No. 15-48

In the Supreme Court of the United States

MUJAHID CARSWELL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LUQMAN A. ABDULLAH, PETITIONER

v.

ANDREW G. ARENA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's civil action for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is barred by the statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is not published in the *Federal Reporter*, but is reprinted at 601 Fed. Appx. 389. The opinion of the district court (Pet. App. 17-41) is not published in the *Federal Supplement*, but is available at 2014 WL 1304725.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2015. A petition for rehearing was denied on April 10, 2015 (Pet. App. 42-43). The petition for a writ of certiorari was filed on July 9, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of the shooting death of decedent Luqman A. Abdullah during a sting operation by the Federal Bureau of Investigation (FBI). Abdullah's estate filed suit against FBI agents involved in the operation under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 2, 19. The district court dismissed the suit as barred by the applicable statute of limitations. *Id.* at 17-41. The court of appeals affirmed. *Id.* at 1-14.

1. On October 28, 2009, FBI agents raided a warehouse in Dearborn, Michigan, to arrest Abdullah and others involved in a conspiracy to receive and sell stolen property. Pet. App. 3. During the operation, four of Abdullah's co-conspirators—including Muhammad Abdul Salaam—surrendered and were arrested. *Id.* at 4, 46. Abdullah, however, did not surrender. He fired his weapon and was killed in an exchange of gunfire with FBI agents. *Id.* at 3-4, 44-45.

Later that day, the Detroit Division of the FBI issued a press release under the names of respondent Andrew G. Arena, then Special Agent in Charge of the FBI's Detroit Division, and two other law enforcement officials. Pet. App. 4, 44. The press release announced that a federal criminal complaint against Abdullah and ten others had been unsealed that day and described the operation conducted to arrest them. *Id.* at 44-45. It stated that the suspects had been ordered to surrender, that four co-conspirators "surrendered and were arrested without incident," and that Abdullah was killed in "[a]n exchange of gun fire" after he "fired his weapon." *Ibid.* The release also

listed Salaam, a 45-year-old resident of Detroit, as among those charged in the complaint. *Id.* at 46.

At the request of Abdullah's family, friends, and political representatives, both the Michigan Attorney General and the United States Department of Justice's Civil Rights Division investigated Abdullah's death. Pet. App. 2, 4, 20-22, 32. The Michigan Attorney General publicly released his report on September 30, 2010. *Id.* at 21. The report concluded that the FBI's use of deadly force against Abdullah was legally justified. *Ibid.* It identified respondent George Nikolopoulos as the leader of the FBI-Detroit SWAT team that had participated in the sting operation, and it disclosed the first names of the four FBI agents who had shot Abdullah, withholding their last names to protect them and their families against possible retaliation. *Id.* at 2 & n.1, 21-22. The Department of Justice released its report on October 13, 2010, also concluding that the use of deadly force against Abdullah was justified. *Id.* at 22.

2. a. On October 25, 2012, more than two years after the reports were issued, Salaam provided a signed affidavit to Abdullah's estate—petitioner in this case—stating that Abdullah had surrendered and had not drawn or fired a weapon at the FBI agents during the October 2009 sting operation. Pet. App. 22-23.[1]

On October 26, 2012, the day after that affidavit was signed, petitioner filed a *Bivens* action against unidentified FBI agents in their individual capacities, alleging wrongful death and violation of Abdullah's

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[1] Salaam pleaded guilty to federal criminal charges in October 2010, and was sentenced to a term of imprisonment. But he was released from prison on October 14, 2011, more than a year before he signed the affidavit. Pet. App. 5 n.3, 31 n.4.

Fourth and Fifth Amendment rights. Pet. App. 5, 23; D. Ct. Doc. 1, at 5-9. The district court ordered the government to enter an appearance on behalf of the unnamed defendants. Pet. App. 23. The government noted that it technically was not a party, but suggested that dismissal may be appropriate because the complaint had not named any real defendants and was barred by the statute of limitations. *Id.* at 5, 23-24. The court then issued an order directing petitioner to show cause why the complaint should not be dismissed as time-barred. *Id.* at 6, 24.

