No.

In the Supreme Court of the United States

ERIK EGBERT,
PETITIONER,

v.

ROBERT BOULE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court recognized a cause of action under the Constitution for damages against Federal Bureau of Narcotics officers for alleged violations of the Fourth Amendment. The questions presented are:

1. Whether a cause of action exists under *Bivens* for First Amendment retaliation claims.

2. Whether a cause of action exists under *Bivens* for claims against federal officers engaged in immigration-related functions for allegedly violating a plaintiff's Fourth Amendment rights.

3. Whether the Court should reconsider *Bivens*.

PARTIES TO THE PROCEEDING

Petitioner Erik Egbert was the defendant in the district court and the appellee in the Ninth Circuit.

Respondent Robert Boule was the plaintiff in the district court and the appellant in the Ninth Circuit.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Boule v. Egbert*, No. 18-35789, 9th Cir. (May 20, 2021) (denying rehearing en banc and reversing grant of summary judgment for defendant); and
- *Boule v. Egbert*, No. 17-cv-0106, W.D. Wash. (August 24, 2018) (granting defendant's motion for summary judgment on plaintiff's First Amendment *Bivens* claim), and *Boule v. Egbert*, No. 17-cv-0106, W.D. Wash. (August 21, 2018) (granting defendant's motion for summary judgment on plaintiff's Fourth Amendment *Bivens* claim).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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Petitioner Erik Egbert respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The original opinion of the court of appeals is reported and available at 980 F.3d 1309. The amended opinion of the court of appeals and the dissenting opinions from the denial of rehearing en banc are reported and available at 998 F.3d 370. Pet.App.1a-47a. The opinions of the United States District Court for the Western District of Washington granting petitioner's motion for summary judgment on respondent's First and Fourth Amendment claims are unreported and available at 2018 WL

4078852 and 2018 WL 3993371, respectively. Pet.App.48a-57a, 58a-70a.

JURISDICTION

The original opinion of the court of appeals was filed on November 20, 2020. On May 20, 2021, the court denied rehearing en banc, issued an amended opinion, and entered judgment. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

This petition raises fundamental questions about the scope and validity of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* implied a cause of action for damages against federal officials for violations of the Fourth Amendment. *Id.* at 396. By 1980, the Court had expanded *Bivens* two more times, into Due Process and Eighth Amendment contexts.

For the last forty years, however, the Court has halted further *Bivens* expansion, rejecting such attempts on ten successive occasions. Most recently, the Court in *Hernandez v. Mesa*, 140 S. Ct. 735, 739 (2020), "refuse[d] to extend *Bivens* into th[e] new field" of "cross-border shooting claims," including the Fourth and Fifth Amendment claims at issue there. The Court in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), likewise refused to extend *Bivens* to Fourth and Fifth Amendment claims arising in the context of detention practices employed in the wake of the 9/11 terrorist attacks.

More broadly, the Court has repudiated the whole project of implying causes of action. The Court has signaled the unlikelihood that *Bivens* should be expanded to any new contexts and emphasized the separation-of-powers problems that the doctrine presents. *Id.* at 1856. And the Court observed that "the analysis in the Court's [first]

three *Bivens* cases might have been different if they were decided today." *Id.*

Although the Court has erected barrier after barrier to new *Bivens* claims, the Ninth Circuit held below that federal Border Patrol agents may be personally liable under *Bivens* for allegedly retaliating against First Amendment-protected speech. Further, the Ninth Circuit below held that plaintiffs can also subject Border Patrol agents to *Bivens* suits for violating Fourth Amendment rights in the course of securing the border. The importance of those rulings is incontrovertible: twelve Ninth Circuit judges filed three separate dissents spanning 24 pages. *See* Pet.App.7a-29a (Bumatay, J., dissenting); Pet.App.29a-30a (Owens, J., dissenting); Pet.App.30a-31a (Bress, J., dissenting).

As many of the Ninth Circuit dissenters observed, the panel's groundbreaking *Bivens* expansions "improperly disregard[] the Court's precedents" and make that court "an outlier among [its] fellow circuit courts." Pet.App.9a (Bumatay, J., dissenting). Six circuits—the Second, Third, Fourth, Fifth, Sixth, and D.C. Circuits—have rejected the availability of First Amendment retaliation *Bivens* claims against myriad types of federal officials. Similarly, three circuits—the Fourth, Fifth, and Eleventh Circuits—have refused to allow Fourth Amendment *Bivens* claims in cases involving immigration enforcement, citing the sensitivity of this area, heightened separation-of-powers concerns, and the availability of many other remedies.

Only this Court can restore uniformity. In the only circuit that spans both borders, Border Patrol agents face uniquely heightened risks of personal lawsuits for money damages that could alter on-the-job decision-making. The lion's share of Customs and Border Protection agents are stationed in the Ninth Circuit, and a large percentage of

drug and human trafficking and illegal crossings occur there as well. Congress has comprehensively legislated in the area of immigration enforcement, and federal agencies afford internal administrative options to root out malfeasance. The risk is simply too high that judicially crafted *Bivens* actions could skew agents' decision-making about whether and how to investigate suspicious activities in carrying out their important national-security mission.

A. Factual Background

Petitioner Erik Egbert is a Border Patrol agent stationed in Blaine, Washington, at the extreme northwest corner of the continental United States right on the Canadian border. *See* U.S. Customs & Border Prot., *Blaine Station* (June 5, 2020), https://tinyurl.com/2jve2jjt. The area is "known for cross-border smuggling of people, drugs, illicit money," and other illicit items. Pet.App.49a. Agent Egbert's job is to investigate those crimes and apprehend those responsible, in keeping with the Border Patrol's "primary responsibility for interdicting persons attempting to illegally enter or exit the United States," 6 U.S.C. § 211(e)(3)(B), and its mission to "detect, respond to, and interdict terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States," *id.* § 211(c)(5).

