No. 21-147

In the Supreme Court of the United States

ERIK EGBERT,
PETITIONER,

v.

ROBERT BOULE,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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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.

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OPINIONS BELOW

The original opinion of the court of appeals is reported 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 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 but available at 2018 WL 4078852 and 2018 WL 3993371, respectively. Pet.App.48a-57a, 58a-70a.

JURISDICTION

The court of appeals entered judgment on May 20, 2021. Pet.App.1a. The petition for certiorari was filed on July 30, 2021, and granted on November 5, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

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 agents for alleged Fourth Amendment violations. Two extensions—to a Fifth Amendment due-process claim and an Eighth Amendment deliberate-indifference claim—followed.

Over the ensuing 40 years, the Court has abandoned the notion that federal courts can fashion their own damages remedies, and has erected barrier after barrier against expanding *Bivens*. To respect the separation of powers, courts must halt if there is any reason to think that Congress might doubt the need for courts to engage in the quintessentially legislative task of creating damages actions. Ten straight attempts to transplant *Bivens* to new contexts have flatlined, prompting this Court to doubt that *Bivens* was rightly decided.

Nonetheless, the Ninth Circuit, in the decision below, created two novel *Bivens* claims against Border Patrol agents, for alleged First Amendment retaliation and Fourth Amendment violations. Allowing novel *Bivens* claims would put federal courts back in the business of crafting new damages actions, contravening a mountain of modern precedent. That jurisprudential U-turn is even less appropriate today because Congress has considered but failed to enact statutes holding federal officers per-

sonally liable for constitutional torts, while comprehensively addressing tort liability for federal and state officers through other means.

The claims at issue—First and Fourth Amendment *Bivens* claims against Border Patrol agents—epitomize why creating damages actions is a task for Congress, not courts. First Amendment retaliation claims would explode the universe of potential defendants, who could face personal liability for performing all sorts of otherwise routine job duties for allegedly retaliatory reasons. The sheer size of this doctrinal expansion cautions hesitation and deference to Congress.

Opening the door to First and Fourth Amendment damages claims against Border Patrol agents also implicates national security and immigration enforcement, two areas the Constitution commits to the political branches. Courts are ill-equipped to predict how such a damages remedy against Border Patrol agents will affect those sensitive areas. And the risks are especially not worth it because plaintiffs have other ways of vindicating their interests. This Court should not revive *Bivens* for the first time in generations by recognizing novel First and Fourth Amendment claims against Border Patrol agents.

A. Factual Background

1. Petitioner Erik Egbert is an agent of the U.S. Border Patrol, a division of U.S. Customs and Border Protection (CBP) within the Department of Homeland Security (DHS). As the name suggests, Border Patrol agents protect the Nation's borders by patrolling 6,000 miles of the northern and southern boundaries with Canada and Mexico. Their "priority mission . . . is preventing terrorists and terrorist[] weapons, including weapons of mass destruction, from entering the United States." *Border Patrol Overview*, CBP (Aug. 24, 2021), https://bit.ly

/3ppBMAS; *see* 6 U.S.C. § 211(e)(3)(B). Congress also charged the Border Patrol with "primary responsibility for interdicting persons attempting to illegally enter or exit the United States." 6 U.S.C. § 211(e)(3)(A).

To fulfill these missions, Congress granted Border Patrol agents broad authority to conduct warrantless interrogations, searches, and arrests when operating near the border. *See* 8 U.S.C. § 1357(a). Within 25 miles of the border, agents also may enter "private lands, but not dwellings," without a warrant to patrol and prevent unlawful entry. *Id.* § 1357(a)(3). Border Patrol agents are trained to rapidly secure target vehicles and not retreat in the face of assault. NBPC Cert. Br. 14-15; *see CBP Use of Force Policy*, CBP 4 (Jan. 2021), https://bit.ly/3puF322.

In "attempting to control the movement of people and goods across the border," Border Patrol agents face a "daunting task." *Hernández v. Mesa*, 140 S. Ct. 735, 746 (2020). Patrolling the border presents "enormous difficulties" and requires "patient skills." *United States v. Cortez*, 449 U.S. 411, 418 (1981). Agents are exposed to "scorching desert heat" and "freezing northern winters" while "work[ing] around the clock on assignments." *Border Patrol Overview*, *supra.* Some days pass in total isolation. Diana Alba Soular, *Border Agents, and the Risks at the Edge of the Line*, USA Today, https://bit.ly/3lxirwK. Other days, agents apprehend more than 100 people at once. *Authorities Arrest More Than 100 Migrants at Stash House in the RGV*, CBP (June 15, 2021), https://bit.ly/31nJW4W. On the average day, CBP personnel collectively stop over a thousand unlawful border crossers and seize nearly two tons of drugs. *On a Typical Day*, CBP (Mar. 19, 2021), https://bit.ly/3dbfEEV.

The work is dangerous. Agents battle "powerful criminal organizations" moving drugs and people across the border. *Hernández*, 140 S. Ct. at 746. Often, agents

are on their own confronting smugglers in "remote area[s]." *See United States v. Arvizu*, 534 U.S. 266, 268 (2002). In one episode, agents nearly 48 hours into their shift came under attack from a "gang[] of bandits" armed with AK-47s, who murdered one agent in a gun battle. *United States v. Soto-Barraza*, 947 F.3d 1111, 1114-15 (9th Cir. 2020).

2. Agent Egbert is stationed in the Blaine, Washington area, at the extreme northwest corner of the continental United States. Patrols along the northern border are stretched thin, with just one agent for every two miles. Chad C. Haddal, Cong. Rsch. Serv., RL32562, *Border Security: The Role of the U.S. Border Patrol* 25 (2010), https://bit.ly/3ppEJ4C. Yet threats are rampant. Along the northern border, the Border Patrol combats "cross-border smuggling" and "terrorist infiltration." *Id.* at 3. CBP seized over 81,000 pounds of illegal drugs on the northern border last year. *Drug Seizure Statistics*, CBP, https://bit.ly/3ElPBXh. Arrests for illegal crossings along the northern border have tripled in recent years. Wilson Ring, *US Northern Border Illegal Crossings Rise*, ABC News (May 7, 2020), https://abcn.ws/3DiztVa.

Blaine and its environs are particularly "known for cross-border smuggling of people, drugs, [and] illicit money." Pet.App.49a. Since Blaine's founding in 1870, smugglers have exploited its coastline and rugged, densely forested terrain as ideal for trafficking everything from narcotics to egret plumes. *Blaine Sector Washington*, CBP (Aug. 19, 2021), https://bit.ly/3lvMa98; Phil Dougherty, *Blaine—Thumbnail History*, HistoryLink (Sept. 7, 2009), https://bit.ly/3lxxM01. During Prohibition, Blaine was an infamous rum-running locale. *Blaine Sector*, *supra.* By the 1990s, Blaine was a marijuana-smuggling hub, as criminal organizations moved tons of high-grade "BC Bud" into the United States. *Criminal*

History in Blaine, City of Blaine, WA, https://bit.ly/3lvSYUl.

Today, Blaine's population is just 6,000, but the area remains a hotbed of cross-border crime. Blaine is the "epicenter of border-related investigations" in the Pacific Northwest. *ICE HSI Blaine: The Epicenter of Border Investigations*, ICE (Oct. 26, 2016), https://bit.ly/3lzMMKX. Smugglers drop marijuana out of helicopters and haul methamphetamine by ATV. *Criminal History*, *supra*; David Rasbach, *Blaine Man Allegedly Smuggles 436 Pounds of Meth Across U.S. Border into Canada*, Bellingham Herald (July 24, 2020), https://bit.ly/3GeB6FA. Even Blaine's main tourist attraction, Peace Arch Park, has doubled as a human smuggling route for decades. Joel Connelly, *'Human Smuggling Network' at Border Uses Peace Arch Park in Blaine, Washington*, Sea. PI (June 21, 2019), https://bit.ly/3Dj8poT.

3. Respondent Robert Boule owns a Blaine bed-and-breakfast on a property straddling the Canadian border. Pet.App.49a; J.A.146. Fittingly called "Smuggler's Inn," Boule's lodging is "a notorious site for illegal border crossing." Pet.App.9a; *see* Brenna Rose, *Smuggler's Inn: The Border Town Bed and Breakfast Whose Visitors Don't Always Stay the Night*, CBC News (Apr. 30, 2017), https://bit.ly/31hSSJf.

