No. 18-35789

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT BOULE,

Plaintiff-Appellant,

v.

ERIK EGBERT,

Defendant-Appellee

On Appeal from the United States District
Court for the Western District of Washington
No. 2:17-cv-00106-RSM Hon. Ricardo S. Martinez

APPELLANT'S REDACTED OPENING BRIEF
ORIGINAL UNREDACTED VERSION FILED UNDER SEAL

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INTRODUCTION

This case presents the issue of whether there is a categorical exemption for United States Customs and Border Protection ("CBP") Border Patrol Agents from liability under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) for unconstitutionally entering and occupying the property of a U.S. citizen in violation of the Fourth Amendment, then compounding the constitutional violation by retaliating against that citizen upon learning the citizen reported the trespass and his physical injuries to the Border Patrol Agent's superior officers.

Mr. Boule's complaint in the District Court alleges that on March 20, 2014, while on duty as a CBP Border Patrol Agent, Defendant-Appellee Erik Egbert unlawfully entered Plaintiff-Appellant Robert Boule's driveway immediately adjacent to his home without a warrant. Mr. Boule asked Agent Egbert to leave his property, but Agent Ebert refused. Instead, he pushed Mr. Boule to the ground, causing Mr. Boule injuries for which he would have to seek medical attention and attend physical therapy for months afterward. After pushing Mr. Boule to the ground, Agent Egbert proceeded to question one of Mr. Boule's guests. The guest was seated in Mr. Boule's vehicle, which was parked in Mr. Boule's driveway.

After this incident, Mr. Boule rightfully complained to Agent Egbert's superior officers. In response to Mr. Boule's complaints, Agent Egbert continued

the constitutional violation by retaliating against Mr. Boule, contacting multiple government agencies including the Internal Revenue Service to instigate agency actions against Mr. Boule.

The District Court denied Mr. Boule's Motion for Summary Judgment on his Fourth Amendment claim, and, in a separate order, granted Agent Egbert's Motion for Summary Judgment. Agent Egbert's Motion for Summary Judgment argued that under *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), there is no *Bivens* remedy for constitutional violations by Border Patrol Agents. Plaintiff-Appellant's Excerpt of Records ("E.R.") volume 2 ("v.2") at 135-160. The District Court disagreed, however, with Agent Egbert's alternative argument: that he was authorized by law to be on Mr. Boule's property, and that Mr. Boule did not have an expectation of privacy. Chief District Court Judge Ricardo S. Martinez ruled that "Defendant Egbert not only invaded Plaintiff's Fourth Amendment interest in the item searched, *i.e.*, the vehicle, but also invaded Plaintiff's Fourth Amendment interest in the curtilage of his home/inn." E.R. v.1 at 21.

The Ninth Circuit has recognized First and Fourth Amendment claims against rank and file law enforcement agents as viable under *Bivens*. The District Court recognized the constitutional violation by Agent Egbert, but refused to allow a remedy due to an overly expansive reading of *Ziglar*, which bars *Bivens* claims against ***executive*** level officers. This case is about whether *Ziglar* precludes any

actions under *Bivens* when the constitutional violations are committed by a rank and file Border Patrol Agent where (A) the violations are not related to searches performed at a Port of Entry; (B) the violations are knowingly and maliciously perpetrated against a U.S. citizen at his home on U.S. soil; (C) there is no other remedy to cure the injury; and (D) there are no other factors counseling hesitation to providing a damages remedy.

STATEMENT OF JURISDICTION

I. BASIS OF THE DISTRICT COURT'S SUBJECT-MATTER JURISDICTION

The District Court has original jurisdiction over cases involving federal questions under 28 U.S.C. § 1331. This appeal arises from the District Court's final judgment denying Mr. Boule's Motion for Summary Judgment on his Fourth Amendment claim (E.R. v.1 at 15–25), and its subsequent order granting Agent Egbert's Motion for Summary Judgment (*Id*. at 6–14) and thereafter entering a final judgment under Federal Rule of Civil Procedure 54(b). *Id*. at 5.

II. BASIS OF JURISDICTION IN THE COURT OF APPEALS

This Court has jurisdiction to review final orders of the United States District Court for the Western District of Washington pursuant to 28 U.S.C. §§ 1291, 1294. The Notice of Civil Appeal was filed on September 20, 2018. E.R. v.1 at 1–4. This appeal challenges the final judgments of the District Court issued separately on August 21 and 24, 2018, and the corresponding order granting Agent Egbert's Motion for Summary Judgment. *Id.* at 5, 6–14, 15–25. Thus, the appeal is timely as it was filed within 60 days of this final judgment. *See* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the District Court erred in finding that *Ziglar v. Abbasi*, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017), which held that a *Bivens* remedy was foreclosed for an unlawful detention policy claim against high-level executive officials by noncitizens, precludes a *Bivens* remedy for ***any*** claims brought by a U.S. citizen against a rank and file Border Patrol Agent who: (A) violates the Fourth Amendment right to be secure in one's home and curtilage absent a consensual or court authorized entry and occupation; and (B) violates the First Amendment right to be free from government retaliation for complaining against Fourth Amendment violations and engaging in other free expression.

2. Whether the District Court erred in finding that special factors counseled against allowing a *Bivens* remedy to address clear and unconscionable Fourth and First Amendment violations by a rank and file Border Patrol Agent against a U.S. citizen on U.S. soil.

PERTINENT CONSTUTUTIONAL/STATUTORY PROVISIONS

All relevant constitutional, statutory, and other authorities appear in the Addendum to this brief.

STATEMENT OF THE CASE

I. MR. BOULE'S BACKGROUND

Mr. Boule resides in a house immediately adjacent to the U.S./Canada border. E.R. v.3 at 494. Mr. Boule's house and its driveway are accessed by a one-lane private dirt road that connects to a paved public street. *Id*. Besides living in the home, Mr. Boule operates a bed and breakfast known as the Smuggler's Inn from the home. *Id.* At the intersection of the private dirt lane that leads to his home and the paved public street, there is posted a visible sign that reads:

Welcome to Smuggler's Inn
Guests Only
Private Property
No Trespassing

Id. at 498, 504. A person approaching Mr. Boule's property would have to pass that sign before reaching his driveway.[1] *Id.* at 494.

[redacted]

[1] Agent Egbert never claims this was not posted before March 20, 2014. He claims he does not remember seeing this sign on or before March 20, 2014, and says that even if he had seen it, it would not have stopped him from entering Mr. Boule's driveway. E.R. v.1 at 34–35.

[redacted]

II. INCIDENT ON MARCH 20, 2014

On March 20, 2014, while on duty as a Border Patrol Agent, Agent Egbert disregarded Mr. Boule's visibly posted "No Trespassing" sign and drove down the dirt lane and into Mr. Boule's driveway. *Id*. at 496–98. A photo of Mr. Boule's property depicts the driveway immediately adjacent to his home, surrounded on two sides by a tall wooden fence. *Id*. at 502. A copy of the photo follows:

Id. Earlier that day, Agent Egbert stopped Mr. Boule while he was driving into town, searched his car, and interrogated him about guests at the inn. *Id*. at 496. Mr. Boule told him of a guest arriving from Turkey who had booked a room at

Smuggler's Inn for that evening. *Id*. Mr. Boule informed Agent Egbert that the guest had arrived in New York via air from Turkey the night before and had then flown to SEA-TAC airport that day. *Id*. Two of Mr. Boule's employees had driven to SEA-TAC airport in one of Mr. Boule's vehicles to pick up the guest and transport him to Smuggler's Inn. *Id*.

As the vehicle returned, driving down the dirt lane and coming to a stop in Mr. Boule's driveway, Agent Egbert followed in his Border Patrol vehicle, entering Mr. Boule's driveway and parking immediately behind the vehicle. *Id*. at 496–97. The driver exited while the guest remained seated in the vehicle. *Id*. at 497. As Agent Egbert approached the vehicle, Mr. Boule, who was on a nearby porch, told Egbert he was trespassing and asked him to leave his property. *Id*.