Respondent Robert Boule owns a Blaine bed-and-breakfast on a property steps away from the Canadian border. Pet.App.49a. Fittingly called "Smuggler's Inn," Boule's lodging is "a notorious site for illegal border crossing." Pet.App.9a. The Smuggler's Inn also attracts drug traffickers; "[l]arge shipments of cocaine, methamphetamine, ecstasy, and opiates" have been seized on site. *Id.* Agent Egbert had previously gone to the Smuggler's Inn

to apprehend people illegally crossing the border, and repeatedly stopped at the Inn on his patrols. *Id.* Boule had for some years served as a paid government informant whose information prompted multiple arrests of his guests. Pet.App.32a-33a. More recently, however, Canadian authorities have arrested Boule and charged him with human trafficking. Pet.App.9a.

On March 20, 2014, Agent Egbert was on patrol and learned from Boule that a Turkish national was arriving at the Smuggler's Inn later that day. Pet.App.50a. Agent Egbert suspected the Turkish national might cross into Canada or meet with associates entering the United States from Canada for a criminal purpose. Pet.App.27a.

Agent Egbert accordingly waited for Boule's employees to drive the Turkish national to the Smuggler's Inn. Pet.App.50a. Once they arrived, Agent Egbert followed them up the Inn's driveway and parked behind Boule's vehicle. *Id.* The driver exited; the Turkish national remained in the car. Boule told Agent Egbert to leave the premises, but Agent Egbert declined. Pet.App.50a-51a. Boule responded by stepping between Agent Egbert and the car with the Turkish national. Pet.App.51a. Agent Egbert allegedly pushed Boule aside, asked the Turkish national about his immigration status, and confirmed his lawful presence. Pet.App.33a. Boule later sought medical treatment for a back injury that Agent Egbert allegedly caused. *Id.*

Boule complained to Agent Egbert's superiors. *Id.* Boule alleges that Agent Egbert retaliated by contacting the Internal Revenue Service to report that Boule "had not properly accounted for income received" and contacted other government agencies to have Boule's business investigated. Pet.App.53a. The IRS subsequently audited Boule's returns, and other agencies also investigated Boule. Pet.App.33a-34a.

B. Procedural History

1. Boule sued Agent Egbert in the U.S. District Court for the Western District of Washington. He asserted two causes of action under *Bivens*, alleging that Agent Egbert (1) retaliated against Boule in violation of the First Amendment, Pet.App.48a, and (2) violated Boule's Fourth Amendment rights by entering his property, refusing to leave, and pushing him to the ground, Pet.App.68a-69a; *see also* Am. Compl. ¶ 2, D. Ct. Dkt. No. 22.

The district court, in two separate decisions, granted Agent Egbert summary judgment on both claims. Pet. App.57a, 69a. The court emphasized that this Court "has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." Pet.App.54a, 66a. The court held that it would be inappropriate to extend *Bivens* to either novel context. Pet.App.56a, 69a.

As to Boule's First Amendment claim, the district court noted that "the Supreme Court has never implied a *Bivens* action under any clause of the First Amendment," and that Boule's claim "clearly presents a new context in *Bivens*." Pet.App.55a. The court then concluded that "special factors" counseled against this doctrinal expansion. Pet.App.56a. The court cited the national-security elements of Border Patrol agents' responsibilities; the risk that personal liability would interfere with Border Patrol agents' judgments in investigations; and Congress' superior position to gauge the appropriateness of remedies in this context. *Id.*

As to Boule's Fourth Amendment claim, the district court explained that Boule sought to expand *Bivens* to a new context because Agent Egbert "is a U.S. Border Patrol Agent," not "a traditional law enforcement officer" or other official previously subject to *Bivens* suits.

Pet.App.67a. The court held that the same "special factors" weighed against extending *Bivens* into the First Amendment and novel Fourth Amendment contexts. Pet.App.56a.

2. The Ninth Circuit reversed both judgments, holding that respondent's complaint stated valid causes of actions under *Bivens*. With respect to Boule's First Amendment claim, the Ninth Circuit reasoned that *Hartman v. Moore*, 547 U.S. 250 (2006), "explicitly stated . . . that such a [*Bivens*] claim may be brought," Pet.App.41a, even if "the [Supreme] Court has not expressly so held," Pet.App.42a. The Ninth Circuit then found "no special factors that make it inadvisable to find a cognizable *Bivens* claim in this new context." *Id.*

With respect to Boule's Fourth Amendment claim, the Ninth Circuit reasoned that extending *Bivens* to Border Patrol agents was a "modest extension," Pet.App.36a, that would not entail "improper intrusion by the judiciary into the sphere of the other branches," Pet.App.40a. The Ninth Circuit deemed Boule's excessive-force claim "indistinguishable from Fourth Amendment excessive force claims that are routinely brought under *Bivens* against F.B.I. agents." Pet.App.36a. The Ninth Circuit thus dismissed as inapposite the national-security and foreign-relations concerns that this Court emphasized in prior cases. Pet.App.36a-38a (distinguishing *Abbasi* and *Hernandez*).

Finally, the Ninth Circuit deemed alternative remedies unavailable. The court reasoned that the existence of potential remedies for intentional tort claims under the Federal Tort Claims Act, 28 U.S.C. § 2680(h), "does not foreclose a *Bivens* action." Pet.App.44a-45a. The court opined that the Westfall Act, 28 U.S.C. § 2679, would bar

any state-law trespass claim, and dismissed injunctive relief as inadequate to remedy Boule's past harms. Pet.App.46a.

