No. 15-16410

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARACELI RODRIGUEZ, individually and as the surviving mother and personal representative of J.A.,

Plaintiff-Appellee,

v.

LONNIE SWARTZ, Agent of the U.S. Border Patrol,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Arizona, Tucson
Case No. 4:14-cv-02551-RCC

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF AFFIRMANCE

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STATEMENT OF CONSENT

Both parties have consented to the filing of this amicus brief.

INTEREST OF AMICI CURIAE

Amici curiae are Michael P. Allen, Associate Dean for Academic Affairs and Professor of Law at Stetson University College of Law; Erwin Chemerinsky, Dean and Distinguished Professor of Law at the University of California, Irvine School of Law; Lumen Mulligan, Earl B. Shurtz Research Professor of Law at the University of Kansas School of Law; Edward Purcell, Joseph Solomon Distinguished Professor of Law at New York Law School; Alexander Reinert, Professor of Law at Benjamin N. Cardozo School of Law; Caprice Roberts, Professor of Law at Savannah Law School; David Rudovsky, Senior Fellow at the University of Pennsylvania Law School; Andrew Siegel, Associate Dean for Planning and Strategic Initiatives and Associate Professor of Law at the Seattle University School of Law; Adam Steinman, Professor of Law at the University of Alabama School of Law; Joan Steinman, Distinguished Professor of Law at the Chicago-Kent College of Law; Stephen Vladeck, Professor of Law at American University Washington College of Law; and Howard M. Wasserman, Professor of Law at Florida International University College of Law. Amici are legal scholars and law professors who research, write, and teach in the areas of constitutional law, federal courts, and civil procedure. Amici have studied extensively the

doctrine of qualified immunity and its interaction with the extraterritorial application of constitutional rights, as well as the jurisdiction of the federal courts.

Amici submit this amicus curiae brief pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-2(a).[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici certify that no party's counsel authored this brief in whole or in part. No person other than amici or their counsel contributed money intended to fund preparation or submission of this brief.

INTRODUCTION

Amici file this brief to highlight two crucial issues for this Court. The first concerns the facts on which an officer may rely in asserting qualified immunity at the motion-to-dismiss stage. The second concerns the scope of this Court's jurisdiction on an interlocutory appeal of a denial of qualified immunity.

First, Officer Swartz, the defendant-appellant, may not rely on J.A.'s non-citizenship in arguing that no "clearly established" constitutional right was violated by his conduct, because (taking the allegations of the complaint in the light most favorable to the plaintiff) Officer Swartz did not know or assume that J.A. was a non-American without any significant ties to the United States at the time he used lethal force. Nor, in any event, would any such assumption have been reasonable. Qualified immunity is intended to shield officers from liability if they can demonstrate that they acted reasonably in light of the circumstances that informed their conduct. That purpose is not served by allowing an officer to escape liability based on a fact that did not form the basis for the officer's actions and only became known later. An officer cannot claim to have acted reasonably on the basis of a fact that he did not know and could not reasonably have assumed at the time he acted.

With regard to the second question, whether this Court has jurisdiction to review whether the plaintiff-appellee, Mrs. Rodriguez, possesses a cause of action

under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court need not address the issue. Officer Swartz has not disputed that Mrs. Rodriguez possesses a cause of action and thus has waived any argument otherwise. Nevertheless, if this Court considers the issue despite Officer Swartz's waiver, the Court should determine, contrary to the government's position, that it lacks jurisdiction to consider whether Mrs. Rodriguez has a cause of action. This Court has jurisdiction to review the District Court's denial of qualified immunity by virtue of the collateral order doctrine, which permits the interlocutory appeal of such denials. This Court has held that on such an interlocutory appeal it may take jurisdiction over both the qualified immunity issue and any issues that are inextricably intertwined with the qualified immunity issue. But the question whether the plaintiff has a damages cause of action under *Bivens* is not inextricably intertwined with the question whether an officer has qualified immunity. The qualified immunity inquiry focuses on whether the officer violated a clearly established constitutional right; the *Bivens* inquiry focuses on the entirely separate question whether the plaintiff is entitled to sue in federal court for damages for that violation. This Court has accordingly previously held that it lacks jurisdiction, on the interlocutory appeal of a denial of qualified immunity, to decide whether a plaintiff possesses a *Bivens* damages action.