The Smuggler's Inn also attracts drug traffickers: "[l]arge shipments of cocaine, methamphetamine, ecstasy, and opiates" have been seized on site. Pet.App.9a. For some years, Boule served as a paid government informant whose information prompted multiple arrests of his guests. Pet.App.32a-33a; Br. in Opp. 3. More recently, Canadian authorities arrested Boule and filed a 21-count indictment, including multiple human-smuggling charges. *R. v. Boule*, 2020 BCSC 1846, paras. 6, 9-10 (Can.), https://bit.ly/3yyZfUn; Pet.App.9a n.3; *see* J.A.114. Boule

pleaded guilty to aiding and abetting violations of Canadian immigration law by helping Syrian and Afghan nationals enter Canada illegally. Keith Fraser, *American Man in Human Smuggling Case Gets Time Served*, Vancouver Sun (Dec. 17, 2021), https://bit.ly/3E3KxWB; *see also* Keith Fraser, *Crown Seeks 12 to 15 Months for U.S. Inn Operator in Human Smuggling Case*, Vancouver Sun (Dec. 16, 2021), https://bit.ly/3e9dWnL.

Agent Egbert routinely patrolled at the Smuggler's Inn and arrested people illegally crossing the border there. Pet.App.9a; J.A.99. On March 20, 2014, Boule told Agent Egbert that a Turkish national would arrive at the Smuggler's Inn later that day. Pet.App.33a, 50a. That journey involved flying in from Turkey and eventually landing in Seattle, whereupon two of Boule's employees would drive the Turkish national another two-plus hours to finally reach Blaine. *See id.*

Agent Egbert's suspicions were aroused; he knew of "no legitimate reason a person would travel from Turkey to stay at a rundown bed-and-breakfast on the border in Blaine." J.A.104; *see* J.A.102 (photo of lodging). He suspected the Turkish national might cross into Canada or meet with confederates entering the United States from Canada for a criminal purpose. Pet.App.27a.

Agent Egbert waited for Boule's employees and the Turkish national to arrive at the Smuggler's Inn, then followed them up the driveway. Pet.App.50a. The driver exited; the Turkish national stayed in the car. *Id.* The driver told Agent Egbert he could speak with the guest, but Boule told Agent Egbert to leave. *Id.* Agent Egbert declined. Pet.App.51a. Boule responded by stepping between Agent Egbert and the car. *Id.* Agent Egbert allegedly pushed Boule aside to open the car door and ask the Turkish national about his status. *Id.* Boule called 911 and asked for Agent Egbert's supervisors to come; Agent

Egbert also made the same request over dispatch. Pet.App.33a. A supervisor and another agent arrived shortly thereafter. *Id.* After confirming that the Turkish national was lawfully in the United States, Agent Egbert and the other two officers left the Smuggler's Inn. *Id.*

That night, the Turkish national illegally crossed the border into Canada from the Smuggler's Inn. J.A.108. Boule later sought medical treatment for a back injury that Agent Egbert allegedly caused. Pet.App.33a.

Boule complained to Agent Egbert's supervisors. *Id.* Boule alleges that Agent Egbert retaliated by discouraging potential guests from staying at the Smuggler's Inn and making "unsubstantiated complaints" to the Internal Revenue Service and other agencies. Pet.App.53a. For example, Agent Egbert alerted the Washington Department of Licensing that Boule's vanity license plate, SMUGLER, might refer to criminal activity, in violation of Wash. Admin. Code § 308-96A-065(3)(a)(v). J.A.110. The IRS audited Boule's returns; other agencies investigated him. Pet.App.33a-34a.

Boule pursued administrative remedies. In June 2014, he filed an administrative claim with CBP pursuant to the Federal Tort Claims Act (FTCA) for damages allegedly due to the incident. C.A. Excerpts of Record (ER) 527. CBP denied the claim in September 2014, finding insufficient evidence that Agent Egbert engaged in wrongdoing or acted negligently. Boule failed to seek reconsideration or file an FTCA lawsuit within six months, as required. *See* 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9. Instead, over a year later, in March 2016, Boule filed a second

FTCA administrative claim, which CBP denied as untimely.[1] Boule's allegations also prompted DHS to conduct an internal investigation, which has since concluded. *See* ER507. Agent Egbert continues to serve as an active Border Patrol agent. J.A.97.

B. Proceedings Below

1. In January 2017, Boule sued Agent Egbert in the U.S. District Court for the Western District of Washington, alleging (1) retaliation in violation of the First Amendment, Pet.App.48a, and (2) Fourth Amendment violations involving Agent Egbert entering Boule's property, refusing to leave, and purportedly pushing him to the ground, Pet.App.36a, 62a. For his causes of action, Boule claimed an implied right to proceed under the Constitution based on *Bivens*.

The district court granted Agent Egbert summary judgment on both claims. Pet.App.57a, 69a. The court considered both claims novel *Bivens* contexts and declined to expand *Bivens* given this Court's admonitions that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." Pet.App.54a, 56a, 66a, 69a. The court emphasized that Boule's claims "raise significant separation-of-powers concerns by implicating the other branches' national-security policies." Pet.App.56a, 68a. The court warned 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." Pet.App.56a, 68a-69a.

[1] Boule's initial FTCA claim appears in the record, but the second claim and CBP's denial letters do not. Boule produced these documents in discovery. *See* D. Ct. Dkt. No. 41-1, at 8-9.

2. The Ninth Circuit reversed, allowing new *Bivens* claims in the First and Fourth Amendment contexts. The panel recognized that both claims would extend *Bivens*. Pet.App.36a, 42a. As to the First Amendment claim, the panel found "no special factors that make it inadvisable to find a cognizable *Bivens* claim in this new context." Pet.App.42a. The panel reasoned that *Hartman v. Moore*, 547 U.S. 250 (2006), "explicitly stated . . . that such a [*Bivens*] claim may be brought," even if "the [Supreme] Court has not expressly so held." Pet.App.41a-42a.

As for Boule's Fourth Amendment claim, the panel 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 authority of other branches," Pet.App.40a. The panel dismissed as inapposite the national-security concerns this Court emphasized in previous *Bivens* cases. Pet.App.36a-38a (distinguishing *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), and *Hernández*, 140 S. Ct. 735). Finally, the panel deemed alternative remedies unavailable for both claims. Pet.App.44a-46a.

3. The Ninth Circuit denied rehearing en banc, with twelve judges dissenting in three opinions. Judge Bumatay, writing for seven judges, criticized the decision for "resurrecting *Bivens*" despite "the [Supreme] Court's clear instructions" to the contrary. Pet.App.9a. Judge Owens' dissent critiqued the *Bivens* doctrine as a "jurisprudential word jumble." Pet.App.29a. And Judge Bress, writing for four judges, considered "it self-evident that there are many reasons counseling hesitation" in a case involving an "investigation of an international traveler near the international border." Pet.App.30a.

SUMMARY OF ARGUMENT

I. The Ninth Circuit erred in extending *Bivens* to two new contexts because the Court's precedents preclude extending *Bivens* any further.

A. This Court has repudiated *Bivens'* reasoning, and extending *Bivens* at this late date would create a profound doctrinal disconnect. *Bivens* and its two follow-on cases—*Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980)—are relics of a discredited view of federal courts' authority. *Bivens* reflects then-prevailing assumptions that jurisdictional grants empower federal courts to imply damages actions, and that if courts can imply damages actions to vindicate statutory rights, the same should go for constitutional rights.

For the last 40 years, this Court has disavowed both premises to the point of doubting that *Bivens* was rightly decided. This Court has repeatedly held that Congress' grant of federal-question jurisdiction does not authorize courts to fashion ad hoc remedies. And in the statutory and constitutional contexts alike, this Court has recognized that only Congress can create damages actions. Extending *Bivens* to any new context now would undermine countless modern precedents.