3. The Ninth Circuit denied rehearing, with twelve judges dissenting in three separate opinions.

Judge Bumatay, writing for seven dissenting judges, expressed the view that the decision "resurrect[s] *Bivens*" and "extend[s] *Bivens* to two new contexts," despite "th[is] Court's clear instructions" to the contrary. Pet.App.8a-9a. Further, he stated that the decision below "puts us out of step with our sister courts," Pet.App.21a, making the Ninth Circuit "the only federal appellate court in the nation trying to resurrect *Bivens* against the weight of the Court's precedents." Pet.App.22a. Judge Bumatay noted particular reasons for hesitation here: "[N]ational security, and specifically, the conduct of agents at the border, is a red light to *Bivens* extensions." Pet.App.26a-27a. Yet "[t]he subject of this litigation is a Border Patrol agent's conduct during an on-duty investigation of a foreign national, at a property known for smuggling activity, adjacent to an international border." Pet.App.27a. Judge Bumatay also described numerous available remedies for the First and Fourth Amendment claims that the panel overlooked. Pet.App.23a-24a, 28a. He emphasized: "[b]y avoiding the Constitution's limits on the 'judicial Power,' we become an outlier among our fellow courts and establish ourselves as a quasi-legislature." Pet.App.9a.

Judge Owens's separate dissent observed, "though hopefully I've improved with age, our *Bivens* jurisprudence has not." Pet.App.29a. He opined that "new legislation that permits plaintiffs to vindicate their rights is better than our current jurisprudential word jumble." *Id.*

Judge Bress, writing for four additional dissenting judges, described the decision below as "significantly out

of step with modern Supreme Court cases emphasizing that the *Bivens* remedy is not to be lightly extended." Pet.App.30a. Judge Bress distinguished the "decidedly new context" of this case from the "few previous cases" allowing *Bivens* actions. *Id.* He considered "it self-evident that there are many reasons counseling hesitation" in a case involving "investigation of an international traveler near the international border." *Id.*

REASONS FOR GRANTING THE PETITION

Both of the Ninth Circuit's groundbreaking *Bivens* expansions parted ways with all other circuits to consider the questions. All six circuits to consider the availability of First Amendment retaliation claims under *Bivens* have rejected them. And three circuits have refused to recognize Fourth Amendment *Bivens* claims in factually analogous circumstances involving immigration enforcement. In breaking with both lines of authority, the decision below departs from the Court's cautious criteria disfavoring *Bivens* expansions. Moreover, the Ninth Circuit's reasoning invites extensions of *Bivens* into new contexts so long as the precise facts of the case differ from the Court's precedents. Only this Court can restore uniformity and ensure that officers in arguably the most critical circuit for border enforcement do not face the risk of burdensome lawsuits that no other circuit would countenance.

The Ninth Circuit's decision also illustrates why *Bivens* should be overruled. This Court's precedents have repeatedly cut back on *Bivens* and disavowed its foundations. But so long as the Court leaves the *Bivens* door open, litigants will keep bringing suits. This petition presents an ideal opportunity to reconsider *Bivens*. The case below turned upon the availability of *Bivens* in concededly novel First and Fourth Amendment contexts. The Ninth Circuit panel produced a lengthy opinion; three separate

dissents from the denial of rehearing garnered twelve total votes. The Court should grant the petition and bring this important area into line with the Court's modern jurisprudence respecting the separation of powers and recognizing Congress' primacy in creating causes of action.

I. The Ninth Circuit's Decision Creates Two Circuit Splits

A. The Circuits Are Split 6-1 Over Whether *Bivens* Extends to First Amendment Retaliation Claims

"[C]ircuit courts have nearly uniformly refused to extend *Bivens* to the First Amendment." Pet.App.21a (Bumatay, J. dissenting). Six circuits have rejected *Bivens* First Amendment retaliation claims in myriad contexts. Three others have expressed doubts that *Bivens* could ever extend to the First Amendment context. The decision below thus creates a sharp 6-1 circuit split, leaving the Ninth Circuit "the only federal appellate court in the nation" on the other side. Pet.App.22a (Bumatay, J., dissenting).

1. Every other circuit to consider the question has declined to expand *Bivens* to any type of First Amendment retaliation claim.

Start with the D.C. Circuit. Though the D.C. Circuit had previously accepted the availability of First Amendment *Bivens* claims in various contexts, the court held that "those cases have been overtaken" by this Court's more recent cases constraining *Bivens*. *Loumiet v. United States*, 948 F.3d 376, 382 (D.C. Cir. 2020). The D.C. Circuit further held that, "[c]onsistent with the Supreme Court's marked reluctance to extend *Bivens* to new contexts . . . the First Amendment does not create such an implied damages action." *Id.* at 378. The court thus identified "special factors counsel[ing]" against expanding *Bivens* to claims of retaliatory enforcement by the Office

of the Comptroller of the Currency, including the existence of a comprehensive administrative scheme (regardless of whether that scheme affords any relief). *Id.* at 382-83. And the D.C. Circuit has rejected every other species of First Amendment *Bivens* claim to cross its plate.[1]

Similarly, the Second Circuit has consistently rejected First Amendment *Bivens* claims across contexts. In a case alleging "First Amendment violations based on retaliatory tax audits"—allegations similar to Boule's—the Second Circuit held that "*Bivens* relief is not available." *Hudson Valley Black Press v. IRS*, 409 F.3d 106, 113 (2d Cir. 2005). The court added: "[E]very circuit that has considered the appropriateness of a *Bivens* remedy in the taxation context has uniformly declined to permit one." *Id.* The Second Circuit also rejected Free Exercise claims, citing this Court's general disinclination "to extend *Bivens* to a claim sounding in the First Amendment." *Turkmen v. Hasty*, 789 F.3d 218, 236 (2d Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

The Third Circuit, "[i]n the heyday of *Bivens* expansion . . . recognized an implied right to sue federal officials for damages for a violation of the First Amendment." *Bistrian v. Levi*, 912 F.3d 79, 95 (3d Cir. 2018). But that court has since disavowed those cases in light of this Court's "opinion in *Abbasi*, which clearly communicates that expanding *Bivens* beyond those contexts already recognized