To support jurisdiction, the government rests on the fact that the Supreme Court has disagreed in dicta in a single footnote in one case. But the Court did so in a different procedural posture, and it has since signaled that it may think that dicta ill-considered. If this Court overlooks Officer Swartz's waiver of this issue, it should therefore hold that it lacks jurisdiction in these circumstances to consider whether a plaintiff possesses a damages cause of action under *Bivens*.

ARGUMENT

I. OFFICER SWARTZ MAY NOT INVOKE QUALIFIED IMMUNITY BASED ON J.A.'S STATUS AS A NON-CITIZEN.

A. When arguing that a plaintiff's constitutional rights were not "clearly established" for qualified immunity purposes, an officer may rely only on facts that reasonably informed the officer's conduct at issue.

In his opening brief, Officer Swartz contends that he is entitled to qualified immunity because it was not clearly established at the time of J.A.'s death that the Fourth Amendment protected "an alien who had no significant voluntary connection to, and was not in the United States when the alleged misconduct occurred." Appellant's Opening Br. 6. Officer Swartz thus assumes that he can rely on J.A.'s citizenship status in advancing his qualified immunity defense. That assumption is incorrect. Rather, an officer cannot rely on an individual's citizenship status if the officer did not know or reasonably assume that status at the time of the alleged unconstitutional conduct.

The qualified immunity inquiry consists of two steps. First, the court must determine "whether the officer's conduct violated a constitutional right." *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005). Second, if such a violation has been shown, the court "must next consider whether that right was clearly established at the time the alleged violation occurred." *Id.* This two-step inquiry "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

It is the second step of the qualified immunity inquiry—the "clearly established" requirement—that operates to shield officers from such "harassment" and "distraction" when their conduct is "reasonabl[e]." *Id.* That prong of the qualified immunity analysis is necessary to lessen "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Anything less would threaten to "unnecessarily paralyze [officers'] ability to make difficult decisions in challenging situations." *Mueller v. Auker*, 576 F.3d 979, 993 (9th Cir. 2009). The "clearly established" prong also ensures that government officials can "reasonably anticipate when their conduct may give rise to liability for damages." *Filarsky v. Delia*, 132 S. Ct. 1657, 1666 (2012) (quoting *Anderson*,

483 U.S. at 646). It therefore has "the same objective," and serves the same purpose, as the due process requirement of "fair warning" before criminal liability may be imposed. *See United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

For these reasons, courts evaluate whether an officer's conduct violated "clearly established" rights based on the circumstances known to the officer at the time he or she acted. As the Supreme Court explained in *Saucier v. Katz*, 533 U.S. 194 (2001), the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Id.* at 202 (emphasis added), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009); *see also Anderson*, 483 U.S. at 641 (qualified immunity applies if reasonable officer, "in light of clearly established law *and the information the . . . officers possessed*," could have thought the action lawful (emphasis added)). That rule makes good practical sense: an officer will not be judged against, but also cannot claim to have been acting reasonably based on, facts he did not know and had no sound basis for assuming.

Of course, that does not mean officers must know facts to a scientific certainty before they may act on them—but they must show that their factual assumptions were reasonable. "The protection of qualified immunity applies" even when "the government official's error is . . . a mistake of fact . . . ." *Pearson*, 555

U.S. at 231 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)). An officer may therefore request that a reviewing court take into account factual assumptions (even if incorrect) that informed the officer's actions. At the same time, the qualified immunity inquiry focuses on what a "*reasonable* officer" would do "in the situation he confronted." *Saucier*, 533 U.S. at 202. Accordingly, courts need only take account of "reasonable" factual assumptions that informed the officer's allegedly unconstitutional action. For example, if an officer used deadly force because he reasonably assumed a suspect had a gun in his hand, the court would assess the officer's actions against that backdrop. That is true even if the officer was not *certain* that it was a gun at the time—and even if it turns out to be a beer bottle. *See Slattery v. Rizzo*, 939 F.2d 213, 216-17 (4th Cir. 1991) (Powell, J., by des'g); *see also Mena v. City of Simi Valley*, 226 F.3d 1031, 1037 (9th Cir. 2000) (granting qualified immunity because officers did not know residence was a multi-unit dwelling requiring a broader warrant). The law does not expect officers to be clairvoyant.

