No. 21-187

In the Supreme Court of the United States

HAMDI MOHAMUD, PETITIONER

v.

HEATHER WEYKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the civil damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is applicable to claims that an officer violated the Fourth Amendment by providing false information to persuade another officer to make an arrest and providing false information in support of a criminal complaint.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 984 F.3d 564. The order of the district court (Pet. App. 24a-36a) is not published in the Federal Supplement but is available at 2018 WL 4469251.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2020. A petition for rehearing was denied on March 16, 2021 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on August 6, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2017, petitioner filed an amended complaint in the United States District Court for the District of Minnesota, alleging that respondent violated her Fourth

Amendment rights by supplying false information to an arresting officer and false information in support of a criminal complaint. C.A. App. 27-41. The district court denied petitioner's motion to dismiss. Pet. App. 24a-36a. The court of appeals reversed and remanded. *Id.* at 1a-23a.

1. Respondent is a police officer employed by the City of St. Paul, Minnesota, who was also, between August 2010 and August 2014, deputized as a Special Deputy United States Marshal. See Pet. App. 41a. Respondent was part of a federal task force investigating a large-scale sex-trafficking ring that was active for ten years and that spanned nine cities in four States. See *United States* v. *Fahra*, 643 Fed. Appx. 480, 481 (6th Cir. 2016). In November 2010, a federal grand jury in the Middle District of Tennessee returned a 58-page indictment charging 30 individuals with conspiracy to commit sex trafficking and related charges. See *id.* at 481, 483.

Muna Abdulkadir was a witness for the government in that sex-trafficking prosecution. Pet. App. 3a, 42a. In 2011, during the pretrial proceedings, Abdulkadir was involved in an altercation with petitioner and two other women during which Abdulkadir brandished a knife and struck one of the women. *Id.* at 2a-3a. After that altercation, petitioner and her associates called 911, while Abdulkadir called respondent. *Id.* at 3a. Respondent contacted the Minneapolis police officer who responded to the 911 call and informed him that she had "information and documentation" that petitioner and her associates "'had been actively seeking out Abdulkadir' in an effort 'to intimidate' her for agreeing to cooperate in a federal investigation." *Ibid.* After the call with respondent, the Minneapolis police officer arrested

petitioner and her associates on suspicion of tampering with a federal witness. *Ibid.*

The following day, respondent filed a criminal complaint in the United States District Court for the Middle District of Tennessee alleging that petitioner and her two associates had retaliated against a federal witness, in violation of 18 U.S.C. 1513(b)(1) and (b)(2). C.A. App. 46. The criminal complaint was supported by an affidavit from respondent. *Id.* at 47-58. A federal grand jury subsequently returned an indictment charging petitioner with retaliating against a federal witness, in violation of 18 U.S.C. 1513(c), and related charges. C.A. App. 71-73. In 2013, the district court granted petitioner's motion to dismiss the indictment for lack of subject-matter jurisdiction under the Federal Juvenile Delinquency Act, 18 U.S.C. 5031 *et seq*. C.A. App. 141-142.

2. In 2017, petitioner filed an amended complaint in the United States District Court for the District of Minnesota, alleging that respondent violated her Fourth Amendment rights by supplying false information to an arresting officer and false information in support of a criminal complaint. C.A. App. 27-41. Petitioner pleaded one claim based on 42 U.S.C. 1983, alleging that respondent was acting under color of state law, and a second claim based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to the extent that respondent was deemed a federal actor. C.A. App. 38-40. The complaint sought compensatory and punitive damages. *Id.* at 41.

Petitioner alleged that when respondent informed the Minneapolis police officer that she had "information and documentation" that petitioner and her associates "had been actively seeking out Abdulkadir and attempt-

ing to intimidate [her] and cause bodily harm," respondent "knew" that statement "was untrue." C.A. App. 32 (brackets in original). Petitioner further alleged that respondent provided that and other "false information * * * with the intention of causing [petitioner] * * * to be arrested under false pretenses without arguable probable cause" and that respondent's "false statements were the only reason" that the arresting officer "believed [he] had probable cause * * * to arrest, seize, or detain" petitioner. *Id.* at 34. Petitioner also alleged that when respondent filed the criminal complaint and supporting affidavit, respondent "fabricated facts, knowingly relayed false information, and withheld exculpatory facts, all with the intention that [petitioner] * * * would continue being seized and detained for crimes [for] which [respondent] knew there to be no actual probable cause." *Id.* at 34-35. And petitioner alleged that she was placed in federal custody "as a direct consequence of" respondent's false statements in the criminal complaint and affidavit. *Id.* at 37.

