The court was explicit that a new context exists whenever "*one or more* meaningful differences exist." *Id.* at 570 (emphasis added). In *Mejia* v. *Miller*, the Ninth Circuit found it "[m]ore importan[t]" than anything else that, "unlike *Bivens*, none of the events in question occurred in or near Mejia's home." 61 F.4th 663, 668 (9th Cir. 2023). The "first" difference in *Quinones-Pimentel* v. *Cannon* emphasized that "no one's home" was involved. 85 F.4th 63, 71 (1st Cir. 2023).

Snowden's theory that courts treat the new-context analysis as an amorphous balancing test, moreover, would contradict this Court's instruction that *any* meaningful difference from *Bivens* counts. See *Ziglar*, 582 U.S. at 139; *Egbert*, 596 U.S. at 492, 496; see also Pet.App.13a

(recognizing that "'*even one*'" meaningful difference suffices). If courts have transmogrified this Court's straightforward inquiry into elaborate, multifactor balancing, that would only underscore the need for review.

2. The Fourth and Seventh Circuits undisputedly have rejected the argument that claims arising outside the home present a new *Bivens* context. Pet.19. That alone establishes a conflict.

Snowden denies "there is any established rule in the Tenth Circuit" because *Logsdon* went on to find a new context based on other differences. Br.in.Opp.17. But the court considered those other differences only because it "agree[d]" with the plaintiff (and the Seventh Circuit) that the "location of the arrest" was irrelevant, 91 F.4th at 1357—further broadening the conflict.

Snowden observes (Br.in.Opp.1, 10-11) that this Court denied review in *Hicks* v. *Ferreyra*, 64 F.4th 156 (4th Cir. 2023), cert. denied, 144 S. Ct. 555 (2024). But denial of certiorari is no comment on the merits. And the denial in *Ferreyra* is especially uninformative. The lead question there was whether *Bivens* extends to "non-narcotics officers." Pet. in No. 23-324, at 8. That has nothing to do with this case. While *Ferreyra* raised a secondary question concerning searches and seizures outside the home, *id.* at 14, it was a poor vehicle. As Snowden admits, the Fourth Circuit gave the issue "only a brief mention in a footnote." Br.in.Opp.16; see 64 F.4th at 167 n.2. By contrast, the decision below addressed the issue extensively. Pet.App.17a-19a. Since the denial in *Ferreyra*, moreover, the Tenth Circuit has expressly recognized the "substantial" "contrary" authority on both sides of the split, *Logsdon*, 91 F.4th at 1357—dispelling any doubt of a circuit conflict.

3. Snowden protests that some cases did not involve excessive-force claims. Br.in.Opp.10-12, 19-21. But *Oliva*, 973 F.3d at 442, *Byrd*, 990 F.3d at 881, and *Mejia*, 61 F.4th at 668, all did—and all found it meaningful that the claim arose outside the home. A context may be new, moreover, "[e]ven though the right and the mechanism of injury were the same" as prior *Bivens* cases. *Ziglar*, 582 U.S. at 139.

Because "creating a cause of action is a legislative endeavor," *Egbert*, 596 U.S. at 491, courts must ask whether *legislators* could think any differences might alter the advisability, from a policy perspective, of a cause of action. In excessive-force cases, no less than others, legislators plainly could think that officers acting outside the home or with a warrant merit different treatment than officers who breach the home's sanctity or lack prior judicial authorization. See pp. 8-10, *infra*.

B. The Circuits Are Divided Over Whether a Warrant Makes the Context New

Snowden does not deny that the Seventh and Tenth Circuits have rejected the argument that warrants render the context "new." He cannot escape that multiple circuits have held "to the contrary," ruling that "a new *Bivens* context exists when federal officials execute a valid warrant." *Logsdon*, 91 F.4th at 1357. Thus, in *Annappareddy* v. *Pascale*, the Fourth Circuit ruled that "searches and a seizure conducted *with* a warrant" present "a 'new' *Bivens* context" from the "*warrantless* searches and seizures" in *Bivens*. 996 F.3d 120, 135-136 (4th Cir. 2021); see Pet.21 n.3. Snowden has no answer. He likewise ignores the Third and Eighth Circuit cases cited by the petition. Pet.21 n.3. That silence is telling.