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[1] *See, e.g.*, *Davis v. Billington*, 681 F.3d 377, 379-80, 388 (D.C. Cir. 2012) (rejecting First Amendment retaliation *Bivens* claim brought by former employee against the Librarian of Congress); *Wilson v. Libby*, 535 F.3d 697, 701-03, 711 (D.C. Cir. 2008) (rejecting former CIA agent's First Amendment *Bivens* claim alleging retaliatory disclosure of her status as covert agent); *Spagnola v. Mathis*, 859 F.2d 223, 224-25 (D.C. Cir. 1988) (en banc) (rejecting First Amendment *Bivens* claim brought by D.C. police officer alleging retaliatory denial of employment in the Environmental Protection Agency).

by the Supreme Court is disfavored." *Id.* For instance, the Third Circuit rejected a First Amendment retaliation *Bivens* claim against a TSA employee who called the police and falsely reported that plaintiff had threatened to bring a bomb to the airport. *Vanderklok v. United States*, 868 F.3d 189, 193, 209 (3d Cir. 2017). The Third Circuit also has nixed First Amendment retaliation claims in the prison-housing context, citing "real-time and often difficult judgment calls" about discipline and the risk of interfering with prison administration. *Bistrian*, 912 F.3d at 96. The court similarly refused to imply a First Amendment retaliation claim in the prison-work-assignment context, noting the risk of "improperly encroach[ing] upon the executive's domain." *Mack v. Yost*, 968 F.3d 311, 323 (3d Cir. 2020).

The Fourth Circuit has repeatedly rejected the availability of First Amendment *Bivens* suits. That court refused to authorize such a claim in the prison-grievance context. *Earle v. Shreves*, 990 F.3d 774, 781 (4th Cir. 2021). The court also disallowed First Amendment retaliation *Bivens* claims by servicemembers who claimed retaliation by military officials for reporting sexual assaults, portraying the whole field of "military service" as a clear factor counseling hesitation. *Cioca v. Rumsfeld*, 720 F.3d 505, 506-07, 512-18 (4th Cir. 2013); *accord Doe v. Meron*, 929 F.3d 153, 162, 169-70 (4th Cir. 2019) (similar). The court has taken its cues from this Court's caselaw, which "has changed dramatically" and now imposes "significant obstacles in the path to recognition of an implied cause of action." *Earle*, 990 F.3d at 778.

The Fifth Circuit takes the same approach. *Petzold v. Rostollan*, 946 F.3d 242 (5th Cir. 2019), concluded that, "as First Amendment retaliation claims are a 'new' *Bivens* context, it is unclear—and unlikely—that *Bivens*' implied cause of action extends this far," *id.* at 252 n.46.

The Fifth Circuit then "decline[d] to extend *Bivens* to include First Amendment retaliation claims against prison officials, joining [other] courts that have recently considered the matter." *Watkins v. Three Admin. Remedy Coordinators of Bureau of Prisons*, 998 F.3d 682, 685 (2021). The court emphasized that "the Supreme Court has not only never recognized a *Bivens* cause of action under the First Amendment but also once rejected a First Amendment retaliation *Bivens* claim for federal employees." *Id.* at 686 (citation omitted).

The Sixth Circuit likewise has repudiated every First Amendment *Bivens* claim it has encountered. The court explained: "The problem for [plaintiffs] is not just that there has been a long drought since the Court last recognized a new *Bivens* action or even that the Court has cut back on the three constitutional claims once covered." *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020). The larger problem "is that the Court has never recognized a *Bivens* action for any First Amendment right and it rejected a First Amendment retaliation claim decades ago." *Id.* (citation omitted).

Three additional circuits—the First, Tenth, and Eleventh—have "expressed skepticism that *Bivens* could be expanded to the First Amendment." Pet.App.21a (Bumatay, J., dissenting). The First Circuit has observed, "[i]t is questionable whether *Bivens* extends to cases asserting a violation of First Amendment rights or retaliation for the exercise of those rights." *Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 35 (1st Cir. 2011). The Tenth Circuit has emphasized this Court's "reluctan[ce] to extend *Bivens* liability to any new context," including the First Amendment. *Pahls v. Thomas*, 718 F.3d 1210, 1226 n.6 (10th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 675). And the Eleventh Circuit has found it significant that "the Court has repeat-

edly declined to imply a *Bivens* remedy in a variety of contexts," including the First Amendment. *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1284 n.3 (11th Cir. 2012).

Thus, until the decision below, the consensus among courts of appeals was universally against extending *Bivens* to First Amendment retaliation claims against federal officers.

2. The decision below does not merely contradict the outcomes in every other circuit. The Ninth Circuit's reasoning also contravenes other circuits' rationales for refusing to imply such First Amendment *Bivens* actions.

The Ninth Circuit interpreted this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), as tacitly endorsing such *Bivens* actions "when federal law enforcement officials have no innocent motive for their actions." Pet.App.42a. But other circuits reject that reading of *Hartman*, noting that this Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009), and *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012), expressly disavowed recognizing any First Amendment *Bivens* claims, *e.g., Loumiet*, 948 F.3d at 382; *Johnson v. Burden*, 781 F. App'x 833, 836-37 (11th Cir. 2019); *Bistrian*, 912 F.3d at 95-96.

The Ninth Circuit considered its own recognition of a *Bivens* claim "in a different First Amendment context" 35 years ago as proof that no "special factors . . . make it inadvisable" to expand *Bivens* to First Amendment retaliation claims. Pet.App.42a. Yet the D.C. and Third Circuits concluded that this Court's recent decisions in *Abbasi* and *Hernandez* warning against further expansion of *Bivens* effectively overruled those courts' prior precedents recognizing *Bivens* claims in various First Amendment retaliation cases. *Loumiet*, 948 F.3d at 382; *Bistrian*, 912 F.3d at 95.