Respondent moved to dismiss the complaint, arguing that no cause of action existed under *Bivens* or Section 1983 and that she was entitled to qualified immunity. Pet. App. 25a. The district court denied respondent's motion to dismiss. *Id.* at 24a-36a. The court found that respondent was not entitled to qualified immunity at the pleading stage because petitioner had "plausibly alleged [that respondent] violated [her] rights under the Fourth Amendment and that [her] allegedly violated rights were clearly established." *Id.* at 35a; see *id.* at 33a-36a.[1] With respect to the cause-of-action argu-

[1] The Minneapolis police officer who arrested petitioner also conducted his own investigation at the scene of the incident involving Abdulkadir and petitioner, interviewing the women separately and

ments, the court stated that there was "no need to decide whether the proper vehicle for [petitioner's] claims is a [Section] 1983 or *Bivens* cause of action." *Id.* at 36a (citation and internal quotation marks omitted).

3. Respondent appealed, and the court of appeals vacated and remanded. Pet. App. 1a-23a.

a. Respondent's "lead argument on appeal" was that there was no *Bivens* cause of action against her as a federal officer, and the court of appeals found that the "threshold question" of "whether an implied cause of action is available" under *Bivens* was "squarely before" the court. Pet. App. 5a-6a & n.1. The court explained that this Court has recognized new causes of action under *Bivens* only three times and that "[e]xpanding *Bivens* is, according to the Supreme Court, 'now a disfavored judicial activity.'" *Id.* at 7a (quoting *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017)) (internal quotation marks omitted); see *id.* at 6a-7a. The court of appeals further explained that determining whether *Bivens*

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reviewing security video that documented part of the altercation. C.A. App. 173, 180-182; see Gov't C.A. Br. 2, 5-8. That information was in public records that were part of the pretrial proceedings against petitioner. See *ibid.* And that information undermines petitioner's allegations regarding (1) the nature of the altercation, and (2) the assertion that the information that respondent provided to the Minneapolis police officer was the sole basis for his belief that he had probable cause to arrest petitioner. See Gov't C.A. Br. 33-35; see also *Yassin* v. *Weyker*, No. 16-cv-2580, 2020 WL 6438892, at *2 (D. Minn. Sept. 30, 2020), appeal pending, No. 20-3299 (8th Cir. filed Nov. 2, 2020). But the district court declined to consider those records when determining whether respondent is entitled to qualified immunity at the pleading stage. Pet. App. 32a-33a, 35a. Given the current posture of the case, this brief accepts the facts as alleged in petitioner's complaint, but respondent does not concede the truth of those allegations or the other allegations included in the petition. See, *e.g.*, Pet. 5.

provides a cause of action in a particular case involves a "two step[]" inquiry. *Id.* at 7a. First, if the case arises in the same context as a case in which a *Bivens* cause of action has already been recognized, the claim may proceed. See *ibid.* And second, if the case arises in a new context, the court must determine whether any special factors counsel hesitation in extending the cause of action to that context, and, "[i]f there is 'reason to pause before applying *Bivens* in a new context or to a new class of defendants,'" the court must "'reject the request.'" *Ibid.* (quoting *Hernández* v. *Mesa*, 140 S. Ct. 735, 743 (2020)).

At the first step of the inquiry, the court of appeals found that *Bivens* itself provided the only possible analogue to petitioner's claim and concluded that the context of "[t]he case before us is meaningfully different from *Bivens* in four ways." Pet. App. 9a; see *id.* at 6a-13a. *First*, the court determined that "'the sorts of actions being challenged here'" differed from those in *Bivens* because "[t]he focus in *Bivens* was an invasion into a home and the officers' behavior once they got there." *Id.* at 9a (citation omitted). The court explained that "[h]ere, by contrast, [respondent] did not enter a home" and that the "[l]ying and manipulation" in which respondent allegedly engaged were "simply not the same as the physical invasions that were at the heart of *Bivens*." *Ibid.* *Second*, the court found that respondent's "role in the arrests"—"provid[ing] allegedly false information to another officer in a different police department" rather than "arrest[ing] anyone herself"—distinguished the arrest here from the one in *Bivens*. *Id.* at 10a. *Third*, the court determined that "'the mechanism of injury'" differed from *Bivens* because "[m]ultiple 'independent legal actors,'" including the Minne-