B. Rather than formally closing the door to *Bivens* extensions, the Court has imposed an extraordinarily demanding test for whether federal courts can imply new damages actions under *Bivens*. When faced with a *Bivens* claim in any remotely new context, courts must say no if "there are sound reasons to think Congress *might* doubt the efficacy or necessity of a damages remedy." *Abbasi*, 137 S. Ct. at 1858 (emphasis added). But every *Bivens* extension raises sound reasons for hesitation. *Bivens* extensions always threaten the separation of powers. Courts are never well-suited to evaluate the far-reaching

consequences of creating new damages actions against individual federal officers. And extending *Bivens* inherently intrudes upon Congress' policy judgments about how best to hold federal officers accountable.

II. Even if this Court preserves the theoretical possibility of future *Bivens* extensions, First Amendment retaliation claims against Border Patrol agents would be a particularly poor place to break new ground.

A. This claim materially differs from any recognized *Bivens* claim, as the Ninth Circuit acknowledged. Boule's claim involves a new right (the First Amendment), a new type of injury (retaliation), a new class of defendants (Border Patrol agents), and a new area (the border).

B. Many special factors counsel hesitation. First Amendment retaliation claims are nebulous. Federal officials engage in all sorts of conduct—arrests, investigations, hiring and firing decisions—that is central to federal agencies' missions. That same conduct becomes unlawful if done in retaliation for protected speech, and gauging an officer's motivations is an amorphous enterprise. The sheer range of conduct that plaintiffs could target through First Amendment retaliation claims would make this *Bivens* extension a quantum leap.

Rendering Border Patrol agents personally liable for damages for First Amendment retaliation claims also raises serious national-security and immigration-enforcement concerns. Claims of retaliatory investigation or arrest risk interfering with sensitive operations against potential terrorists, smugglers, criminals, and illegal entrants, which often require Border Patrol agents to make snap judgments in dangerous situations. And claims, like Boule's, that allege improper information-sharing risk chilling interagency cooperation.

Boule also had myriad alternative remedies to address his asserted injury, including state tort law, the Tax Code, the Privacy Act, and administrative investigations. For serious misconduct, criminal charges are also available. Many of these remedies underscore that Congress has carefully considered how to deter constitutional violations by federal officers and when to provide redress.

III. For similar reasons, the Ninth Circuit erred in recognizing a new Fourth Amendment *Bivens* claim arising from a Border Patrol agent's investigation into a foreign national's activities at the border.

A. This claim also presents a new context, as the Ninth Circuit acknowledged. While *Bivens* itself involved a Fourth Amendment claim, the class of defendants here (Border Patrol agents) and the circumstances (protecting the border) both break new ground.

B. Reasons abound why Congress might doubt the wisdom of this *Bivens* extension. Start with national-security and immigration-enforcement concerns. The Fourth Amendment applies differently at the border. Congress has thus given Border Patrol agents greater powers than ordinary law-enforcement officers, including authority to conduct warrantless searches. Border Patrol agents constantly engage in searches and seizures while carrying out their counterterrorism and immigration-enforcement duties. Courts risk disrupting those functions by threatening agents with personal liability.

Plaintiffs like Boule also have ample other ways to hold agents accountable for alleged Fourth Amendment violations. They can seek a DHS investigation and recovery from the United States under the FTCA, as Boule did here. Plus Congress has extensively regulated immigration enforcement without enacting a *Bivens*-like damages remedy. Courts should respect that choice.

ARGUMENT

I. This Court Should Not Extend *Bivens* to New Contexts

For 40 years, this Court has resisted calls to engage in the "'disfavored' judicial activity" of implying constitutional damages actions. *Hernández*, 140 S. Ct. at 742 (quoting *Abbasi*, 137 S. Ct. at 1856-57). In ten cases, this Court has refused to expand *Bivens* to new contexts, no matter the circumstances, type of defendant, or unavailability of other remedies. *See id.* at 743. Meanwhile, this Court has repudiated *Bivens*' foundations root and branch. Extending *Bivens* to any new context would breathe new life into doctrines the Court has extinguished. In every case, the question whether Congress or courts are better-suited to create a damages remedy has just one answer: Congress.

A. Extending *Bivens* Would Contravene Modern Precedents Rejecting *Bivens*' Reasoning

1. In *Bivens*, this Court "broke new ground" by authorizing an implied private damages action against Federal Bureau of Narcotics agents for alleged Fourth Amendment violations. *Hernández*, 140 S. Ct. at 741. "[I]n the 100 years leading up to *Bivens*, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government." *Abbasi*, 137 S. Ct. at 1854. Since 1871, Congress has, however, authorized damages suits against state officers for constitutional violations under 42 U.S.C. § 1983. But for federal officers, "the traditional way in which civil litigation addressed abusive conduct . . . was by subjecting them to liability for common-law torts" such as trespass. *Hernández*, 140 S. Ct. at 748; *see id.* at 751 (Thomas, J., concurring); Pet.App.11a-12a (Bumatay, J., dissenting).

In *Bivens*, the Court invented a novel federal damages action for Fourth Amendment violations. That holding rested on two assumptions. First, the Court believed that Congress' grant of jurisdiction over federal questions in 28 U.S.C. § 1331 also empowered federal courts to create substantive federal common law whenever necessary "to make good the wrong done." 403 U.S. at 396 (citation omitted); *id.* at 405 (Harlan, J., concurring in the judgment); *accord, e.g.*, *Abbasi*, 137 S. Ct. at 1854; *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001) (recognizing that *Bivens* proceeds from this premise). Second, *Bivens* reasoned that because federal courts could freely imply damages actions to vindicate federal *statutory* rights, federal courts could fashion similar damages actions for constitutional rights. 403 U.S. at 397 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)); *see id.* at 402 (Harlan, J., concurring in the judgment); *accord, e.g.*, *Hernández*, 140 S. Ct. at 741; *Abbasi*, 137 S. Ct. at 1855 (recognizing *Bivens*' reliance on this premise).

Applying that reasoning, *Davis v. Passman*, 442 U.S. 228 (1979), extended *Bivens* to a Fifth Amendment due-process claim against a Congressman for firing an administrative assistant based on her sex. Then *Carlson v. Green*, 446 U.S. 14 (1980), expanded *Bivens* to an Eighth Amendment deliberate-indifference claim against prison officials who allegedly disregarded a prisoner's medical needs. That "interpretive framework" raised the prospect that "the Court would keep expanding *Bivens* until it became the substantial equivalent of 42 U.S.C. § 1983." *Abbasi*, 137 S. Ct. at 1855 (citation omitted).

2. After 1980, "the Court changed course" and renounced *Bivens*' doctrinal underpinnings. *See Hernández*, 140 S. Ct. at 741. The Court has "gone so far as to observe that if the Court's three *Bivens* cases had been

decided today, it is doubtful that [the Court] would have reached the same result." *Id.* at 742-43 (cleaned up).

To start, this Court has rejected the notion that Congress' grant of federal-question jurisdiction opens a Pandora's box of federal common-law powers. For 40 years, the Court has held that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law," including "the power to create . . . a cause of action." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638, 640-41 (1981). Jurisdictional grants simply do not create "new causes of action." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). There is "no reason to think that federal-question jurisdiction was extended subject to" an assumption that courts would recognize new common-law claims. *Id.* at 731 n.19. Thus, while *Bivens* viewed federal courts' "authority to recognize a damages remedy" as "inherent in the grant of federal question jurisdiction," the Court's "later cases have demanded a clearer manifestation of congressional intent." *See Hernández*, 140 S. Ct. at 742.

This Court has also demolished *Bivens'* related foundation, that federal courts' purported power to imply statutory damages claims authorizes the same innovation for constitutional rights. *See Abbasi*, 137 S. Ct. at 1856-57. "*Bivens*, *Davis*, and *Carlson* were the products of an era when the Court routinely inferred 'causes of action'" absent from the statutory text. *Hernández*, 140 S. Ct. at 741. Under that "'*ancien regime*,' . . . the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Abbasi*, 137 S. Ct. at 1855 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), and *Borak*, 377 U.S. at 433).