By the same token, however, a government official may not invoke qualified immunity by relying on facts that he did not know, and could not reasonably have assumed, at the time of the allegedly unconstitutional action. *See Cooper v. Sheehan*, 735 F.3d 153, 159-60 & n.10 (4th Cir. 2013) (denying officers qualified immunity when they "predicated their use of deadly force" on "unreasonable"

factual "assumptions" regarding the plaintiff's state of mind). Were it otherwise, qualified immunity would protect officials who, at the time they act, are "plainly incompetent or . . . knowingly violate the law," merely because of the fortuity that later-discovered facts could have justified their conduct had they known those facts. *Hope v. Pelzer*, 536 U.S. 730, 752 (2002) (internal quotation marks omitted). That would not serve the purposes of the qualified immunity doctrine. Just as a plaintiff cannot benefit from hindsight when later-discovered facts cast doubt on an officer's actions that seemed reasonable at the time, so too an officer cannot benefit from hindsight when later-discovered facts could justify actions that were unreasonable based on the facts known to the officer at the time.

This Court's decision in *Moreno* applies this framework to an officer's lack of knowledge concerning a plaintiff's status. *See* 431 F.3d 633. In *Moreno*, two police officers detained and searched the plaintiff; the officers learned shortly thereafter that the plaintiff was on parole and had an outstanding arrest warrant. *Id.* at 636-37. When the plaintiff sued the officers alleging a Fourth Amendment violation, the officers responded that, "because of his parole status and his outstanding arrest warrant," "it was not clearly established that [the plaintiff] had any right to be free from suspicionless searches." *Id.* at 642. In other words, the officers—much like Officer Swartz in this case—contended that the constitutional rights of someone of the plaintiff's "status" were not clearly established, despite

having learned of that status *after* the challenged conduct.

But this Court rejected the officers' contention. Whether an officer "was on notice that his conduct was unlawful in a particular instance," for purposes of qualified immunity, turns on "'the circumstances presented to [the] officer.'" *Id.* (quoting *Saucier*, 533 U.S. at 209 (alteration in original)). It was "uncontested" that the officers "did not know of [the plaintiff's] parole status and his outstanding arrest warrant at the time they searched and seized him." *Id.* Accordingly, this Court held that the officers could not rely on "those circumstances" to "justify their conduct" because they did not "*know*" of those circumstances before acting. *Id.* (emphasis added). Notably, with respect to an individual's parole status or outstanding warrant, the Court seemingly left no room for officers to claim that they had reasonably assumed those facts. *Cf. Samson v. California*, 547 U.S. 843, 857 n.5 (2006) ("Under California precedent, we note, an officer would not act reasonably in conducting a suspicionless search absent *knowledge* that the person stopped for the search is a parolee." (emphasis added)).

The Seventh Circuit held to the same effect with respect to an inmate's status in *Currie v. Chhabra*, 728 F.3d 626 (7th Cir. 2013). There, the defendants sought qualified immunity on the ground that they were entitled to assume an inmate's status—as a pretrial detainee or convicted prisoner—and then to "calibrate the level of medical care they provide . . . based on [that assumption],

taking advantage of the right to be sloppy where the [constitutional] standard is lower" for individuals of the inmate's assumed status. *Id.* at 632. The court emphatically rejected that argument. If "the defendants really [did] undertake such a crass triage," the court warned, "we would expect them to exercise particular care in sorting the jail's residents into the proper constitutional camps." *Id.* at 633. If the officers acted before exercising such care, they would not be entitled to qualified immunity if they made a mistake regarding an inmate's status, as "their failure to ascertain [the] correct status [could not] be characterized as a 'reasonable' mistake." *Id.* The court therefore denied the defendants' qualified immunity claim.

As *Moreno* and *Currie* demonstrate, an officer seeking to justify his conduct as reasonable under clearly established law cannot rely on facts, such as the plaintiff's status, that he neither knew nor reasonably assumed at the time of the challenged conduct.

B. J.A.'s citizenship status did not reasonably inform Officer Swartz's decision to use deadly force.

Because qualified immunity is an affirmative defense, the *officer* bears the burden of proving that his conduct was "reasonable." *See LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000). Yet at the motion-to-dismiss stage, the plaintiff's "allegations of material fact are taken as true and construed in the light most favorable to" the plaintiff. *Stapley v. Pestalozzi*, 733 F.3d 804, 809 (9th Cir. 2013)

(internal quotation marks omitted). Thus, to prevail on a motion to dismiss due to qualified immunity, an officer must establish that his conduct was "reasonable" even if the plaintiff's allegations are assumed to be true and construed in the light most favorable to the plaintiff. Moreover, at this stage, an officer's claim to qualified immunity cannot rest on facts asserted by the officer that the plaintiff did not allege.