apolis police officer and federal prosecutors, "played a role" in injuring petitioner. *Id.* at 11a (citations omitted). And *fourth*, the court found that in order to determine whether respondent violated petitioner's Fourth Amendment rights, the fact-finder would need to engage in "fact-checking and conscience-probing"—such as determining whether respondent made false statements knowingly and intentionally. *Id.* at 12a; see *id.* at 11a. That meant, the court concluded, that proving petitioner's claim "would require a different type of showing" than the one that had been required in *Bivens*. *Id.* at 11a.

Turning to the second step of the *Bivens* inquiry, the court of appeals found that special factors counseled hesitation in extending the *Bivens* remedy to the new context presented by this case. Pet. App. 13a-15a. The court determined that a trial could interfere with the Executive Branch's investigative functions, noting that there are "'substantial costs' associated with requiring public officials to litigate these types of issues, including 'the diversion' of public resources and deterring 'able citizens from . . . public office.'" *Id.* at 14a (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814, 816 (1982)). The court explained that "[i]t may well be that the costs are worth it, but Congress is better equipped than we are to make the call." *Ibid.* And the court found that "other remedies are available" to redress injuries such as those petitioner alleged. *Ibid.* The court noted that such remedies include the Hyde Amendment, which permits an award of attorney's fees and costs to a prevailing criminal defendant "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith," Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Ap-

propriations Act, 1998, Pub. L. No. 105-119, Tit. VI, § 617, 111 Stat. 2519 (18 U.S.C. 3006A note), and statutory provisions that permit an award of damages to "any person unjustly convicted of an offense against the United States and imprisoned" when certain prerequisites are satisfied, 28 U.S.C. 1495; see 28 U.S.C. 2513. Pet. App. 14a-15a.

Having found no cause of action available under *Bivens*, the court of appeals noted that, if respondent "was acting under color of *state* law," then petitioner's "[S]ection 1983 claims may proceed, subject to [respondent's] defense of qualified immunity." Pet. App. 15a. It remanded to allow the district court to determine whether the case could proceed under Section 1983. *Id.* at 16a.

b. Judge Kelly dissented. Pet. App. 16a-23a. Judge Kelly agreed that "no *Bivens* remedy is available for [petitioner's] claim that [respondent] violated [her] Fourth Amendment rights by submitting a false affidavit to the district court." *Id.* at 17a-18a. But Judge Kelly would have found that, to the extent that petitioner's claim was premised on respondent's statements and actions leading up to petitioner's arrest, that claim was not "meaningful[ly] differen[t]" from the claim recognized in *Bivens*, and she therefore would have permitted that claim to proceed. *Id.* at 23a; see *id.* at 18a-23a.

ARGUMENT

Petitioner argues (Pet. 25) that the court of appeals "misappli[ed]" this Court's decision in *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), and should have recognized a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to support her Fourth Amendment claim. The

court of appeals correctly found that this case presents a new *Bivens* context and that special factors counsel hesitation in extending *Bivens* to that context. Although petitioner contends (Pet. 12) that other courts have permitted cases to proceed "against federal officers for individual instances of law enforcement overreach in violation of the Fourth Amendment," the new-context inquiry cannot be conducted at that high level of abstraction. In fact, the court of appeals' decision does not conflict with any decision of this Court or of another court of appeals. This Court has recently denied review in another case presenting similar issues. See *Cantú* v. *Moody*, 141 S. Ct. 112 (2020) (No. 19-1033). And the court of appeals remanded to allow for a determination whether petitioner's constitutional claims may proceed under 42 U.S.C. 1983. Further review of its interlocutory decision is unwarranted.

1. In its 1971 decision in *Bivens*, this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (citation omitted). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of his home. In creating that cause of action, the Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396. In the next decade, "the Court recognized what has come to be called an implied cause of action in two cases involving other constitutional violations." *Abbasi*, 137 S. Ct. at 1854. It approved a damages remedy for a Fifth Amendment due process claim involving gender

discrimination by a Congressman in *Davis* v. *Passman*, 442 U.S. 228 (1979), and an Eighth Amendment claim for failure to provide adequate medical treatment in a prison in *Carlson* v. *Green*, 446 U.S. 14 (1980).