The Sixth Circuit, too, has held that a claim presents a "new context" where officers acted pursuant to a warrant. *Cain* v. *Rinehart*, No. 22-1893, 2023 WL 6439438, at *3

(6th Cir. July 25, 2023). So has the Ninth Circuit, finding a "new *Bivens* context because the agents had a search warrant," *Massaquoi* v. *FBI*, No. 22-55448, 2023 WL 5426738, at *1-2 (9th Cir. Aug. 23, 2023)—a view it recently reaffirmed, *Libman* v. *United States*, No. 23-55417, 2024 WL 2269271, at *4 (9th Cir. May 20, 2024). That those decisions were unpublished, Br.in.Opp.21, suggests only that the courts did not think they were breaking new ground. Contrary to Snowden's assertion, Br.in.Opp.22 n.3, *Cain* specifically reasoned that the presence of a "warrant" is a meaningful difference in the officer's "'legal mandate.'" 2023 WL 6439438, at *3 (quoting *Ziglar*, 582 U.S. at 139-140). There is no reason to think the Sixth Circuit would depart from that conclusion in another case.[1]

Finally, the Fifth Circuit holds that "[v]irtually everything" other than the "warrantless" "strip-search" and "manacling" in *Bivens* presents a "'new context.'" *Oliva*, 973 F.3d at 442-443. Snowden cannot deny this case would come out differently in that circuit. Pet.21-22.

II. THE DECISION BELOW IS WRONG

The decision below is on the wrong side of both circuit splits. Whether law-enforcement officers have a warrant, or act outside the sanctity of the home, fundamentally alters the costs and benefits of subjecting them to personal damages liability. Pet.17-19, 23-24; see FLEOA.Br.5-15.

1. Snowden's argument that this case involves "'run-of-the-mill allegations of excessive force,'" Br.in.Opp.24, 27, repeats the Seventh Circuit's error. That a claim seems "'conventional'" or arises in a "'common and recur-

[1] Snowden questions whether *Quinones-Pimentel*, 85 F.4th at 71, would come out the same way if the warrant "were the *only* difference." Br.in.Opp.20. But "even one" meaningful difference suffices. *Egbert*, 596 U.S. at 496.

rent sphere of law enforcement'" is "not enough to support the judicial creation of a cause of action." *Egbert*, 596 U.S. at 495.

Snowden argues that warrants and location have no bearing on the *merits* of excessive-force claims like his. Br.in.Opp.24-25, 27. That reproduces the Seventh Circuit's error of approaching the new-context analysis as a "mode of *judicial* reasoning" that asks whether *courts* would find a difference *legally* significant when evaluating the merits. Pet.App.12a (emphasis added); see Pet.28. "[C]reating a cause of action is a *legislative* endeavor." *Egbert*, 596 U.S. at 491 (emphasis added). Courts thus must consider the full "'range of *policy* considerations * * * a *legislature* would consider.'" *Ibid.* (emphasis added). Even if a fact might matter little to *courts* deciding the *merits* of a claim, a *legislature* may find it relevant to the "'costs and benefits'" of a damages *remedy*, foreclosing *Bivens*'s judicial expansion. *Id.* at 496.

2. Congress plainly could find that extending *Bivens* to *warranted* seizures, and seizures *outside the home*, presents different cost-benefit calculus than the *warrantless* searches and seizures *inside the home* in *Bivens* itself. Congress could agree the home has special sanctity as protection from all intrusions. Pet.17. And as FLEOA explains, officers operating in public settings face "'significantly'" more "'unknown variables'" and "'increased risk,'" FLEOA.Br.10, including heightened dangers *to* and *from* bystanders. Pet.18-19. Congress reasonably could think law-enforcement officers facing such risks should not bear the additional threat of damages liability.

Snowden never answers FLEOA. He argues arrests in the home are more dangerous, Br.in.Opp.25-26, noting precedent allowing for precautions like protective sweeps. But in-home arrests are *safer* than public ones precisely

because officers can conduct protective sweeps and detentions under *Maryland* v. *Buie*, 494 U.S. 325 (1990), and *Muehler* v. *Mena*, 544 U.S. 93 (2005). FLEOA.Br.5. Officers planning in-home searches or seizures can run "'criminal checks on the people likely to be in the home,'" learn of "'registered weapons in the home,'" and "surveil" the home. FLEOA.Br.10. Officers generally cannot run sweeps for, conduct background checks on, or "detain," Br.in.Opp.25, everyone they might encounter in places open to the public. Besides, if it were *debatable* whether in-home or public arrests present more risks, that would confirm that creating a private cause of action is a *policy* judgment properly reserved to Congress.