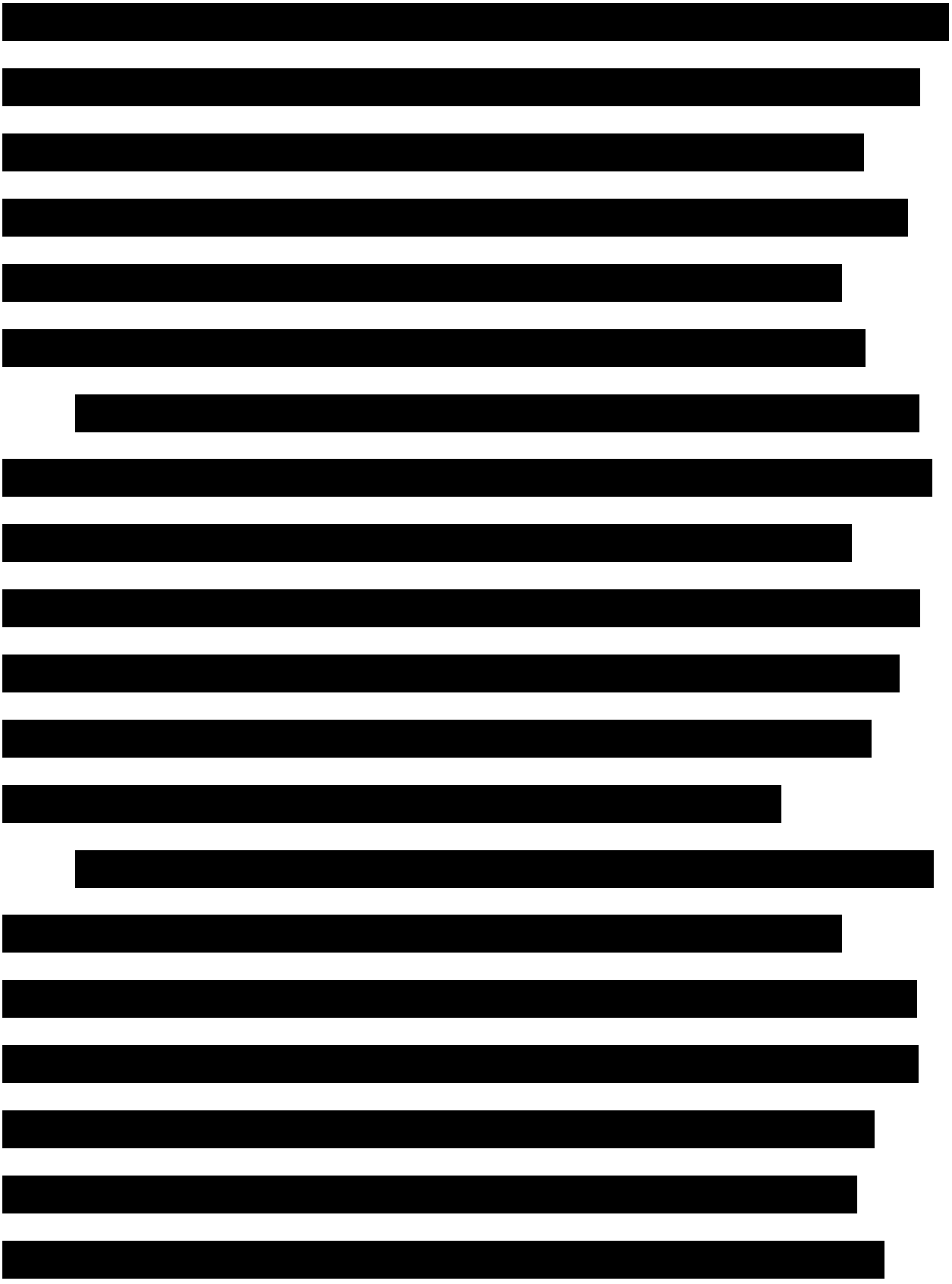
However, Egbert did not leave when asked to do so by Mr. Boule. *Id*. Mr. Boule then moved between Agent Egbert and the vehicle in which the passenger was seated. *Id.* Agent Egbert states he informed Mr. Boule he (Egbert) wanted to speak with the guest about his immigration status. E.R. v.2 at 127. Mr. Boule refused, reiterating that Agent Egbert was trespassing on his private property; in response, Agent Egbert threatened Mr. Boule, saying "are you going to make me hit you with the door . . . are you going to get out of the way or what's going to happen here?" *Id*. at 192; E.R. v.3 at 497, 509. Agent Egbert then pushed Mr. Boule up against the car. *Id* at 509. Although this hurt Mr. Boule's back, he did not

move. *Id*. When Mr. Boule did not move, Agent Egbert "grabbed [him] by the chest and pushed him aside toward the front of the vehicle," causing Mr. Boule to fall to the ground. *Id*. at 497, 509. Mr. Boule began to feel extreme pain in his back at that point. *Id*. at 509. Once past Mr. Boule, Agent Egbert opened the vehicle door and asked the guest about his status in the country. E.R. v.2 at 128; E.R. v.3 at 497. Agent Egbert confirmed that the guest was legally in the country, and then allowed the guest to get out of the car and enter Mr. Boule's home. *Id.* The following photo, submitted as part of Agent Egbert's declaration, is an aerial view of Mr. Boule's driveway where this incident occurred:

E.R. v.2 at 134. It is undisputed that Egbert pushed past Mr. Boule to access the guest. E.R. v.2 at 128; E.R. v.3 at 509. It is also undisputed that Mr. Boule had to seek medical treatment for his back injuries resulting from the incident. *Id*. at 509, 523, 564–73. Immediately after the incident, Mr. Boule began having serious pain in his shoulder and lower back. *Id*. at 509. Mr. Boule went to the doctor approximately six times for the injury and required several months of physical therapy. *Id*. at 509, 564–73.

III. RETALIATION

Mr. Boule rightfully complained to CBP authorities regarding Agent Egbert's actions (E.R. v.1 at 68; E.R. v.2 at 106–07; E.R. v.3 at 509), and Agent Egbert learned of these complaints soon after they were made. E.R. v.2 at 217, E.R. v.3 at 509. Shortly after learning of the Mr. Boule's complaints, Agent Egbert contacted an undetermined number of local, state and federal regulatory agencies with allegations about Mr. Boule. E.R. v.2 at 104, 172, 317. Some of these agencies investigated Agent Egbert's complaints. E.R. v.2 at 322; E.R. v.3 at 515–22, 550–51, 559–60, 565. For example, because of Egbert's complaints, the IRS audited several years of Mr. Boule's tax filings. E.R. v.2 at 322; E.R. v.3 at 515–22, 550–51.



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IV. PROCEEDINGS

On January 25, 2017, Mr. Boule filed a *Bivens* action against Agent Egbert for violations of his Fourth, First, and Fourteenth Amendment rights to be free from unlawful entry onto his property, unlawful seizure of his person and property, use of force causing him injury, and retaliation for free expression and petitioning his government for redress of grievances. E.R. v.1 at 74–81. Mr. Boule filed an amended complaint restating these issues on September 6, 2017. *Id.* at 65–73. Agent Egbert filed an Answer denying essential portions of the complaint. *Id*. at 55–64. As the matter progressed, Agent Egbert moved for summary judgment alleging that a *Bivens* remedy was not available in the case, arguing that Border Patrol Agents are categorically exempt from *Bivens* liability; he also argued that Mr. Boule did not have standing to bring his claims, and that he (Agent Egbert) was entitled to qualified immunity. E.R. v.2 at 135–160.

On August 21, 2018, Judge Martinez dismissed Mr. Boule's Motion for Summary Judgment based on the Fourth Amendment violations by Agent Egbert, finding that the Supreme Court's decision in *Ziglar* foreclosed a *Bivens* remedy. E.R. v.1 at 15–25. He dismissed Mr. Boule's remaining civil rights claims, including his First Amendment retaliation claim, in a subsequent order issued August 24, 2018. *Id*. at 6–14. Judge Martinez clarified that he "agree[d] with Plaintiff that the driveway in front of his house/inn is curtilage" and that

"Defendant Egbert not only invaded Plaintiff's Fourth Amendment interest in the item searched, *i.e.*, the vehicle, but also invaded Plaintiff's Fourth Amendment interest in the curtilage of his home/inn." *Id*. at 21. However, he believed *Ziglar* precluded a remedy. *Id*. at 22–25. The District Court declined to address Agent Egbert's alternative arguments regarding standing and qualified immunity. *Id*. at 25.

In *Ziglar*, the Supreme Court held that a *Bivens* remedy was not available to noncitizens challenging unlawful detention ***policy*** while being detained in the aftermath of the September 11, 2001 terrorist attacks, because the claims were against high-level Executive Branch and federal prison policy-makers. The Supreme Court noted that allowing a *Bivens* remedy against these high-ranking federal officials

> would call into question the formulation and implementation of a high-level executive policy, and the burdens of that litigation could prevent officials from properly discharging their duties. . . . The litigation process might also implicate the discussion and deliberations that led to the formation of the particular policy, requiring courts to interfere with sensitive Executive Branch functions.

Ziglar, 137 S. Ct. at 1849. The Supreme Court said that Congressional silence for remedies in these situations "is notable because it is likely that high-level policies will attract the attention of Congress. Thus, when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that 'congressional inaction' was 'inadvertent.'" *Id*. at 1862.

The Supreme Court ultimately recognized that extending *Bivens* is now a "disfavored judicial activity" and identified "factors counselling hesitation" in extending *Bivens*, particularly to cases that involve high-level national security policy. *Id.* at 1848. Judge Martinez found this ruling applies to constitutional violations committed 1) by a rank and file Border Patrol Agent; 2) against a U.S. citizen; 3) on his U.S. property, in a scenario unrelated to conditions of detention or high-level border policy:

> Plaintiff's claims raise significant separation-of-powers concerns by implicating the other branches' national-security policies… This Court agrees that the risk of personal liability would cause Border Patrol agents to hesitate and second guess their daily decisions about whether and how to investigate suspicious activities near the border, paralyzing their important border-security mission.

E.R. v.1 at 24. Thus, despite finding that Agent Egbert violated Mr. Boule's firmly established constitutional rights, Judge Martinez ultimately concluded that Mr. Boule's claim could not stand given *Ziglar*. *Id*. at 15–25.