Bivens, *Davis*, and *Carlson* "rel[ied] largely on earlier decisions implying private damages actions into federal statutes"—decisions from which the Court has "retreated" and that reflect an approach to recognizing private rights of action that the Court has "'abandoned.'" *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001) (citation omitted). More recently, the Court has also "recognized that Congress is best positioned to evaluate 'whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government' based on constitutional torts." *Hernández* v. *Mesa*, 140 S. Ct. 735, 742 (2020) (quoting *Abbasi*, 137 S. Ct. at 1856). "Given the notable change in the Court's approach to recognizing implied causes of action," this Court "has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Abbasi*, 137 S. Ct. at 1857 (quoting *Iqbal*, 556 U.S. at 675); see *Hernández*, 140 S. Ct. at 742-743 ("We have stated that expansion of *Bivens* is a disfavored judicial activity, and have gone so far as to observe that if the Court's three *Bivens* cases [had] been . . . decided today, it is doubtful that we would have reached the same result.") (citations and internal quotation marks omitted; brackets in original).

Since its 1980 decision in *Carlson*, this Court has "consistently rebuffed requests to add to the claims allowed under *Bivens*." *Hernández*, 140 S. Ct. at 743 (list-

ing cases).[2] When deciding whether to extend *Bivens* to a new context, the Court "engage[s] in a two-step inquiry." *Ibid.* It first asks "whether the request involves a claim that arises in a new context or involves a new category of defendants." *Ibid.* (citation and internal quotation marks omitted). The Court has repeatedly emphasized that its "understanding of a 'new context' is broad," and that "[a] claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized" as long as the claim is "'different in a meaningful way from previous *Bivens* cases decided by this Court.'" *Ibid.* (citation omitted); see *Abbasi*, 137 S. Ct. at 1859 (same). When the Court determines "that a claim arises in a new context," it proceeds "to the second step and ask[s] whether there are any 'special factors [that] counse[l] hesitation' about granting the extension." *Hernández*, 140 S. Ct. at 743 (citations and

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[2] Petitioner notes (Pet. 21 n.14) decisions in which this Court assumed without deciding that a *Bivens* cause of action existed. But those decisions do not suggest that any extension of *Bivens* by a lower court was proper because "[t]he Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions * * * are not binding in future cases that directly raise the questions." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted); see *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (explaining that when an issue "was not * * * raised in briefs or argument nor discussed in the opinion of the Court" a "case is not a binding precedent" on the relevant issue). That is particularly true in the context of extending the *Bivens* remedy, because this Court has repeatedly emphasized that "*Bivens*, *Davis*, and *Carlson* * * * represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself." *Abbasi*, 137 S. Ct. at 1855; see *Hernández*, 140 S. Ct. at 741-743.

internal quotation marks omitted; brackets in original). Although the Court has "not attempted to create an exhaustive list of factors that may provide a reason not to extend *Bivens*," it has "explained that central to this analysis are separation-of-powers principles." *Ibid.* (brackets, citations, and internal quotation marks omitted); see *id.* at 750 ("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? The correct answer most often will be Congress.") (citations and internal quotation marks omitted). And the Court has emphasized that although "it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford" a particular plaintiff "an 'adequate' federal remedy," *United States* v. *Stanley*, 483 U.S. 669, 683 (1987), the "existence of alternative remedies" is "a further reason not to create *Bivens* liability," *Hernández*, 140 S. Ct. at 750 n.12.

2. Under that framework, the court of appeals correctly determined that petitioner's Fourth Amendment claim arises in a new *Bivens* context and that special factors counsel hesitation in extending the *Bivens* damages remedy to that new context.