Here, Mrs. Rodriguez alleged that Officer Swartz "did not know whether J.A. was a U.S. citizen or whether he had significant contacts with the United States" at the time of the shooting. *See* First Am. Compl. and Demand for Jury Trial ¶ 17 ("Am. Compl.") (ER 55). Construing those allegations in the light most favorable to Mrs. Rodriguez, the District Court correctly stated: "Swartz did not know at the time he shot . . . whether J.A. was a United States citizen or [not], and if J.A. had significant voluntary connections to the United States. It was only *after* Swartz shot J.A. and learned of J.A.'s identity as a Mexican national that he had any reason to think he might be entitled to qualified immunity." *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1040 (D. Ariz. 2015) (emphasis added) (internal citation omitted) (ER 22). Accordingly, Officer Swartz is not entitled to rely on J.A.'s citizenship as the basis for claiming qualified immunity.

Whether Officer Swartz in theory could have reasonably assumed J.A.'s citizenship prior to firing at J.A. is therefore irrelevant at this stage of the

proceedings—Mrs. Rodriguez's allegations, construed in the light most favorable to her, foreclose any argument that Officer Swartz in fact "assumed" J.A.'s citizenship prior to shooting J.A. Because (taking the allegations of the complaint as true) that assumption did not inform Officer Swartz's action, this Court must resolve Officer Swartz's claim of qualified immunity without analyzing whether a reasonable officer could have made that assumption.[2]

In any event, even if Officer Swartz had shot J.A. on the basis of an assumption about J.A.'s citizenship, that assumption would have been patently unreasonable. This Court has repeatedly held that, like an individual's parole status or inmate status, an individual's citizenship status cannot reasonably be assumed based on nothing more than his or her appearance, even when that individual is essentially at the border between Mexico and the United States. In *Chavez v. United States*, 683 F.3d 1102 (9th Cir. 2012), this Court denied qualified immunity to an officer who had (allegedly) stopped a van near the border "principally" because of the "Latin, Hispanic, or Mexican appearance" of its occupants, explaining that "[s]tanding alone, apparent Mexican ancestry, even in the border area," does not justify a "reasonable" belief that a vehicle's occupants

[2] Relying on what Officer Swartz in particular knew or assumed at the time of the allegedly unconstitutional action does not render this a subjective inquiry. *See Mendez v. Cty. of L.A.*, 815 F.3d 1178, 1190 (9th Cir. 2016) (noting that assessing an officer's actions under the Fourth Amendment based on "the information they had at the time, as confirmed by the conclusions they reached on the scene," constitutes an "objective, not subjective," inquiry).

are aliens. *Id.* at 1111-12 (internal quotation marks omitted) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975)); *see also United States v. Mallides*, 473 F.2d 859, 860 (9th Cir. 1973) ("It is impossible to determine from looking at a person of Mexican descent whether he is an American citizen [or not]."); *Brignoni-Ponce*, 422 U.S. at 886 (noting that "[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry").

The fact that the victim in this case was on the Mexican side of the border, rather than the American side, makes no difference; presuming the citizenship of an individual near the border in Mexico is just as unreasonable as doing so near the border in the United States. *See* Am. Compl. ¶ 9 (ER 53). J.A. easily could have been, for example, one of the millions of American citizens who regularly travel to northern Mexico to visit family, conduct business, or travel. *See* Am. Compl. ¶ 17 (ER 55) (noting that J.A.'s grandmother, not a U.S. citizen, lived in Arizona but often cared for J.A. in Nogales, Mexico); *Rodriguez*, 111 F. Supp. 3d at 1036 (ER 15) (finding that J.A. had a substantial voluntary connection to the United States because J.A. lived "within the region formerly called 'ambos Nogales' . . . once adjacent cities flowing into one-another, now divided by a fence").

Moreover, Officer Swartz had no basis for assuming not only that J.A. was Mexican, but also that he had no significant voluntary connection with the United

States, merely because he was on the Mexican side of the border. The complaint does not allege that Officer Swartz knew *anything* about J.A. prior to this encounter. J.A. could easily have been a Mexican citizen with legal permanent residence in the United States, or one who had resided with his family in the United States for a prolonged period.