Upon Agent Egbert's Motion for Summary Judgment under Rule 56(c)(1) of the Federal Rules of Civil Procedure, Judge Martinez entered a final judgment regarding Mr. Boule's *Bivens* claims. *Id*. at 5, 6–14, 15–25. Mr. Boule now seeks review of Judge Martinez's finding that a *Bivens* remedy is unavailable against Agent Egbert.

SUMMARY OF THE ARGUMENT

This appeal turns on the Supreme Court's recent case of *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). The District Court erroneously held, based on *Ziglar*, that Border Patrol Agents are categorically exempt from *Bivens*[2] claims and therefore dismissed Plaintiff's Fourth and First Amendment claims on summary judgment. E.R. v.1 at 6–14, 15–25. While *Ziglar* narrows the availability of *Bivens*, the District Court's decision is overly broad.

This cause of action involves very narrow and egregious facts, and the Plaintiff's only remedy is through the judicial branch. Here, a lone rank and file Border Patrol Agent unlawfully enters a U.S. citizen's property and injures him, and then harms the citizen's reputation and business as retaliation to the homeowner's complaints. These serious harms are perpetrated on the U.S. citizen's private property, on U.S. soil, in a border community, and under the color of law while the Border Patrol Agent was on duty.

The District Court found the Plaintiff's Fourth Amendment interests were violated. E.R. v.1 at 21. The original *Bivens* case concerned unlawful Fourth Amendment violations, just like this case. The *Ziglar* decision expressly upholds *Bivens* and its progeny in the "sphere of law enforcement" as it relates to Fourth

[2] Referring to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

Amendment search-and-seizure law, as is the case here. *Ziglar*, 137 S. Ct. at 1857–58.

Agent Egbert's status as a rank and file Border Patrol Agent does not present a "meaningful" difference from other types of federal law enforcement officers subject to *Bivens* claims. He is not a policy maker, as were the defendants in *Ziglar*. Border Patrol Agents work for the federal government; they wear uniforms; they patrol in cars; they conduct stops, searches, and seizures. In appropriate cases, Border Patrol Agents benefit from the defense of qualified immunity, like other federal law enforcement officers. CBP holds itself out as one of the world's largest law enforcement agencies.

Even if Border Patrol Agents present a "new context" under *Ziglar*, the facts here are narrow and egregious, perpetrated by a rank and file Border Patrol Agent, and best addressed by judicial remedy. "[N]arrow and egregious facts" are well suited for a judicial remedy." *Lanuza v. Love*, 899 F.3d 1019, 1021 (9th Cir. 2018). *Ziglar* recognizes that "national security concerns must not become a talisman used to ward off inconvenient claims–a 'label' used to cover a multitude of sins." *Ziglar*, 137 S. Ct. at 1862.

At least three post-*Ziglar* Ninth Circuit decisions support the availability of *Bivens* claims where constitutional violations are narrow and egregious. In *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018), the panel held that a *Bivens*

claim could go forward **against a Border Patrol Agent** for a transboundary shooting. In *Lanuza v. Love*, 899 F.3d 1019 (9th Cir. 2018), the panel held a *Bivens* claim was permissible against a government attorney who forged documents to advance a deportation. In an unpublished decision, the Ninth Circuit held that *Ziglar* does not require "perfect factual symmetry" to the original *Bivens* case for *Bivens* liability to apply. *See Brunoehler v. Tarwater*, 743 F. App'x 740 (9th Cir. 2018). The District Court's expansive ruling cannot be reconciled with these decisions.

First Amendment retaliation claims against federal law enforcement line officers are recognized under *Bivens* in the Ninth Circuit if there are no alternative remedies available. *Vega v. United States*, 881 F.3d 1146, 1153–54 (9th Cir. 2018) (citing *Gibson v. United States*, 781 F.2d 1334, 1341–42 (9th Cir. 1986)). No special factors counsel for a different result post-*Ziglar* because neither the Federal Tort Claim Act nor Washington law provide a tort remedy for constitutional violations by a federal employee like Agent Egbert. *See Ziglar*, 137 S. Ct. at 1856 (citing 28 U.S.C. §2679(b)(2)(A)) and *Reid v. Pierce County*, 136 Wash.2d 195, 213–14 (1998).

The record demonstrates substantial animus by Agent Egbert against Mr. Boule and a jury may conclude that such animus motivated retaliation by Agent Egbert in response to Mr. Boule's complaints against him. An individual has a

right to be free from law enforcement action motivated by retaliatory animus even if there is probable cause for the law enforcement action. *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013). The Ninth Circuit also supports a citizen's clearly established constitutional right to file complaints against law enforcement. *Mulligan v. Nichols*, 835 F.3d 983, 988 (9th Cir. 2016). A jury could find, on this record, that "there was a substantial causal relationship between the constitutionally protected activity and the adverse action." *Id.* (citing *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010)).

Mr. Boule's rights to freedom from First Amendment violations are long-standing, and a reasonable jury could find these rights were violated by Agent Egbert. Such violations are not entitled to qualified immunity. *Chew v. Gates*, 27 F.3d 1432, 1446 (9th Cir. 1994).

Based on the undisputed facts, the District Court found, as a matter of law, that Agent Egbert violated Mr. Boule's Fourth Amendment rights. The District Court modeled its analysis after *Collins v. Virginia*, a recent Supreme Court case reaffirming the sanctity and parameters of curtilage. 138 S. Ct. 1663 (2018). Agent Egbert's unlawful invasion of Mr. Boule's person and property was both knowing and malicious. As a trained Border Patrol Agent, Agent Egbert cannot credibly claim he did not know he was violating the Fourth Amendment when he refused to leave Mr. Boule's driveway, pushed Mr. Boule to the ground, detained Mr. Boule's

guest, and searched Mr. Boule's vehicle.

ARGUMENT

I. STANDARD OF REVIEW

The Court of Appeals reviews *de novo* a district court's grant of summary judgment. *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir.2008). A grant of summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In its *de novo* review of a district court's summary judgment ruling, the Court of Appeals views the evidence in the light most favorable to the non-moving party. *San Diego Police Officers' Ass'n v. San Diego City Emps.' Ret. Sys.*, 568 F.3d 725, 733 (9th Cir. 2009); *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014).

II. THE DISTRICT COURT ERRED IN FINDING THAT *ZIGLAR V. ABBASI* CATEGORICALLY PROTECTS RANK AND FILE CBP BORDER PATROL AGENTS FROM *BIVENS* LIABILITY FOR FOURTH AMENDMENT VIOLATIONS.

The District Court erred in finding that rank and file U.S. Customs and Border Protection ("CBP") Border Patrol Agents are categorically immune from Fourth Amendment implied causes of action for search-and-seizure violations. Mr. Boule has a clear cause of action for damages against Agent Egbert because his Fourth Amendment claims fit squarely in the "common and recurrent" theme of *Bivens* search-and-seizure claims. *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). The District Court's reasoning is directly contradicted by post-*Ziglar* caselaw in the

Ninth Circuit and in other Circuits. *See, e.g., Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018) (holding Border Patrol Agent liable based on implied cause of action); *Lanuza v. Love*, 899 F.3d 1019 (9th Cir. 2018) (holding government removal attorney liable based on narrow and egregious facts).

The District Court found that Agent Egbert violated Mr. Boule's constitutional rights as a matter of law (E.R. v.1 at 21), and so there is a manifest injustice, demanding remedy. The Judiciary is best suited to craft the remedy for these specific and isolated constitutional violations. Unlike *Ziglar*, this case involves a defendant rank and file law enforcement agent, rather than high-ranking government policy-makers and wardens. Like the original *Bivens* case, this matter stems from a traditional Fourth Amendment search-and-seizure violation claim. Further, there is no other remedy for Mr. Boule against Agent Egbert, leaving a judicially crafted *Bivens* remedy his only path to justice.

A. Mr. Boule's Fourth Amendment Claim Falls Within The Natural Ambit Of *Bivens* Case Law For Unlawful Searches And Seizures, At The Core Of *Bivens* Jurisprudence.

1. CBP Border Patrol Agents are "federal law enforcement officers" for purposes of *Bivens* claims, and as a class do not present a new context.

In 1971, the U.S. Supreme Court decided *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The Supreme Court held that, even absent statutory authorization, courts can enforce a damages remedy to compensate

persons injured by federal officers who violated the prohibition against unreasonable searches and seizures. *Ziglar,* 137 S. Ct. at 1854. *Bivens* established an implied cause of action for Fourth Amendment claims against federal law enforcement officers, when those officers unlawfully searched the plaintiff's home and arrested him without probable cause.

Subsequently, the Supreme Court recognized an implied cause of action in two other cases. In 1979, the Supreme Court held that a plaintiff may advance an implied cause of action for an alleged Fifth Amendment Due Process Clause violation, where an administrative assistant sued a Congressman for firing her because she was a woman. *Davis v. Passman*, 442 U.S. 228 (1979). Then, in 1980, the Supreme Court allowed an implied cause of action for damages to go forward against federal jailers for an alleged violation of the Eighth Amendment's Cruel and Unusual Punishment Clause. *Carlson v. Green*, 446 U.S. 14 (1980). *Bivens*, *Davis*, and *Carlson* are the only cases where the Supreme Court has validated an implied cause of action under the U.S. Constitution. *Ziglar*, 137 S. Ct. at 1855.