Over time, the Court came "to appreciate that, '[l]ike substantive federal law itself, private rights of action to

enforce federal law must be created by Congress.'" *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020) (quoting *Sandoval*, 532 U.S. at 286-87). Before *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts acted as "common-law court[s], which exercise[] a degree of lawmaking authority." *Hernández*, 140 S. Ct. at 742. But *Erie* disavowed the existence of "federal general common law," so "federal courts today cannot fashion new claims in the way that they could before 1938." *Id.* And "[w]ith the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress." *Id.*

Today, "the judicial practice of creating causes of action is widely considered disfavored—if not a dead letter." Pet.App.8a (Bumatay, J., dissenting). The Court has often "expressed doubt about [its] authority to recognize any causes of action not expressly created by Congress." *Hernández*, 140 S. Ct. at 742. If Congress has not created a damages action, one "does not exist and courts may not create one." *Sandoval*, 532 U.S. at 286-87. And the Court has "been at least equally reluctant to create new causes of action" for "constitutional cases." *Hernández*, 140 S. Ct. at 742.

To be sure, the Court has suggested that *stare decisis* and reliance might justify retaining *Bivens* "in the search-and-seizure context in which it arose." *Abbasi*, 137 S. Ct. at 1856-57. But *stare decisis* and reliance interests also apply to the Court's many intervening precedents. To extend *Bivens*, this Court would either have to resurrect long-buried doctrines or invent a novel justification for *Bivens* 50 years in. Either move would defy decades of precedent. "Having sworn off the habit of venturing beyond Congress's intent," this Court should decline the "invitation to have one last drink." *Sandoval*, 532 U.S. at 287.

B. Special Factors Counsel Against Any *Bivens* Extensions

Even if federal courts could hypothetically create new damages actions, this Court's "extraordinarily strict" test for exercising such power would foreclose further *Bivens* extensions in practice. *See Nestlè USA, Inc. v. Doe*, 141 S. Ct. 1931, 1938 (2021) (plurality opinion). "A court '*must*' not create a private right of action if it can identify *even one* 'sound reaso[n] to think Congress *might* doubt the efficacy or necessity of [the new] remedy.'" *Id.* at 1938-39 (emphases added) (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018)); *see Hernández*, 140 S. Ct. at 743. That test is so "demanding by design" that the Court has "yet to find it satisfied" in any context. *See Nestlè*, 141 S. Ct. at 1939 (plurality opinion). Instead, the Court has called *Bivens* expansions "disfavored" and said the "watchword is caution." *Hernández*, 140 S. Ct. at 742; *accord Abbasi*, 137 S. Ct. at 1857; *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009).

After "consistently rebuff[ing] requests to add to the claims allowed under *Bivens*" in ten cases over 40 years, it is hard to envision how any new claim could avoid triggering some "reason to pause." *See Hernández*, 140 S. Ct. at 743. Separation-of-powers concerns inhere in every *Bivens* extension. The judiciary is never "well suited . . . to consider and weigh the costs and benefits" of new damages actions. *See id.* And every *Bivens* extension undermines Congress' decision to provide comprehensive remedies excluding personal damages against federal officers.

1. Respect for the Separation of Powers

This Court has "made clear in many prior cases" that "the Constitution's separation of powers requires [courts] to exercise caution before extending *Bivens* to a new 'context.'" *Hernández*, 140 S. Ct. at 739. Implying a damages

action always marks a "significant step under separation-of-powers principles." *Abbasi*, 137 S. Ct. at 1856. Creating causes of action is up to Congress, "not the Federal Judiciary." *Nestlè*, 141 S. Ct. at 1937 (plurality opinion); *see id.* at 1942 (Gorsuch, J., concurring). Thus, "any judicially created cause of action risks 'upset[ting] the careful balance of interests struck by the lawmakers.'" *Id.* at 1938 (plurality opinion) (quoting *Hernández*, 140 S. Ct. at 742).

It follows that "the separation of powers is itself a special factor" counseling hesitation. *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020); *accord Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 524 (6th Cir. 2020); *Bistrian v. Levi*, 912 F.3d 79, 90 (3d Cir. 2018). Any reason to think Congress might doubt the need for a judicially created *Bivens* action is fatal. *See Hernández*, 140 S. Ct. at 743. Given this Court's many warnings that implying damages actions risks intruding on Congress' turf, it stands to reason that Congress might at least have similar qualms. Respect for the separation of powers thus strikes out any *Bivens* extension.

2. Difficulties with Judicial Cost-Benefit Analysis

This Court also refuses to recognize new *Bivens* claims unless "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" in that context. *Hernández*, 140 S. Ct. at 743 (quoting *Abbasi*, 137 S. Ct. at 1858). For instance, "the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide." *Abbasi*, 137 S. Ct. at 1858. Judges must evaluate "the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself," including "defense and indemnification" and "time and administrative costs," among "other considerations." *Id.* at 1856, 1858.

But that sort of guesswork is, by definition, beyond the judicial ken. Every *Bivens* extension requires countless predictive judgments: Will personal liability make agents hesitate in the field? Will damages prove an effective deterrent for constitutional violations? Will liability sap agency morale and affect recruitment or retention? How important is the government program that might be impaired? How much will administrative costs run? What metric should courts use to balance pros and cons? Exacerbating the problem, judges must tackle those questions with minimal facts to hand. Because the availability of *Bivens* is a threshold question, courts ordinarily evaluate these questions at the motion-to-dismiss or summary-judgment stage. Only "Congress," not "the courts[] is both qualified and constitutionally entitled to weigh the costs and benefits of different approaches and make the necessary policy judgments." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019).

3. Interference with Congress' Policy Judgments

Finally, this Court refuses to extend *Bivens* to new contexts if it appears "congressional inaction" in omitting a damages remedy "has not been inadvertent." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). "[I]n any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant," and when "Congressional interest has been frequent and intense," legislative inaction is particularly "telling." *Abbasi*, 137 S. Ct. at 1862 (internal quotation marks omitted).

That criterion again rules out *Bivens* expansions. Congress has "been on notice for years regarding this Court's misgivings about" *Bivens* extensions. *Cf. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2484 (2018). And Congress is presumably aware of the Court's repeated conclusion that Congress has never codified *Bivens* (let alone further extensions of *Bivens*).

See Hernández, 140 S. Ct. at 748 n.9 (Congress has "simply left *Bivens* where it found it"); *contra* Br. in Opp. 32-33. Yet Congress has never authorized *Bivens*-like remedies against federal officers.

That inaction is not for lack of trying. On dozens of occasions, Congress has taken up legislation to codify and expand *Bivens*. Recently, Congress has considered (but not enacted) a federal-officer analogue to 42 U.S.C. § 1983. H.R. 7213, 116th Cong. (2020); S. 2103, 117th Cong. (as introduced June 17, 2021). Between 1973 and 1985, Congress debated but failed to pass 21 proposals to make the United States liable for whole categories of constitutional violations by federal officers. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 98 (1999); *e.g.*, 119 Cong. Rec. 33,495 (1973); 129 Cong. Rec. 5,561 (1983). Those failed proposals are red flags, not a call to "step into [Congress'] shoes" and accomplish through judicial fiat what Congress failed to achieve through bicameralism and presentment. *See Hernández*, 140 S. Ct. at 750.

Conversely, "legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation." *Abbasi*, 137 S. Ct. at 1865; *cf. Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (courts cannot create federal common law if Congress "speaks directly to the question at issue" (cleaned up)); *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (no room for federal common law if Congress "establish[es] . . . a comprehensive regulatory program"). Generations of legislators have comprehensively legislated on federal and state officers' civil and criminal liability for constitutional violations. Congress' failure to codify *Bivens* is no "mere oversight." *See Abbasi*, 137 S. Ct. at 1862.

During Reconstruction, Congress in 42 U.S.C. § 1983 authorized damages actions against officers who violate constitutional rights, but limited that remedy to state officers. *Hernández*, 140 S. Ct. at 752 (Thomas, J., concurring). Congress has twice amended section 1983 and altered its scope—just not by encompassing federal officers. Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853 (1996); Pub. L. No. 96-170, 93 Stat. 1284 (1979). That exclusion of federal officers from civil-damages liability appears especially deliberate given that section 1983's "criminal counterpart," 18 U.S.C. § 242, extends equally to federal and state officers in authorizing *criminal* liability for constitutional violations. *See Daniels v. Williams*, 474 U.S. 327, 330 (1986); 18 U.S.C. § 242 (making it a crime when "[w]hoever, under color of any law, . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States").