Conversely, the Ninth Circuit treated this Court's decision rejecting a *Bivens* First Amendment retaliation action in *Bush v. Lucas*, 462 U.S. 367 (1983), as permitting such claims in factually distinguishable cases. Pet.App.42a-43a. Again, other circuits have drawn the opposite conclusion, treating *Bush* as a sign that First Amendment retaliation claims would be especially unlikely territory for breaking new *Bivens* ground. *E.g.*, *Callahan*, 965 F.3d at 523; *Watkins*, 998 F.3d at 686; *Hudson Valley Black Press*, 409 F.3d at 109-11.

Finally, the Ninth Circuit reasoned that "retaliation is a well-established First Amendment claim" and that Agent Egbert purportedly "was not carrying out official duties" in taking the allegedly retaliatory acts. Pet.App.43a. But every other circuit looks to the separation-of-powers concerns, potential policy costs, and judicial discomfort involved in guessing whether holding federal officers personally responsible for money damages for these claims will disrupt their ability to discharge their duties. Pet.App.20a-22a (Bumatay, J., dissenting); *accord Earle*, 990 F.3d at 781; *Callahan*, 965 F.3d at 524. And other circuits refuse to imply First Amendment retaliation claims under *Bivens* even when other federal officers acted outside the scope of official duties. *E.g.*, *Vanderklok*, 868 F.3d at 194-95, 209; *Earle*, 990 F.3d at 781; *Watkins*, 998 F.3d at 684-86. Given that the en banc court denied rehearing, this pronounced split will not resolve absent this Court's intervention.

B. The Circuits Are Split 3-1 Over Whether Bivens Extends to Fourth Amendment Claims Involving Immigration Enforcement

The Ninth Circuit further split 3-1 from its sister circuits by endorsing Fourth Amendment *Bivens* claims against federal officers charged with enforcing immigration laws. Every other circuit to consider the issue has

refused to extend *Bivens* in cases involving immigration enforcement, including to Fourth Amendment claims against Border Patrol agents. And every other circuit has invoked cross-cutting reasons for hesitation and alternative remedies that apply equally to this case.

1. The Fourth Circuit has refused to extend *Bivens* to Fourth Amendment claims that a U.S. citizen and other plaintiffs brought against Immigration and Customs Enforcement agents engaged in immigration enforcement. *Tun-Cos v. Perrotte*, 922 F.3d 514, 528 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 2565 (2020). The court emphasized this Court's "open hostility to expanding *Bivens* liability," *id.* at 521, and listed multiple reasons why "Congress *might doubt* the need for an implied damages remedy," *id.* at 525. The court observed that "immigration enforcement . . . has 'the natural tendency to affect diplomacy, foreign policy, and the security of the nation,'" all factors "counsel[ing] hesitation." *Id.* at 526 (quoting *Mirmehdi v. United States*, 689 F.3d 975, 983 (9th Cir. 2012)). The court cited the comprehensiveness of Congress' immigration legislation as another sign that it was "less likely that Congress would want the Judiciary to interfere." *Id.*

The Fifth Circuit has rejected any and all extensions of *Bivens* in the immigration context. That court has suggested that "proximity to the border alone is sufficient to qualify as a 'new context' in which *Bivens* is unavailable." *Angulo v. Brown*, 978 F.3d 942, 948 n.3 (5th Cir. 2020). The Fifth Circuit has also denied a *Bivens* remedy based on the overarching concern that "judicial meddling in immigration matters is particularly violative of separation-of-powers principles." *Maria S. v. Garza*, 912 F.3d 778, 784-85 (5th Cir.), *cert. denied*, 140 S. Ct. 81 (2019) (rejecting procedural due process *Bivens* claim against immigration officials); *see also Hernandez v. Mesa*, 885 F.3d 811,

823 (5th Cir. 2018) (en banc) (rejecting Fourth Amendment *Bivens* claim against Border Patrol agent), *aff'd* 140 S. Ct. 735.

Further, in a case notably similar to this one, the Fifth Circuit held that *Bivens* actions are unavailable against Customs and Border Protection agents for alleged Fourth Amendment violations in searches and seizures arising in the course of civil immigration enforcement. *De La Paz v. Coy*, 786 F.3d 367, 369 (5th Cir. 2015). The court identified many "special factors unique to the immigration context" that counsel against extending *Bivens,* including that "*Bivens* liability could deter agents from vigorous enforcement and investigation of illegal immigration," and "that immigration policy and enforcement implicate serious separation of powers concerns." *Id.* at 378-79. The court also cited alternative remedies generally available in the immigration context, *id.* at 376, adding that "[a] fair reading of legislative developments pertaining to immigration leads ineluctably to the conclusion that Congress's failure to provide an individual damages remedy 'has not been inadvertent'" and "counsels strongly against judicial usurpation of the legislative function." *Id.* at 377 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)).

The Eleventh Circuit, too, has declined to imply a Fourth Amendment *Bivens* claim against Immigration and Customs Enforcement agents. *Alvarez v. U.S. Immigr. & Customs Enf't*, 818 F.3d 1194, 1208 (11th Cir. 2016). The Eleventh Circuit found it significant that its "sister circuits ha[d] counseled against" recognizing "a *Bivens* remedy in the immigration context." *Id.* at 1206. Like other circuits, the Eleventh Circuit found that "numerous special factors counsel hesitation" in the immigration context, including "the breadth and detail of the Immigration and Nationality Act" and the "importance of demonstrating due respect" for the political branches. *Id.*

at 1210. And, like other circuits, the Eleventh Circuit viewed "the complexity of the Immigration and Nationality Act, and Congress's frequent amendments to it," as a comprehensive, alternative source of remedies that "suggest that no *Bivens* remedy is warranted." *Id.* at 1209.