Because Officer Swartz had no knowledge of J.A.'s status and no reasonable basis for assuming anything about it, he cannot rely on that status in invoking qualified immunity. That conclusion is underscored by the fact that this case involves the use of deadly force.[3] *Brignoni-Ponce*, *Mallides* and *Chavez* all held that an assumption as to an individual's citizenship based on appearance alone cannot even constitute the reasonable suspicion necessary for a traffic stop. *Brignoni-Ponce*, 422 U.S. 873; *Chavez*, 683 F.3d 1102; *Mallides*, 473 F.2d 859. This was no traffic stop. The facts as alleged by Mrs. Rodriguez are that Officer Swartz used deadly force against J.A., without provocation. Even assuming that before he did so, Officer Swartz made the cold-blooded calculation to use unjustifiable deadly force because he assumed J.A. was a Mexican citizen, that assumption—whether correct or not—was unreasonable. As the Seventh Circuit

[3] It is well-established that the reasonableness of an officer's use of force must be judged against the severity of that force. When assessing an excessive-force claim under the Fourth Amendment, for example, federal courts "balance the amount of force applied against the need for that force." *Bryan v. MacPherson*, 630 F.3d 805, 823-24 (9th Cir. 2010) (quoting *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003)).

explained in *Currie*, government officials cannot "reasonabl[y]" assume an individual's status, presume that status renders the individual subject to a "lower" constitutional standard, and then deliberately "tak[e] advantage of the right to" harm the individual under that lower standard. 728 F.3d at 632.

For these reasons, this Court should not consider J.A.'s citizenship in determining whether Officer Swartz's actions were protected under the qualified immunity doctrine—that is, in determining whether the constitutional right at issue was "clearly established."[4]

II. THIS COURT LACKS JURISDICTION TO DETERMINE WHETHER MRS. RODRIGUEZ POSSESSES A DAMAGES CAUSE OF ACTION UNDER *BIVENS*.

The government contends in its Amicus Brief that this Court "should not

[4] *Moreno* also held that the officers could not rely on the plaintiff's parole status when disputing whether there was a constitutional violation *at all*, under the first step of the qualified immunity analysis. *See Moreno*, 431 F.3d at 641 ("[P]olice officers cannot retroactively justify a suspicionless search and arrest on the basis of an after-the-fact discovery of an arrest warrant or a parole condition."). That was because, under the Fourth Amendment, an officer's reasonable suspicion justifying a search or seizure must be based on the facts known to the officer at the time. *See id.* at 639-40; *see also Mendez*, 815 F.3d at 1190 ("A search cannot be considered reasonable based on facts that 'were unknown to the officer at the time of the intrusion.'" (quoting *Moreno*, 431 F.3d at 639)).

The same is not necessarily true of citizenship status. Whether J.A. possessed Fourth Amendment rights *may* be affected by his citizenship status, even if Officer Swartz was unaware of that status. *See* Plaintiff-Appellee's Answering Br. 20-22, ECF No. 45. The key point here, however, is that an officer may *not* rely on an individual's unknown citizenship status for purposes of the "clearly established" inquiry, because that inquiry relates only to whether the officer is entitled to immunity, not to whether the plaintiff has a constitutional right.

fashion a new damages action" under *Bivens*, 403 U.S. 388, because this case "implicates national-security and diplomatic sensitivities." *See* Amicus Curiae Brief of the United States in Support of Reversal 20, ECF No. 36. The government assures this Court that it "may consider the propriety of implying a *Bivens* action at all in addition, or as an alternative, to the qualified-immunity question." *Id.* at 15 n.3. But Officer Swartz utterly failed to raise the question of the availability of a *Bivens* cause of action in his opening brief. He has therefore waived that issue, and it is not properly before this Court. Accordingly, the Court should reject the government's invitation to opine on the issue. But if the Court were to overlook Officer Swartz's waiver for some reason, it should hold, contrary to the government's position, that it lacks jurisdiction to determine whether Mrs. Rodriguez possesses a damages cause of action under *Bivens*.

A. Whether a plaintiff possesses a damages cause of action under *Bivens* is not within this Court's "pendent appellate jurisdiction" on interlocutory appeal of a denial of qualified immunity.

District court orders denying qualified immunity are within the narrow class of collateral orders that may be immediately appealed before final judgment. The "final judgment" rule codified at 28 U.S.C. § 1291 generally bars interlocutory appeals, embodying the congressional judgment that "'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (quoting

Will v. United States, 389 U.S. 90, 96 (1967)). However, under the collateral order doctrine, "a 'small class' of collateral rulings," "although they do not end the litigation, are appropriately deemed 'final.'" *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009). Qualified immunity denials fall within that small class. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Mueller*, 576 F.3d at 987.