In 2017, the U.S. Supreme Court re-examined the subject of *Bivens* claims in *Ziglar v. Abbasi*. The *Ziglar* case arose in the aftermath of the September 11, 2001 terrorist attacks. The plaintiffs were six men, deemed unlawfully in the country, who were detained in harsh conditions. *Ziglar*, 137 S. Ct. at 1852–53. The main issue in *Ziglar* was the plaintiffs' ability to seek redress against high–ranking

policy making officials (Attorney General, FBI Director, INS Commissioner), and the Detention Center warden and associate warden, for Fourth and Fifth Amendment constitutional violations resulting from policies they adopted and oversaw. *Id*. at 1853–54. Plaintiffs' claims were principally based on the Fifth Amendment's substantive due process and equal protection clauses. A third claim involved the Fourth Amendment, concerning alleged punitive strip searches. *Id.* The Court ruled that the *Bivens* claims could not be brought against the high–ranking officials. *Id*. at 1860–63.

Although the Supreme Court in *Ziglar* warranted caution in finding a new context for *Bivens* claims, it also expressly upheld *Bivens* and its progeny in the "sphere of law enforcement" as it relates to Fourth Amendment search-and-seizure law. *Ziglar,* 137 S. Ct. at 1857–58. Specifically, the Court said:

> [I]t must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. **The settled law of *Bivens* is this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in law, are powerful reasons to retain it in that sphere.** (Emphasis added).

Id.

At issue here is whether CBP Border Patrol Agents are categorically exempt from *Bivens* actions. A *Bivens* remedy is not available if 1) there is a new context,

and 2) there are "'special factors counseling hesitation in the absence of affirmative action by Congress,'" *Carlson*, 446 U.S. at 18 (quoting *Bivens*, 403 U.S. at 396). A new context exists if there is a "meaningful" difference from previous *Bivens* cases. *Ziglar*, 137 S. Ct. at 1859–60. The *Ziglar* decision provides several examples of what might constitute a "meaningful" difference:

> Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential factors that previous *Bivens* cases did not consider.

Id.

Here, Mr. Boule's Fourth Amendment claim fits squarely within *Bivens* line of cases. Mr. Boule's claim 1) implicates the sphere of law enforcement activities; 2) occurred on private property; and 3) involves a U.S. citizen on U.S. soil. "[T]he Fourth Amendment is at the core of the *Bivens* jurisprudence, as *Bivens* itself concerned a Fourth Amendment claim." *Turkmen v. Hasty*, 789 F.3d 218, 237 (2d Cir. 2015), *judgment rev'd in part, vacated in part sub nom. Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). The District Court found that Agent Egbert violated Mr. Boule's Fourth Amendment rights: "[I]n physically intruding on the curtilage of

the Plaintiff's home/inn to stop and search the vehicle, Defendant not only invaded Plaintiff's Fourth Amendment interest in the item searched, *i.e.*, the vehicle, but also invaded the Plaintiff's Fourth Amendment interest in the curtilage of his home/inn." E.R. v.1 at 21.

Agent Egbert's status as a Border Patrol Agent and thus "a traditional law enforcement officer" does not present a meaningful difference from previous *Bivens* claims. The Border Patrol Agent involved is not a high-ranking officer who makes agency policy, but rather a rank and file agent on patrol, carrying out daily duties. *See Oliva v. United States,* No. EP-18-CV-00015-FM, 2019 WL 136909, at *4 (W.D. Tex. Jan. 8, 2019) ("*Bivens* is not contingent on the specific category of federal law enforcement officers involved in the alleged constitutional violation[;] Rather, *Bivens* looks at whether the official was simply federal law enforcement or a high-level decisionmaker.").

Officers of law, including Border Patrol Agents, receive training on how they must conduct stops, searches, and seizures. (E.R. v.3 at 335–37, 436–37). They patrol in law enforcement vehicles, and, in appropriate circumstances, can seize and detain individuals for further legal processing. The law does not distinguish Border Patrol Agents from other federal law enforcement, in any "meaningful" sense. Border Patrol Agents are employed by the federal government. Indeed, Agent Egbert's proposed defense of qualified immunity is

predicated upon his being a law enforcement officer, which is a law enforcement defense available to Border Patrol Agents. *See Hernandez v. Mesa*, 885 F.3d 811, 814 (5th Cir. 2018). Federal courts are constantly balancing the law enforcement actions of Border Patrol Agents against the constitutional rights of U.S. citizens (and noncitizens). *See*, *e.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (holding warrantless searches by Border Patrol Agents at permanent immigration checkpoints do not violate the Fourth Amendment's protection against unreasonable searches and seizures).

Border Patrol Agents regularly receive law enforcement exemptions to Freedom of Information Act requests for documents. *See Concepcion v. U.S. Bureau of Customs & Border Prot.*, 907 F. Supp. 2d 133, 140 (D.D.C. 2012), *aff'd sub nom*. *See also Strunk v. U.S. Dep't of State*, 905 F. Supp. 2d 142, 146 (D.D.C. 2012). CBP defines itself as one of the world's largest law enforcement agencies.[3] *See Strunk*, 905 F. Supp. 2d at 146 (CBP's representative defining the agency as "a law enforcement agency with enforcement responsibilities for over 400 Federal statutes, on behalf of over 20 different federal agencies.").

The claim that Border Patrol Agents would have to consider their daily

[3] Mr. Boule respectfully requests, pursuant to Federal Rule of Evidence 201(f), this Court take judicial notice that CBP is one of the "world's largest law enforcement agencies." U.S. Customs and Border Protection, *About CBP*, (November 21, 2016), available at https://www.cbp.gov/about.

activities in the context of personal liability is unpersuasive. Border Patrol Agents ***should*** consider their activities in accordance with the Constitution.[4] *Bivens* and its progeny represent a long-recognized deterrent for egregious constitutional violations, which the courts can best decide when and how to apply. *See Ziglar*, 137 S. Ct. at 1860 (quoting *FDIC v. Meyer*, 510 U.S. 471, 485 (1994)) ("The purpose of *Bivens* is to deter the officer."). The decision to not allow a *Bivens* claim against Border Patrol Agents *per se* creates a broad categorical exemption for a large branch of federal law enforcement which has never existed. Such a decision is contrary to the separation-of-powers principles discussed at length in *Ziglar*, principles which affirm that certain cases are better handled by the Judiciary. *Ziglar*, 137 S. Ct. at 1857–58.

CBP's search-and-seizure authority may be expansive under certain conditions, but it is still ultimately limited by the Constitution. *United States v. Flores-Montano*, 541 U.S. 149 (2004). Border Patrol Agents do not have the authority to search the homes or the curtilage of the homes of border community residents without warrant, consent, or exigent circumstances. *See United States v.*

[4] Mr. Boule respectfully requests, pursuant to Federal Rule of Evidence 201(f), this Court take judicial notice of the Customs and Border Protection Oath of Office. On their first day of duty, all Border Patrol Agents swear, under the penalty of perjury, to "support and defend the Constitution of the United States." *See* Customs and Border Protection (2002). *Appointment Affidavits*. U.S. Office of Personnel Management, available at https://www.cbp.gov/employees/new–employee–resources/your–first–day.

Romero-Bustamente, 337 F.3d 1104, 1107–10 (9th Cir. 2003). As the District Court's Order affirms, it is possible for Border Patrol Agents to violate person's Fourth Amendment protections. E.R. v.1 at 21. Fourth Amendment *Bivens* claims protect U.S. citizens from abuse of CBP authority, just as they do from all federal law enforcement officers.

2. Even if CBP Border Patrol Agents present a "new context," the facts here are narrow and egregious, perpetrated by a rank and file CBP Border Patrol Agent, such that the Judiciary is best suited to frame a remedy under a special factors analysis.

This matter does not present a new context, because there is not a "meaningful" difference for *Bivens* purposes between rank and file Border Patrol Agents and other federal law enforcement officers. However, if the status of the being a Border Patrol Agent is deemed a "new context," then it is necessary to conduct a "special factors analysis" to determine if a damages suit should proceed. *Ziglar*, 137 S. Ct. at 1860. The inquiry is "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857–58. Even in a new context, *Bivens* is appropriate unless an available alternative remedial scheme would adequately compensate Mr. Boule. *Id.* at 1858. The availability of a remedy under the Federal Tort Claims Act (FTCA) does not preclude a *Bivens* action for the same injury; thus, the FTCA is not an alternative remedial scheme. *Carlson*, 446 U.S. at 19–24 (1980). If there are special factors to be found, they do not

outweigh *Bivens*' deterrent effect and neither factual or a legal basis have been demonstrated by Agent Egbert. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

This matter is appropriately resolved by the Judiciary, because of the narrow and egregious facts, perpetrated by a rank and file federal law enforcement officer, principally based on Fourth Amendment violations. This case does not involve high-level government policy-makers, such as in *Ziglar*. "[N]arrow and egregious facts" are well suited for a judicial remedy. *Lanuza v. Love*, 899 F.3d at 1021. There is long-standing law on how Border Patrol Agents must conduct their duties in the search-and-seizure context. *See, e.g., United States v. Flores-Montano,* 541 U.S. 149 (2004). There is little risk of the Judiciary intruding into the other branches where the facts are so "specific and isolated," as in this case. S*ee Bistrian v. Levi*, No. 18–1967, 2018 WL 6816924, at *9 (3d Cir. Dec. 28, 2018). This is not a general case involving CBP's ability to conduct warrantless searches and seizures of people and vehicles crossing a border. This is a case about an individual federal law enforcement officer on roving patrol unlawfully intruding onto the private property of a U.S. citizen who rightfully lives and works near a border.