On April 18, 2013, before responding to the show-cause order, petitioner filed an amended complaint naming respondents Arena and Nikolopoulos as defendants in their individual capacities. Pet. App. 6, 24. The complaint also named as defendants four unidentified FBI agents described as the "shooters involved in the tactical operation inside the warehouse that resulted in the death of Abdullah," *id.* at 24, and claimed "that the FBI had fraudulently concealed the existence of a cause of action * * * by lying about whether Abdullah fired on FBI agents and concealing the identities of the FBI agents involved in the operation," *id.* at 6.

b. Respondents moved to dismiss, arguing that the amended complaint was filed outside the applicable three-year statute of limitations; that neither the facts underlying the shooting nor respondents' identities had been fraudulently concealed; and that the amended complaint did not relate back to the original complaint, which had been filed just before the limitations period expired. Pet. App. 6.

The district court granted the motion to dismiss. Pet. App. 17-41. The court explained that, in constitu-

tional tort actions, "the statute of limitations begins to run after the plaintiff knows, or has reason to know, of the injury forming the basis of his action." *Id.* at 25 (citing *Eidson* v. *State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 635 (6th Cir. 2007)). Under that standard, the court concluded, the *Bivens* claim against respondents accrued no later than October 29, 2009, the day after the FBI issued the press release about the shooting. *Id.* at 33. The court explained that the press release and other public statements had "made clear to the public that FBI agents were responsible for the shooting death of Abdullah." *Id.* at 30. The court further concluded that petitioner was not entitled to tolling of the limitations period based on fraudulent concealment, *id.* at 33-37, and that the amended complaint against respondents did not relate back to the original complaint naming only unidentified defendants, *id.* at 26. Accordingly, the court dismissed the amended complaint as barred by the three-year statute of limitations. *Id.* at 37-38, 41.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-14. The court explained that, "[u]nder the discovery rule," a plaintiff's *Bivens* claim accrues when he knows or should know that "he has been hurt and who has inflicted the injury." *Id.* at 8 (quoting *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979)). The court concluded that petitioner knew that information on "the day [Abdullah] was killed: October 28, 2009." *Ibid.* The FBI press release issued that day, the court explained, established "that Abdullah had been injured and that FBI agents had caused the injury," and it provided "the identities of the co-conspirator eyewitnesses." *Ibid.* That information enabled petitioner to "determin[e] within the limita-

tions period whether the injury was a *Bivens* violation." *Ibid.*

The court of appeals rejected petitioner's contention that its claims did not accrue until petitioner learned "that Abdullah's death was wrongful and in violation of his constitutional rights." Pet. App. 8. The court explained that this "Court has rejected that theory of claim accrual in the context of 'medical malpractice, where the cry for a discovery rule is loudest,'" and has instead held that "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Id.* at 8-9 (quoting *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000)). The court reiterated that petitioner knew of the injury and who had caused it "on October 28, 2009," and that this was "not a case where the identity of the [respondents] and at least the possibility that the shooting was wrongful were not known." *Id.* at 9. Because petitioner's amended complaint was filed more than three years after the claims accrued, the court affirmed the dismissal of the complaint as untimely. *Id.* at 14.[2]

ARGUMENT

Petitioner contends (Pet. 10-28) that (1) the court of appeals erred in affirming the dismissal of petitioner's *Bivens* claims as time-barred and (2) this Court's review is warranted to resolve a conflict among the circuits on the rule governing the accrual of *Bivens*

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[2] The court of appeals rejected petitioner's additional arguments that petitioner was entitled to tolling based on fraudulent concealment; that the amended complaint against respondents related back to the original complaint naming unidentified defendants; and that the district court violated procedural requirements under circuit law for dismissing complaints *sua sponte*. Pet. App. 9-14. Petitioner does not renew those arguments in this Court.