a. Petitioner alleges that respondent, a local police officer who had been deputized as a Special Deputy United States Marshal, violated her Fourth Amendment rights by lying to a Minneapolis police officer in order to encourage petitioner's arrest and by submitting a false affidavit in support of a federal criminal complaint against petitioner. The court of appeals correctly found that those allegations support a claim that is "meaningfully different" from the claim at issue in *Bivens*, Pet. App. 9a, which involved a claim against narcotics agents "for handcuffing a man in his own

home without a warrant," *Abbasi*, 137 S. Ct. at 1860. Unlike the defendants in *Bivens*, respondent was not physically involved in petitioner's arrest; rather, she provided information to a local police officer who was conducting an investigation on the scene of a violent altercation, and she later swore out an affidavit to support federal criminal charges against petitioner. In addition, the elements that petitioner must prove to succeed on her false-arrest claim differ from the elements that the plaintiff in *Bivens* had to prove to succeed on his warrantless-search claim. See Pet. App. 11a-12a. Those and other differences that the court of appeals identified, see pp. 6-7, *supra*, compel the conclusion that petitioner's claim involves a new *Bivens* context. See *Abbas*i, 137 S. Ct. at 1865 (explaining that even when "[t]he differences between [a] claim" and one previously recognized by the Court are "small, * * * [g]iven this Court's expressed caution about extending the *Bivens* remedy, * * * the new-context inquiry is easily satisfied").

The court of appeals' determination that this case involves a new *Bivens* context is consistent with this Court's own treatment of different Fourth Amendment claims that it has confronted since *Bivens*. Petitioner contends that a *Bivens* cause of action has already been recognized in the context of "Fourth Amendment claims against federal police." Pet. 12; see Pet. 13 ("Fourth Amendment claims in the law enforcement space"); *id.* at 15 ("Fourth Amendment claims against federal police for instances of law enforcement overreach"). But this Court has not read *Bivens* as sweeping so broadly across the variety of Fourth Amendment claims that may be alleged. To the contrary, it has explained that "[a] claim may arise in a new context even if it is based

on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Hernández*, 140 S. Ct. at 743. Thus, last year in *Hernández*, the Court held that a Fourth Amendment claim involving a cross-border shooting by a rank-and-file law-enforcement officer presented a new context. *Id.* at 743-744. And in *Abbasi*, the Court did not treat a Fourth Amendment claim that prison officials subjected pretrial detainees to "frequent strip searches" as sufficiently similar to the unreasonable search claim in *Bivens*. 137 S. Ct. 1858-1860. Indeed, this Court has never found that any other Fourth Amendment claim arose in the same context as the claim in *Bivens*. The court of appeals did not err in concluding that petitioner's Fourth Amendment claim arises in a new context for *Bivens*.

b. The court of appeals likewise did not err in determining that special factors counsel hesitation in extending the *Bivens* remedy to the new context presented by petitioner's claim. Following this Court's instruction that "separation-of-powers principles" must be treated as "central" to the special-factors analysis, *Hernández*, 140 S. Ct. at 743 (citation omitted), the court of appeals (1) emphasized that a trial could interfere with the Executive Branch's investigative functions, (2) noted the substantial costs associated with requiring public officials to litigate the issues that this case implicates, and (3) explained that Congress is better equipped than the courts to determine whether and what types of federal remedies are available for such claims. Pet. App. 14a.

And the court of appeals correctly found that Congress's creation of other remedies that redress the sort of injuries alleged by petitioner further weighs against extending *Bivens* to the context of this case. The Hyde

Amendment provides one such remedy; it authorizes a district court to award attorney's fees and costs to a prevailing defendant in a criminal case where the court finds that "the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." 18 U.S.C. 3006A note. Congress also permits an individual who has been unjustly convicted, has obtained a certificate of innocence from the district court in which she was convicted, and satisfies the other requirements of 28 U.S.C. 2513 to obtain damages of up to $50,000 per year of incarceration (or $100,000 per year of incarceration in capital cases). 28 U.S.C. 2513(e).[3]

In adopting those remedies, Congress chose to strike a balance between protecting the government's ability to robustly prosecute federal crimes and ensuring that a defendant has some redress if she is prosecuted in bad faith or convicted of a crime of which she is actually innocent. Cf. *Abu-Shawish* v. *United States*, 898 F.3d 726, 734-736 (7th Cir. 2018) (discussing the changes and amendments that Congress made when enacting Section 2513); *United States* v. *Gilbert*, 198 F.3d 1293, 1299-1303 (11th Cir. 1999) (discussing the compromises made during Congress's adoption of the Hyde Amendment). The court of appeals correctly found that those alternative remedies provide additional support for declining to extend *Bivens* to the context of this case. See *Hernández*, 140 S. Ct. at 750 n.12.[4]

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[3] Individuals who are incarcerated may also seek a writ of habeas corpus in certain situations. See *Abbasi*, 137 S. Ct. at 1863 (explaining that "the habeas remedy * * * would have provided a faster and more direct route to relief" than a *Bivens* suit).