Further, since 1946, the FTCA has provided a comprehensive approach to "torts committed by federal employees acting within the scope of their employment." *See Levin v. United States*, 568 U.S. 503, 509 (2013). Plaintiffs alleging that federal officers committed torts against them—including constitutional violations amounting to torts—have long brought state-law tort suits. *See Hernández*, 140 S. Ct. at 748. The FTCA preserves that traditional remedy but channels many suits into suits against the United States itself.

The FTCA works as follows: Upon certification that the federal officer acted within the scope of employment, the United States substitutes for the officer as the defendant. 28 U.S.C. § 2679(d). The FTCA waives the United States' sovereign immunity, so the United States can face damages for the officer's "negligent or wrongful act[s] or

omission[s]" committed "within the scope of . . . employment"—if a private person would be liable under state law for the same conduct. *Id.* § 1346(b)(1). The 1988 Westfall Act "makes the [FTCA] the exclusive remedy for most claims against Government employees arising out of their official conduct." *Hernández*, 140 S. Ct. at 748 (internal quotation marks omitted); *see* 28 U.S.C. § 2679(b).

The FTCA thus balances "Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 808 (1984). When plaintiffs bring state tort suits against federal officers for conduct *outside* the scope of their employment, the FTCA does not apply, 28 U.S.C. § 2679(b)(1), and plaintiffs can sue the officer under state tort law like any private person. When plaintiffs seek damages for conduct *within* the scope of the officer's employment, plaintiffs ordinarily must sue the United States, gaining access to the deepest-pocketed defendant on Earth.

The price of that access is the FTCA's procedural and substantive limitations on claims, which bar relief in certain cases even if the claim would otherwise be viable under state tort law. *E.g.*, *id.* § 2680(k) (no liability for torts arising abroad); *id.* § 2680(h) (no liability for certain intentional torts). That scheme may not redress every constitutional violation. But Congress, having weighed the costs and benefits, enacted the FTCA as the political branches' solution to federal officers' tort liability. That "statutory scheme for torts committed by federal officers weighs against inferring a new cause of action." *Oliva*, 973 F.3d at 443-44 (internal quotation marks omitted).

Boule emphasizes that the Court in *Carlson* portrayed the FTCA and *Bivens* as complementary remedies. Br. in Opp. 21 (citing *Carlson*, 446 U.S. at 19-20); *see* Pet.App.44a-45a. But *Carlson* rested on the assumption that Congress had to "explicitly declare[]" an "alternative remedy" an "equally effective" "*substitute* for recovery directly under the Constitution" to foreclose a *Bivens* extension. 446 U.S. at 18-19. The Court has rejected that approach, instead asking whether "Congress had specific occasion to consider the matter" of whether to provide damages remedies in a given context. *See Abbasi*, 137 S. Ct. at 1865. Congress' repeated, abortive attempts to codify damages remedies against federal officers for constitutional violations—coupled with Congress' exhaustive legislation in the field—"suggests Congress chose not to extend" the *Bivens* remedy. *See id.* The mere "possibility" that "Congress' failure to provide a damages remedy might be more than mere oversight" suffices to render judicial intervention inappropriate. *Id.* at 1862.

* * *

Since 1980, this Court has rejected ten calls to extend *Bivens*, while dismantling *Bivens'* doctrinal foundations. Since *Abbasi,* courts of appeals have considered more than 60 requests to extend *Bivens.* Only the Ninth Circuit has extended *Bivens* to any new context. Once courts determine that a *Bivens* claim presents a new context, "[t]here's something to be said for leaving it at that." *Callahan*, 965 F.3d at 523. Every new situation presents some reason to think Congress might doubt the need for courts to craft a damages remedy. Holding out the possibility of *Bivens* extensions "offers false hope to [plaintiffs], distorts the law, misleads judges, and wastes the resources" of litigants and courts. *Cf. Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021). This Court should make it official: the door to *Bivens* expansions is shut.

II. This Court Should Not Extend *Bivens* to First Amendment Retaliation Claims

Even if the door remains ajar to future *Bivens* extensions, the Court should not endorse First Amendment retaliation claims, which would open a vast new frontier of *Bivens* liability. There are plenty of reasons why Congress might doubt the wisdom of upending government operations with this sort of damages remedy.

A. Such Claims Arise in a New Context

A context is "new" "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by this Court." *Abbasi*, 137 S. Ct. at 1859. *Bivens* involved an "unconstitutional arrest and search carried out in New York City"; *Davis* involved "sex discrimination on Capitol Hill"; and *Carlson* involved a "failure to provide medical care" at a federal prison in Indiana. *Hernández*, 140 S. Ct. at 744; *Abbasi*, 137 S. Ct. at 1864. "Virtually everything else is a 'new context.'" *Oliva*, 973 F.3d at 442 (citation omitted). A new location, "class of defendants," "constitutional right," or the "presence of potential special factors that previous *Bivens* cases did not consider" all make a context "new." *Abbasi*, 137 S. Ct. at 1860; *Hernández*, 140 S. Ct. at 743-44. In short, "the new-context inquiry is easily satisfied." *Abbasi*, 137 S. Ct. at 1865.

Under that test, Boule's First Amendment claim arises in a new *Bivens* context, as every judge to consider the question has concluded. Pet.App.16a, 30a, 42a, 55a. The "claim involves different conduct by different officers from a different agency." *See Cantú v. Moody*, 933 F.3d 414, 423 (5th Cir. 2019).

Start with the constitutional right at issue: *Bivens*, *Davis*, and *Carlson* involved the Fourth, Fifth, and Eighth Amendments, respectively. The Court's only previous encounter with a proposed First Amendment

Bivens claim ended with the Court rejecting a retaliation claim in the federal-employment context. *Bush v. Lucas*, 462 U.S. 367, 390 (1983). Further, Boule is pursuing a new class of defendants (Border Patrol agents) in a new context (the border). This Court has never recognized a *Bivens* action against Border Patrol agents in any context. *Elhady v. Unidentified CBP Agents*, --- F.4th ---, 2021 WL 5410758, at *5 (6th Cir. 2021). And "border-related disputes always present a new *Bivens* context." *Id.* at *4.

Boule counters that *Hartman*, 547 U.S. 250, already "suggested that a claim like Mr. Boule's First Amendment retaliation claim is cognizable under *Bivens*." Br. in Opp. 18. He points to the statement in *Hartman* that "[w]hen the vengeful officer" retaliating against protected speech "is federal, he is subject to an action for damages on the authority of *Bivens*." 547 U.S. at 256. But the Court has since explained that it has "never held that *Bivens* extends to First Amendment claims." *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012); *see* Pet.App.20a (Bumatay, J., dissenting). And, since *Abbasi*, every other circuit court to consider the question has refused to extend *Bivens* to any First Amendment context.[2]

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[2] *See, e.g.*, *Butler v. S. Porter*, 999 F.3d 287, 293 (5th Cir. 2021); *Watkins v. Three Admin. Remedy Coordinators*, 998 F.3d 682, 685-86 (5th Cir. 2021); *Earle v. Shreves*, 990 F.3d 774, 776 (4th Cir. 2021); *Mack v. Yost*, 968 F.3d 311, 325 (3d Cir. 2020); *Callahan*, 965 F.3d at 525; *Loumiet v. United States*, 948 F.3d 376, 385-86 (D.C. Cir. 2020); *Doe v. Meron*, 929 F.3d 153, 169-70 (4th Cir. 2019); *Bistrian*, 912 F.3d at 96; *Vanderklok v. United States*, 868 F.3d 189, 209 (3d Cir. 2017); *Patton v. Kimble*, 847 F. App'x 196, 196 (4th Cir. 2021); *Jones v. Sposato*, 783 F. App'x 214, 217 (3d Cir. 2019); *Borowski v. Bechelli*, 772 F. App'x 338, 339 (7th Cir. 2019); *Waksmundski v. Williams*, 727 F. App'x 818, 820 (6th Cir. 2018); *see also* Pet.App.21a-22a (Bumatay, J., dissenting) (collecting additional citations).