claims. Those contentions lack merit. The court of appeals correctly concluded that petitioner's *Bivens* claims accrued on October 28, 2009, the day of Abdullah's death, because petitioner knew or should have known of its injury at that time. There is also no disagreement among the circuits warranting this Court's review. Although the courts of appeals have used slightly different language to describe the accrual rule governing *Bivens* claims, all apply the same basic standard, and petitioner has identified no circuit in which his claims would be timely. The petition should therefore be denied.

1. The court of appeals correctly affirmed the dismissal of petitioner's *Bivens* claims as time-barred.

a. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), 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." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001). Although this Court has not so expressly held, the courts of appeals agree that, as in actions against state and local officials under 42 U.S.C. 1983, the limitations period for bringing "*Bivens* actions is determined by the statute of limitations for personal injury actions in the state where the incident forming the basis of the claim occurred." *King* v. *One Unknown Fed. Corr. Officer*, 201 F.3d 910, 913 (7th Cir. 2000); see, *e.g.*, *Barrett* v. *United States*, 462 F.3d 28, 38 (1st Cir. 2006), cert. denied, 550 U.S. 936 (2007); see also *Wilson* v. *Garcia*, 471 U.S. 261, 280 (1985) (establishing that rule for suits under Section 1983). The applicable limitations period under Michigan law is three years. Pet. App. 9, 25; see *Hardin* v. *Straub*,

490 U.S. 536, 540 (1989) (three-year limitations period applicable to Section 1983 suit arising in Michigan).

"[T]he accrual date of a [*Bivens*] cause of action," however, "is a question of federal law that is *not* resolved by reference to state law." *Wallace* v. *Kato*, 549 U.S. 384, 388 (2007) (so holding for Section 1983 claims). Under federal law, "the 'standard rule' is that a claim accrues 'when the plaintiff has a complete and present cause of action.'" *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1220 (2013) (quoting *Wallace*, 549 U.S. at 388). And in tort cases, to which this Court has looked in the *Bivens* and Section 1983 contexts, "the traditional rule" is that the "cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages." *Wallace*, 549 U.S. at 391 (quoting 1 Calvin W. Corman, *Limitation of Actions* § 7.4.1, at 526 (1991) (Corman)); cf. *Malesko*, 534 U.S. at 66 (describing a *Bivens* claim as a "constitutional tort").

The Court has recognized that a different rule may be appropriate in specific circumstances. The Court has thus applied a judicially created "'discovery rule' exception" in cases of fraud, "where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 644, 651 (2010). And for similar reasons, the Court has applied that discovery rule exception to claims of latent disease and medical malpractice. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 27 (2001); see *United States* v. *Kubrick*, 444 U.S. 111, 122-123 (1979). The Court has also recognized, without endorsing it, the general practice in the federal courts of "apply[ing] a discovery accrual rule when a

statute is silent on the issue." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000); see *TRW*, 534 U.S. at 27.

When it has addressed "the court-created 'discovery rule' exception," *Merck*, 559 U.S. at 651, however, the Court has "been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Rotella*, 528 U.S. at 555. In the malpractice context, for example, the Court has held that a claim accrues under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, "when the plaintiff knows both the existence and the cause of his injury," *Kubrick*, 444 U.S. at 113, not at the later date when the plaintiff also learns "that his injury was negligently inflicted," *id.* at 123. The Court explained that a plaintiff "armed with the facts about the harm done to him * * * can protect himself by seeking advice in the medical and legal community," and that "[t]o excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute." *Ibid.*