[4] Contrary to petitioner's suggestion (Pet. 13 n.7), Congress's adoption of the Westfall Act (Federal Employees Liability Reform

3. Petitioner asserts (Pet. 12-17) that court of appeals' decision conflicts with decisions from the First, Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits. But petitioner identifies no case in which a court of appeals recognized a *Bivens* remedy on facts comparable to those of this case, and she has not otherwise identified any conflict among the courts of appeals that merits this Court's review in this case.

a. In *Hicks* v. *Ferreyra*, 965 F.3d 302 (2020) (cited at Pet. 15), which involved an alleged Fourth Amendment violation arising out of traffic stops conducted by United States Park Police officers, the Fourth Circuit found that the defendants' argument that the plaintiff "lacked a cause of action under *Bivens*" was "raise[d] * * * for the first time on appeal" and was therefore "forfeited." *Id.* at 309. As a result, the court in *Hicks* did not squarely address whether *Bivens* generally provides a cause of action for Fourth Amendment claims similar to the one at issue there. In any event, the context in *Hicks*—a traffic stop that the plaintiff alleged became constitutionally unreasonable at some point during the stop, *id.* at 307—is meaningfully different from the context of petitioner's false-arrest claim. Indeed, the Fourth Circuit has since concluded that a Fourth Amendment false-arrest claim cannot be brought under *Bivens*. See *Annappareddy* v. *Pascale*, 996 F.3d 120 (2021). In that case, the plaintiff alleged

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and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563), which permits certain tort claims "brought for a violation of the Constitution of the United States," 28 U.S.C. 2679(b)(2)(A), does not suggest that the *Bivens* cause of action is broadly available to support all Fourth Amendment claims. As this Court explained in *Hernández*, the Westfall Act "simply left *Bivens* where it found it" and "is not a license to create a new *Bivens* remedy in a context" that the Court "ha[s] never before addressed." 140 S. Ct. at 748 n.9.

that federal agents "falsif[ied] evidence in support of [an] arrest warrant and * * * indictment," *id.* at 135, but the Fourth Circuit found that the plaintiff's claim presented a new *Bivens* context and that *Bivens* should not be extended to that new context, *id.* at 135-139. In reaching that conclusion, the Fourth Circuit repeatedly relied on the court of appeals' decision in this case. See *id.* at 134-136.

Petitioner's reliance (Pet. 14-15) on the Sixth Circuit's decision in *Jacobs* v. *Alam*, 915 F.3d 1028 (2019), is also misplaced. In *Jacobs*, the plaintiff alleged that Special Deputy United States Marshals entered his home and searched it while he was not present; that the plaintiff entered the house while the deputies were still there and was shot by one of the deputies; and that the same deputies effected a false arrest by arresting him without probable cause immediately after the shooting. *Id.* at 1033-1034, 1042-1043. There are, however, meaningful differences between the false-arrest claim in *Jacobs*, which involved an arrest by officers who had entered the plaintiff's home and engaged in a physical altercation with the plaintiff before arresting him, and petitioner's false-arrest claim, which does not allege that respondent entered petitioner's home, does not allege that she was on the scene of the crime, and instead alleges that she provided false information to another officer and in a criminal complaint. *Jacobs* therefore does not suggest that the Sixth Circuit would have reached a different result on the facts of this case than that reached by the court of appeals below. In addition, because *Jacobs* was decided before this Court decided *Hernández*, it is not even clear that the Sixth Circuit would reach the same conclusion on the facts of *Jacobs* today.

Nor was anything like a false-arrest claim at issue in *Boule* v. *Egbert*, 998 F.3d 370 (9th Cir. 2021), cert. granted, No. 21-147 (Nov. 5, 2021) (cited at Pet. 16-17). In *Boule*, the plaintiff alleged that a Border Patrol agent came onto the plaintiff's property and, after the plaintiff asked him to leave, grabbed the plaintiff and pushed him onto the ground; the plaintiff then brought a Fourth Amendment excessive-force claim against the Border Patrol agent. *Id.* at 386-387. That the Ninth Circuit permitted that excessive-force claim to proceed under *Bivens* does not suggest that it would have done the same if confronted with petitioner's false-arrest claim. For similar reasons, it is not necessary to hold this petition pending the Court's resolution of *Boule*. Even if the Court were to affirm the Ninth Circuit's extension of the *Bivens* cause of action to the *Boule* plaintiff's excessive-force claim, that would not suggest that the court of appeals below erred in declining to extend *Bivens* to a different claim (a false-arrest claim) involving materially different facts (allegedly false statements in support of an arrest and a criminal complaint). Accordingly, no reasonable prospect exists that this Court's decision in *Boule* will affect the outcome of this case.