In none of these other circuits would Agent Egbert or any other Border Patrol agent face the prospect of personal liability for money damages under *Bivens*. All of these circuits recognize that courts are ill-equipped to evaluate the costs and benefits of such liability in the sensitive area of immigration enforcement, where the political branches bear primary responsibility. Proximity to the border only heightens those concerns.

2. The Ninth Circuit recognized that allowing Fourth Amendment excessive-force *Bivens* claims against Border Patrol agents would extend *Bivens* to a novel context. Pet.App.36a-40a. Nonetheless, the Ninth Circuit considered that doctrinal expansion "modest," reasoning that *Bivens* claims against Border Patrol agents are "indistinguishable from Fourth Amendment excessive force claims that are routinely brought under *Bivens* against F.B.I. agents." Pet.App.36a. The court observed that both F.B.I. and Border Patrol agents are "federal law enforcement officials," *id.*, and equated the Fourth Amendment excessive-force claim here to the Fourth Amendment excessive-force claim in *Bivens*, Pet.App.38a.

But other circuits have expressly rejected that comparison and have refused to classify Fourth Amendment claims against Border Patrol agents as challenges to "run-of-the-mill, unconstitutional law enforcement activity by individual law enforcement agents." *Tun-Cos*, 922 F.3d at 525; *see Maria S.*, 912 F.3d at 784. Those circuits instead view immigration enforcement as presenting fundamentally different concerns, and accordingly have refused to extend *Bivens* to Fourth Amendment illegal-search and

illegal-seizure claims in the immigration context. Those circuits have done so even though *Bivens* itself involved such Fourth Amendment claims against different federal law-enforcement officers. *See Tun-Cos*, 922 F.3d at 523-25; *De La Paz*, 786 F.3d at 379-80. Thus, in every other circuit on the record, differences between law enforcement and immigration enforcement are dispositive.

The Ninth Circuit reasoned that no "special factors" counseled hesitation because the facts here were a "far cry" from this Court's decisions in *Abbasi* and *Hernandez*. Pet.App.36a. The Ninth Circuit considered those cases inapt because *Abbasi* involved "high-level Executive Branch decisions involving issues of national security," Pet.App.37a, and *Hernandez* involved an "extremely unusual" cross-border shooting, Pet.App.38a, not "a conventional Fourth Amendment excessive force claim," *id.* The Ninth Circuit also dismissed this Court's concern that "the conduct of agents positioned at the border has a clear and strong connection to national security," *Hernandez*, 140 S. Ct. at 746, by pointing out that the Turkish national whom Agent Egbert was investigating had first arrived in New York before traveling cross-country. Pet.App.38a. Thus, the Ninth Circuit did not place significance on Agent Egbert's posting at the border or his investigation at a known smuggling hotbed straddling the Canadian border. Pet.App.30a (Bress, J., dissenting).

But in other circuits, the "threshold" for whether "a factor counsels hesitation" is "remarkably low," and does not require a Supreme Court decision with the exact same facts. *See Maria S.*, 912 F.3d at 783-84 (collecting cases). Thus, in other circuits, *Abbasi* and *Hernandez* are near-dispositive. As the Fifth Circuit recently observed: "*Hernandez v. Mesa* strongly implies that proximity to the border alone is sufficient to qualify as a 'new context' in which *Bivens* is unavailable." *Angulo*, 978 F.3d at 948 n.3

(5th Cir. 2020); *accord Tun-Cos*, 922 F.3d at 525-26. Further, every other circuit to consider the issue has recognized that extending *Bivens* in the immigration-enforcement context raises the same types of diplomatic, foreign-policy, and security concerns that universally "counsel hesitation." *Tun-Cos*, 922 F.3d at 526. Only the Ninth Circuit ignores these factors.

The Ninth Circuit also believed that other circuits had "allowed various *Bivens* actions against border patrol agents under the Fourth Amendment." Pet.App.38a. But other circuits disagree with that characterization. The Ninth Circuit pointed to *Martinez-Aguero v. Gonzales*, 459 F.3d 618 (5th Cir. 2006), Pet.App.39a. But the Fifth Circuit has explained that *Martinez-Aguero* did not decide whether *Bivens* extends to Fourth Amendment claims in the immigration-enforcement context. *De La Paz*, 786 F.3d at 373. The Ninth Circuit also invoked *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015). Pet.App.38a-39a. But that case resolved a qualified immunity question and did not address whether the *Bivens* claims were viable (an issue the defendants did not raise). *Morales*, 786 F.3d at 213-14.

In sum, the Ninth Circuit sharply broke from an entrenched consensus that courts should not inject unpredictability and second-guess the political branches by implying *Bivens* actions in the immigration context. In the wake of the decision below, Border Patrol agents in the only circuit that spans both borders now face unacceptable uncertainty. Those agents must now recalibrate their on-the-job risk calculus. Every day, those agents must make swift judgments about whether to pursue often-dangerous investigations—judgments that will now be colored by the fear of facing expensive litigation and money damages from plaintiffs who seek to second-guess their judgment calls. Pet.App.28a (Bumatay, J., dissenting).

II. The Decision Below Is Wrong

1. The Ninth Circuit's decision "is inconsistent with the Supreme Court's directives on *Bivens* remedies," Pet.App.30a-31a (Bress, J., dissenting), and "flies in the face of everything the Supreme Court has told us over the last 20 years," Pet.App.16a (Bumatay, J., dissenting).

This Court has instructed that courts must reject new *Bivens* extensions in the face of even one possible qualm about implying a cause of action. *Abbasi*, 137 S. Ct. at 1858. Yet the Ninth Circuit overlooked many red flags against the pathbreaking First and Fourth Amendment *Bivens* claims here. Reasons for hesitation include:

- This Court's unwillingness to extend *Bivens*.
- Other circuits' uniform refusal to entertain claims in these contexts, *supra* pp. 10-21.
- *Hernandez*'s instruction that "[s]ince regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." 140 S. Ct. at 747.
- The risk that exposing Border Patrol agents to new personal liability for money damages would impede the effectiveness of their decision-making when discharging sensitive responsibilities. Pet.App.68a-69a.
- The existence of alternative remedies, including administrative processes, Privacy Act claims, and the Federal Tort Claims Act. Pet.App.23a-25a, 28a-29a (Bumatay, J., dissenting).