b. The court of appeals correctly applied these accrual principles to petitioner's *Bivens* claims. Pet. App. 8-9. The court explained that, "[u]nder the discovery rule," a plaintiff's claims accrue once he "knows 'he has been hurt and who has inflicted the injury.'" *Id.* at 8 (quoting *Kubrick*, 444 U.S. at 122); see *ibid.* (claim accrues "when the plaintiff knew or should have known of the injury which is the basis of his *Bivens* claim") (citation and internal quotation marks omitted). Petitioner knew the relevant facts as of October 28, 2009, the day that Abdullah died. The FBI press release issued that day revealed the injury (Abdullah's death) and its cause (an exchange of gunfire with FBI agents). *Ibid.*; see *id.* at 30 (the FBI's

public statements "made clear to the public that FBI agents were responsible for the shooting death of Abdullah"). The press release also named respondent Arena as the Special Agent in Charge of the FBI's Detroit Division, and it identified co-conspirators who were potential eyewitnesses to the shooting. *Id.* at 8, 44-48.

Accordingly, as the court of appeals determined, this was "not a case where the identity of the defendants and at least the possibility that the shooting was wrongful were not known." Pet. App. 9. To the contrary, the courts below found that the shooting "was a well-publicized and much criticized event," *id.* at 32, and that Abdullah's family and friends were "[s]uspicious of" and "[d]issatisfied with the FBI's account" from the start, prompting them to press for investigations by state and federal authorities, *id.* at 2, 4. Because petitioner knew of its injury and the cause as of October 28, 2009, petitioner had three years from that date to file suit against respondents. *Id.* at 9; see *Hardin*, 490 U.S. at 540. Petitioner did not file its amended complaint, however, until April 18, 2013, well beyond that three-year period. Pet. App. 6. The court of appeals therefore properly affirmed the dismissal of petitioner's *Bivens* claims against respondents as time-barred.

c. In arguing otherwise, petitioner misunderstands the discovery rule. Petitioner contends that the statute of limitations could not have begun to run on October 28, 2009, because petitioner had no reason to believe at that time that Abdullah's death was unlawful and "could not have reasonably discovered the *violation* at issue" within the three-year limitations

period. Pet. 27 (emphasis added).[3] As the court of appeals explained, however, "that theory of claim accrual" is at odds with this Court's precedents applying the discovery rule, Pet. App. 8, which make clear that "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Rotella*, 528 U.S. at 555; see *Barrett*, 462 F.3d at 39 (in suit arising from spouse's death, the limitations period commenced when the "[p]laintiff had either actual knowledge or constructive knowledge of [the] death and sufficient facts to permit a reasonable person to believe that there was a causal connection between the government and" the death) (citation, internal quotation marks, and brackets omitted).

Petitioner's contrary view would undermine the primary justifications for and benefits of a limitations period: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S. at 555. For example, petitioner argued in the court of

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[3] Petitioner draws its formulation of the discovery rule (Pet. 10-11, 13, 27) from language in *Merck* addressing a securities-fraud provision that ties accrual to "discovery of the facts constituting the violation." 28 U.S.C. 1658(b)(1); see *Merck*, 559 U.S. at 637, 653. The Court in *Merck*, however, emphasized that it was "dealing" only with that statute. 559 U.S. at 651; see *id.* at 645 (interpreting the statute as courts do when "legislators have written the word 'discovery' directly into [a] statute"); *id.* at 648 (explaining what the word "'discovery' as used in this statute encompasses"). *Merck* therefore cannot be read as reformulating the "court-created" discovery rule, *id.* at 651, which is keyed to the plaintiff's awareness of its injury. See *Jay E. Hayden Found.* v. *First Neighbor Bank, N.A.*, 610 F.3d 382, 387 (7th Cir. 2010) (describing the statute at issue in *Merck* as an "exception[]" to the "general" principles governing the discovery rule).

appeals that its claims did not accrue until October 25, 2012, because that was when Salaam provided petitioner an affidavit contradicting the FBI's account of Abdullah's death. Pet. C.A. Br. 31. But under that view of the discovery rule, the accrual date for petitioner's claims would be postponed long beyond the three-year period if Salaam came forward with his account in 2015, 2020, or even 2025. Petitioner's position thus engenders the kind of uncertainty, and the risk of stale claims, that limitations periods are designed to avoid. See *Gabelli*, 133 S. Ct. at 1221.