However, just because a Court of Appeals may take jurisdiction over the question whether an officer is entitled to qualified immunity does not mean the court can *also* take jurisdiction over, and decide, any other question in the case. The collateral order doctrine confers limited jurisdiction on the Court of Appeals. Indeed, the Supreme Court has "not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will v. Hallock*, 546 U.S. 345, 350 (2006). When it first announced that qualified immunity denials are immediately appealable collateral orders, the Supreme Court therefore cautioned that the "question of immunity is separate from the merits of the underlying action." *Mitchell*, 472 U.S. at 528.

True, the Supreme Court has recognized that, beyond the qualified immunity question itself, Courts of Appeals have at times exercised "pendent appellate jurisdiction" over a very narrow class of subsidiary questions that would not normally, by themselves, be subject to interlocutory review. *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35 (1995). But the Supreme Court has warned

that if such jurisdiction exists at all, it encompasses *only* those issues "inextricably intertwined with [the district court's] decision to deny the individual defendants' qualified immunity motions," or which it is "necessary" to review "to ensure meaningful review" of the qualified immunity determination. *Id.* at 51. "[L]oosely allowing pendent appellate jurisdiction," the Court explained, "would encourage parties to parlay" qualified immunity denials "into multi-issue interlocutory appeal tickets." *Id.* at 49-50.

This Court has "consistently interpreted" *Swint*'s "inextricably intertwined" test "very narrowly." *Cunningham v. Gates*, 229 F.3d 1271, 1284 (9th Cir. 2000). In the qualified immunity context, a pendent issue is "inextricably intertwined" with the qualified immunity question only if the court "must decide the pendent issue in order to review" the claim of qualified immunity, or if "resolution of the [qualified immunity issue] . . . necessarily resolves the pendent issue." *Id.* at 1285 (internal quotation marks omitted); *see also Huskey v. City of San Jose*, 204 F.3d 893, 905 (9th Cir. 2000) ("[A] pendent appellate claim can be regarded as inextricably intertwined with a properly reviewable claim on collateral appeal only if the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." (quoting *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995)).

Under that test, the question whether Mrs. Rodriguez possesses a cause of action under *Bivens* does not fall within this Court's pendent jurisdiction: It need not be decided in order to review Officer Swartz's claim of qualified immunity, and will not necessarily be resolved by determining his entitlement to immunity.

The qualified immunity inquiry focuses on the scope of the asserted constitutional right, looking at whether that right was clearly established. But the question whether to imply a constitutional damages remedy under *Bivens* for that constitutional violation is entirely separate. Even when the defendant has violated the plaintiff's constitutional rights, a "freestanding damages remedy for [that] claimed constitutional violation" is "not an automatic entitlement." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Whether to imply such a remedy turns not on the scope of the underlying constitutional right, but on wholly different considerations, such as whether there is "any alternative, existing process" that provides compensation to the plaintiff and deters future violations, or whether there are "special factors" that "counsel[] hesitation" before authorizing a new cause of action. *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2012) (quoting *Wilkie*, 551 U.S. at 550)). "[T]he availability of a damages action under the Constitution for particular *injuries* . . . is [thus] a question logically distinct from immunity to such an action on the part of particular *defendants*, [and] the *Bivens* inquiry . . . is analytically distinct from the question of official immunity from *Bivens* liability."

United States v. Stanley, 483 U.S. 669, 684 (1987). A constitutional violation, even a clearly established one, does not always go hand-in-hand with a *Bivens* damages remedy.

Thus, whether there is a *Bivens* cause of action for damages involves the application of legal standards that are entirely distinct from those governing qualified immunity. *See Cunningham*, 229 F.3d at 1285 ("Two issues are not 'inextricably intertwined' if we must apply different legal standards to each issue."). Moreover, resolving the qualified immunity question certainly would not "necessarily resolve[]" the *Bivens* question as well; rather, if Officer Swartz is not entitled to qualified immunity, an entirely distinct inquiry would be required to determine whether Mrs. Rodriguez may sue. As a result, the damages cause of action question is not within this Court's pendent appellate jurisdiction.

B. A footnote in the Supreme Court's opinion in *Wilkie v. Robbins*, 551 U.S. 537 (2007), should not be read to grant this Court that jurisdiction.

In arguing that this Court may review whether Mrs. Rodriguez possesses a damages cause of action, the government points to the Supreme Court's decision in *Wilkie*, 551 U.S. 537. There, in a two-sentence footnote, the Court stated that the "recognition of [an] entire cause of action" under *Bivens* was "directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal," and so "the Court of Appeals" in *Wilkie* "had jurisdiction over [that]

issue." *Id.* at 549 n.4 (internal quotation marks omitted).