In Fourth Amendment search-and-seizure, "[t]he settled law of *Bivens* is this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in law, are powerful reasons to retain it in that sphere." *Ziglar*, 137 S. Ct. at 1857–58. The Supreme Court further wrote, "There are

limitations, of course, on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security." *Ziglar*, 137 S. Ct. at 1861–62 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 527, 532–37 (2004) ("Whatever power the United States Constitution envisions for the Executive…in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.")). "[N]ational security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to cover a multitude of sins." *Ziglar*, 137 S. Ct. at 1862 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)). The danger of abuse is heightened when there is difficulty in defining security interests in domestic cases. *Id.*

Fourth Amendment violations are at the core of *Bivens* jurisprudence, and Border Patrol Agents are federal law enforcement officers. Special factors do not preclude a *Bivens* remedy here.

B. Post-*Ziglar* Decisions Support *Bivens* Liability Against CBP Border Patrol Agents, Under "Narrow And Egregious" And Specific And Isolated Facts.

Post-*Ziglar* caselaw, including in the Ninth Circuit, directly contradicts the District Court's reasoning for summary judgment.

1. The Ninth Circuit allowed a *Bivens* claim against a CBP Border Patrol Agent in relation to the transboundary shooting of a Mexican citizen.

On August 7, 2018, the Ninth Circuit held that a *Bivens* claim may go forward in a case against a Border Patrol Agent. In *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018), the Ninth Circuit held that it had jurisdiction, on interlocutory appeal, to decide whether a mother had a cause of action for damages against a Border Patrol Agent under *Bivens*, where the agent, standing on U.S. soil, shot and killed her son on a street in Mexico. The panel held that despite its reluctance to extend *Bivens*, it was appropriate to do so, because no other adequate remedy was available, there was no reason to conclude that Congress deliberately withheld a remedy, and the asserted special factors either did not apply or counseled for extending *Bivens*.

Mr. Boule's claim fits a *Bivens* remedy much more closely than do the facts of *Rodriguez*. Agent Egbert is also a rank and file Border Patrol Agent, which undercuts any argument for categorical immunity. However, the alleged harms are also on U.S. soil, and do not directly involve international relations. Agent Egbert unlawfully intruded on Mr. Boule's person and private property, including his real property, business, and vehicle. The *Bivens* claim therefore arises principally under the Fourth Amendment, with a First Amendment retaliation claim naturally flowing from the Fourth Amendment violations. No high-ranking officials or policy-makers are involved.

The Constitution protects the rights of homeowners to be safe in their person and property from unlawful government intrusion. Mr. Boule's facts present a far less meaningful difference or new context from *Bivens* than do the facts in *Rodriguez*. Special factors suggesting the inapplicability of *Bivens* are not present.

2. The Ninth Circuit allowed a *Bivens* claim against a government removal attorney for forging documents in immigration removal proceedings.

On August 14, 2018, the Ninth Circuit permitted a *Bivens* action to go forward in a case involving a government removal attorney and intentional bad conduct. *Lanuza v. Love*, 899 F.3d 1019 (9th Cir. 2018). The panel reversed the district court's order declining to extend a *Bivens* remedy to an immigrant pursuing lawful permanent resident status where a government immigration attorney intentionally submitted a forged document in an immigration proceeding to bar that immigrant from pursuing relief to which he was entitled. The panel concluded that while the Supreme Court "has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity," a *Bivens* remedy was available in this narrow circumstance because none of the special factors outlined in *Ziglar* and other Supreme Court precedent applied. *Lanuza*, 899 F.3d at 1021 (citing *Ziglar*, 137 S. Ct. at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009))). The panel affirmed the district court's order denying qualified immunity to the former U.S. ICE Assistant Chief Counsel because qualified immunity was not meant to protect

those who are "plainly incompetent or those who knowingly violate the law." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 743 (2011)). The panel concluded that qualified immunity could not shield an officer from suit when he intentionally submitted a forged document in an immigration proceeding in clear violation of 8 U.S.C. § 1357(b). In addressing the *Ziglar* decision, the panel wrote:

> We are tasked with answering in part a question asked by many legal commentators ***in the wake of the Supreme Court's decision in Ziglar v. Abbasi, 137 S. Ct. 1843 (2017): where does Bivens stand?*** . . . Here, a U.S. Immigration and Customs Enforcement (ICE) Assistant Chief Counsel representing the government intentionally forged and submitted an ostensible government document in an immigration proceeding, which had the effect of barring Ignacio Lanuza (Lanuza) from obtaining lawful permanent resident status, a form of relief to which he was otherwise lawfully entitled. ***We recognize that the Supreme Court "has made clear that expanding the Bivens remedy is now a 'disfavored' judicial activity," Ziglar, 137 S. Ct. at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)), but, if the principles animating Bivens stand at all, they must provide a remedy on these narrow and egregious facts***. We therefore reverse the district court's holding that Lanuza was not entitled to a *Bivens* remedy.

Lanuza, 899 F.3d at 1021 (emphasis added).

The Ninth Circuit was not deterred from allowing the claim to go forward because the defendant was a removal attorney, rather than a law enforcement officer. The panel instead focused on there being "narrow and egregious facts," demanding a judicially crafted remedy. The facts of Mr. Boule's case parallel the

Bivens decision even more than those in *Lanuza*, as they involve the search-and-seizure context with a law enforcement officer.

3. The Ninth Circuit states that *Ziglar* does not require "perfect factual symmetry" to the original *Bivens* case for *Bivens* liability to apply.

In *Brunoehler v. Tarwater*, 743 F. App'x 740 (9th Cir. 2018), the plaintiff brought *Bivens* claims against two federal agents for allegedly obtaining search warrants and arresting him in his home without probable cause. The plaintiff was arrested for securities violations, rather than narcotics violations. In its unpublished decision, the Ninth Circuit held that "the difference in the underlying criminal charges is not the kind of 'meaningful difference' envisioned in *Abbasi*; regardless of the crime alleged, the requirement of probable cause is the same under the Fourth Amendment." *Brunoehler*, at 743–44 (9th Cir. 2018). "*Ziglar* does not require that there be perfect factual symmetry between a proffered *Bivens* claim and *Bivens* itself. Rather, *Ziglar* explicitly preserved 'the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose.'" *Id*.

4. The Supreme Court, federal courts, and Congress have not prohibited *Bivens* claims against Border Patrol Agents.

No branch of government has categorically prohibited *Bivens* claims against Border Patrol Agents, although they have had the opportunity. In *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017), a U.S. Border Patrol Agent fired shots across the U.S.-Mexico border and killed a 15-year-old Mexican citizen, who was throwing

rocks at him from the Mexico side. The Fifth Circuit determined that *Bivens* was inappropriate, because the matter involved trans-territorial, international, and political issues. The Supreme Court remanded the case to the Fifth Circuit for en banc consideration of whether *Bivens* applied in a Border Patrol case, given the *Ziglar* decision. *See Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015), *vacated and remanded sub nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017).

However, neither the Supreme Court nor the Fifth Circuit, with the opportunity, found a categorical exemption from *Bivens* claims from rank and file CBP Border Patrol Agents. Indeed, subsequent decisions controlled by Fifth Circuit precedent have been careful to avoid such a broad exemption by limiting the application of *Hernandez* to specifically cross-border/international cases. *See Oliva v. United States*, No. EP-18-CV-00015-FM, 2019 WL 136909, at *4 (W.D. Tex. Jan. 8, 2019) ("*Hernandez* is careful to acknowledge that in ***domestic*** cases, there is a danger for abusing the phrase 'national security'.") (emphasis added). Mr. Boule's case is domestic. The violation of his Fourth Amendment rights occurred solely within the United States and within the curtilage/home guarantee of privacy.

III. *ZIGLAR* DOES NOT PRECLUDE LIABILITY FOR FIRST AMENDMENT RETALIATION CLAIMS ARISING OUT OF REPORTING A *BIVENS* FOURTH AMENDMENT VIOLATION AND THERE ARE QUESTIONS OF FACT THAT PRECLUDE SUMMARY JUDGMENT DISMISSAL OF MR. BOULE'S CLAIMS.

Mr. Boule's retaliation claim is integrally connected to Agent Egbert's original violation of Fourth Amendment rights, a violation which falls within the "common and recurrent" theme of *Bivens* search-and-seizure claims against federal law enforcement officers. *Ziglar*, 137 S. Ct. at 1857. Agent Egbert chose to extend his constitutionally tortious conduct beyond the initial assault to evade accountability for Mr. Boule's First Amendment-protected complaint against the forcible invasion of his property and person. Although Agent Egbert's violation of the Fourth Amendment also infringed on the First Amendment, the core violation does not differ from a recognized *Bivens* claim in any meaningful manner and there is no way to remedy the harm and hold him accountable other than to allow the companion constitutional violations to be vindicated under *Bivens* in a unified judicial proceeding.