Petitioner also argues (Pet. 18, 23-24) that, although the court of appeals stated that it was applying "the discovery rule," Pet. App. 8, the court actually applied an "inquiry-notice rule" that imposed on petitioner "a duty to investigate." But as petitioner acknowledges (Pet. 18, 21-22), the court of appeals drew the governing standard from the decision in *Kubrick*, 444 U.S. at 122, which this Court has repeatedly identified as applying the discovery rule. See *Merck*, 559 U.S. at 644-645; *TRW*, 534 U.S. at 27; *Rotella*, 528 U.S. at 555-556. And while petitioner points out (Pet. 22) that the court of appeals has elsewhere described *Kubrick* as applying "an inquiry-notice rule," *Hertz* v. *United States*, 560 F.3d 616, 618 (6th Cir.), cert. denied, 558 U.S. 1047 (2009), the Sixth Circuit has since made clear that its use of the term "inquiry notice" is substantively identical to the discovery rule applied by this Court and other courts of appeals—"*i.e.*, discovering the injury and its cause," *Amburgey* v. *United States*, 733 F.3d 633, 636 (6th Cir. 2013). Whatever the label, in short, the court of appeals here applied the correct standard in affirming the dismissal of petitioner's complaint as untimely.

2. Contrary to petitioner's contention (Pet. 10-24), there is no conflict warranting this Court's review on the rule governing the accrual of *Bivens* claims. Every court of appeals to address the issue has applied, with some minor variations in phrasing, the discovery rule set forth in this Court's precedents. Even were there a conflict, moreover, this case would not be a suitable vehicle for resolving it because petitioner's claim would be untimely under the accrual rule applied in every circuit.

a. Petitioner argues (Pet. 12-24) that the courts of appeals are divided over when a *Bivens* cause of action accrues, with six circuits applying the discovery rule, one applying an "injury-occurrence rule," and one applying an "inquiry-notice rule." Petitioner is incorrect.

Every court of appeals to address the question in a precedential opinion has applied to *Bivens* claims (and analogous Section 1983 claims) the discovery accrual rule described in this Court's precedents. See *Barrett*, 462 F.3d at 38-39 (1st Cir.); *Gonzalez* v. *Hasty*, No. 13-2844, 2015 WL 5155150, at *4, *6 (2d Cir. Sept. 3, 2015); *Kach* v. *Hose*, 589 F.3d 626, 634-635 (3d Cir. 2009) (Section 1983); *Nasim* v. *Warden, Md. House of Corr.*, 64 F.3d 951, 955 (4th Cir. 1995) (en banc) (Section 1983), cert. denied, 516 U.S. 1177 (1996); *Brown* v. *Nationsbank Corp.*, 188 F.3d 579, 589-590 (5th Cir. 1999), cert. denied, 530 U.S. 1274 (2000); *Ruff* v. *Runyon*, 258 F.3d 498, 500-501 (6th Cir. 2001); *United States* v. *Norwood*, 602 F.3d 830, 837 (7th Cir. 2010); *Western Ctr. for Journalism* v. *Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000) (per curiam); *Van Tu* v. *Koster*, 364 F.3d 1196, 1199 (10th Cir.), cert. denied, 543 U.S. 874 (2004); *Chappell* v. *Rich*, 340 F.3d 1279,

1283 (11th Cir. 2003) (per curiam) (Section 1983), cert. denied, 540 U.S. 1219 (2004).