B. Special Factors Counsel Against Extending *Bivens* to First Amendment Retaliation Claims

There are many reasons "to think Congress might doubt the efficacy or necessity" of applying *Bivens* to any First Amendment retaliation claims—especially against Border Patrol agents. *See Hernández*, 140 S. Ct. at 743 (quoting *Abbasi*, 137 S. Ct. at 1858). Recognizing a *Bivens* damages action for retaliation claims would massively expand potential liability and require a particularly thorny judicial cost-benefit analysis. Retaliation claims also risk disrupting Border Patrol operations, which implicate national security and immigration enforcement—areas committed to the political branches. And the game is especially not worth the candle for claims like Boule's, where multiple alternative remedies exist.

1. The Magnitude of Liability and Difficulty of the Cost-Benefit Questions

Recognizing First Amendment retaliation claims under *Bivens* would balloon the range of potential defendants and conduct potentially subject to damages. The three recognized claims in *Bivens*, *Davis*, and *Carlson* at least constrained the types of defendants and prohibited conduct. Only traditional law-enforcement officers can use "unreasonable force" during a search and seizure in the home. *Bivens*, 403 U.S. at 389. Only employers can unconstitutionally fire someone on the basis of sex. *Davis*, 442 U.S. at 231. And only prison officials can be "deliberately indifferent" to prisoners' medical needs in violation of the Eighth Amendment. *Carlson*, 446 U.S. at 16 n.1.

But First Amendment retaliation claims are unusually broad. Retaliation can occur through basically any adverse action. Routine, lawful conduct—initiating investigations, conducting searches, making arrests, sharing information, or terminating employment—can become

unlawful if allegedly done for the purpose of retaliating against protected speech. *E.g.*, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1720 (2019) (arrests); *Bush*, 462 U.S. at 370-71 (demotions); *Hartman*, 547 U.S. at 254 (investigations). Further, because the defendant's "state of mind" is all that differentiates lawful and unlawful conduct, retaliation claims are hard to defeat on summary judgment and produce "obvious" "social costs." *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998). Expanding *Bivens* to First Amendment retaliation claims could thus "open the floodgates to litigation," and the prospect of personal liability for damages could "detract from an officer's ability to properly fulfill his duties to the federal government." *Mack v. Yost*, 968 F.3d 311, 325 (3d Cir. 2020). Only Congress can "weigh the implications of such a significant expansion." *See FDIC v. Meyer*, 510 U.S. 471, 486 (1994).

First Amendment retaliation claims also "involve[] a host of considerations" best left for "those who write the laws rather than for those who interpret them." *Abbasi*, 137 S. Ct. at 1857 (cleaned up). The amorphousness of these claims leaves courts ill-equipped to predict the consequences of a novel damages claim. Courts cannot even begin to analyze the effects without canvassing the full range of actions that might trigger liability. Yet every adverse action by a federal official could be fair game if the plaintiff alleged a retaliatory motive.

Given that threshold problem, courts would be adrift trying to ascertain the "burdens on Government employees," "the projected costs and consequences to the Government itself," or the "impact on governmental operations systemwide." *Id.* at 1858. And weighing the chilling effect on legitimate conduct versus the value of deterrence in this context starts to look like asking "whether a particular line is longer than a particular rock is heavy."

Cf. Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

2. National-Security and Immigration Concerns for Claims Against Border Patrol Agents

a. This Court gives "heightened deference to the judgments of the political branches with respect to matters of national security." *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001). Similarly, "[t]he admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (internal quotation marks omitted).

Thus, this Court is "especially wary" before extending *Bivens* to areas "so exclusively entrusted to the political branches." *Hernández*, 140 S. Ct. at 744 (citation omitted); *accord, e.g.*, *id.* at 747 ("[N]ational security implications" provide "reason to hesitate before extending *Bivens*"); *De La Paz v. Coy*, 786 F.3d 367, 378 (5th Cir. 2015) (same for the "immigration context"); *Elhady*, 2021 WL 5410758, at *5; *Tun-Cos v. Perrotte*, 922 F.3d 514, 526 (4th Cir. 2019); *Alvarez v. ICE*, 818 F.3d 1194, 1210 (11th Cir. 2016) (similar).

"The conduct of agents at the border," whose core functions implicate both national security and immigration enforcement, "is a red light to *Bivens* extensions." *See* Pet.App.27a (Bumatay, J., dissenting). Border Patrol agents face the "daunting task" of "attempting to control the movement of people and goods across the border." *Hernández*, 140 S. Ct. at 746. Agents conduct stops, investigate smuggling, monitor checkpoints, and make arrests. *See What We Do*, CBP (June 21, 2021), https://bit.ly/3pJbiKN. All of that work fulfills the Border Patrol's

statutory duty to "interdict[] persons attempting to illegally enter or exit the United States," stop the illegal import or export of goods, and "prevent the illegal entry of terrorists" and contraband. 6 U.S.C. § 211(e)(3)(A)-(B).

Authorizing damages claims against individual Border Patrol agents for First Amendment retaliation claims risks judicial micromanagement and disruption of those duties. The prospect that courts might flyspeck whether sensitive decisions at the Nation's frontlines stemmed from legitimate reasons or retaliatory motives could chill "all but the most resolute, or the most irresponsible" of agents "in the unflinching discharge of their duties." *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (citation omitted). Plaintiffs might skate through early stages of litigation by simply asserting a retaliatory motive for arrests, investigations, or otherwise-routine searches at the border. Expanding *Bivens* to this area "could cripple immigration enforcement with the distraction, cost, and delay of lawsuits." *De La Paz*, 786 F.3d at 380.

Boule's claim that Agent Egbert engaged in retaliatory communications with other agencies illustrates the point. Interagency information-sharing is central to effective counterterrorism. *See The 9/11 Commission Report* 400 (2004). Communicating with other agencies is also a routine way that officers in one agency ensure they have the full picture of a suspect's criminal history or immigration status. *E.g.*, *National Crime Information Center*, FBI, https://bit.ly/3EJrp1i; *Arizona v. United States*, 567 U.S. 387, 397 (2012) (describing the Immigration and Customs Enforcement Law Enforcement Support Center). Allowing plaintiffs to sue on the theory that agents shared information for retaliatory reasons risks exposing interagency cooperation to second-guessing in litigation, with obvious chilling effects.

b. The decision below declared the national security and immigration-related concerns this Court invoked in *Hernández* irrelevant. The Ninth Circuit reasoned that the agent in *Hernández* was "literally at the border" and involved in an "extremely unusual" cross-border shooting, while the incident here arose on private property—a bed and breakfast on the border—with a U.S.-citizen plaintiff. Pet.App.38a; *accord* Br. in Opp. 17. Both incidents, however, occurred at international borders, a context where courts have traditionally been hesitant to interfere with federal officers' performance of their duties. This case need not be "a carbon copy of *Hernandez*" for this Court's warnings about "'the risk of undermining border security'" to apply. *Elhady*, 2021 WL 5410758, at *5 (quoting *Hernández*, 140 S. Ct. at 747).

Boule's retaliation claim illustrates those risks. Boule alleges that Agent Egbert retaliated against him by sharing information and initiating investigations, J.A.85.—two functions that are ordinarily a core part of Border Patrol agents' duties. Boule and the decision below portrayed these particular actions as outside the scope of Agent Egbert's employment because his official duties did not include "asking for investigations of Boule." Pet.App.43a; *accord* Br. in Opp. 14. But, under that reasoning, plaintiffs could always recharacterize instances of retaliation as beyond the scope of employment by alleging that the motive was retaliatory. Relatedly, Boule and the Ninth Circuit suggested that constitutional violations never promote national security or immigration enforcement. Br. in Opp. 15-16, 29; Pet.App.36a. That logic "misses the point" and would extend *Bivens* in every case. *Hernández*, 140 S. Ct. at 746. "The question is not whether national security requires" the alleged misconduct, "but whether the Judiciary should alter the framework established by the political branches for addressing cases [of misconduct] by an agent at the border." *Id.*

The Ninth Circuit went on to find "no special factors" counselling hesitation on Boule's retaliation claim because that circuit recognized a First Amendment *Bivens* claim in 1986, the facts here differ from the First Amendment retaliation claim this Court rejected in *Bush*, 462 U.S. 367, and "retaliation is a well-established First Amendment claim" generally. Pet.App.42a-43a. But this Court has "not attempted to 'create an exhaustive list'" of special factors. *Hernández*, 140 S. Ct. at 743 (quoting *Abbasi*, 137 S. Ct. at 1857). The panel erred in simply distinguishing the facts of previous *Bivens* cases and failing to consider other reasons to pause.