A. Agent Egbert's Retaliation Against Mr. Boule For Complaining About Violating His Rights To Be Free From Unlawful Seizure And Assault Is Not A New Context, And Even If It Were, There Are No Special Factors That Caution Against A Judicial Remedy.

Agent Egbert's retaliation against Mr. Boule extended the original constitutional abuse perpetrated when he invaded his curtilage and assaulted him. As described in Section B. below, Agent Egbert responded to Mr. Boule's

complaint against him for Fourth Amendment violations by conducting a campaign to punish Mr. Boule through unwarranted investigation by other government agencies. Unlike standalone First Amendment claims that may not yet have qualified for an extension of *Bivens* (*see, e.g.*, *Bush v. Lucas*, 462 U. S. 367, 390 (1983) (finding that an alternative civil service remedy precluded a *Bivens* claim)), Mr. Boule's retaliation claim extends the original assault but with additional general damages for suffering retaliation, special damages related to business losses, and additional costs in defending against a frivolous tax audit.

First Amendment retaliation claims against federal law enforcement officers are recognized under *Bivens* in the Ninth Circuit if there are no alternative remedies available. *Vega*, 881 F.3d at 1153–54 (9th Cir. 2018) (citing *Gibson*, 781 F.2d at 1341–42 (9th Cir. 1986)). The *Vega* court barred the First Amendment *Bivens* claim because the plaintiff prisoner had alternative remedies to federal court claims, but noted the availability of First Amendment *Bivens* claims set out in *Gibson* (individual law enforcement agents who unconstitutionally sought to curb the speech of political activists not incarcerated). *Id.*

Regardless of whether the First Amendment claims are in a new context, there are no special factors favoring hesitation of a court offering a *Bivens* remedy to Mr. Boule. Most important, there are no alternative means to remedy Agent Egbert's unconstitutional retaliation and attempts to curb Mr. Boule's free speech

and association. Neither the Federal Tort Claim Act nor Washington law provide a tort remedy for constitutional violations by a federal employee like Agent Egbert. *See Ziglar*, 137 S. Ct. at 1856 (citing 28 U.S.C. §2679(b)(2)(A)) and *Reid v. Pierce County*, 136 Wash.2d 195, 213–14 (1998). Nor is there a substitute administrative remedy as set out in the cases distinguished by *Ziglar*. *See* 137 S. Ct. at 1857 (citing *Bush*, 462 U. S. at 390; *Wilkie*, 551 U.S. at 547–48, 562; *Correctional Services Corp*. v. *Malesko*, 534 U.S. 61, 63 (2001); and *Minneci* v. *Pollard*, 565 U.S. 118, 120 (2012)). Because the retaliation claim is an extension of the violation of the Fourth Amendment claim and not merely a standalone claim, there is no meaningful increase in the cost to the employee, his employer, or the courts in adjudicating the claim. Rather, allowing this naturally flowing secondary claim ensures a full capture of the damages caused by Agent Egbert's violations of the Fourth Amendment.

This retaliation claim against a rank and file law enforcement officer, like in *Bivens*, is limited to individual retributive actions unrelated to real-time law enforcement activities and does not implicate border security or high-level decision-making like the claims in *Ziglar*. The only difference between this matter and the original *Bivens* claim is that after the federal law enforcement officer violated Mr. Boule's Fourth Amendment rights and Mr. Boule rightly complained, the law enforcement officer, Agent Egbert, retaliated.

Failure to allow this companion claim to the valid *Bivens* search-and-seizure claim will provide future federal law enforcement violators with an incentive to engage in retaliation to avoid accountability for enforceable *Bivens* claims. *See, e.g.*, *Loumiet v. United States*, 292 F. Supp. 3d 222, 237 (D.D.C. 2017) (allowing a *Bivens* remedy in a First Amendment retaliation case and interpreting *Ziglar* as continuing to reinforce deterrence as the core of *Bivens*: "Without damages recovery against the . . . officers themselves, provided that plaintiff can prove his claims, it is not clear that officers similarly positioned in the future would find the personal risks of pursuing a retaliatory prosecution to caution adequately against it."). Allowing Mr. Boule to pursue his companion First Amendment retaliation claim will vindicate the core principles of *Bivens* as recognized in the Ninth Circuit under *Gibson* implicating none of the concerns raised in *Ziglar* or *Vega*.

B. Mr. Boule Has Established A Factual And Legal Basis For Arguing To A Jury That Agent Egbert's Attempts To Interfere With His Business After Mr. Boule Complained About Agent Egbert's Misconduct Violated His First Amendment Right To Be Free From Retaliation in Petitioning His Government For Redress Of Grievances, As Well As His Rights To Free Association And Expression.

An individual has a right to be free from law enforcement action motivated by retaliatory animus even if there is probable cause for the law enforcement action. *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013). To establish a claim of retaliation in violation of the First Amendment, the evidence must demonstrate that the officer's conduct "would chill a person of ordinary firmness

from future First Amendment activity" and that the officer's desire to chill this speech was a "but for" cause of the allegedly unlawful conduct. *Id.* Thus, it is not a defense to argue that another investigating agency subsequently found the existence of probable cause when the evidence shows that law enforcement actions were taken for a retaliatory reason.

1. A jury may infer animus in retaliation by Agent Egbert based on his own declaration and reports.

Viewing the evidence in the light most favorable to Mr. Boule, as required at this stage, a jury could find that the attempts by Agent Egbert were motivated by retaliatory animus, whether or not an investigatory agency agreed there was a basis for investigating Mr. Boule. Agent Egbert's own declaration provides a sufficient basis for a jury to infer such animus. [redacted]

[redacted]

Agent Egbert does not deny that he knew Mr. Boule complained about his illegal behavior on the day he physically confronted Mr. Boule, or that he was interviewed about Mr. Boule's complaints against him within days of the confrontation, all before his attempts to get the IRS and the Department of Licensing, and an indeterminate number of other agencies, to investigate Mr. Boule. *Id*. at 117–132, 217. [redacted] A reasonable juror could easily infer retaliatory motivation. Accordingly, this issue is not appropriate for dismissal on summary judgment.

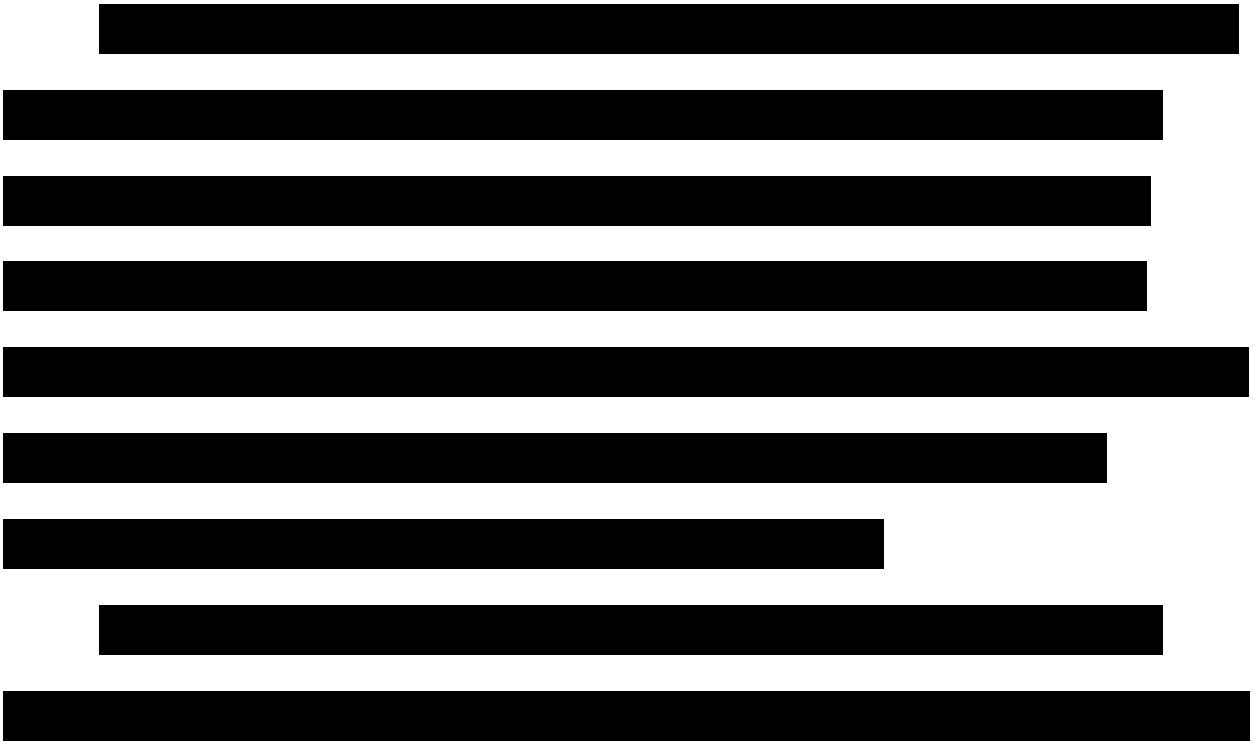
2. Mr. Boule has a constitutional right to (1) complain about Agent Egbert's violation of his rights, [redacted] and (3) display his choice of words on his license plate without retaliation.