In applying the discovery rule, the courts of appeals have at times used somewhat different formulations to describe that rule. Some courts have stated, as did this Court in *Rotella*, that the limitations period starts "when a plaintiff knew or should have known of his injury." 528 U.S. at 553; see, *e.g.*, *Kach*, 589 F.3d at 634; *Ruff*, 258 F.3d at 500-501; *Western Ctr. for Journalism*, 235 F.3d at 1156. Other courts echo the language used in *Kubrick*, where the Court held that an FTCA claim alleging medical malpractice accrues when the plaintiff knows his injury and its cause. 444 U.S. at 122; see, *e.g.*, *Norwood*, 602 F.3d at 837; *Barrett*, 462 F.3d at 38-39; *Van Tu*, 364 F.3d at 1199.

b. Petitioner does not argue that the minor variation in the formulations used by the courts of appeals that apply the discovery rule warrant this Court's intervention. Nor does the single difference between the formulations—a focus on injury, as opposed to injury and its cause—matter in this case. The court of appeals determined, and petitioner does not dispute, that petitioner knew of both its injury and the cause on the same date. Pet. App. 8-9.

Petitioner does assert (Pet. 13-16), however, that review is necessary because two circuits—the D.C. and Fourth Circuits—have adopted a standard materially different from the discovery rule.[4] That is incorrect.

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[4] Petitioner also contends (Pet. 16-19) that the Fifth, Sixth, and Seventh Circuits "[a]re [i]nternally [s]plit" on the governing rule. Pet. 16 (emphasis omitted). Such intracircuit conflicts would not warrant this Court's review even if they existed. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). But there

As an initial matter, petitioner errs (Pet. 11, 16, 25) in attributing "an injury-occurrence rule" to the D.C. Circuit based on *Zhao* v. *Unknown Agent of Central Intelligence Agency*, 411 Fed. Appx. 336 (2010) (per curiam). According to petitioner (Pet. 11, 16), under that rule, the limitations period runs from the time that the injury occurred, regardless of the plaintiff's knowledge. *Zhao*, however, is a non-precedential opinion that summarily affirmed a district court decision that had not addressed the timeliness issue. 411 Fed. Appx. at 336-337 (stating without analysis that the plaintiff's "claims under *Bivens* against the unknown CIA agent are barred by the applicable statute of limitations," and citing *Wallace*, 549 U.S. at 388, and the limitations provision in the D.C. Code); see *Zhao* v. *Unknown CIA Agent*, No. 09-cv-1986, 2009 WL 3835073 (D.D.C. Nov. 16, 2009). The court of appeals in *Zhao* therefore did not adopt an injury-occurrence rule, or for that matter any other accrual rule, for *Bivens* claims. The issue instead appears to remain open in the D.C. Circuit.

Petitioner also contends (Pet. 13-15) that the Fourth Circuit adopted an "inquiry-notice rule" in *Nasim*, a Section 1983 case. 64 F.3d at 955. The plaintiff in *Nasim* alleged violations of his Eighth

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are no internal splits. All three circuits apply the prevailing discovery rule. See *Norwood*, 602 F.3d at 837; *Ruff*, 258 F.3d at 500-501; *Brown*, 188 F.3d at 589-590; see also *Barry Aviation Inc.* v. *Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 688 (7th Cir. 2004) (Section 1983); *Piotrowski* v. *City of Hous.*, 51 F.3d 512, 516 (5th Cir. 1995) (Section 1983). And as explained above, see p. 12, *supra*, the Sixth Circuit's decisions using the term "inquiry notice" in the FTCA context do not create an intracircuit conflict because that court has clarified that the inquiry-notice standard equates to the discovery rule applicable to *Bivens* and Section 1983 claims.

Amendment rights based on exposure to asbestos while he was incarcerated in a state prison. The district court dismissed the complaint as time-barred, because the complaint on its face "revealed that [the plaintiff] knew or should have known of his injury and its cause" outside of the limitations period. *Id.* at 952.