b. None of the remaining cases that petitioner cites (Pet. 15-16) even confronted the question whether *Bivens* properly provided a cause of action. Instead, in each of those cases, the courts of appeals considered whether federal officials were entitled to qualified immunity for Fourth Amendment claims that were brought under *Bivens* or whether those claims could otherwise proceed. Those cases did not determine whether the claims were appropriately brought under *Bivens* in the first instance, apparently because the de-

fendants in each case did not challenge the existence of a *Bivens* cause of action.

What is more, none of those cases involved a false-arrest claim analogous to petitioner's claim. See *Pagán-González* v. *Moreno*, 919 F.3d 582, 586-587, 590-602 (1st Cir. 2019) (finding (1) that the defendants were not entitled to qualified immunity from a Fourth Amendment claim alleging that they had obtained consent to enter the plaintiff's home and search his computer under false pretenses, and (2) that the defendants were entitled to qualified immunity from a Fourth Amendment malicious-prosecution claim alleging that they relied solely on evidence obtained in an unlawful search when arresting and charging the plaintiff); *McLeod* v. *Mickle*, 765 Fed. Appx. 582, 585 (2d Cir. 2019) (per curiam) (noting that "[t]he sole issue on appeal is whether [the plaintiff] plausibly alleged that [the defendant] violated the Fourth Amendment by prolonging [the plaintiff]'s traffic stop beyond the time necessary to issue a citation" and finding that the defendant was not entitled to qualified immunity at the motion-to-dismiss stage); *Bryan* v. *United States*, 913 F.3d 356, 361-363 (3d Cir. 2019) (holding that the defendants were entitled to qualified immunity from Fourth Amendment claims arising out of searches of cruise-ship cabins that occurred at the United States' border); *Harvey* v. *United States*, 770 Fed. Appx. 949, 954 (11th Cir. 2019) (per curiam) (finding that the plaintiff's claim that his Fourth Amendment rights were violated by the denial of access to his storage unit was not barred by issue preclusion). There is therefore no indication that any of those courts of appeals would have held that *Bivens* provides a cause of action to support petitioner's claim,

and further review of the court of appeals' fact-intensive resolution of petitioner's claim is unwarranted.

c. To the extent that petitioner suggests that there is disagreement among the courts of appeals about whether *Bivens* provides a cause of action in the context of "individual instances of law enforcement overreach in violation of the Fourth Amendment," Pet. 12 (emphasis omitted), petitioner has not identified any disagreement that merits this Court's review. That courts have reached different results in the context of different Fourth Amendment claims based on different facts is consistent with this Court's instruction that "[a] claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized" as long as the claim is "'different in a meaningful way from previous *Bivens* cases decided by this Court.'" *Hernández*, 140 S. Ct. at 743 (citation omitted). And, as discussed, see pp. 16-19, *supra*, none of the decisions on which petitioner relies suggests that any other court of appeals would have permitted petitioner's claim to proceed under *Bivens*.

4. In all events, review is unwarranted at this time because the decision below is interlocutory. See, *e.g.*, *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893). Although the court of appeals reversed the district court's order to the extent that it permitted petitioner's *Bivens* claim to proceed, the court of appeals remanded the case to permit the district court to determine whether respondent was acting under color of state law, which might permit petitioner's constitutional claim to proceed under Section 1983. Pet. App. 15a.

Under this Court's ordinary practice, the interlocutory posture of a case "alone furnishe[s] sufficient ground for * * * denial." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded to the district court "is not yet ripe for review by this Court"). If the district court finds that petitioner's Fourth Amendment claim cannot proceed under Section 1983, and if that determination is upheld in any subsequent appeal, petitioner will be able to raise her current claim, together with any other claims that may arise in those subsequent proceedings, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought after the most recent" judgment). This case presents no occasion for the Court to depart from its usual practice of awaiting final judgment before deciding whether further review is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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