"[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *Mackinney v. Nielsen*, 69 F.3d 1002, 1007 (9th Cir. 1995). "Unless the speech is likely to produce a clear and present danger of a serious substantive evil . . . it is protected." *Id*. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation

from a police state." *Id*. *See also City of Houston, Texas v. Hill*, 482 U.S. 451, 461 (1987). The Ninth Circuit also supports citizens' clearly established constitutional right to file complaints against law enforcement. *Mulligan*, 835 F.3d at 988. While *Nichols* held that officers may respond to complaints in the media, retaliatory government actions that can lead to punishment are within the core of actionable retaliation claims. *Id.* at 989.

> To state a claim for First Amendment retaliation against a government official, a Mr. Boule must demonstrate that "(1) he engaged in constitutionally protected activity; (2) as a result, he was subjected to adverse action by Agent Egbert that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action."

Id. at 988. (citing *Blair*, 608 F.3d at 543).



[redacted]

Retaliation against First Amendment expression, association, and petition of grievances are long established causes of action against law enforcement personnel and Mr. Boule's version of the facts meets the prima facie elements of those claims. Mr. Boule need not gain admissions from Agent Egbert on his motivation, though he has plenty in Agent Egbert's declaration; he merely needs to establish logical inferences that a reasonable jury might reach. *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1132 (9th Cir. 2003). Thus, there is no basis for dismissing this claim before jury consideration of the evidentiary record.

IV. QUALIFIED IMMUNITY IS NOT AVAILABLE TO AGENT EGBERT BECAUSE THE RIGHT TO FREE SPEECH AND TO BE FREE FROM LAW ENFORCEMENT INTRUSION INTO CURTILAGE WERE FIRMLY ESTABLISHED BEFORE THIS INCIDENT.

Because it has been established that Mr. Boule's constitutional rights have been violated, the analysis into whether Agent Egbert may have qualified immunity turns on whether "the right at issue was clearly established at the time of Agent Egbert's alleged misconduct." *Moss v. U.S. Secret Service*, 675 F.3d 1213,

1222 (9th Cir. 2012). "Whether the defendants are entitled to qualified immunity for their actions in formulating or implementing [a policy] turns on the objective legal reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken." *Chew*, 27 F.3d at 1446. "Specific precedent is not required in order to overcome a qualified immunity defense, but the law in question must be sufficiently clear that the unlawfulness of the action would have been apparent to a reasonable official." *Id*. at 1447. "Even where there is no federal case analyzing a similar set of facts, a plaintiff may nonetheless demonstrate that a reasonable officer would have known that the force he used was excessive." *Davis v. City of Las Vegas*, 478 F.3d 1048, 1056 (9th Cir. 2007). "Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Id*.

As set out in the sections above, the rights to freedom from First Amendment violations and invasion of private curtilage are long-standing and a reasonable jury could conclude (and such a conclusion is likely compelled as a matter of law) that Agent Egbert's violations of Mr. Boule's rights to be free from invasion of his vehicle and person within his private curtilage and retaliation for protected First Amendment activities were violated. Such violations are not entitled to qualified immunity.

V. AGENT EGBERT VIOLATED MR. BOULE'S FOURTH AMENDMENT RIGHTS BY ENTERING AND REMAINING IN HIS CURTILAGE WITHOUT CONSENT, WARRANT, OR PROBABLE CAUSE.

The District Court found that Agent Egbert violated Mr. Boule's Fourth Amendment rights when, on March 20, 2014, Agent Egbert entered Mr. Boule's driveway immediately adjacent to home, refused to leave the premises when asked by Mr. Boule, then physically engaged Mr. Boule before conducting a warrantless detention of his vehicle and a search of a passenger in one of his automobiles. E.R. v.1 at 21.

In finding that Agent Egbert violated Mr. Boule's Fourth Amendment rights, the Court modeled its order after the language in *Collins v. Virginia*, a recent Supreme Court case re-affirming the sanctity of curtilage (the area immediately surrounding and associated with the home). 138 S. Ct. 1663 (2018). Using the language of *Collins* in its description of the curtilage, the applicable law, and its conclusion, the District Court stated it:

> agrees with Plaintiff that the driveway in front of his house/inn is curtilage. According to photographs in the record, the driveway runs in a u-shape, off of 99th St. SW[5], in front of the house/inn and alongside part of the front lawn past the front perimeter of the house. Dkt. #98, Exs. 3 and 4. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a white, wooden fence that appears to be the height of a

[5] The actual address of Mr. Boule's home is 2480 Canada View Drive, Blaine, WA. The aerial view presented to the District Court as an exhibit to Mr. Boule's Declaration mistakenly lists the driveway as being on 99th Street. E.R. v.3 at 495.

> car. *Id.*, Ex. 4. A visitor endeavoring to reach the front door of the house/inn would have to enter the driveway and park, before proceeding up a set of steps leading to the front porch. *Id.* When Defendant Egbert followed the vehicle and encountered the person sitting inside, it was parked in the driveway near the front steps to the house/inn.
>
> The "'conception defining the curtilage' is... familiar enough that it is 'easily understood from our daily experience.'" *Jardines*, 569 U.S. at 7 (quoting *Oliver*, 466 U.S. at 182, fn. 12). Just like the front porch, side garden, or area "outside the front window," *Jardines*, 569 U.S. at 6, the driveway enclosure where Defendant Egbert stopped the vehicle and confronted the guest inside constitutes "an area adjacent to the home and 'to which the activity of home life extends,'" and so is properly considered curtilage. *Id.* at 7 (quoting *Oliver*, 466 U.S. at 182, fn. 12). In physically intruding on the curtilage of Plaintiff's home/inn to stop and search the vehicle, Defendant Egbert not only invaded Plaintiff's Fourth Amendment interest in the item searched, *i.e.*, the vehicle, but also invaded Plaintiff's Fourth Amendment interest in the curtilage of his home/inn.

E.R.v.1 at 21. *See also Collins*, 138 S. Ct. at 1670–71.

A. The Fourth Amendment Protects A Fundamental Liberty, Which Agent Egbert Violated

The Fourth Amendment was drawn to protect a fundamental liberty. It provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. The Fourth Amendment "expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a

warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *Kentucky v. King*, 563 U.S. 452, 459 (2011) (citing *Payton v. New York*, 445 U.S. 573 (1980)). "The Fourth Amendment 'indicates with some precision the places and things encompassed by its protections': persons, houses, papers, and effects." *Fla. v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Oliver v. United States*, 466 U.S. 170, 176 (1984)). Moreover, curtilage is considered part of the home for Fourth Amendment analysis. *Id*. The curtilage enjoys Fourth Amendment protection as part of the home itself. *Id*. The principle that the curtilage is considered part of the home "has ancient and durable roots." *Id*. The identity of home with the curtilage "is as old as the common law." *Jardines*, 569 U.S. at 6.

As introduced above, the Supreme Court recently reaffirmed the sanctity of curtilage in *Collins*,138 S. Ct. 1663. In *Collins*, a police officer encountered Collins riding an orange and black extended-frame motorcycle at high speed. The officer tried to stop him, but Collins fled at a speed of over 140 miles per hour. When the officer searched the motorcycle's license plate number, he learned the motorcycle was stolen. Collins denied knowing anything about the motorcycle, even though the officer confronted Collins with photos pulled from Collins' Facebook page that showed the motorcycle parked in the driveway of a house where Collins regularly stayed.

The officer then drove to this house and parked along the street. From his position, he could see a motorcycle parked in the house's driveway. It was covered by a white tarp and parked in the same spot as the motorcycle in the Facebook photos. The officer walked up the driveway, removed the tarp, and snapped a photo of the motorcycle—it was orange and black and with an extended frame. He then replaced the tarp and returned to his car. When Collins arrived and entered the house, the officer knocked on the front door. Collins answered and agreed to speak with him. After Collins admitted to having bought the motorcycle without title, the officer arrested him.

A grand jury indicted Collins for receiving stolen property. The trial court denied Collins' motion to suppress evidence resulting from the officer's warrantless search, and Collins was convicted. Upon review, the U.S. Supreme Court noted "When …[the police officer]… searched the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abuts the house." *Collins*, 138 S. Ct. at 1667.

The Court's opinion describes the driveway in which the motorcycle was parked:

> According to photographs in the record, the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially

> enclosed section of the driveway and the house. A visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch.

Collins, 138 S. Ct. at 1670–71. The *Collins* court concluded the driveway in which the motorcycle was parked, a driveway almost identical to Mr. Boule's, was curtilage to the home.

> The "'conception defining the curtilage' is…familiar enough that it is 'easily understood from our daily experience.'" *Jardines*, 569 U.S. at 7 (quoting *Oliver*, 466 U.S. at 182, n. 12). Just like the front porch, side garden, or area "outside the front window," *Jardines*, 569 U.S. at 6, the driveway enclosure where [the officer] searched the motorcycle constitutes "an area adjacent to the home and 'to which the activity of home life extends,'" and so is properly considered curtilage, *id.*, at 7 (quoting *Oliver*, 466 U.S. at 182, n. 12).