Petitioner points out (Pet. 14) that, in affirming that ruling, the Fourth Circuit stated that a claim "accrues when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action," and described that standard using the term "inquiry notice." *Nasim*, 64 F.3d at 955. But the court later made clear that, under its standard, the limitations period is triggered by the same information that starts the clock under the discovery rule—*viz.*, "knowledge of the fact of injury and who caused it." *Ibid.* The court also drew support for that standard from an earlier decision holding that a claim accrues under the FTCA "when the plaintiff knows or, in the exercise of due diligence, should have known both the existence and the cause of his injury." *Gould* v. *U.S. Dep't of Health & Human Servs.*, 905 F.2d 738, 742 (4th Cir. 1990) (en banc), cert. denied, 498 U.S. 1025 (1991); see *Nasim*, 64 F.3d at 955 (citing *Gould*, 905 F.2d at 742). And, in explaining why the claim before it was untimely, the court relied on "the indisputable fact[]" that the plaintiff "knew of his injury and who caused it" outside of the limitations period. *Nasim*, 64 F.3d at 956. In short, while using a different term to describe its rule, the Fourth Circuit in *Nasim* articulated a standard materially identical to the discovery rule applied by this

Court and other courts of appeals.[5] There is, accordingly, no conflict among the circuits that warrants the Court's review.

c. In any event, even were there disagreement among the circuits, this case would be an unsuitable vehicle for resolving that disagreement because petitioner's claim is untimely under all of the accrual rules allegedly applied by the courts of appeals.

Petitioner concedes (Pet. 28) that its claim would be time-barred under the injury-occurrence rule that petitioner attributes to the D.C. Circuit. Petitioner also acknowledges (Pet. 28) that its claim "would arguably" be untimely under an inquiry-notice rule. The claim would be untimely if inquiry notice is defined as the point "when[,] judged objectively[,] the plaintiff should be on notice that further inquiry is needed." 2 Corman § 11.5.8, at 203 (quoted at Pet. 22). Indeed, petitioner and its supporters began conducting—and demanding that public officials conduct—such "further inquiry" well before the accrual date (April 18, 2010, see Pet. 27) that would render petitioner's claims timely. See Pet. App. 32 (noting that the Detroit mayor and a U.S. congressman called for an independent investigation, respectively, in November 2009 and January 2010). The result would be the same under the standard applied by the Fourth Circuit: the FBI press release put petitioner "on notice

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[5] Neither of the other Fourth Circuit decisions cited by petitioner (Pet. 14-15) establishes a conflict. One addressed the Railway Labor Act, 45 U.S.C. 151 *et seq.*, not *Bivens* (or Section 1983). *Lekas* v. *United Airlines, Inc.*, 282 F.3d 296, 297, 300 (4th Cir. 2002). The other summarily affirmed the dismissal of *Bivens* claims, but did so in a non-precedential opinion. *Slaey* v. *Adams*, 363 Fed. Appx. 255, 256 (4th Cir. 2010) (per curiam).

* * * to make reasonable injury" by informing petitioner that Abdullah had been killed in gunfire with FBI agents, thereby supplying "knowledge of the fact of injury and who caused it." *Nasim*, 64 F.3d at 955; see Pet. App. 8-9.

Petitioner does assert (Pet. 12, 28) that its claim would "likely" be timely under the discovery rule. That would be true only if the discovery rule delayed accrual until a plaintiff knows that the actions that caused its injuries were unlawful. But as explained above, see p. 10-11, *supra*, that is not how the discovery rule functions under this Court's precedents. See *Rotella*, 528 U.S. at 555. And under those precedents, petitioner's *Bivens* claims are untimely because petitioner knew or should have known of its injury and the cause on October 28, 2009, but did not file a complaint naming respondents as defendants until more than three years after that date. Pet. App. 8-9.

In sum, because petitioner's claim is time-barred under all three of the claim-accrual rules that the courts of appeals allegedly apply to *Bivens* claims, this case would not be a suitable vehicle for deciding which one of those rules is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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