In short, it is "self-evident that there are many reasons counseling hesitation in devising court-created First and

Fourth Amendment damages remedies against a federal agent for actions relating to his investigation of an international traveler near the international border." Pet.App.30a (Bress, J., dissenting).

2. The decision below is also wrong because *Bivens* is a remnant of a bygone era that is at odds with modern precedent. This case presents an optimal vehicle for reconsidering *Bivens* and avoiding future litigation over attempts to expand *Bivens*.

This Court's more recent precedents have fatally undercut *Bivens*' foundations, leaving *Bivens* an anomalous relic of an "*ancien regime*." *Abbasi*, 137 S. Ct. at 1855. The Court decided *Bivens* in 1971, back when it was commonplace for courts to fashion freestanding causes of action to vindicate the perceived policies underlying the Constitution or statutes. *Id.* 1854-55. The Court has extended *Bivens* in just two cases, in 1979 and 1980. *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979). "After those decisions, however, the Court changed course." *Hernandez*, 140 S. Ct. at 741. The Court has now "consistently rebuffed" every attempted extension of *Bivens* in ten cases spanning four decades. *Id.* at 743.

That track record reflects a sea change in the Court's approach to implied rights of action. "In later years," the Court "came to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power." *Id.* at 741; *accord Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1938 (2021) (opinion of Thomas, J.). Congress, not courts, possess the authority to create new causes of action. *Bivens* violates the separation of powers because courts wrest legislative authority away from Congress by crafting their own new causes of action. The Court thus abandoned implied causes of action at the start of the twenty-first century and "ha[s] not

returned to it since." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001); Pet.App.13a-14a (Bumatay, J., dissenting).

Today, the Court has repeatedly "expressed doubt about [its] authority to recognize any causes of action not expressly created by Congress." *Hernandez*, 140 S. Ct. at 742. In "constitutional cases," that principle warrants even further caution, because "Congress is best positioned to evaluate 'whether, and the extent to which, monetary and other liabilities should be imposed on [federal officers]' based on constitutional torts." *Id.* (quoting *Abbasi*, 137 S. Ct. at 1856). Recently, the Court has observed that "the analysis in the Court's [first] three *Bivens* cases might have been different if they were decided today." *Abbasi*, 137 S. Ct. at 1856.

The Court's skepticism of *Bivens*' foundations, coupled with its repeated refusal to extend *Bivens* anywhere else, also undercuts any reliance interests. And "[t]he view that constitutional tort actions are less likely to prove meritorious than civil litigation in general has been confirmed as to both prisoner and nonprisoner actions." Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *The Federal Courts and the Federal System* 1122 (4th ed. 1996); *see also* William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and its Employees for Torts and Constitutional Torts*, 9 Admin. L.J. Am. U. 1105, 1150-51 (1996).

Bivens has also proven unworkable, necessitating repeated overhauls of the criteria for deciding whether courts should fashion new *Bivens* claims. At *Bivens*' inception, courts applied "a presumption in favor of implied rights of action." *Callahan*, 965 F.3d at 523. Later, the Court flipped the presumption, explaining that courts should decline to recognize new *Bivens* claims in the face

of any "special factors counseling hesitation" or alternative remedies (regardless of their efficacy). *E.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). This Court's recent decision in *Abbasi* ratcheted up the bar further, asking courts to make "separation-of-powers principles . . . central to the analysis," and indicating that "[i]n most instances … the Legislature is in the better to position" to decide on the advisability of new causes of action. 137 S. Ct. at 1857. *Hernandez* likewise heightened the standard, stressing that the Court's "watchword is caution," 140 S. Ct. at 742, and expounding upon many non-exhaustive factors weighing against the extension of *Bivens* to new contexts, *id.* at 743-47.

But the Court's current, stringent criteria still demand judgment calls that judges are ill-suited to make. For instance, lower courts should evaluate the impact of recognizing a *Bivens* action "on governmental operations systemwide." *Abbasi*, 137 S. Ct. at 1858. But courts are ill-equipped to study such far-reaching policy issues, and parties are even less equipped to brief such questions. Or take "whether the Judiciary is well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1858. It is unclear how the answer to that question could ever be yes, given the Court's repeated admonition that weighing those costs and benefits is a quintessential task for Congress. Yet, borne by the belief these criteria could produce different answers in different cases, litigants understandably persist in making *Bivens* claims.

Meanwhile, calls for the Court to reconsider *Bivens* have grown. Multiple Justices have urged the overruling of *Bivens*. *E.g.*, *Hernandez*, 140 S. Ct. at 750 (Thomas, J., concurring); *Carlson*, 446 U.S. at 31-32 (Rehnquist, J., dissenting). Other Justices have more broadly advocated for the Court to "clarify where accountability lies when a new

cause of action is either created or refused: With the people's elected representatives." *Nestlé*, 141 S. Ct. at 1943 (Gorsuch, J., concurring). Yet other Justices have opined that *Bivens* and "its two follow-on cases" should at least be strictly limited to their facts. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

Circuit judges have likewise questioned *Bivens*. Seven Ninth Circuit judges in the decision below alone described *Bivens* as unmoored from "the text or history of the Constitution" and contrary to the "separation of powers," which demands "defer[ing] to Congress and the States to provide remedies for [constitutional] violations." Pet.App.8a (Bumatay, J., dissenting). An eighth—Judge Owens—called *Bivens* jurisprudence a "jurisprudential word jumble" that has not "improved with age." Pet.App.29a (Owens, J., dissenting). Judge Silberman has described *Bivens* as a "prime example[] of rank policymaking by the High Court, not [a] legitimate exercise[] of constitutional interpretation." *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 252 (D.C. Cir. 2021) (Silberman, J., dissenting in part). And Judge Sutton, writing for a Sixth Circuit majority, has observed: "There's something to be said for . . . pointing out that the best idea for [plaintiffs] is to urge Congress to create a cause of action." *Callahan*, 965 F.3d at 523.