Collins, 138 S. Ct. at 1671. In reaching this conclusion, the *Collins* court did not create new law:

> [T]he Fourth Amendment's protection of curtilage has long been black letter law. "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Fla. v. Jardines*, 569 U.S. 1, 6 (2013). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Ibid*. (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). To give full practical effect to that right, the Court considers curtilage—"the area 'immediately surrounding and associated with the home'"—to be "'part of the home itself for Fourth Amendment purposes.'" *Jardines*, 569 U.S. at 6 (quoting *Oliver*, 466 U.S. at 180). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most

> heightened." *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986). When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. *Jardines*, 569 U.S. at 11. Such conduct thus is presumptively unreasonable absent a warrant.

Collins, 138 S. Ct. at 1670.

In an order echoing *Collins* and the long history of similar cases described in *Collins*, the District Court found Agent Egbert's invasion of Mr. Boule's curtilage and assault on his person constituted an invasion of Mr. Boule's home. E.R. v.1 at 19–21. *See also Payton*, 445 U.S. at 585 ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment was directed.").

Searches and seizures at a home without a warrant are "presumptively unreasonable." *King*, 563 U.S. at 459 (citing *Payton*, 445 U.S. at 586). Again framing the language of its order after *Collins*, the District Court found that Agent Egbert "not only invaded Mr. Boule's Fourth Amendment interest in the item searched, *i.e.*, the vehicle, but also invaded Mr. Boule's Fourth Amendment interest in the curtilage of his home/inn." E.R. v.1 at 21. *See also Collins*, 138 S. Ct. at 1672 ("[S]earching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage.").

B. The 25-Mile Rule Does Not Weaken The Sanctity Of Mr. Boule's Curtilage

Under 8 U.S.C. § 1357(a)(3), also known as the 25-mile Rule, Border Patrol Agents have the power, without warrant, "within a distance of twenty–five miles from any such external boundary [of the United States] to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States."

While Mr. Boule's home is within this 25-mile zone, the curtilage of his home—as shown in the photo reproduced at page 8 in the statement of the case—remains sacrosanct. *See United States v. Romero-Bustamente*, 337 F.3d 1104, 1107 (9th Cir. 2003). Romero-Bustamente lived in a house in Nogales, Arizona, located approximately 10–15 feet north of the border with Mexico. One evening, Border Patrol Agents monitoring video cameras along the border observed several individuals jump the border fence and enter Romero's property.

Several Border Patrol Agents made their way to Romero-Bustamente's house. Two of the agents knocked on the door asked for permission to search the house for illegal aliens. Romero-Bustamente made a phone call and then ultimately agreed to allow the agents to search his house, but they found nothing.

A third agent who had remained outside of the home heard a sound coming from Romero-Bustamente's backyard and, without seeking permission, went around the side of the house to investigate. Upon reaching the backyard, the agent

found two men, apparently undocumented Mexican nationals, hiding behind a shed.

Romero-Bustamente was arrested and indicted on one count of harboring illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(iii). He moved to suppress the discovery of the individuals on Fourth Amendment grounds as he had not authorized the agent access to his backyard. The trial court denied his motion, finding that the search of the backyard was justified under 8 U.S.C. § 1357(a)(3).

On appeal, the government relied on 8 U.S.C. § 1357(a)(3) for the proposition that the search was authorized by law, arguing that "curtilage is not a 'dwelling,' and therefore falls within the ambit of this statute, which creates an exception to the warrant requirement." *Romero-Bustamente*, 337 F.3d at 1108. Romero-Bustamente contended that "the residential curtilage does fall within the definition of a 'dwelling,' and that the statutory search authority therefore does not apply." *Id.* Finding for Romero, the court held:

> [T]he word "dwelling[ ]" in § 1357(a)(3) has the legal meaning of the word "home," with its concomitant constitutional protections. Because the curtilage is "part of the home itself for Fourth Amendment purposes," *Oliver*, 466 U.S. at 180, 104 S. Ct. 1735, the curtilage is excluded from warrantless searches along with residential structures.

Romero-Bustamente, 337 F.3d at 1110.

The 25–mile Rule does not diminish Mr. Boule's Fourth Amendment right to privacy in the curtilage of his home. Just as in *Romero-Bustamente*, where the

small enclosed yard adjacent to and behind a house was held to fall within the curtilage as a matter of law (*Romero-Bustamente*, 337 F.3d at 1107), so too is Mr. Boule's private driveway within the curtilage of his home and subject to the same protection as other private areas surrounding his home. E.R. v.1 at 21. It is not only within the private area immediately surrounding his home, but it is well within an area behind a marked "Guests Only; Private Property; No Trespassing" sign, further supporting Mr. Boule's expectation of privacy. E.R. v.3 at 498, 504.

It is undisputed that Mr. Boule reiterated his expectation of his right to privacy in the area when he advised Agent Egbert that he was trespassing and demanded he leave the premises, which Egbert refused to do. E.R. v.1 at 8; E.R. v.2 at 127; E.R. v.3 at 497. Any license Agent Egbert may have believed he had to be on Mr. Boule's property was revoked at that moment.

As recently re-confirmed by the Supreme Court in *Collins*, "searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle, but also an invasion of the sanctity of the curtilage." 138 S. Ct. at 1672. Agent Egbert's unwarranted and unconstitutional intrusion into the sanctity of Mr. Boule's curtilage violated the privacy of his home itself, a Fourth Amendment violation not in any way ameliorated by the 25-mile Rule.

C. Agent Egbert Violated Mr. Boule's Constitutional Rights Knowingly And Maliciously.

Agent Egbert must be held accountable for entering and/or refusing to leave Mr. Boule's driveway. His trespass, assaultive behavior, detention and search of Mr. Boule's vehicle were all performed in knowing violation of the Fourth Amendment.

As a trained Border Patrol Agent, Agent Egbert cannot claim lack of knowledge for his violations of Mr. Boule's Fourth Amendment rights. His own witness, a fellow Border Patrol Agent, confirmed that instruction regarding curtilage law is part of the curriculum for entry-level Border Patrol Agents. E.R. v.3 at 335–37, 436–37. This witness also opined that 1) driveways constitute curtilage; 2) curtilage is not part of the open fields doctrine[6]; and 3) that the area where Agent Egbert entered and refused to leave was Mr. Boule's driveway. *Id.* at 335–37, 436–37, 446–62.

Agent Egbert's own declaration provides a reasonable basis to infer malice in his intrusion into Mr. Boule's protected curtilage. [redacted]

[redacted]

[redacted]

[6] "The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects' is not extended to the open fields." *Hester v. United States*, 265 U.S. 57 (1924).

[redacted]

It is commonly accepted that "Complying with the terms of … [legal access to another person's curtilage] …does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Jardines*, 569 U.S. at 8. In failing to allow a sanction against Agent Egbert for his violations of Mr. Boule's constitutional rights, the District Court effectively holds that basic knowledge and responsibility toward another's curtilage can be expected of Girl Scouts and trick-or-treaters, but not Border Patrol Agents—an alarming prospect, given the enormous authority and power that Border Patrol Agents hold and the damages that can flow from misuse of this authority and power.

CONCLUSION

A *Bivens* remedy is appropriate and necessary to address the constitutional violations alleged in this case. Congress has not demonstrated any intent to create a categorical exemption from *Bivens* liability for CBP Border Patrol Agents. On the contrary, both Congress and the Ninth Circuit have explicitly acknowledged the possibility of federal immigration officers being liable for damages.

Special factors related to national security, foreign relations, or separation-of-powers do not counsel hesitation in this case involving a domestic violation of the Fourth and First Amendment rights of a U.S. citizen by a federal agent. For these reasons, Mr. Boule respectfully requests this Court reverse the District Court's dismissal of Plaintiff's *Bivens* claims under the Fourth and First Amendments, find liability as a matter of law against Agent Egbert for the Fourth Amendment *Bivens* claim and remand to the District Court for the determination of damages and further liability consideration by a jury.

DATED: January 30, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Federal Rules of Appellate Procedure 28–2.6, Mr. Boule states he is not aware of any related cases currently before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,575 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016, Times New Roman 14-point font.

Date: January 30, 2019

By: *s/Breean Beggs*
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By: *s/Gregory Boos*
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By: *s/W. Scott Railton*
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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be notified of filing by the appellate CM/ECF system at the following:

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I further certify that, pursuant to agreement of the above parties as to service by e–mail, the I transmitted a true and correct unredacted copy of the foregoing document via e–mail to each one of them to the e–mail addresses listed above, plus a copy to Kristie Wong: kristie@seamarklaw.com

I further certify there are no non–CM/ECF participants to this case.

Date: January 30, 2019

By: *s/Gregory Boos*
Gregory Boos

ADDENDUM

I. U.S. Const. Amend I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II. U.S. Const. Amend IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

III. U.S. Const. Amend. XIV (excerpt)

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV. 28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

V. 28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the

Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

VI. 28 U.S.C. § 1294 (excerpt)

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

VII. 28 U. S.C. §2679(b)(2)(A)

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States

VIII. 8 U.S.C. § 1357(a)(3) (excerpt)

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary

to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.

IX. Fed. R. App. P. 4(a)(1)(B)

The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

X. Fed. R. Civ. P. 56(a)

A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

XI. Fed. R. Evid. 201(f) (excerpt)

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(3) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.