Prior to *Wilkie*, this Court had repeatedly held that the question whether to infer a damages cause of action under *Bivens* does not fall within this Court's pendent jurisdiction while reviewing a qualified immunity denial. *See Sissoko v. Rocha*, 440 F.3d 1145, 1154 (9th Cir. 2006), *adopted by superseding opinion*, 509 F.3d 947 (9th Cir. 2007); *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 871 (9th Cir. 1992); *Todd v. United States*, 849 F.2d 365, 368 (9th Cir. 1988).

Since *Wilkie*, this Court has not yet (in any published decision) expressly grappled with and read *Wilkie* as overruling its long-standing holdings in *Sissoko*, *Pelletier*, or *Todd*, so as to grant jurisdiction in circumstances like those present here.[5] Indeed, the panel in *Sissoko* issued a superseding opinion that adopted its pendent-jurisdiction holding even after *Wilkie* was decided. *See* 509 F.3d at 948; *Sissoko*, 440 F.3d at 1154 (original panel opinion's jurisdictional holding); Plaintiff-Appellee's Answering Br. 20-22, ECF No. 46-47.

This Court did recently cite *Wilkie*'s footnote in *Ministerio Roca Solida v. McKelvey*, stating that, on an "interlocutory appeal to challenge the denial of

[5] *But see Martin v. Naval Criminal Investigative Service*, 539 F. App'x 830, 831-33 (9th Cir. 2013) (citing *Wilkie* and finding jurisdiction in these circumstances); *Yowell v. Abbey*, 532 F. App'x 708, 710-11 (9th Cir. 2013) (concluding on interlocutory appeal of denial of qualified immunity that no *Bivens* action existed, but not addressing the court's jurisdiction to do so).

qualified immunity," it "by necessity" had jurisdiction to address whether the defendant, a government official, could properly be sued under *Bivens* in her personal capacity. *See* No. 13-16808, 2016 WL 2342127, at *2 (9th Cir. May 4, 2016) (citing *Wilkie*, 551 U.S. at 549 n.4). The Court held that, because the plaintiff sought only injunctive and declaratory relief for an ongoing violation of law, the plaintiff's allegations failed to state a claim that the defendant had violated the Constitution in her personal capacity. *See id.* at *5. In essence, the Court held that the individual defendant was not personally involved in the alleged ongoing constitutional violation, and that the United States was therefore the proper defendant for obtaining equitable relief. *See id.* ("[O]nly the United States—through its officers—has the power to take the action that [plaintiff] seeks . . . McKelvey as an individual has no authority to do so."). The question of a defendant's personal involvement in a constitutional violation is arguably inextricably intertwined with the qualified immunity issue of whether it is the *defendant*'s conduct that violated the Constitution. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 673 (2009) (Court of Appeals had jurisdiction to review "whether the facts pleaded establish" that the defendant's conduct violated the Constitution).[6] But

[6] *Iqbal* and *Hartman v. Moore*, 547 U.S. 250 (2006), both held that certain issues fall within the Court of Appeals' collateral-order jurisdiction when reviewing a denial of qualified immunity. But neither case supports the exercise of jurisdiction in this case. *Hartman* stated that the Court of Appeals may review whether a plaintiff must plead the absence of probable cause when bringing a First

Ministerio Roca Solida does not address whether jurisdiction would be proper in this case. The question the government asks this Court to address here is whether *Bivens* provides a damages cause of action for the constitutional *injury* alleged by the plaintiff—not whether the plaintiff's allegations make out a claim that a particular *defendant*'s conduct violated the Constitution. *Cf. Stanley*, 483 U.S. at 684 (stating that the "availability of a damages action . . . for particular *injuries*" is "a question logically distinct from immunity to such an action on the part of particular *defendants*").

Nor does *Wilkie*'s footnote itself justify jurisdiction here. First, that footnote is not directly on point, because *Wilkie* addressed the Court of Appeals' jurisdiction in a context wholly unlike that present in this case. The Court of Appeals in *Wilkie* had actually *not* addressed the existence of a *Bivens* cause of action on interlocutory appeal of the denial of qualified immunity, as the government requests this Court do in this case. Rather, the Tenth Circuit in *Wilkie* addressed the *Bivens* question during a *separate* appeal, which followed from an