3. Many Alternative Remedies Exist

An alternative scheme for redressing injuries "usually precludes a court from authorizing a *Bivens* action," *Abbasi*, 137 S. Ct. at 1865, even if that scheme is "not as effective as an individual damages remedy," *Bush*, 462 U.S. at 372, 386. *Abbasi* thus considered even the hypothetical availability of habeas relief adequate to redress the plaintiffs' interest in avoiding unlawful detention. 137 S. Ct. at 1862-63. Here, Boule alleges that Agent Egbert retaliated against him by engaging in "intimidation and slander to potential guests" at the Smuggler's Inn and by making "unsubstantiated complaints to the Internal Revenue Service" and other agencies. Pet.App.53a. Boule had "ready at hand a wide variety of administrative and judicial remedies to redress his injuries." *See Wilkie v. Robbins*, 551 U.S. 537, 562 (2007). To the extent Boule wants "even *more* tools . . . , Congress is free to provide them." *See Whole Women's Health v. Jackson*, No. 21-463, slip op. at 17 (U.S. Dec. 10, 2021).

State Tort Law. Because Boule asserts that Agent Egbert "was not carrying out official duties" when engaging in alleged retaliation, Pet.App.43a; *see* Br. in Opp. 14, Boule could sue Agent Egbert for state-law tort claims.

The FTCA and the Westfall Act do not apply to tort claims targeting conduct outside the scope of employment. *Supra* p. 23; 28 U.S.C. § 2679(b)(1).

"[S]tate tort law provides an 'alternative, existing process' capable of protecting the constitutional interests at stake." *Minneci v. Pollard*, 565 U.S. 118, 125 (2012) (quoting *Wilkie*, 551 U.S. at 550); *see* Pet.App.24a (Bumatay, J., dissenting). Boule's allegations center on purported false statements. Defamation is the traditional means for addressing intentional false statements that cross the line. *See Duc Tan v. Le*, 300 P.3d 356, 363 (Wash. 2013). The tort of "false light invasion of privacy" similarly targets offensive intentional or reckless false statements. *Eastwood v. Cascade Broad. Co.*, 722 P.2d 1295, 1297 (Wash. 1986). As for Boule's allegation that Agent Egbert dissuaded potential customers, Boule might allege tortious interference with contract or business expectancy. *See Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 375 P.3d 651, 662 (Wash. 2016). Agent Egbert disputes these allegations, but the bottom line is that Boule had many state-law claims potentially at his disposal.

Tax Code. Boule's claim that Agent Egbert induced a retaliatory tax audit also falters because this Court will not extend *Bivens* where Congress has provided "comprehensive procedural and substantive provisions giving meaningful remedies." *See Bush*, 462 U.S. at 368. "It would be difficult to conceive of a more comprehensive statutory scheme . . . than the Internal Revenue Code." *Jud. Watch, Inc. v. Rossotti*, 317 F.3d 401, 410 (4th Cir. 2003). Accordingly, every other circuit to consider the question has rejected extending *Bivens* to retaliatory tax audits. *Hudson Valley Black Press v. IRS*, 409 F.3d 106, 113 (2d Cir. 2005) (collecting citations).

The Tax Code provides "all sorts of rights against an overzealous officialdom." *Cameron v. IRS*, 773 F.2d 126,

129 (7th Cir. 1985). Taxpayers can obtain judicial review of audit requests and improper assessments. *See* 26 U.S.C. §§ 6213(a), 7422, 7602(a)(2), 7604(b); *Hudson Valley*, 409 F.3d at 111. Taxpayers can sue for damages in connection with tax collection. 26 U.S.C. § 7433. And taxpayers can complain to the Treasury Inspector General for Tax Administration. *See* 5 U.S.C. App. 3 § 2. If the Treasury finds wrongdoing, the IRS must fire any employee who breaks rules "for the purpose of retaliating against, or harassing, a taxpayer." 26 U.S.C. § 7804 note. Whether these remedies help Boule himself is irrelevant. When Congress makes the "inevitable compromises required in the design" of a comprehensive scheme, no *Bivens* extension will lie. *See Schweiker*, 487 U.S. at 429.

Privacy Act. The Privacy Act also provides a damages remedy for claims involving the improper disclosure of government records. 5 U.S.C. § 552a(g); *see* Pet.App.23a (Bumatay, J., dissenting). First Amendment retaliation and Privacy Act claims often overlap, making this relevant relief for many plaintiffs. *E.g.*, *Wilson v. Libby*, 535 F.3d 697, 703 (D.C. Cir. 2008); *Downie v. City of Middleburg Heights*, 301 F.3d 688, 696 (6th Cir. 2002). Boule alleges only that Agent Egbert sent other agencies a public news article. Br. in Opp. 20-21. But Congress' decision to provide a remedy only for more serious allegations involving private materials does not perversely entitle Boule to a judicial substitute.

Administrative Investigations. Administrative remedies are also relevant. *Wilkie*, 551 U.S. at 553; *Oliva*, 973 F.3d at 444. DHS invites reports of misconduct, including civil-rights violations. 6 U.S.C. § 345(a)(6); *Report on Internal Investigations and Employee Accountability*, CBP 6 (Nov. 12, 2021), https://bit.ly/3y7V4Pi. Complaints can trigger internal investigations and employee discipline. *Report on Internal Investigations*, *supra*, at

14, 20. "Criminal or dishonest conduct," like filing a false report with another agency, provides grounds for termination. 5 C.F.R. § 731.202(b)(2). Indeed, Boule availed himself of this route, making complaints that sparked a year-long DHS investigation. *See* ER507. Boule may be dissatisfied with the final outcome, but these procedures plainly provide "an avenue for some redress." *See Malesko*, 534 U.S. at 69.

Criminal Liability. In the most serious cases, criminal charges offer another alternative. *See Hernández*, 140 S. Ct. at 744-45; *id.* at 760 (Ginsburg, J., dissenting). Many statutes prohibit making false accusations to other agencies in retaliation for protected speech. Lying to government officials is a crime under federal and Washington law. 18 U.S.C. § 1001(a); Wash. Rev. Code § 9A.76.175. And violating constitutional rights under color of law generally is a federal crime. 18 U.S.C. § 242; *e.g.*, *United States v. Brugman*, 364 F.3d 613, 614-15 (5th Cir. 2004) (prosecution of Border Patrol agent). Crime victims can also receive restitution. 18 U.S.C. § 3663; Wash. Rev. Code § 9.94A.750. Criminal law thus provides "meaningful safeguards [and] remedies" for victims of severe constitutional violations. *See Schweiker*, 487 U.S. at 425.

III. This Court Should Not Extend *Bivens* to Fourth Amendment Claims in the Immigration-Enforcement Context

The Ninth Circuit also erred in extending *Bivens* to Fourth Amendment claims against Border Patrol agents, whose search-and-seizure duties plainly implicate immigration and national security concerns.

A. Such Claims Present a New Context

Boule's Fourth Amendment claim presents a new context, as every judge to consider the question has agreed. Pet.App.26a, 30a, 36a, 67a. Agent Egbert is part of a "new class of defendants"—Border Patrol agents.

See Hernández, 140 S. Ct. at 743. And, though *Bivens* itself involved Fourth Amendment claims, searches and seizures at the border present a "new context," *id.*, since the Fourth Amendment inquiry is "qualitatively different" at the border. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Further, "potential special factors that were not considered in previous *Bivens* cases" apply. *Abbasi*, 137 S. Ct. at 1864; *infra* pp. 37-40. Tellingly, no circuit besides the Ninth has extended *Bivens* to officers enforcing immigration laws, in any context. *E.g.*, *Tun-Cos*, 922 F.3d at 528; *De La Paz*, 786 F.3d at 369.