"[T]he time has come to consider discarding the *Bivens* doctrine altogether." *Hernandez*, 140 S. Ct. at 750 (Thomas, J., concurring). And this is an optimal case. The Ninth Circuit extended *Bivens* to two new contexts despite this Court's strong reservations against the whole enterprise. If *Bivens* has not survived into the modern era, this Court should say so. *Cf. Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021) (rejecting viability of *Teague* watershed-procedural-rule exception); *see Nestlé*, 141 S. Ct. at 1942-43 (Gorsuch, J., concurring) (questioning creation

of implied causes of action under Alien Tort Statute). Instructing litigants to direct their efforts to Congress, not the courts, would provide up-front clarity, stem spiraling litigation costs, and avoid what could be decades more of incremental interventions.

III. The Questions Presented Are Exceptionally Important and Squarely Presented

1. Whether to recognize any implied right of action inherently implicates separation-of-powers questions that go to the heart of our constitutional design. *Hernandez*, 140 S. Ct. at 743. This case also arises in a setting raising exceptionally sensitive questions about whether recognizing *Bivens* actions will undercut the ability of Border Patrol agents to fulfill their basic mission of securing the border, enforcing the immigration laws, and protecting national security.

The fact that twelve judges dissented from the denial of rehearing en banc and filed three separate dissents shows the importance of these questions—and the dubiousness of the decision below. *Cf. Garland v. Ming Dai*, 141 S. Ct. 1669, 1674 (2020) (granting review after twelve Ninth Circuit judges dissented from denial of rehearing en banc); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (same after nine judges dissented from denial of rehearing).

The practical consequences of leaving the decision below intact are enormous. The country's borders are protected by 25,756 Customs and Border Protection officers covering 328 points of entry, and another 19,740 Border Patrol agents based at 131 Border Patrol stations. U.S. Customs & Border Prot., *Snapshot: A Summary of CBP Facts and Figures* (Mar. 2021), https://tinyurl.com/xren6f6z [hereinafter CBP Facts & Figures]. And the Ninth Circuit houses the majority of those agents. *See* U.S. Customs & Border Prot., *U.S. Border*

Patrol Fiscal Year Staffing Statistics (FY1992-FY 2019) (2020), https://tinyurl.com/mjnnn6n6. The decision below thus exposes thousands of potential defendants to unforeseen personal exposure for damages suits.

The costs of judicial miscalculation about the effects of such liability are high. Every day, 650,178 passengers and pedestrians cross America's borders. CBP Facts & Figures, *supra*. On the average day during fiscal year 2020, Border Patrol agents and Customs and Border Protection officers apprehended 1,107 of those individuals, arrested 39 wanted criminals, seized 3,677 pounds of narcotics, and confiscated $386,195 of undeclared or illicit currency. *Id.* This fiscal year, apprehensions have grown to an average of 4,000 people per day. *See* U.S. Customs & Border Prot., *CBP Enforcement Statistics Fiscal Year 2021*, https://tinyurl.com/8xe2x4mh. If the prospect of *Bivens* suits undercuts these federal officers' ability to perform these important functions, the consequences could be catastrophic. Pet.App.68a-69a.

Furthermore, the Ninth Circuit's decision has no limiting principle. The court expanded *Bivens* to two new contexts, found no reasons for hesitation or alternative remedies, and all but cabined this Court's recent *Bivens* decisions to their facts. If that decision stands, it risks emboldening an "onslaught of *Bivens* actions." *Wilkie*, 551 U.S. at 562. The Ninth Circuit has made another recent foray into extending *Bivens* into the immigration context. *See Lanuza v. Love*, 899 F.3d 1019, 1021 (9th Cir. 2018) (post-*Abbasi* extension of *Bivens* to due process claim against ICE official for forging document). Lower courts in the Ninth Circuit have already relied on the decision below to expand *Bivens* yet further, for instance to Fourth Amendment claims against ICE officers for allegedly "us[ing] unconstitutional means to arrest and detain removable immigrants in their own homes." *Kidd v.*

Mayorkas, 2021 WL 1612087, at *1, *12 (C.D. Cal. Apr. 26, 2021).

2. This case is an ideal vehicle for resolving the questions presented, which were outcome-determinative below. The district court granted Agent Egbert summary judgment on both *Bivens* claims. No factual development is needed. The Ninth Circuit reversed solely because the court considered extensions of *Bivens* warranted in the First and Fourth Amendment contexts. The Ninth Circuit produced four separate opinions, including three different dissents joined by twelve total judges. And the Ninth Circuit joined battle not only on the advisability of extending *Bivens* to novel First and Fourth Amendment contexts, but also on the underpinnings of *Bivens* itself. *Compare* Pet.App.31a-32a (emphasizing reasons to retain or expand *Bivens*), *with* Pet.App.11a-19a (Bumatay, J., dissenting) (emphasizing *Bivens*' unconstitutionality).

Further percolation is unnecessary. Six circuits have already foreclosed First Amendment *Bivens* relief, and three circuits have refused to extend *Bivens* to Fourth Amendment claims brought against officers enforcing our Nation's immigration laws. Many of those circuits have entertained multiple such claims, and rejected them every time. The Fifth Circuit—the other circuit covering the vast majority of the border, where a large percentage of Border Patrol agents are stationed—has categorically rejected *Bivens* claims in the immigration context. *Supra* p. 16-17. This Court should intervene now to restore uniformity and stem a further tide of litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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