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Amendment claim for retaliatory inducement of prosecution. *See Hartman*, 547 U.S. at 257 n.5. But that pleading question also defined the scope of the underlying First Amendment right, and so in exercising that jurisdiction the Court of Appeals would only be addressing the first step of the typical qualified immunity inquiry. In *Iqbal*, the Court similarly held that Courts of Appeals may examine whether the facts as alleged by the plaintiff are sufficient to make out a constitutional violation—again, a question encompassed by the first step of the qualified immunity analysis. *See Iqbal*, 556 U.S. at 672-75. Here, as previously explained, the *Bivens* question is not encompassed by, or even related to, the qualified immunity analysis.

indisputably final judgment: the district court's dismissal of the plaintiff's complaint for failure to state a claim. *See Robbins v. Wilkie*, 300 F.3d 1208 (10th Cir. 2002). The district court's later denial of qualified immunity gave rise to a second, independent appeal in which the Tenth Circuit did not address whether there was a *Bivens* remedy. *See Robbins v. Wilkie*, 433 F.3d 755 (10th Cir. 2006), *rev'd*, 551 U.S. 537 (2007). Thus, the Court of Appeals indisputably had jurisdiction over the *Bivens* question in *Wilkie*, because it did not arise during an interlocutory appeal. That the Supreme Court found appellate jurisdiction in that context is unremarkable.

Second, the *Wilkie* footnote is dicta. The Supreme Court had no need to affirm the Court of Appeals' jurisdiction, as just explained. And it had no need to refer to its own jurisdiction, because it may elect to take jurisdiction over any issue in a case so long as that case is "in" the Court of Appeals. *See* 28 U.S.C. § 1254. Unlike the Court of Appeals, the Supreme Court's jurisdiction has never been confined by Congress to the review of final judgments. Instead, Section 1254 grants that court the authority to review by certiorari all "[c]ases in the courts of appeals," "before *or* after rendition of judgment or decree." 28 U.S.C. § 1254(1) (emphasis added). A case is properly "in" the Court of Appeals when the Court of Appeals has jurisdiction over a collateral order denying qualified immunity. *See United States v. Nixon*, 418 U.S. 683, 692 (1974) (collateral order was "properly

'in' the Court of Appeals," and the case was thus "properly before [the] Court on the writ of certiorari"). And Section 1254 allows the Court to take jurisdiction over and decide *any* question in the case once it is "in" the Court of Appeals. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982); 17 Charles Alan Wright et al., *Federal Practice & Procedure* § 4036, at 11-12 (3d ed. 2007) ("Once review has been granted, . . . the scope of the matters open for decision is approached entirely as a matter of wise judicial administration within a single system of courts . . . ."). The *Wilkie* Court thus could have chosen to address the *Bivens* question itself irrespective of whether the Court of Appeals in *Wilkie* had jurisdiction to do so.

Third, the Supreme Court has recently signaled that the footnote in *Wilkie* was not only dicta, but perhaps ill-considered dicta. In 2013, the Court heard the case of *Madigan v. Levin*, No. 12-872, in which the Seventh Circuit had addressed whether the plaintiff had a cause of action during the interlocutory appeal of a denial of qualified immunity—just what the government would have this Court do here. *See Levin v. Madigan*, 692 F.3d 607, 611 (7th Cir. 2012). The Court took the case to decide whether the plaintiff had a cause of action. *See* Petition for a Writ of Certiorari i, *Madigan v. Levin*, No. 12-872 (U.S. Jan. 14, 2013), 2013 WL 166411. After the Supreme Court granted certiorari, a group of law professors, including several of the amici in this case, filed an amicus brief urging that the

Seventh Circuit had lacked jurisdiction to address the existence of a cause of action in that posture, and that the Court should therefore vacate that portion of the Seventh Circuit's decision. *See* Brief of Law Professors as Amici Curiae in Support of Respondent, *Madigan v. Levin*, No. 12-872 (U.S. Aug. 5, 2013), 2013 WL 4022092. The case was dismissed as improvidently granted. *See Madigan v. Levin*, 134 S. Ct. 2 (2013) (Mem.). After *Madigan*, this Court should certainly pause before uncritically following *Wilkie*'s footnoted dicta, especially in a posture—addressing the existence of a *Bivens* damages remedy on the interlocutory appeal of a denial of qualified immunity—not actually before the Court in *Wilkie*.

Accordingly, should this Court overlook Officer Swartz's waiver of this issue, it would have to address whether, given *Wilkie* and *Madigan*, it possesses jurisdiction to review whether a *Bivens* damages remedy exists on the interlocutory appeal of a denial of qualified immunity. Careful attention to the narrow scope of this Court's collateral-order jurisdiction makes clear it does not.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,671 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

May 6, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system.

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