Boule counters that his claim falls within "the 'common and recurrent' 'sphere of law enforcement'" in which *Bivens* itself arose. Br. in. Opp. 17 (quoting *Abbasi*, 137 S. Ct. at 1857). Under that reasoning, *any* unlawful-search or excessive-force claim against the more than 130,000 federal law enforcement officers across 83 agencies would fall under *Bivens*. *See Federal Law Enforcement Officers, 2016 – Statistical Tables*, Bureau of Just. Stat. 3-4 (Oct. 2019), https://bit.ly/31I1ngv. The Court has already rejected grouping Fourth Amendment claims against all law-enforcement officers under the *Bivens* umbrella. *Hernández*, like *Bivens*, involved a Fourth Amendment claim against a law-enforcement officer. Yet this Court found it "glaringly obvious" that the claim in *Hernández* "involve[d] a new context" given the "world of difference" between "an allegedly unconstitutional arrest and search carried out in New York City" and the claim against a Border Patrol agent there. 140 S. Ct. at 743-44.

B. Special Factors Counsel Against Extending *Bivens* to Fourth Amendment Claims at the Border

Congress has many good reasons for skepticism about a damages remedy in the border context.

1. Intrusions on National Security and Immigration Enforcement

"[T]he risk of undermining border security provides reason to hesitate before extending *Bivens*." *Hernández*, 140 S. Ct. at 747; *supra* pp. 29-30. Fourth Amendment claims against Border Patrol agents raise especially acute concerns. What is "reasonable" "at the international border" is "qualitatively different." *Montoya de Hernandez*, 473 U.S. at 538. Given the dangerous, isolated conditions in which Border Patrol agents operate, Congress provided agents with broad search-and-seizure powers near the border. Agents may, without a warrant, "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," "board and search" vessels and vehicles, make arrests, and enter "private lands." 8 U.S.C. § 1357(a). Border Patrol agents do not build cases for prosecution; they make "split-second decisions" to quickly identify and thwart illegal conduct. *CBP Use of Force*, *supra*, at 3; NBPC Cert. Br. 14-15.

Allowing a new damages action against Border Patrol agents for allegedly mishandling searches and seizures would thus inject tremendous uncertainty into an area with little room for error. *See Abbasi*, 137 S. Ct. at 1863. Agents arresting 100 people at once cannot afford to hesitate. *E.g.*, *Authorities Arrest*, *supra*. Courts have no good way to tell whether *Bivens* suits would deter Border Patrol agents from apprehending suspects or using appropriate force. Like national security, immigration enforcement requires "large elements of prophecy for which the Judiciary has neither aptitude, facilities, nor responsibility." *See Hernández*, 140 S. Ct. at 749 (cleaned up). Courts cannot weigh the "costs and consequences" of liability, *Abbasi*, 137 S. Ct. at 1858, without first understanding how agents in the field will react to the threat of suit.

Only Congress and the President can make those sensitive judgment calls. *See Tun-Cos*, 922 F.3d at 526.

Boule and the Ninth Circuit suggested that this case does not implicate national security or immigration enforcement because Boule is a U.S. citizen. Br. in Opp. 16; Pet.App.36a. But Boule is a U.S. citizen who tried to stop Agent Egbert from questioning a foreign national about his presence in the country. American citizens like Boule can both facilitate international smuggling and impede lawful investigations, as this case shows. *See* J.A.115-16. And the risks of deterring officers from lawful stops and arrests apply "regardless of whether the plaintiff is a United States citizen." *See Elhady*, 2021 WL 5410758, at *5. Border Patrol agents may not know in advance whether they are stopping a citizen.

As noted, Boule and the Ninth Circuit also disclaimed any national-security implications because the incident here did not occur "literally 'at the border,'" but on private land abutting the border. *Supra* p. 31. That argument carries particularly little force in the Fourth Amendment context. Congress endowed Border Patrol agents with robust enforcement powers up to 25 miles from the border, precisely because agents cannot always investigate or apprehend individuals exactly on the line. 8 U.S.C. § 1357(a)(3). Boule's denial that his Fourth Amendment claim involves "national security and immigration concerns," Br. in Opp. 29, is especially hard to credit when the Turkish national Agent Egbert was investigating crossed the border illegally hours after the incident. J.A.108.

2. Interference with Congress' Choices

"Congress's failure to provide an individual damages remedy 'has not been inadvertent.'" *De La Paz*, 786 F.3d at 377 (quoting *Schweiker*, 487 U.S. at 423). The Immigration and Nationality Act establishes a "complex and

comprehensive" immigration scheme, *Tun-Cos*, 922 F.3d at 525, and spells out the bounds of Border Patrol agents' authority, *see* 8 U.S.C. § 1357(a). Congress has repeatedly amended that statute, yet omitted any damages remedy against Border Patrol agents.[3]

Congress is currently considering legislation to require further training for Border Patrol agents on constitutional rights, again with no damages action. S. 3160, 117th Cong. (as introduced Nov. 3, 2021). Congress' omission of damages actions against Border Patrol agents for constitutional violations is no "mere oversight," *see Abbasi*, 137 S. Ct. at 1862, and shows that "the Judiciary [should] stay its *Bivens* hand," *see Wilkie*, 551 U.S. at 554.

3. Many Alternative Remedies Exist

This is also not a case of *Bivens* or nothing. Boule could and did seek relief from Agent Egbert's employer, DHS. DHS bans the use of force unless a Border Patrol agent "has reasonable grounds to believe that such force is necessary." 8 C.F.R. § 287.8(a)(1)(ii). Members of the public can "lodge . . . complaint[s] pertaining to violations of [these] enforcement standards," which DHS "investigate[s] expeditiously" before taking "appropriate action." *Id.* § 287.10(a)-(c). Such action may include suspension or termination of employment. *See Discipline Overview: Fiscal Year 2019*, CBP 12 (2019), https://bit.ly/3lBs6Ci. Underscoring the viability of this option, Boule's complaints prompted a year-long investigation. ER507. Such an "administrative . . . process for vindicating" complaints rules out a *Bivens* extension. *See Wilkie*, 551 U.S. at 539.

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[3] *See, e.g.*, Pub. L. No. 109-13, 119 Stat. 231 (2005); Pub. L. No. 104-208, 110 Stat. 3009 (1996); Pub. L. No. 104-132, 110 Stat. 1214 (1996); Pub. L. No. 101-649, 104 Stat. 4978 (1990); Pub. L. No. 99-603, 100 Stat. 3359 (1986).

The FTCA provides further redress. A plaintiff must first file a claim with the agency. 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2(a). If that fails, plaintiffs can sue the United States for certain intentional torts by law-enforcement officers, including assault and battery, when available under local law. 28 U.S.C. §§ 1346(b)(1), 2680(h). Washington allows tort suits for assault and battery against officers who use excessive force. *Staats v. Brown*, 991 P.2d 615, 627-28 (Wash. 2000). And a claim of authority does not defeat an assault or battery claim, so these torts are not "inconsistent or even hostile" to constitutional damages claims. *Malesko*, 534 U.S. at 73. Thus, tort law provides an "alternative, existing process for protecting the [injured party's] interest." *Abbasi*, 137 S. Ct. at 1858 (internal quotation marks omitted); *see Oliva*, 973 F.3d at 444.

Here, Boule filed an FTCA administrative claim with CBP, which CBP denied. Boule just failed to follow through with a suit against the United States. *Supra* pp. 8-9. Boule now seeks to sue Agent Egbert instead. But plaintiffs "are not always able to pick and choose the timing and preferred forum for their arguments." *Whole Women's Health*, slip op. at 15.

Boule and the Ninth Circuit dismissed the FTCA as a supplement to *Bivens* and not a substitute. Br. in Opp. 21-22; Pet.App.44a-45a (citing *Carlson*, 446 U.S. at 19-20). Again, that position does not square with modern precedent. *Supra* p. 24. Congress and the President have made considered choices about when and how to redress allegedly unlawful conduct by officers protecting our Nation's borders. Those choices should remain where the Constitution assigns them: with the political branches.

CONCLUSION

The judgment of the court of appeals should be reversed.

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