3. Congress likewise could think warrants alter the cost-benefit calculus. Warrants confer a "judicial mandate," *Utah* v. *Strieff*, 579 U.S. 232, 240 (2016), that officers acting on their own initiative lack. A warrant is "'vetted and validated by [a] judge,'" and "'carries the weight of a court order.'" FLEOA.Br.14. Legislators could readily think that distinct "legal mandate," *Ziglar*, 582 U.S. at 140—and the need to avoid deterring officers charged with executing it—merits different treatment from the warrantless search and seizure in *Bivens*.

Snowden insists that "legal mandate[s]" for *Bivens* purposes must reflect different "statutory responsibilities." Br.in.Opp.27-28. But the "easily satisfied" "new-context inquiry" considers differences in an officer's "statutory *or other* legal mandate." *Ziglar*, 582 U.S. at 140, 149 (emphasis added).

While Snowden quibbles that warrants are not "'truly' mandatory," Br.in.Opp.28, nor are other "legal mandates" this Court has considered in the *Bivens* arena, which inevitably carry some degree of discretion. What matters

is the different *authority* an officer possesses, not whether he is categorically obligated to exercise it.

4. Snowden nowhere denies that the Federal Tort Claims Act offered him an alternative remedy unavailable in *Bivens*, Pet.25-27, and that alternative remedial structures "independently foreclose" *Bivens* relief, *Egbert*, 596 U.S. at 497. He urges alternative remedies are irrelevant unless courts find a "new context" at "step one." Br.in.Opp.29. But the inquiry boils down to "*one question*: whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action.'" 596 U.S. at 496 (emphasis added). That Congress has prescribed a *different* remedy plainly counts, whatever "step" it is labeled.[2]

Snowden protests that the FTCA does not displace *Bivens*, citing *Carlson* v. *Green*, 446 U.S. 14, 20 (1980). He offers no response to this Court's warning that *Carlson* carries "little weight." *Egbert*, 596 U.S. at 500-501; Pet.27.

III. THE ISSUES ARE RECURRING AND IMPORTANT

The issues are important and recurring. Pet.29-30. And the impact on law enforcement is profound. As FLEOA explains, officers deeply "feel the effects" of inconsistent rules, making their work "'more dangerous for officers and the public.'" FLEOA.Br.16.

The problem is especially acute for officers—like Agent Henning—who work across circuit boundaries. Pet.30; FLEOA.Br.17. And in circuits that have yet to pick a side, officers confront a bevy of inconsistent district-court deci-

[2] Snowden erroneously asserts that Agent Henning raised the FTCA below only at step two. Br.in.Opp.29. Agent Henning argued the "context" is "new" because "Snowden was free to seek relief" under "the Federal Tort Claims Act." C.A.Dkt.54 at 10.

sions. Pet.29-30 & nn.6-10. That uncertainty is untenable. Snowden offers no response.

IV. THIS CASE IS AN IDEAL VEHICLE

This case squarely presents both circuit splits. Pet.31-32. While Snowden argues the petition seeks "fact-bound error correction" limited to "'*this case*,'" Br.in.Opp.8, that requires him to lop off most of the question presented. The petition asks "[w]hether 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*." Pet.i (emphasis added). That question presents *legal* issues—the relevance of warrants and the conduct's location outside the home—that have divided the circuits. It also encompasses the possibility that "*Bivens* should be overruled altogether," Pet.31: If *Bivens* remedies are never appropriate, the court of appeals erred in allowing one here.

There is nothing "'interlocutory,'" Br.in.Opp.31, about the question presented. The district court granted judgment on the pleadings, holding the context was new; the Seventh Circuit reversed, conclusively holding that neither an arrest's setting outside the home nor a warrant creates a new *Bivens* context. Nor would discovery "clarif[y] the issues." Br.in.Opp.31. There is no dispute Snowden was arrested pursuant to a warrant; the warrant was filed with Agent Henning's motion to dismiss. D.Ct.Dkt.24-1, 24-2. And there is no chance discovery will reveal the arrest somehow occurred in Snowden's home, rather than a hotel lobby.

Snowden does not dispute Agent Henning raised the outside-the-home and warrant distinctions below, and that both lower courts addressed them. Pet.31. He contends Agent Henning "forfeited" the observation that public settings involve heightened bystander risks. Br.in.Opp.31.

But "'a party can make any argument in support of'" an issue "'properly presented'" below. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

At least seven circuits have weighed in on the outside-the-home conflict, and eight on the warrant conflict. Both splits are openly acknowledged. *Logsdon*, 91 F.4th at 1357. There is no reason to wait.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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